STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

SCOTT SMITH,

Plaintiff-Respondent-
Cross-Appellant,

ALPHA CARGO TECHNOLOGY, LLC,

Plaintiff,

Appeal Case No.: 2015-AP-207

v.

GREG KLEYNERMAN,

Defendant-Appellant-
Cross-Respondent,

RED FLAG CARGO SECURITY SYSTEMS, LLC,

Defendant.

COMBINED BRIEF OF RESPONDENT AND CROSS-APPELLANT SCOTT SMITH

Appeal from Final Order Entered December 16, 2014 in Milwaukee County Circuit Court, Case No. 2011CV18551, Honorable Pedro Colon, Presiding

HANSEN REYNOLDS DICKINSON CRUEGER LLC
Timothy M. Hansen, Bar No. 1044430
Andrew J. Kramer, Bar No. 1055182
James B. Barton, Bar No. 1068900
Danielle M. Nardick, Bar No. 1097696
316 N. Milwaukee St., Ste. 200
Milwaukee, WI 53202

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

SCOTT SMITH,

Plaintiff-Respondent-
Cross-Appellant,

ALPHA CARGO TECHNOLOGY, LLC,

Plaintiff,

Appeal Case No.: 2015-AP-0207

v.

GREG KLEYNERMAN,

Defendant-Appellant-
Cross-Respondent,

RED FLAG CARGO SECURITY SYSTEMS, LLC,

Defendant.

RESPONDENT SCOTT SMITH'S RESPONSE BRIEF

Appeal from Final Order Entered December 16, 2014 in Milwaukee County Circuit Court, Case No. 2011CV18551, Honorable Pedro Colon, Presiding

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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Federal Cases

Wisconsin Statutes

Wisconsin Cases

STATEMENT OF THE ISSUES

I. **Issue Presented for Review**: Did Kleynerman, under the facts established at trial, owe Smith a fiduciary duty to further Smith's personal interest in the transaction?

Answered by Trial Court: The Jury answered yes, as indicated in Question 10 of the special verdict. (R.112, 4, R.App.106.) The Trial court answered yes, when it denied Kleynerman's post-trial motion for judgment notwithstanding the verdict on this issue. (R.156, 19:15-18.)

Standard of Review: Whether a party breached a fiduciary duty presents a mixed question of fact and law. *Jorgensen v. Water Works, Inc. (Jorgensen II),* 2001 WI App 135, ¶ 8, 246 Wis. 2d 614, 630 N.W.2d 230 Findings of fact are upheld unless clearly erroneous. *Id.*; Wis. Stat. § 805.17(2). Whether facts fulfill the elements of a claim for breach of fiduciary duty presents a question of law reviewed independently by this court. *Yates v. Holt-Smith*, 2009 WI App 79, ¶ 13, 319 Wis. 2d 756, 768 N.W.2d 213.

II. **Issue Presented for Review**: Was there sufficient evidence at trial to support the jury's verdict that Kleynerman breached his fiduciary duty to Smith?

Answered by Trial Court: The Jury answered yes, as indicated in Question 11 of the special verdict. (R.112, 4, R.App.106.) The Trial court answered yes when it denied Kleynerman's post-trial motion for judgment notwithstanding the verdict on this issue. (R.156, 19:15-18.)

Standard of Review: Appellate review of the jury's verdict is narrow; the verdict will be sustained if there is any credible evidence to support it. *Lang v. Lowe*, 2012 WI App 94, ¶ 16, 344 Wis. 2d 49, 820 N.W.2d 494. It is the role of the jury to weigh the testimony of the witnesses and assess their credibility, therefore the Court must "search the record for credible evidence that sustains the jury's verdict, not for evidence to support a verdict that the jury could have reached but did not." *Id.*

III. **Issue Presented for Review**: Was Smith's breach of fiduciary duty claim timely under Section 893.57 of the Wisconsin Statutes?

Answered by Trial Court: Kleynerman did not present the statute of limitations defense to the Jury. The Trial Court answered yes, when it denied Kleynerman's motion for judgment notwithstanding the verdict on the statute of limitations issue.

Standard of Review: The "date of discovery" for statute of limitations purposes "is generally a question of fact for the jury and is a question of law only where the facts are undisputed." *John Doe 1 v. Archdiocese of Milwaukee*, 2007 WI 95, ¶ 53, 303 Wis. 2d 34, 734 N.W.2d 827. On review, an appellate court will not upset a verdict if there was a complete failure of proof on a legal issue that should have been brought to the attention of the trial court at a time when the jury could be correctly instructed. *Dakter v. Cavallino*, 2014 WI App 112, ¶ 78, 358 Wis. 2d 434, 856 N.W.2d 523, *aff'd*, 2015 WI 67, ¶ 98, 363 Wis. 2d 738, 866 N.W.2d 656.

IV. **Issue Presented for Review:** Did Smith, as an equal member in an LLC, have standing to recover his portion of the LLC's lost profits?

Answered by Trial Court: Lack of standing to recover damages was not an issue presented to the jury. The Trial court answered yes when it denied Kleynerman's post-trial motion. (R.156, 19:20-20:13; R.122)

Standard of Review: The Court reviews the denial of a motion for judgment notwithstanding the verdict "*de novo*, applying the

same standards as the trial court." *Hicks v. Nunnery*, 2002 WI App 87, ¶ 15, 253 Wis. 2d 721, 643 N.W.2d 809 (citations omitted).

V. **Issue Presented for Review:** Was there competent evidence at trial to sustain the jury's award to Smith for damages flowing from Kleynerman's breach of fiduciary duty?

Answered by Trial Court: Yes, the Trial court implicitly found that the evidence at trial was sufficient to sustain the jury's damages award for breach of fiduciary duty. (R.156, 19:3-20:13; R.122.)

Standard of Review: An appellate court will not reverse a damage award if it is "within the realm of reason in view of the evidence." *State v. Abbott Labs.*, 2012 WI 62, ¶ 26, 341 Wis. 2d 510, 816 N.W.2d 145. The Court searches the record for credible evidence to support the award, and views that evidence "in the light most favorable to the jury's determination." *Id.*

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is warranted in this case. An opinion in this case also satisfies the criteria for publication under Section 809.23 of the Wisconsin Statutes.

STATEMENT OF THE CASE

I. NATURE OF CASE

This case presents a breach of fiduciary duty owed by Defendant-Appellant Gregory Kleynerman ("Kleynerman") to his friend and business partner Plaintiff-Respondent Scott Smith ("Smith"). Kleynerman owed Smith a fiduciary duty and Smith trusted and relied upon Kleynerman to look out for his best interests. Kleynerman exploited Smith's trust and dependence upon him to remove all valuable assets, technology, business goodwill and sales opportunities from the company they shared, Alpha Cargo Technology, LLC, for Kleynerman's personal benefit. Smith was thereafter left with nothing to show for his life's work in the cargo security seal industry, effectively squeezed out of the business he built from nothing.

II. STATEMENT OF FACTS

A. Background.

Scott Smith and Gregory Kleynerman were 50/50 business partners in Alpha Cargo Technology, LLC ("ACT"), a firm that sold cargo security seals, which are devices used on shipping conveyances, such as rail cars and containers, to prevent theft of cargo and infiltration of contraband during transit throughout the international supply chain. (R.150, 140:6-10, 145:13-15.) The firm was founded on the cargo security knowledge and expertise of Smith

and utilized Kleynerman's connections in his home country of Ukraine. (R.154, 50:11-15; R.153, 242:9-12, 245:10-11.) Scott Smith has significant experience in the security seal industry including his work as an Executive Vice President at Tyden Brammall, a large international security seal manufacturer, as well as his service as the chairman of International Cargo Security Counsel. (R.150, 138:7-140:10; 152:11-22.) ACT used Smith's detailed knowledge of the United States government's security requirements to revise a Ukrainian seal to meet the needs of North American companies. (R.150, 149:13-150:18; R.151, 34:18-22.) Kleynerman, a tailor and consumer goods importer by trade, had no experience with engineering, design or the security seal industry, but assisted in this endeavor by communicating with a seal company in his native Ukraine to modify an existing patent, and acting as the go-between with patent attorneys to obtain three United States Patents on this technology. (R.153, 234:14-235:22; R.150, 142:19-143:2.) Kleynerman was credited as an inventor for his work on facilitating the patent application. (R.150, 150:13-18; R. 151, 47:5-7; R.139, DX179.) ACT was the assignee of these security seal technology patents. (R.139, DX179.) With Smith at the helm, ACT experienced significant growth between 2002 and 2007, going from gross sales of $18,856 in 2003 to $680,187 in 2006, and $475,813 in 2007. (R.139, DX2-7).

B. Smith's Personal Tragedy and Kleynerman's Assumption of a Special Role.

In 2007, however, Smith experienced a personal tragedy that negatively impacted his mental health, and consequently, his ability to effectively manage ACT's affairs; Smith's wife, Gigi, was diagnosed with lung cancer in July of 2007. (R.150, 162:12, R.App.169.) Her illness progressed rapidly and she passed away on September 21, 2007. (*Id.* at 163:6, R.App.170.) Smith was overcome with grief and fell into a deep and lasting depression that included two attempts at ending his own life in May 2009 and May 2010. (R.151, 28:17-29:12, R.App.209-210; R.152, 96:14-97:25, R.App.220-221.)

