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 REPLY BRIEF OF CROSS-APPELLANT

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ARGUMENT

Cross-Appeal Points I and II

The Trial Court erred when it imposed minority and marketability discounts on the Fair Value of Joan's PJC stock. As the buyout is a remedy for Appellants' wrongful conduct, equitable considerations militate against applying discounts because they reward and incentivize bad behavior, which runs counter to the controlling majority's fiduciary duties to the minority shareholder. See *Swope v. Siegel-Robert, Inc.*, 243 F.3d 486, 493-4 (8th Cir. 2001), citing *Advanced Communication Design, Inc. v. Follett*, 615 N.W.2d 285, 292 (Minn. 2000). Moreover, the market conditions that could justify marketability and minority discounts are absent in this case. In their response to Joan's Cross-Appeal, Appellants do not dispute this absence, nor could they.

After the buyout, Appellants would not be taking Joan's place as a minority shareholder in PJC. Rather, they become the sole owners of PJC. Therefore, there is no factual support justifying a minority discount in this case. In every buyout case, the purchasing majority is consolidating their interest, not becoming a minority shareholder. Accordingly, a minority discount is never appropriate in a buyout remedy by the majority or the company, and this Court should so hold.

Under the facts of this case, there is no evidentiary basis for a marketability discount. No evidence was presented that Appellants would have any difficulty selling the entirety of PJC after purchasing Joan's shares. Therefore, no facts on the record support application of a marketability discount in this case. For future cases, the Court should adopt a rule providing that for a such a discount to be employed, the discount's

proponent must prove that the majority, post-purchase, would have difficulty selling its stock due to the market for the same. See Douglas K. Moll, *Shareholder Oppression and "Fair Value": Of Discounts, Dates, and Dastardly Deeds in the Close Corporation*, 54 Duke L.J. 293, 329-30 (2004) (Hereafter as "Moll, *Fair Value*.").

Section E of Respondent's Point I of her initial Cross-Appeal brief demonstrates that no "extraordinary circumstances" exist to buttress use of discounts, so she will not repeat them here, except to summarize that Respondent did not control the Trial Court and its choice of remedy and both Appellants and Respondent urged the Trial Court to utilize the buyout remedy if it found a case was made for shareholder oppression. The assertion that Joan "picked her remedy" is ridiculous. If that were true, she would have nothing to appeal, as the Trial Court would have adopted her proposed judgment in total. (D137)

As to the purported threat of dissolution, Appellants apparently cannot make up their minds as to whether dissolution was a meaningful, feared result or equal to a buyout remedy. In their Reply in support of their Point IV, they claim that a buyout is an equal outcome for Appellants (Appellants' Response Br. p. 22), yet a few pages later, the purported existential threat of dissolution is a knee-knocking leverage point that Joan exploited (pp. 35, 40). Appellants' vacillation shows this argument's weakness.

What is more, it is inaccurate to claim that Respondent held the supposed Damoclean Sword of dissolution over Appellants' heads. While it was true that Joan did not know what remedy to pursue for her shareholder oppression claim until judgment was entered on the jury's verdict in February 2017, nor could anyone, it was clear to all that

dissolution was not being pursued in the months preceding the bench trial on October 26 and November 1, 2017. First, inferentially, the third party interests of PJC's dealers in the continuity of PJC and PJC's financial viability essentially precluded dissolution as a possibility. Moreover, case law and commentary state that a buyout is the preferred remedy in oppression cases.[1] That was clear to both counsel.

Second, this understanding is reflected in the evidence and testimony adduced in the bench trial by both parties. The parties' experts only testified to their valuations of Joan's portion of PJC stock to determine Appellant's purchase price. (E.g., Bench Tr. 103) Both experts prepared reports on the proper price for Joan's stock, which were exchanged by the parties months prior to the bench trial and obviously were not hastily thrown together the night before. (Pl.'s Ex. 29; Defs.' 10-26 Exs. A, B) In fact, no mention of dissolution is made in the entire bench trial transcript, except in the context of noting that a buyout is the most common remedy for shareholder oppression. (Bench Tr. 117) No party introduced any evidence that PJC was not viable or that dissolution was the best way to get maximum value for PJC. It was the clear understanding of all parties well in advance of the bench trial that Joan was not pursuing PJC's dissolution.

In any event, the important issue of discount applicability should not be amorphously left to the Trial Court's discretion. The Court should provide meaningful and objective guidance for future cases where discounts are imposed or not based on the facts of the case. Courts should logically reject discounts when the rationale for the

[1] 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, 325-6 (2015).

discount is absent in the circumstances of the case. Moll, *Fair Value*, 54 Duke L.J. at 335. Here, the market conditions that could justify discounts are wholly absent, and the discounts should be vacated from the Trial Court's Equitable Judgment.

Cross-Appeal Point III

The Trial Court erred by failing to use a 2017 valuation date for Respondent's stock.

Appellants argue in their footnote 10 that Respondent's Point III is insufficiently stated. However, Point III adequately "explain[s] why the legal reasons in the context of the case support the claim of reversible error," i.e., that a 2012 valuation date does not conform with the relief granted by the jury verdict. The Point need only state "ultimate facts." "Detailed evidentiary facts shall not be included." Rule 84.04(d)(1) and (4). Appellants' claim is without merit.

As to the substance of Point III, Appellants do not appear to dispute Respondent's proposition that a 2017 valuation date fits with the damages awarded by the jury verdict. The verdict, when paid, would compensate Joan for her lost share of PJC earnings from her June 2012 expulsion to the 2017 trial date. Because the value of a company is based on its expected future earnings, as Appellant's expert testified, a valuation of PJC in 2017 is an aggregation of PJC's expected future earnings from 2017 forward. (Bench Tr. 82-3; Tr. 259). Therefore, payment of the verdict 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 from 2017 and after.