Smith's depression affected his ability to run ACT. (R.150, 176:3-9, R.App.181.) Without the benefit of Smith's involvement, ACT experienced declining sales and struggled to stay in business. (R.154, 52:22-24.) While Smith was dealing with these issues, Kleynerman voluntarily undertook a special role toward Smith, stating "do whatever you have to do with Gigi and I'll take care of the business." (R.150, 164:4-6, R.App.171.) After Smith's wife passed away, Kleynerman visited Smith and reiterated his promise to take over running the business and look out for Smith's best interests, stating "just do whatever it takes and I'll handle the business. Don't worry about a thing." (R.150, 167:14-21, R.App.174.) Smith felt very close to Kleynerman, often calling him by his

family nickname, Grisha, so he trusted that Kleynerman would do what he promised and look out for his interests in ACT. (R.150, 171:17-20, 174:22-25, R.App.178.)

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C. Kleynerman Advances His Own Interests at Smith's Expense.

In 2008, Kleynerman began experiencing severe financial problems with his other businesses outside of ACT. (R.150, 181:16-25.) Kleynerman met Bruce Glaser ("Glaser") in late 2007 or early 2008. (R.152, 174:14-15.) Kleynerman received loans, investments, and advice from Glaser related to his struggling businesses. (R.154, 58:20-59:11, R.App.262-263.) In 2009, Kleynerman mentioned to Smith that his friend Glaser was an attorney and "turn-around specialist" who was helping to restructure his other businesses. (R.150, 186:3-8, R.App.183.) At that time, Smith did not know that Kleynerman had already started discussing ACT, both its potential and its problems, with Glaser at least as early as January 2009, when he forwarded Glaser an email Smith wrote discussing problems and ideas related to ACT. (R.152, 178:13-17, R.App.224; R.139, DX14.) Regarding Smith, Kleynerman told Glaser "[h]e no [sic] nothing about our work with you." (R.139, DX14, A.App. 135.)

ACT was importing security seals from Ukraine and reselling the seals, often in Mexico or other locations outside of the United States, which involved extra shipping costs, as well as import and export duties. (R.150, 191:4-5, R.App.188.) Smith and Kleynerman believed that manufacturing and/or assembling their own seals in the United States would reduce those import and export costs. (*Id.*) They agreed to look for outside investors to provide funding for a manufacturing and assembly facility in Milwaukee. (R.154, 50:20-51:1, R.App.260-261.) Kleynerman proposed having Glaser invest in ACT. (R.150, 189:6-7, R.App.186.) Kleynerman and Smith specifically discussed Smith's struggles with depression and their potential impact on negotiating with Glaser. (R.150, 189:11-12, R.App.186.) Accordingly, Kleynerman volunteered that "he would handle the negotiations." (R.150, 189:12-13, R.App.186.) Smith met Glaser for the first time in early March 2009. (R.150, 187:1-7, R.App.184; R.139, PX6.)

By March 29, 2009, Glaser and Kleynerman had drafted a Memorandum of Understanding ("MOU") addressing Glaser's potential investment in ACT and plans to bring assembly of the security seals to the United States. (R.139, PX8, R.App.298-299.) Smith signed the MOU, but he recalls neither reading nor signing the document because his mental health was "not good" at the time. (R.150, 187:20-24, 188:2-3, R.App.184-185.)

D. Kleynerman Assumes Power of Attorney and Makes a Series of Misrepresentations to Smith.

Prior to the execution of the MOU, Kleynerman told Smith that Glaser and another man, Kleynerman's childhood friend, Gregory Grinberg ("Grinberg"), were being brought in as investors, and would invest $250,000 in ACT. (R.150, 190:6-21, R.App.187.) Kleynerman told Smith that they would all be equal partners and that profit would be split evenly. (R.150, 191:17-25, R.App.188.) The MOU contained an "Authorization to Negotiate and Sign Documents" clause that authorized and obligated Kleynerman to act as Smith's agent and on ACT's behalf in negotiating and signing "binding documents." (R.150, 192:14-17, R.App.189; R.139, PX8; R.App.299.) Smith had no such authority or obligation on behalf of Kleynerman. (*Id.*)

After the MOU was signed, Kleynerman and Glaser negotiated a series of documents that collectively constituted the transaction (the "Transaction") that transferred the valuable assets of ACT to the company that would eventually be known as Red Flag Cargo Security Systems, LLC ("Red Flag"). These documents constituting the Transaction include the Asset Sale Agreement (R.139, PX15, R.App.309-317); the U.S. Patent Assignments (R.139, PX12, R.App.318-319); the European Patent Assignment (R.139, PX13, R.App.320-321); and the Sales Representative Agreement (R.139, DX67,

R.App.300-308).

Kleynerman transferred ACT's patents to Red Flag before the Asset Sale Agreement was executed on June 5, 2009, and without Smith's knowledge. (R.139, PX15, 16, R.App.309-317.) On May 26, 2009, the patent assignments were signed by only Kleynerman on behalf of ACT and by Glaser on behalf of the assignee. (R.150, 203:5-204:7, R.App.190-191.) Kleynerman signed the patent assignments without notifying or consulting Smith, or providing the assignments to Smith for his review. (*Id.*)

E. Smith is Pressured into the Transaction.

Approximately one month after Smith attempted to take his own life, and as his depression worsened, Kleynerman pressured Smith into signing the Asset Sale Agreement. (R.150, 199:13-200:6, 205:10-23, R.App.192; R.151, 11:4-8; R.App.202.) The Asset Sale Agreement was inconsistent with the terms that Kleynerman had previously described to Smith; namely, that the agreement was an investment of capital into ACT with an equal partnership. (R.150, 190:6-21, 191:17-25, R.App.187-188; R.139, DX 68.)

Kleynerman and Glaser were conscious of Smith's misperceptions regarding the Transaction documents in the days leading up to Smith's execution of the Transaction documents. (R.139, PX44, R.App.323; R.153, 204:3-205:1.) Indeed, Glaser copied Kleynerman on email correspondence with

Red Flag sales and marketing advisor Greg Fream ("Fream"), advising Fream: "*If [Smith] asks you anything about the relationship between our new company and him, plead ignorance.*" (R.139, PX44, R.App.323) (Emphasis added).

The actual terms of the Asset Sale Agreement transferred all of the assets of ACT to a new company, initially named Alpha Cargo Technology Marketing, LLC ("ACM") that later became Red Flag.[1] (R.139, PX15, R.App.309-317.) Under the terms of the Asset Sale Agreement, Red Flag acquired:

- ACT's interests and rights to three U.S. Patents and one European Patent related to Security Seal Technology;
- ACT's Technology Rights, including Confidential Information, know how, copyright, trade dress and proprietary rights to Security Seal Technology.
- ACT's documentation and Marks.

(R.139, PX15, R.App.309-317.)

ACT was also required to disclose all customers and potential customers to Red Flag. (R.139, PX15, § 4(f), R.App.312-313.) In exchange for the transfer of all of ACT's valuable assets, ACT was to receive between $45,000 and $70,000, dependent upon whether ACT also received any commissions under the Sales Representative Agreement. (R.139, PX15, § 3, R.App.311.)

After transferring all valuable assets to Red Flag, ACT was relegated to

[1] For clarity, the name Red Flag will be used throughout, even when referring to actions taken by the company under the name Alpha Cargo Technology Marketing, LLC.

being a sales representative tasked with selling products produced by Red Flag. (R.139, DX67, R.App.300-308.) ACT was contractually designated as an independent contractor of Red Flag. (*Id.*, § 4, R.App.302-303.) The sales representative agreement was non-exclusive and could be terminated for any reason after one year. (R.139, DX67, §§ 1, 5, R.App.300, 303.) As a condition of the Sales Agreement, ACT was required to forward all contact information for prospective customers to Red Flag, meaning that ACT could not even control the new customers generated for Red Flag. (*Id.*, § 2.1(b), R.App.300.) Red Flag's investment in a manufacturing facility was not guaranteed, the investment would happen only if Red Flag "determine[d] in the exercise of its business judgment that it [wa]s prudent to do so." (R.139, DX67, § 2.2, R.App.301.)

Apart from the Transaction, Kleynerman had also separately negotiated to be paid directly by Glaser to perform work for Red Flag as a liaison and to assist in setting up the production facility. (R.151, 10:3-11:9; R.App.201-202.) Kleynerman was also expected to devote all of his time to Red Flag, which left Smith with all responsibilities for ACT. (*Id.*, 13:12-17; R.App.204.) Glaser introduced Kleynerman as a "partner" in Red Flag in his email correspondence with potential customers and vendors. (R.139, PX45, R.App.326; PX53.) Glaser also gave Kleynerman check signing authority for Red Flag bank accounts.

(R.139, PX45, R.App.326.)

After the Transaction, Kleynerman informed Smith that he had met with Glaser and Grinberg to discuss each man's role in the company, and Smith was assigned the role of sales. (R.151, 12:5-12, R.App.203.) Smith's work to procure sales for ACT included a presentation to ACT's biggest potential customer, Kansas City Southern Mexico Railroad ("KCSMR"), which earned him praise from Glaser. (R.151, 17:2-18:11, R.App.205-206; R.139, PX21.) KCSMR was the focus of ACT's business development plan from the very beginning, and the adoption of ACT's device by the railroad was the focus of years of Smith's work. (R.150, 154:8-16; R.151, 25:1-2.) After Red Flag gained access to ACT's current and prospective customer contacts, Kleynerman and Glaser effectively cut Smith out of sales activity within four months of the Transaction, with Glaser stating to Kleynerman and Grinberg that "we're not relying on Scott for our sales." (R.139, PX51, R.App.328.)

F. Smith is Terminated by Red Flag and Left With Nothing.

ACT was officially terminated from serving as sales representative under the Sales Representative Agreement by way of a May 28, 2010 letter signed by Glaser on behalf of Red Flag, which Smith received in the mail in early June. (R.151, 26:19-27:10, R.App.207-208; R.139, DX114.) Smith actually learned that

he was terminated from any role with Red Flag through a phone call from Kleynerman, who knew of the termination well before the official documentation was provided to Smith. (R.151, 27:11-28:9, R.App.208-209.)

Emails showed that Kleynerman had discussed the ACT termination with Glaser and Fream, even helping to craft an email announcement to customers regarding the termination. (R.139, PX59.) Kleynerman then informed Smith that "you're fired; your ass is out of here." (R.151, 27:21; R.App.208.) Smith was confused by the call because until that time, he believed that he was one of the four owners of the business. (*Id.* at 27:24-25, R.App.208.) Kleynerman replied to Smith: "[Y]ou're stupid. You should have looked at the papers that were put in front of you. You shouldn't have believed what I told you. It's no longer your firm." (*Id.*, 27:25-28:3; R.App.208-209.)

Although ACT was terminated, Kleynerman continued working for Red Flag without interruption. (R.154, 86:10-87:4, R.App.265-266; R.139, PX59.) Glaser and Kleynerman drafted an official announcement regarding ACT's termination that also announced Kleynerman's continuing role at Red Flag. (*Id.*) Kleynerman later purchased Glaser's majority interest in Red Flag in 2011. (R.154, 89:22-90:16, R.App.267-268.) Red Flag had an estimated total revenue of between $2,245,418 and $2,445,418 from the Transaction until the date of trial. (R.153, 146:1-11.) Since Kleynerman assumed majority control of Red Flag

he has refused to pay Smith or ACT the commissions that are due. (R.154, 99:24-100:12.)

ARGUMENT

I. KLEYNERMAN OWED SMITH A FIDUCIARY DUTY TO ACT IN FURTHERANCE OF SMITH'S INTERESTS.

A fiduciary relationship can be created "by contract or a formal legal relationship," or it can be implied by "special circumstances from which the law will assume an obligation to act for another's benefit." *Prod. Credit Ass'n of Lancaster v. Croft*, 143 Wis. 2d 746, 755, 423 N.W.2d 544 (Ct. App. 1988). The fiduciary duty of loyalty, more specifically, is described as not only the "constraint on acting in one's own self-interest," but as also including a broader level of protection that would require things like "keeping . . . information confidential" and "fully disclosing to [a] beneficiary all information relevant to the beneficiary's interest." *Zastrow v. Journal Commc'ns, Inc.*, 2006 WI 72, ¶ 29, 291 Wis. 2d 426, 718 N.W.2d 51

Relevant here, Kleynerman owed Smith a fiduciary duty for four distinct reasons: (a) the MOU signed by Kleynerman, Smith, and Glaser created a power-of-attorney relationship that authorized Kleynerman to act on behalf of Smith regarding the affairs of ACT; (b) Kleynerman assumed an implied fiduciary duty when he "consciously under[took] a special position" regarding

Smith by voluntarily taking over the operations of ACT so that Smith could grieve the loss of his wife; (c) the circumstances surrounding the transaction demonstrate that Kleynerman was afforded managerial control of ACT, which independently gives rise to fiduciary duties; and (d) as a matter of law, equal members in an LLC owe one another a fiduciary obligation.

A. THE MEMORANDUM OF UNDERSTANDING CREATED A FIDUCIARY OBLIGATION THAT KLEYNERMAN OWED TO SMITH.

Wisconsin, like many other states, develops its fiduciary duty law by analogy. *Zastrow*, 2006 WI 72 at ¶ 25. Model, or "paradigm," fiduciary relationships have been identified, and courts examine whether subsequent relationships are sufficiently similar to the "paradigm" ones such that fiduciary obligations should be extended to those relationships. *Id.* Relevant here, a fiduciary duty is established when a power-of-attorney relationship is created. *Praefke v. Am. Enter. Life Ins. Co.*, 2002 WI App 235, ¶ 9, 257 Wis. 2d 637, 655 N.W.2d 456; *see also Matter of Vorel's Estate*, 105 Wis. 2d 112, 117, 312 N.W.2d 850 (Ct. App. 1981).

The MOU signed by Kleynerman, Smith, and Glaser granted Kleynerman a power-of-attorney relationship that authorized Kleynerman to act on behalf of Smith regarding the affairs of ACT and obligated him to refrain from acting in his own self-interest. The MOU states in pertinent part:

> Kleynerman is authorized by Smith to sign binding documents on behalf of ACT[,] to assign all patents, the website, and logo to [Red Flag], with ACT retaining the rights to use the website and logo. Smith and Kleynerman understand that [Red Flag] is relying on such authorizations in moving forward [with the Transaction].

(R.139, PX8, R.App.299.)

Kleynerman argues that the MOU authorized Kleynerman to act only on behalf of ACT, and only to "perform the ministerial task of signing patent assignment forms." (Appellant's Br. 37.) This argument does not reflect the facts established at trial. Kleynerman and Smith were the only two members of ACT.[2] As such, the authority to sign binding documents on behalf of ACT is necessarily the authority to act on Smith's behalf because Kleynerman could already act on behalf of ACT—he did not need special authorization. *See, e.g.*, Wis. Stat. § 183.0702 ("property of a limited liability company held in the name of the limited liability company may be transferred by an instrument of transfer executed by any member in the name of the limited liability company.")

The only reason such authorization was required was so Kleynerman could act on behalf of Smith as his attorney-in-fact, which rendered Kleynerman a fiduciary. *Praefke*, 2002 WI App 235 at ¶ 9 (citing *Alexopoulos v. Dakouras*, 48

[2] Because Kleynerman and Smith never executed an operating agreement governing their relationship in ACT, the general provisions of Chapter 183 of the Wisconsin Statutes are applicable; ACT was therefore, a member-managed LLC. Wis. Stat. § 183.0401.

Wis. 2d 32, 40, 179 N.W.2d 836 (1970)) (stating that an attorney in-fact has a fiduciary obligation to the principal). Kleynerman's interpretation of this MOU provision—that it merely afforded him ministerial authority to execute patent assignments—would render this provision superfluous. *Ash Park, LLC v. Alexander & Bishop, Ltd.*, 2015 WI 65, ¶ 37, 363 Wis. 2d 699, 866 N.W.2d 679 ("Interpretations that give reasonable meaning to each provision in the contract are preferred over interpretations that render a portion of the contract superfluous.") (citations omitted).

Through the execution of the MOU, Smith authorized Kleynerman to "perform all acts that [Smith] could perform" regarding ACT's patents, *Praefke*, 2002 WI App 235 at ¶ 10, a key characteristic of all fiduciary relationships. *Zastrow*, 2006 WI 72 at ¶ 31.

B. KLEYNERMAN'S UNIQUE RELATIONSHIP WITH SMITH, COUPLED WITH HIS VOLUNTARY ASSUMPTION OF SMITH'S AFFAIRS, ALSO CREATED A FIDUCIARY OBLIGATION.

Kleynerman also assumed an implied fiduciary duty when he "consciously under[took] a special position" regarding Smith by voluntarily taking over the operations of the company so that Smith could grieve the loss of his wife. *Zastrow*, 291 Wis. 2d at ¶ 28; (R.154.) The evidence at trial showed that a special relationship developed between Smith and Kleynerman during

Smith's wife's illness and particularly after her death. Smith testified that Kleynerman assured him that he would "handle the business" and that Smith should "do whatever it takes" to deal with his loss. (R.150, 167:18-21, R.App.174.) Kleynerman testified that he told Smith "whatever you need" and it was "no big deal" to pay ACT's bills and loans. (R.154, 37:11-16, R.App.259.)

Kleynerman's offer to operate and manage ACT on his own so that Smith could grieve shows Kleynerman's "conscious undertaking of a special position" to Smith. *Zastrow*, 2006 WI 72 at ¶ 28. By undertaking the obligation to take care of ACT's interests in Smith's absence, Kleynerman, by extension, undertook the obligation to protect Smith's interests because he is the only other member of ACT, and whatever helped or hurt ACT directly impacted Smith.

Kleynerman argues that the numerous assurances provided by Kleynerman to Smith that he would take care of ACT amount to nothing more than Kleynerman's "advice and encouragement" and Smith's "trust and confidence" in Kleynerman. (Appellant's Br. 42.) Kleynerman further argues that neither of these things create a fiduciary relationship. (*Id.*) Despite Kleynerman's attempts to downplay the assurances that he gave Smith, the record shows that he provided more than mere "advice and encouragement." Indeed, Kleynerman himself testified at trial to obligating himself to "enter

some bills" and "pay loans to the bank." (R.154, 37:14–16, R.App.259.) Neither of these things are advice or encouragement—they are offers to act. Accordingly, the special circumstances surrounding their relationship demonstrates that Kleynerman voluntarily undertook the obligation to manage Smith's affairs in ACT, which further the jury's finding that he owed Smith a fiduciary duty.

C. KLEYNERMAN'S STATUS AS THE CONTROLLING MEMBER OF ACT CREATED A FIDUCIARY OBLIGATION THAT HE OWED TO SMITH.

Moreover, the MOU and the circumstances surrounding its execution demonstrate that Smith became the controlling shareholder of ACT, giving rise to a fiduciary obligation, just as if Smith served as ACT's manager. Those with the power to direct the affairs of a corporation are deemed fiduciaries to the organization and its non-controlling members. *See, e.g., Grognet v. Fox Valley Trucking Serv.*, 45 Wis. 2d 235, 241, 172 N.W.2d 812 (1969).