Appellants make no effort to address this issue in their Response Brief and cite no case involving both a jury verdict and an equitable buyout remedy. For this case's circumstances where the equitable claim is to be resolved consistently with the facts found by the jury (i.e., the amount of Joan's 2012-2017 damages), Joan's shares should be valued as of 2017. See *State ex rel. Leonardi v. Sherry*, 137 S.W.3d 462, 473 (Mo. En Banc. 2004).

In *Hendley v. Lee*, the Court was likewise posed with the question of when to value the selling party's interest. *Hendley v. Lee*, 676 F. Supp. 1317 (D.S.C. 1987). The Court found that the trial date was the appropriate valuation date. *Id*. at 1327. The selling party continued to be employed up to the trial date. *Id*. at 1325. While Joan was ousted years before the February 2017 trial, the jury verdict would function to compensate her for her share of PJC earnings from her ouster up to the trial, placing her in a posture similar to *Lee* who was compensated up to his trial. The Court should follow this analogy here and order that Joan's stock is to be valued as of 2017.

Cross-Appeal Point IV

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. In the portion of their Response Brief opposing Point III, Appellants urged the Court to apply the Dissenting Shareholder framework to this case to conclude that a 2012 valuation date was appropriate. Because it is now inconvenient, Appellants argue that the Dissenting Shareholder analogy providing for such interest should not be followed. The Court

should not embrace this Heads-I-Win-Tails-You-Lose argument. If the Dissenting Shareholder analogy is to be followed, it should be followed in full.

Prejudgment interest can be awarded under principles of equity. *Mitchell v. Residential Funding Corp.*, 334 S.W.3d 477, 508 (Mo. Ct. App. 2010). No demand is necessary for an award of pre-judgment interest under equitable circumstances. *A.G. Edwards & Sons, Inc. v. Drew*, 978 S.W.2d 386, 397 (Mo. Ct. App. 1998) (while plaintiff made no demand, it could still recover pre-judgment interest under equitable principles). Such a demand is only a requirement for pre-judgment interest under Mo. Rev. Stat. § 408.020, which Respondent is not invoking.

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. *Mitchell*, 334 S.W.3d at 509. In such circumstances, a Trial Court abuses its discretion when it denies plaintiff that complete remedy. *Id*. at 509-10. 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.* at 509. 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.

Cross-Appeal Point V

Appellants do not contest Respondent's conclusion that they caused PJC to wrongfully indemnify them and provide their defense. Rather, they claim that relief for

this impropriety was not pleaded, requested from the Trial Court, or available to Joan in her individual claims (i.e., arguing that such a claim is derivative).

As explained in her Response Brief (pp. 78-9), Joan's claim for her proportionate share of this indemnity benefit is not a derivative claim and is properly brought in her individual capacity. If Appellants had PJC pay them a *de jure* dividend and not pay the same to Joan, there would be no credible argument that Joan did not have an individual claim against Appellants for excluding her from this dividend. The same reasoning applies to *de facto* dividends, and Joan's claim in this regard is not derivative.

Appellants' other arguments are likewise baseless. Respondent did request that the Trial Court treat Appellants' wrongful indemnification of themselves as a dividend to which Joan was entitled to participate. (D136, pp. 12, 14) Appellants admit in their brief that Joan requested this relief. (Appellants' Response Br. p. 41). Their argument claiming she made no such request of the Trial Court has no merit.

Whether the issue of Appellants' wrongful indemnity was pleaded misses the point. The point is that Joan proved at trial and the Court and jury found that Appellants acted in bad faith in their exclusion of Joan from PJC (D149, p. 9; D201; D140, ¶¶40-1), and Joan introduced evidence by stipulation that PJC, nevertheless, paid for Appellants' defense (D128, ¶¶1-2). The evidence established Joan's claim for her proportional share of this one-sided benefit that Appellants contrived for themselves via their control of PJC in violation of Mo. Rev. Stat. § 351.355. Accordingly, the pleadings were amended to conform to this evidence. See *MFA Livestock Association, Inc. v. Shrewsbury*, 965 S.W.2d 432, 436 (Mo. Ct. App. 1998).

Appellants hyper-technical arguments are unavailing. This Court should provide Respondent equitable relief to Joan for the wrongful indemnity Appellants granted themselves to the exclusion of Respondent and/or award her attorney's fees as sought in Respondent's Point VI.

Cross-Appeal Point VI

The Trial Court erred in failing to award Respondent her attorney's fees. 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. *21 West, Inc. v. Meadowgreen Trails, Inc*., 913 S.W.2d 858, 881 (Mo. Ct. App. 1995). 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.

In response to Respondent's Point VI, Appellants claim this case is not unusual. However, they do so after first asserting the unusual nature of this case in their own appeal. (Appellants' Response Br. p. 10). Respondent agrees with their first mind.

Appellants agree that attorney's fees are properly awarded for intentional misconduct (Appellants' Response Br. p. 44), and they do not rebut or contest Joan's assertions that her need to bring this case and incur the resulting attorney's fees were caused by Appellants' intentional misconduct. In bad faith, they fired Joan from PJC then tried to fire her as a shareholder. See *Cooke v. Fresh Express Foods Corp., Inc.*, 7 P.3d 717, 723 FN 13 (Or. Ct. App. 2000). If she wanted any value from her PJC stock, she had

no choice but to combat Appellants' intentional misconduct in the Courts. Respondent should be awarded her attorney's fees.

CONCLUSION

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

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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 2,636 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 November 22, 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:

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