Delaware has applied the same rules to managers and controlling members of an LLC. *See Feeley v. NHAOCG, LLC*, 62 A.3d 649, 660 (Del. Ch. 2012) ("Numerous Court of Chancery decisions hold that the managers of an LLC owe fiduciary duties.") (collecting cases); *see also id.* at 661 (Delaware LLC statute "contemplates that equitable fiduciary duties will apply by default to a

manager or managing member of a Delaware LLC.").[3] Managerial control occurs when a party has "such formidable voting and managerial power that [he], as a practical matter, [is] no differently situated than if [he] had majority voting control." *In re Morton's Restaurant Group Inc. S'holder's Litig.*, 74 A.3d 656, 665 (Del. Ch. 2013).

The execution of the MOU, coupled with the circumstances surrounding Smith's depression, demonstrate that Kleynerman had "formidable voting and managerial power" over ACT affairs. *Id.* At the time of the Transaction, Smith was greatly depressed and had little to no involvement in ACT. Kleynerman told Smith that he would handle the business and that Smith should take all the time that he needed. (R.150, 167:14-21, R.App.174.) Smith's sister came to stay with him after his wife's death to take over a lot of daily activities for him, and he spent a lot of time "sitting in [his] family room looking out the window." (R.150, 169:4-5, 16-17, R.App.176.)

Smith was not involved in the daily operations of ACT at the time of the Transaction. Kleynerman would email Smith with important updates, and Smith would reword Kleynerman's emails for him, but Smith was not involved in the operations of ACT at all. (R.150, 172:8-11, 182:9-15, R.App.179.) Kleynerman

[3] "Wisconsin courts often look to Delaware law for guidance on matters of corporate law." *Lane v. Sharp Packaging Sys., Inc.*, 2002 WI 28, ¶ 81, 251 Wis. 2d 68, 640 N.W.2d 788.

was making all of ACT's business decisions because Smith trusted him to do what was right on behalf of himself and ACT. (R.150, 176:8-9, R.App.181; R.154, 136:10-12.) Whatever business decisions he made, without Smith's input, were the formal decisions of ACT, so he held all managerial control of the company.

Generally, to "decide any matter connected with the business of a limited liability company" the members must vote, approve of, or voice consent to a decision. Wis. Stat. § 183.0404. By executing the MOU, Smith ceded this authority to Kleynerman, therefore affording Kleynerman complete autonomy to run ACT as he saw fit. Effectively, the MOU rendered Kleynerman as ACT's manager; and in doing so it imposed by default the "equitable fiduciary duties" that apply to "a manager or managing member" of an LLC. *Feeley*, 62 A.3d at 660. Accordingly, Kleynerman was bound to act as a fiduciary to Smith—ACT's other member who ceded control of the company as he dealt with his depression.

D. KLEYNERMAN AND SMITH, AS EQUAL BUSINESS PARTNERS IN ACT, OWED EACH OTHER A FIDUCIARY DUTY.

Finally, Kleynerman and Smith's status as 50-50 members in ACT demonstrate that they owed one another a fiduciary duty. For more than 100 years, Wisconsin courts have recognized that parties to a joint venture are

treated like partners, and consequently, "owe each other the exercise of good faith and ordinary care and prudence." *Knudson v. George*, 157 Wis. 520, 147 N.W. 1003, 1004 (1914). Thus, the existence of this relationship impos[es] on its members the duties and obligations of fiduciaries." *Jolin v. Oster*, 55 Wis. 2d 199, 206, 198 N.W.2d 639 (1972). As the Eastern District of Wisconsin Bankruptcy Court has explained:

> The relationship between joint venturers, like that existing between partners, is fiduciary in character and imposes upon all participants the obligation of loyalty to the joint concern and of the utmost good faith, fairness, and honesty in their dealings with each other with respect to matters pertaining to the enterprise. This is especially true as to the participants in a joint venture who are entrusted with the conduct thereof and the control of the property constituting the subject matter of the enterprise.

In re Selenske, 103 B.R. 200, 202 (1989) (further stating that Wisconsin law "is generally to the same effect.") The fact that parties subsequently reduce their arrangement to a corporate form is irrelevant; the fiduciary obligations flowing from a joint venture can survive incorporation. *Jolin*, 55 Wis. 2d at 211.

The Wisconsin Limited Liability Company Law ("WLLCL"), adopted in 1991, aimed to "create a business entity providing limited liability, flow-through taxation, and simplicity." *Gottsacker v. Monnier*, 2005 WI 69, ¶¶ 18-19, 281 Wis. 2d 361, 697 N.W.2d 436 (citations omitted). In codifying this new corporate form, however, the Legislature retained many characteristics of partnerships,

including the "informality of organization and operation" as well as "direct participation by members in the company." *Id.* at ¶ 15.

Moreover, the WLLCL codified certain fiduciary obligations that members owe to each other when conducting the business of the LLC, which is rooted in Wisconsin's Partnership Act and the common law applicable to fiduciaries. *Compare* Wis. Stat. § 183.0405 (LLC members must provide "true and full information of all things affecting the [other] members") *with* Wis. Stat. § 178.17 (partners must provide "true and full information of all things affecting the partnership to any partner"); *see also* Wis. Stat. § 183.0402 (a member owes a duty to deal fairly with other members) *and* Wis. Stat. § 178.18 (a partner has a fiduciary obligation to deal fairly with the partnership); *Zastrow*, 2006 WI 72 at ¶ 29 (a fiduciary has an obligation to "*fully disclos[e] to the beneficiary all information relevant to the beneficiary's interest.*") (emphasis added).

Given this similarity between members in an LLC and partners in a partnership courts around the country have held that equal members of an LLC owe one another a fiduciary duty. *See Bushi v. Sage Health Care, PLLC*, 203 P.3d 694, 699 (Idaho 2009) ("[T]he majority of courts considering the issue have concluded that members of an LLC owe one another the fiduciary duties of trust and loyalty.") (collecting cases); *Griffin v. Jones*, 975 F. Supp. 2d 711, 724

(W.D. Ky. 2013) (In Kentucky, a 50-50 member of an LLC "owes a duty of loyalty to fellow members.") (citation omitted).[4]

The logic of these decisions is sound, especially when there are only two members in an LLC who have equal control over the enterprise. Any member who breaches his fiduciary obligation to the LLC disproportionally impacts the only other member to the enterprise. In Wisconsin members of an LLC "with a material conflict of interest may not willfully act or fail to act in a manner that will have the effect of injuring the LLC *or its other members.*" *Gottsacker*, 2005 WI 69 at ¶ 31 (emphasis added).

Thus, apart from the MOU and the special relationship between Smith and Kleynerman, both parties owed one another a fiduciary obligation as equal members in ACT. Having failed to disclaim these common law obligations in any operating agreement, the default provisions apply; therefore, Kleynerman owed Smith a fiduciary obligation to provide "true and full information of all things affecting" Smith's interest in ACT as a result of the Transaction, including Kleynerman's undisclosed interest in Red Flag.

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[4] *See also Salm v. Feldstein*, 20 A.D.3d 469, 470, 799 N.Y.S.2d 104 (2005); *Fiederlein v. Boutselis*, 952 N.E.2d 847, 860 (Ind. Ct. App. 2011); *Bros. v. Winstead*, 129 So. 3d 906, 924 (Miss. 2014); *McConnell v. Hunt Sports Ent.*, 725 N.E.2d 1193 (Ohio 1999).

The court's decision in *Estate of Sheppard ex rel. McMorrow v. Specht*, 2012 WI App 124, 344 Wis. 2d 696, 824 N.W.2d 907, which held that 50% shareholders do not owe a fiduciary duty to one another is inapposite. *Sheppard* dealt with a corporation, which was controlled through a board of directors. Thus, the court held that while the defendant owed the plaintiff a fiduciary obligation as a member of the board, it could not declare that the defendant's status as a 50% shareholder—standing alone—created a fiduciary obligation.

Here, however, ACT was member-managed LLC. As discussed above, the MOU granted managerial authority to Kleynerman. Thus, just as a member of a corporation's board of directors owes the corporation's shareholders a fiduciary obligation, Kleynerman's role as the controlling member (through the MOU) rendered him a fiduciary to Smith. But even if the MOU did not vest sufficient managerial control over ACT to render him a fiduciary, the general rules of member-managed LLCs apply, and Kleynerman and Smith owed each other a fiduciary duty, just as partners do. Accordingly, Kleynerman's claim that he did not owe Smith a fiduciary obligation is specious.

II. KLEYNERMAN BREACHED HIS FIDUCIARY DUTY TO SMITH.

Kleynerman cites *Zastrow* for the proposition that the breach of the duty of loyalty involves disloyalty or infidelity. While *Zastrow* does state that a breach of the duty of loyalty "connotes disloyalty or infidelity," it also goes on to give

examples of wrongful conduct that constitute that disloyalty or infidelity. *Zastrow*, 2006 WI 72 at ¶ 30. Under *Zastrow*, a "lawyer can breach his fiduciary duty of loyalty to a client by entering into a contract with a client without full disclosure that the contract will benefit the lawyer and potentially disadvantage the client." *Id.*

As discussed above, Kleynerman owed Smith a fiduciary obligation. (*See supra* Section I.) Kleynerman's wrongful conduct closely mirrors the conduct that *Zastrow* deemed a breach of the duty of loyalty. Kleynerman, acting as Smith's attorney in fact, signed Smith's patents over to Red Flag without Smith's knowledge and without fully disclosing to Smith how the transaction would affect Smith's interests—a violation of his common law duty of full disclosure, *id.*, which is also codified Section 184.0405 of the Wisconsin Statutes.

Kleynerman argues that he merely chose to "find a way to keep ACT afloat, to provide an opportunity for ACT's long-term success, and thereby provide an opportunity for Smith." (Appellant's Br. 46–47.) Kleynerman's testimony reveals that he did not consider the viability of other options regarding ACT's patents before transferring them to Glaser. Kleynerman stated that he did not even consider auctioning off a patent, explaining that "[n]obody would buy this patent anyway." (R.154, 114:1; R.App.271.)

Kleynerman cannot convincingly argue that he did not act in his own self-interest when, rather than explore all available options for ACT's patents, he quickly chose to work with Glaser and Grinberg in the Red Flag venture, Kleynerman now owns outright. Indeed, after the MOU was signed, but before the Asset Sale Transaction was consummated, Kleynerman was already teaming up with Glaser and Red Flag without Smith's knowledge. For example, Kleynerman was copied on correspondence where Glaser instructed Fream to "plead ignorance" regarding the structure of the deal in order to exploit Smith's confusion and induce him to sign the Transaction documents. (R.139, PX44; R.153, 204:3-205:1.)

Kleynerman also had signature authority on checks written from the Red Flag account, and he testified at trial that he had this authority "to run the company." (R.154, 70:11-22.) Although Kleynerman downplayed the importance of his Red Flag check writing authority as way to ensure that vendors could get paid while Glaser was out of town, the authority to write checks and control the books of a company is managerial authority. (R.154, 70:18-21; R.App.264.)

The facts at trial established that Kleynerman not only owed Smith a fiduciary duty, but also that he breached that duty when he acted in his own self-interest and transferred the patents to Red Flag without Smith's knowledge.

The trial court considered this evidence in the light most favorable to the jury's determination in its post-trial decision and correctly denied the Defendants' motion for judgment notwithstanding the verdict. (R.122.) As such, the trial court's decision should be affirmed as to this issue.

III. SMITH'S BREACH OF FIDUCIARY CLAIM WAS TIMELY ASSERTED.

Kleynerman also contends that Smith's breach of fiduciary duty claim is timed barred pursuant to Section 893.57 of the Wisconsin Statutes ("Section 893.57")—the application statute of limitations for fiduciary duty claims. (Appellant's Br. 49.) Kleynerman forfeited this argument, however, by failing to submit jury instructions or special verdict questions on this issue, thereby depriving the jury of an opportunity to make these findings of fact. Even absent Kleynerman's forfeiture, Smith's breach of fiduciary duty claim is subject to both the continuous violation doctrine and the discovery rule; each of which renders his claim timely.

A. KLEYNERMAN FORFEITED HIS STATUTE OF LIMITATION DEFENSE BECAUSE HE FAILED TO PRESENT THIS QUESTION TO THE JURY.

A forfeiture occurs when a party fails "to make the timely assertion of a right." *State v. Ndina*, 2009 WI 21, ¶ 29, 315 Wis. 2d 653, 761 N.W.2d 612. In many instances, a party forfeits certain rights "when they are not claimed at trial." *Id.* at ¶ 30. When a party forfeits certain rights at trial, appellate review

is precluded. *State v. Huebner*, 2000 WI 59, ¶ 10, 235 Wis. 2d 486, 611 N.W.2d 727 ("It is a fundamental principle of appellate review that issues must be preserved at the circuit court.")

The forfeiture rule[5] "is not merely a technicality or a rule of convenience; it is an essential principle of the orderly administration of justice." *Id.* at ¶ 11. The rule "enable[s] the circuit court to avoid or correct any error with minimal disruption of the judicial process, eliminating the need for appeal." *Ndina*, 2009 WI 21 at ¶ 30 (citation omitted). "The forfeiture rule also gives both parties and the circuit court notice of the issue and a fair opportunity to address the objection; encourages attorneys to diligently prepare for and conduct trials; and prevents attorneys from 'sandbagging' opposing counsel by failing to object to an error for strategic reasons and later claiming that the error is grounds for reversal." *Id.*

Relevant here, Kleynerman moved for summary judgment on his statute of limitations defense (R.88, 223–24), which the Trial court properly denied because there were disputed issues of material fact concerning when Smith learned of Kleynerman's breach. (R.145, 33:7-10); *John Doe 1 v. Archdiocese of*

[5] As the Supreme Court of Wisconsin has acknowledged, Wisconsin courts have loosely used the terms "waiver" and "forfeiture" to mean the same thing, although they have different meanings. *Huebner*, 2000 WI 59 at ¶ 11, n.2; *Ndina*, 2009 WI 21 at ¶ 28.

Milwaukee, 2007 WI 95, ¶ 53, 303 Wis. 2d 34, 734 N.W.2d 827 (The "date of discovery" for statute of limitations purposes "is generally a question of fact for the jury and is a question of law only where the facts are undisputed."). Accordingly, Kleynerman had the burden at trial to prove that Smith's fiduciary duty claim was timed barred. *See Doe*, 2007 WI 95 at ¶ 62; *see also Strong v. Brushafer*, 185 Wis. 2d 812, 820 n.5, 519 N.W.2d 668 (Ct. App. 1994) (the defendant bears the burden of proof on any affirmative defense it pleads).

Therefore, Kleynerman was required to present the statute of limitations defense and, if asserted, the additional factual issue concerning whether Smith failed to exercise reasonable diligence to the jury. *See, e.g., Gumz v. N. States Power Co.*, 2007 WI 135, ¶ 49, 305 Wis. 2d 263 (stating that statute of limitation defenses based on failure to exercise reasonable diligence present questions of fact appropriate for a jury). If Kleynerman had submitted such factual issues to the jury, Smith would have had the opportunity to present evidence and jury instructions regarding the discovery rule, the continuing violation doctrine and equitable estoppel. Instead, Kleynerman abandoned the statute of limitations argument in front of the jury and presented no argument, instructions, or questions on the special verdict regarding the issue. (R.155, Def's Closing Argument, 54:23 – 74:10; R. 101, Def's Proposed Jury Instruction.) Only after

the trial was concluded did Kleynerman raise the statute of limitations argument in his motion for judgment notwithstanding the verdict. (R.116, 14–16.)

Kleynerman's failure to address these issues at trial constitutes a forfeiture of his statute of limitations defense. *See Best Price Plumbing, Inc. v. Erie Ins. Exch.*, 2012 WI 44, ¶¶ 35–38, 340 Wis. 2d 307 (finding forfeiture when jury was not instructed about or asked to answer any questions that would support a point of law); *see also* Wis. Stat. § 805.13(3) (stating that a party waives any claimed error in the special verdict when it fails to make an objection on the record); *State v. Shah*, 134 Wis. 2d 246, 251 n.4, 397 N.W.2d 492 (1986) ("[E]ven when a[ ] [jury] instruction misstates the law, the party must object to the instruction to preserve a challenge to the instruction as of right on appeal [and] [f]ailure to object to an instruction constitutes waiver of the error.")

Allowing Kleynerman to raise post-trial contentions that Smith's claim was barred by the statute of limitations—despite approving the jury instructions and verdict which are devoid of any information to aid the jury in determining this question of fact—would promote precisely the sort of "sandbagging" that the forfeiture rule was designed to prevent. "A party is not permitted to save its legal arguments until after trial, only to present those arguments if the party dislikes the jury's ultimate conclusion." *Best Price*, 2012 WI 44 at ¶ 41.

B. SMITH'S BREACH OF FIDUCIARY DUTY CLAIM IS TIMELY IRRESPECTIVE OF KLEYNERMAN'S FORFEITURE.

Even ignoring Kleynerman's forfeiture of this statute of limitations defense, competent, credible evidence establishes that Smith timely asserted his breach of fiduciary duty claim. Kleynerman argues without analysis that Smith's breach of fiduciary duty claim accrued on June 5, 2009, and then tersely concludes that the two-year statute of limitations period in effect at that time Section 893.57 bars Smith's claim. (Appellant's Br. 49) (citing 2009 Wis. Act. 120).

Smith's claim was timely. First, evidence exists that Smith did not discover Kleynerman's breach until June 2010, when he was terminated from working with Red Flag. Moreover, the continuous violation doctrine precludes Kleynerman's defense because his breach of duty to Smith was designed to wrest control of ACT's valuable assets from Smith, a series of action that were not completed until February 2011, when Kleynerman became the majority shareholder of Red Flag. Accordingly, Smith's claims are timely.

1. Smith's Breach of Fiduciary Duty Claim Did Not Accrue Until His Discovery of Kleynerman's Breach in June 2010.

The discovery rule "tolls the statute of limitations until the plaintiff discovers or with reasonable diligence should have discovered that he or she

has suffered actual damage due to wrongs committed by a particular, identified person." *Pritzlaff v. Archdiocese of Milwaukee,* 194 Wis. 2d 302, 315, 533 N.W.2d 780 (1995). Smith did not discover his actual damages due to Kleynerman's misdeeds until Smith was unceremoniously fired from any duties with Red Flag. (R.151, 26:19-28:9, R.App.207-209.) ACT was left as a shell of the company Smith had built, and he was left with nothing to show for his years of hard work. Smith could not have discovered Kleynerman's breach of his fiduciary duties at the time the agreements were signed because he did not understand the structure of the Transaction.

The evidence at trial showed that Smith was deeply depressed during the time period of the Transaction, and while the jury found that Smith was not legally incompetent, it is clear that his ability to discern the truth of Kleynerman's promises was greatly compromised. Furthermore, Smith was highly reliant upon Kleynerman at that time because Kleynerman was one of the few people that Smith trusted and interacted with on a daily basis. The exercise of ordinary care to discover the falsity of a statement or a resulting injury is determined "in light of the intelligence and experience of the misled individual and the relationship between the parties." *Ritchie v. Clappier*, 109 Wis. 2d 399, 405–06, 326 N.W.2d 131 (Ct. App. 1982); *Williams v. Rank & Son Buick, Inc.*, 44 Wis. 2d 239, 246, 170 N.W.2d 807(1969).

Smith did not know and could not find out that Kleynerman was self-dealing, working with Glaser at Red Flag and planning to take over Red Flag. Kleynerman was his main point of contact with Glaser, all communications were filtered through Kleynerman. (R.150, 194:2-13.) The evidence presented at trial was sufficient to show that Smith did not discover Kleynerman's duplicity until Kleynerman revealed the truth to Smith in a phone call informing him that he was fired. (R.151, 27:11-28:9.) Shortly thereafter, Smith received confirmation of the deception when he received the letter from Glaser officially terminating the relationship between ACT and Red Flag. (R.151, 26:19-27:10.) Smith further discovered Kleynerman's breach when Smith discovered Kleynerman had been working for Red Flag's benefit behind Smith's back.

Accordingly, Smith's breach of fiduciary duty claim did not accrue until Smith discovered Kleynerman's breach and the earliest this could have occurred is May 28, 2010, when Smith and ACT were terminated by Red Flag. (R.151, 26:19-27:10.) Claims accruing after February 26, 2010 are subject to the three year statute of limitations period described in the current version of Wis. Stat. § 893.57 (2011-12). This case was filed December 16, 2011, well within two years from the date the claim accrued, and certainly within the applicable three year period. (R.1.)

2. The Continuing Violation Doctrine Also Renders Timely Smith's Fiduciary Duty Claims.

The continuing violation doctrine dictates that "[w]here the tort is continuing, the right of action is continuing." *Production Credit Ass'n of W. Cent. Wis. v. Vodak*, 150 Wis. 2d 294, 305–06, 441 N.W.2d 338 (Ct. App. 1989) (quoting *Tamminen v. Aetna Ca. & Sur. Co.*, 109 Wis. 2d 536, 554, 327 N.W.2d 55 (1982)). In other words, "the doctrine applies to claims premised on a continuing course of related acts that cause injury to the plaintiff, as opposed to several separate, discreet events that would be actionable by themselves." *Beal v. Wyndham Vacation Resorts, Inc.*, 956 F. Supp. 2d 962, 974 (W.D. Wis. 2013).

In *White Knight Commercial Funding, LLC v. Trewin*, for example, the Wisconsin Court of Appeals remanded a case to address the factual interplay between the statute of limitations and the continuing violation doctrine in connection with a client's breach of fiduciary duty claim their lawyer. 2015 WL 5725181, ¶ 22 (Ct. App. Sept. 30, 2015) (slip op), R.App.340-341. While the lawyer's breach of fiduciary duty occurred in 2005, the clients alleged that the lawyer perpetrated a "long-term scheme" to take advantage of them. *See id.* The court of appeals acknowledged that the lawyer's myriad breaches of fiduciary duty could constitute an ongoing scheme under the continuing violation theory,

thereby extending the statute of limitations. It therefore remanded to the circuit court to address these factual issues. *See id.*

Kleynerman breached his fiduciary duties to Smith so that Kleynerman could ultimately wrest control over ACT by selling its assets to Red Flag—an entity in which Kleynerman held an undisclosed interest and which he now owns outright. Thus, Kleynerman's overarching course of conduct was to "squeeze out" Smith from ACT and take control of the business through another venture. *See Sugarman v. Sugarman*, 797 F.2d 3, 7 (1st Cir. 1986); *see also Jorgensen v. Water Works, Inc. (Jorgensen I)*, 218 Wis. 2d 761, 779, 582 N.W.2d 98, 105 (Ct. App. 1998). Thus, while Kleynerman began sowing the seeds to effectuate this breach in 2009, the ultimate consummation of this act—gaining 100% control of ACT's assets through Red Flag, which Kleynerman now owns outright—was not accomplished until February 22, 2011 when Kleynerman gained complete control of Red Flag. (R.139, DX126). Accordingly, Kleynerman's squeeze out of Smith was accomplished over a number of years, meaning that his breach of fiduciary duty to Smith was a continuing course of conduct that did not come to its final conclusion until less than a year before Smith filed this case. (R.1.)

IV. SMITH HAS STANDING TO RECOVER THE DAMAGES THAT THE JURY AWARDED.

Kleynerman asserts on appeal that the damages Smith presented at trial were in the form of ACT's lost profits; therefore, he contends, Smith cannot bring a direct claim for breach of fiduciary duty against Kleynerman because any breach committed by Kleynerman damaged ACT and could only be asserted through a derivative action. (Appellant's Br. at 54.) What Kleynerman ignores, however, is that a defendant's course of conduct could give rise to *both* direct and derivative claims for breach of fiduciary duty. *See, e.g., Park Bank v. Westburg*, 2013 WI 57, ¶ 42, 348 Wis. 2d 409, 832 N.W.2d 539. "An individual 'may sue to redress direct injuries to him or herself regardless of whether the same violation injured the corporation.'" *Id.*, at ¶ 44 (quoted source omitted).

In this case, the jury found that: (a) Kleynerman owed Smith a fiduciary duty to protect Smith's interests in the Transaction; and (b) Kleynerman breached that duty when he engineered the transfer of ACT's assets to another enterprise in which he had an undisclosed interest, and over which he subsequently gained complete control. (*See* Sections I and II, *supra.*) The jury then calculated Smith's damages in the form of ACT's lost profits, because they were monies to which Smith would have otherwise been entitled but for Kleynerman's breach.

Thus, the profits ACT lost due to Kleynerman's breach of fiduciary duty are, in effect, a constructive dividend that Kleynerman received and that Smith was deprived of as the only other member of ACT. A constructive dividend received by one shareholder at the expense of others is the type of inequitable treatment that supports a direct claim for breach of fiduciary duty. *Notz v. Everett Smith Group, Ltd.*, 2009 WI 30, ¶ 27, 316 Wis. 2d 640, 764 N.W.2d 904. An injury that is done "primarily . . . to an individual shareholder is one that affects a shareholder's rights in a manner distinct from the effect upon other shareholders.'" *Jorgensen v. Water Works, Inc., (Jorgensen II)*, 2001 WI App 135, ¶ 16, 246 Wis. 2d 614, 630 N.W.2d 230

In *Jorgensen II*, for example, the court held that when shareholders continued to pay themselves regular distributions while depriving two shareholders of those distributions, the two deprived shareholders were treated differently than the other shareholders. *Id.* at ¶ 18. Likewise, the *Notz* Court held that due diligence expenses that were paid for by all shareholders of company that only one shareholder later acquired was a constructive dividend to the acquiring shareholder of which other shareholders were deprived. *Notz*, 2009 WI 30 at ¶¶ 27, 38. The court held that because the other shareholders did not receive a dividend-like payment that the acquiring shareholder did, they suffered an injury that "affect[ed] [their] rights in a manner distinct from the effect upon

[the acquiring shareholder]," supporting the filing of a direct claim by the individual shareholders against the acquiring shareholder. *Id.*, at ¶ 28; *Jorgensen II* 2001 WI App 135 at ¶ 16.

Kleynerman deprived Smith of a constructive dividend when he reaped the benefits of his breach of fiduciary duty and wrested away control over ACT's assets. This was solely to Smith's detriment, as the only other member of the LLC. As in *Notz*, there was "never any intention for [Smith] to benefit in any way from this [transfer]," *Notz*, 2009 WI 30 at ¶ 27. And while Kleynerman's breach may have also harmed ACT, "there can be little doubt that any injury to the corporation caused by one fifty percent owner is in fact a direct injury to the other owner." *In re Phillips*, 185 B.R. 121, 127 (Bankr. E.D.N.Y. 1995). Accordingly, Smith has standing to bring a direct claim for ACT's lost profits because the lost profits to ACT were a dividend-like payment to Kleynerman that Smith did not receive as the other member of ACT.

Kleynerman's breach may also properly be analyzed as a "squeeze out" scenario wherein Kleynerman's machinations ultimately resulted in his complete control of ACT's assets and business to Smith's detriment. Because "squeeze out claims result in a unique harm to the shareholder, they are direct rather than derivative claims. *See, e.g.*, *Steelman v. Mallory*, 716 P.2d 1282, 1285 (Idaho 1986) (holding that a direct action is permissible when "[t]he gravamen

of [plaintiff's] complaint is that the majority shareholders/directors were attempting to squeeze him out."); *Wenzel v. Mathies*, 542 N.W.2d 634, 641 (Minn. Ct. App. 1996) (same); *Davis v. Dorsey*, 495 F. Supp. 2d 1162, 1168 (M.D. Ala. 2007) (same); *Noakes v. Schoenborn*, 841 P.2d 682, 688 (Or. App. 1992) (same). Accordingly, Smith has standing to recover his damages, i.e., his portion of ACT's lost profits that resulted from Kleynerman's action to squeeze Smith out the cargo security seal business, by transferring assets and sales opportunities to Red Flag.

Similarly, Smith has standing to recover in the form of restitution. Restitution is a proper measure of compensation for tort claims. *Zastrow*, 2006 WI 72 at ¶ 37–38; *Pro-Pac, Inc. v. WOW Logistics Co.*, 721 F.3d 781, 786–787 (7th Cir. 2013) (applying Wisconsin law and holding that restitution is an appropriate remedy for a breach of fiduciary duty); *see also Dick & Reuteman Co. v. Doherty Realty Co.*, 16 Wis. 2d 342, 355-56, 114 N.W.2d 475 (1962). The amount of restitution is measured by "the defendant's gain or benefit." *Ludyjan v. Cont'l Cas. Co.*, 2008 WI App 41, ¶ 8, 308 Wis. 2d 398, 474 N.W.2d 745 (quoting 1 Dan B. Dobbs, *Dobbs Law of Remedies: Damages Equity and Restitution* § 3.1, at 280 (2d ed. 1993)).

Here, Kleynerman was unjustly enriched by his breach of fiduciary duty in the form of the profits that he and Red Flag received, and continue to receive,

flowing from assets obtained by squeezing out Smith. Accordingly, Smith has standing to recover restitution equal to that portion of ACT's profits that he would have received, but for Kleynerman's breach of his fiduciary duty.

V. THERE WAS SUFFICIENT EVIDENCE PRESENTED AT TRIAL TO ESTABLISH THAT SMITH SUFFERED $499,000 IN DAMAGES BECAUSE OF KLEYNERMAN'S BREACH OF FIDUCIARY DUTY.

A. Damages Were Properly Awarded Based Upon the Damage to Smith's Interests.

Kleynerman next challenges the sufficiency of the evidence presented at trial to support the jury's damages award. Competent evidence was presented at trial that was sufficient to support the jury's award of $499,000 in damages, and it should be upheld.

"The amount of damages awarded is a matter resting largely in the jury's discretion." *Weber v. Chicago and Northwestern Transp. Co.*, 191 Wis. 2d 626, 635, 530 N.W.2d 25 (Ct. App. 1995) (quotation omitted). A motion challenging the sufficiency of the evidence to support a verdict will not be granted unless considering the evidence in the light most favorable to the non-moving party "there is no credible evidence to sustain a finding in favor of such party." *Richards v. Mendivil*, 200 Wis. 2d 665, 670, 548 N.W.2d 85 (Ct. App. 1996). The Court searches the record for credible evidence to support the award, and views that evidence "in the light most favorable to the jury's determination." *Id.* A

damage award will be upheld if it is "within the realm of reason in view of the evidence." *State v. Abbott Labs.*, 2012 WI 62, ¶ 26, 341 Wis. 2d 510, 816 N.W.2d 145.

ACT's lost profits resulting from Kleynerman's breach of fiduciary duty are a proper measure of Smith's damages. Smith is entitled to be restored to the position he would have been in absent Kleynerman's breach. *Cmty. Nat. Bank v. Med. Ben. Adm'rs, LLC*, 2001 WI App 98, ¶ 14, 242 Wis. 2d 626, 626 N.W.2d 340.

Alternatively, Kleynerman's breach of his duty of loyalty to Smith requires a disgorgement of the profits Kleynerman received as a result of the breach. *Id.* at ¶ 8. The sales opportunities realized by Red Flag would have been available to Smith in proportion to his interest in ACT but for Kleynerman's breach of the duty of loyalty. Therefore, the profits from those sales opportunities, which Rodrigues testified would have been ACT's but for the breach, are a proper measure of damages to put Smith in the position he would have been absent Kleynerman's breach. *Id.* Similarly, Kleynerman is liable for the benefit he received as a result of the breach, and that benefit is half of Red Flag's profits that would have been ACT's but for the breach. *Id.* at ¶ 8; Restatement (Second) of Torts, § 903, comment b.; *Pederson v. Johnson,* 169 Wis. 320, 324–25, 172 N.W. 723 (1919). Regardless of which legal theory of damages

is appropriate, the jury had sufficient, and competent, evidence to conclude that Smith's share of ACT's lost profits, totaling $499,000, was a proper measure of those damages.

Smith presented the expert testimony and opinion of Certified Public Accountant Rodrigues regarding Smith's share of sales that were lost due to Kleynerman's actions. (R.153, 104–198.) Rodrigues testified that his damages calculation is based on the premise that "but for this transaction occurring, where sales were removed from ACT; had they occurred in ACT, this is what I believe would be a reasonable calculation to determine what ACT's lost profits would have been within ACT." (R.153, 178:7-11, R.App.246.) The jury determined that Kleynerman breached his fiduciary duty "to act in furtherance of Smith's interests as it related to the Transaction." (R.112, 4, R.App.106.) Accordingly, Rodrigues' calculation of damages merely set out a reasonable measuring stick of how much Kleynerman had gained, or conversely how much Smith had been harmed by Kleynerman's breach of fiduciary duty. The end result is the same under each theory: Kleynerman transferred, to his benefit and Smith's detriment, patents, sales opportunities, and business goodwill from ACT to Red Flag. The profits from those lost sales opportunities are the damages flowing from Kleynerman's misdeeds.

Kleynerman attempts to cast doubt on Rodrigues' testimony with a

series of statements that are unsupported by the record. Kleynerman states that "Smith's counsel twice suggested that he was stipulating that Rodrigues was not testifying beyond the misrepresentation claim." (Appellant's Br. 57.) This assertion is demonstrably false. The first "stipulation" was the result of an imprecise question during cross examination and which confused counsel, the witness, and the trial court.

> MR. BYKHOVSKY: Yes. In your report you state that you had calculated damages for fraudulent inducement into this transaction, correct?
>
> MR. RODRIGUES: No, I don't think that's correct. That a little bit different than what I stated in my report. I said that there were two possible scenarios.
>
> MR. NISTLER: Judge for legal purposes, I'm stipulating to what he's asserting. I don't know if that moves it along.
>
> THE COURT: Well, I don't know what he's saying, so I don't know if you have any idea as to what he's saying. I suppose you can stipulate, but the court doesn't know what he's saying.
>
> MR. NISTLER: I guess if you don't know, then maybe I don't know either. I thought I did.

(R.153, 182:15-23, R.App.247.) Kleynerman seeks to assign meaning to an exchange that the trial court found meaningless. The second "stipulation" occurred after a sustained objection and contained no words indicating the subject matter. Smith's counsel merely stated "I will stipulate - - Never mind." (*Id.*, 185:6-7, R.App.248.) To claim that Smith's counsel was suggesting a

stipulation to anything, let alone a stipulation that Rodrigues was not testifying beyond the misrepresentation claim, is specious.

Rodrigues testified that his calculation of damages is a "but for" analysis of the amount of harm to Smith from Kleynerman's transfer of ACT's valuable assets to Red Flag. (R.153, 178:7-11, R.App.246.) Accordingly, Rodrigues' damages calculation was applicable to both the intentional misrepresentation claim and the breach of fiduciary duty claim because the harm to Smith in each claim was the loss of his share of ACT's sales opportunities resulting from Kleynerman's misrepresentations and breach of duty. (R.153, 178:7-11, R.App.246.)

Kleynerman argues that he was entitled to judgment notwithstanding the verdict because Smith presented no evidence of damages specific to the breach, but to support that argument, cites only to authority where the jury heard no evidence to support damages. In *Sporleder v. Gonis*, the plaintiff presented tax returns indicating that he earned less in the year after a breach of contract, but did not present evidence of what this income would have been absent the breach. 68 Wis. 2d 554, 560, 229 N.W.2d 602 (1975). In *Berner Cheese v. Krug*, the plaintiff's expert testified that the relevant standard of care was not met, but expressed no opinion about whether the plaintiff sustained any damages

stemming from a breach of fiduciary duty. 2008 WI 95, ¶ 59, 312 Wis. 2d 251, 752 N.W.2d 800.

Berner Cheese and *Sporleder* are inapposite to the instant case, where Smith presented expert testimony of what ACT's sales would have been absent a breach. (R.153, 178:3-12, R.App.246.) Not only did Rodrigues present such testimony, he did so despite Kleynerman's and Red Flag's failure to provide requested accounting information or updated sales figures until the middle of trial, when Kleynerman finally divulged some estimated sales figures while on the witness stand. (R. 153, 17:24-19:21; R.139, DX155.)

B. Smith's Expert Witness' Damages Opinion was Admissible.

Kleynerman argues that the Expert Opinion testimony presented by CPA Rodrigues was improper and should have been disallowed. Although Kleynerman correctly notes that Wis. Stat. § 907.02(1) adopted the *Daubert* standard for the admission of expert witness testimony, his argument misapplies the *Daubert* standard. Kleynerman merely regurgitates arguments that may bear on the weight to be given to Rodrigues' testimony, but not the admissibility. Kleynerman's argument glosses over the fact that he did not appropriately challenge Rodrigues' opinion or testimony in a pretrial *Daubert* motion.

Wis. Stat. § 907.02(1) provides that an expert may state an opinion "if

the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case." A trial court's decision to admit or exclude expert testimony is reviewed under an erroneous exercise of discretion standard and "will not be overturned if it has a rational basis and was made in accordance with accepted legal standards in light of the facts in the record." *Seifert ex rel. Scoptur v. Balink*, 2015 WI App 59, ¶ 15, --- N.W.2d ----, (internal quotation marks omitted). "A circuit court's decision about admission of expert testimony is largely a matter within the discretion of the circuit court." *Weiss v. United Fire & Cas. Co.*, 197 Wis. 2d 365, 378, 541 N.W.2d 753 (1995). Furthermore, the trial court is entitled to "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999); *Seifert*, 2015 WI App 59 at ¶ 18.

Kleynerman forfeited any right to a *Daubert* challenge to the admissibility of Rodrigues' testimony. Despite having access to Rodrigues' report well in advance of trial, Kleynerman did not file a motion in limine to challenge the admissibility of the testimony. (R.121, 3–5.) In fact, Kleynerman waited until Rodrigues had concluded his testimony to even raise the issue of admissibility. (R.153, 193:17-194:1, R.App.251.) Accordingly, Kleynerman has waived his

challenge on this issue. *See Macsenti v. Becker*, 237 F.3d 1223, 1232 (10th Cir. 2001) (*Daubert* does not mandate *sua sponte* questioning and challenging of the expert testimony absent a timely request by an objecting party); *see also United States v. Jasin*, 292 F. Supp. 2d 670, 680–81 (E.D. Pa. 2003) (absent a request from the parties, a district court has no obligation to make explicit on-the-record rulings concerning *Daubert* issues). Kleynerman's request for a *Daubert* inquiry is belated, and therefore waived.

Even absent Kleynerman's waiver, Rodrigues' testimony was reliable and admissible under the *Daubert* standard. Mr. Rodrigues' qualifications indicating the reliability of his testimony are numerous. Mr. Rodrigues is a principal at Chortek, LLP, a Waukesha public accounting firm and has significant education, training and experience in the field of accounting. (R.153, 104-111, R.App.235-242; R.139, PX26.) Rodrigues has been a Certified Public Accountant (CPA) for over 20 years and has been both a Certified Fraud Examiner and certified in financial forensics since 2008. (R.153, 109:7-111:13.) He also serves as a forensic accounting investigator for United States Bankruptcy Court for the Eastern District of Wisconsin. (*Id.*, 108:4-12.) He has provided expert opinions and testimony in numerous cases, including lost profit calculations. (*Id.*, 108:2-109:2.)

Rodrigues' methodology in determining ACT's lost profits was

straightforward. He reviewed the relevant documents (*see* R.139, PX26 at App. A), and determined ACT's average net income margin when operating at regular capacity prior to 2009. (R.153, 143:17-144:12, R.App.243-244; PX26, 4.) Rodrigues then used the limited information he was provided by Kleynerman that showed sales of $872,000 reported by Red Flag in its accounting system between 2009 and 2012. (*Id.*) Rodrigues noted in his report that the opinion was a partial analysis of Smith's damages based on incomplete information. (*See* PX26, 5.) Upon obtaining additional information during the trial, Rodrigues updated the calculations by multiplying the additional sales, based on Kleynerman's estimates, by the net income profit margin to identify ACT's total lost profits between $898,167 and $978,167. (R.146:2-23.) Rodrigues testified that, based on Smith's 50% ownership of ACT, Smith would be entitled to half of the profits from those sales that would have resulted had Kleynerman not entered into the Transaction on behalf of ACT. (*Id.*, 146:18-23.)

Finally, Kleynerman attempts to fault Rodrigues for not offering an opinion that ACT "in fact would have made those sales" but this moves the bar far beyond the reliability standard and purports to require an expert to engage in the impossible task of stating definitively what would have happened in the absence of Kleynerman's breach of fiduciary duty. (Appellant's Br. 60.) Damages need not be proved "with mathematical precision; rather, evidence of

damages is sufficient if it enables the jury to make a fair and reasonable approximation." *Abbott Labs.*, 2012 WI 62 at ¶ 80.

Kleynerman made these arguments to the jury, who after listening to all of the testimony, awarded $499,000 to Smith. The jury's award is certainly "within the realm of reason in view of the evidence." *Id.* at ¶ 26 (*citing Rupp v. Travelers Indem. Co.*, 17 Wis.2d 16, 26, 115 N.W.2d 612 (1962)).

CONCLUSION

Other than as specified in Smith's cross-appeal, the judgment against Kleynerman for breach of fiduciary duty should be affirmed.

CERTIFICATION AS TO FORM/LENGTH

I certify that the foregoing Brief of Respondent meets with the form and length requirements of Wis. Stat. 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 10,747 words.

Dated this 9th day of October, 2015.

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CERTIFICATION

In accordance with Wis. Stat. § 809.19(12)(f), I hereby certify that the text of the electronic copy of the Respondent's Brief is identical to the text of the paper copy of the Respondent's Brief.

Dated this 9th day of October, 2015

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

SCOTT SMITH,

Plaintiff-Respondent-
Cross-Appellant,

ALPHA CARGO TECHNOLOGY, LLC,

Plaintiff,

Appeal Case No.: 2015-AP-207

v.

GREG KLEYNERMAN,

Defendant-Appellant-
Cross-Respondent,

RED FLAG CARGO SECURITY SYSTEMS, LLC,

Defendant.

BRIEF OF CROSS-APPELLANT SCOTT SMITH

Appeal from Final Order Entered December 16, 2014 in Milwaukee County Circuit Court, Case No. 2011CV18551, Honorable Pedro Colon, Presiding

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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Wisconsin Cases

STATEMENT OF THE ISSUES ON CROSS APPEAL

I. **Issue Presented for Review**: Did the trial court err as a matter of law, based on the evidence at trial, by denying Smith's motion to change Verdict Question 5 from "NO" to "YES" and dismissing Smith's intentional misrepresentation claim?

Answered by Trial Court: No

Standard of Review: Upon review of the trial court's denial of a motion to change a special verdict, the court should disturb the verdict when there is no credible evidence that supports the jury's finding under any reasonable view. *Hanson v. Am. Family Mut. Ins. Co.*, 2006 WI 97, ¶¶ 18–20, 294 Wis. 2d 149, 716 N.W.2d 866. A trial court's decision on a motion to change the jury's answers will be overturned if the record reveals that the trial court was "clearly wrong." *Richards v. Mendivil*, 200 Wis. 2d 665, 672, 548 N.W.2d 85 (Ct. App. 1996).

II. **Issue Presented for Review**: Did the trial court err as a matter of law by not granting the Smith's post-verdict

motion for a new trial on the misrepresentation claim based on the inconsistency in the jury verdict requiring a new trial?

Answered by Trial Court: No.

Standard of Review: Denial of a motion for new trial is reviewed for an erroneous exercise of discretion. *Kolpin v. Pioneer Power & Light Co.*, 162 Wis. 2d 1, 30, 469 N.W.2d 595 (1991); *Priske v. General Motors Corp.*, 89 Wis. 2d 642, 663, 279 N.W.2d 227 (1979). Where a jury verdict is inconsistent, the remedy is for a court to order a new trial. *Westfall by Terwilliger v. Kottke*, 110 Wis. 2d 86, 98, 328 N.W.2d 481 (1983).

III. **Issue Presented for Review**: Did the trial court err as a matter of law by dismissing the award of punitive damages?

Answered by Trial Court: No

Standard of Review: A reviewing court will reverse a trial court's dismissal of a punitive damages award if it determines that the trial court erroneously exercised its discretion. *Mgmt. Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 191, 557 N.W.2d 67 (1996).

STATEMENT OF THE CASE FOR CROSS APPEAL

I. NATURE OF THE CASE

Plaintiff-Respondent, Cross-Appellant Scott Smith ("Smith") appeals the trial court's decision to dismiss his misrepresentation claim against Kleynerman and the related decision to deny a new trial on that issue. The evidence presented at trial and the jury's answers on the special verdict form show that the jury found intentional misrepresentation occurred and the Court therefore erred in dismissing the claim. The jury's answers on the special verdict related to intentional misrepresentations and punitive damages were inconsistent and the Court erred in not sending the jury back to deliberate until the inconsistency was resolved. Because the inconsistency in the verdict was not resolved at trial, the Court erred in not granting a new trial on the misrepresentation claim. In addition, the trial court's dismissal of the punitive damages award without granting a new trial on that issue was in error. The evidence presented at trial and the jury's answers on the special verdict show that punitive damages were warranted.

II. STATEMENT OF FACTS FOR THE CROSS APPEAL

The following Statement of Facts supplements (and assumes familiarity with) the underlying facts of the case set forth in Smith's Response Brief.

A. Circuit Court Proceedings Relevant to the Cross Appeal.

Scott Smith ("Smith") initiated this lawsuit, individually and on behalf of Alpha Cargo Technology, LLC against Gregory Kleynerman ("Kleynerman") and Red Flag Cargo Security Systems, LLC ("Red Flag") on December 6, 2011. (R.1) The Amended Complaint stated ten causes of action including three claims that were eventually submitted to the jury. (R.2; R.112, R.App.131-132.) The case proceeded to a six-day jury trial, which took place September 22-29, 2014. (R.150-R.155.) The special verdict submitted to the jury included questions related to Smith's claims for Rescission Based Upon Mental Incompetence (Questions 1-3); Intentional Misrepresentation (Questions 4-9); Breach of Fiduciary Duty (Questions 10-12); and Punitive Damages (Questions 13-14). (R.112, R.App.103-107.) The special verdict also included questions related to Red Flag's counterclaim for Misrepresentation (Questions 15-19). (*Id.*, R.App.107.)

The jury deliberated and then informed the court that they had reached a verdict; upon inspection of the special verdict, however, the trial court noted that the jury's answers to Questions 5-9 (concerning Smith's Misrepresentation claims) were inconsistent with the jury's answers to Questions 13 and 14, which awarded punitive damages. (R.155, 84:16-85:3, R.App.278-279.) The jury was

ordered to continue deliberating, but returned twice more with an inconsistent verdict. (*Id.* at 86:17-22, 87:3-93:20, R.App.280-281.) After the jury returned for the second time, the trial court accepted the special verdict, polled the jurors, and then discharged the jury. (*Id.* at 87:3-93:20, R.App.281-287.)

The special verdict finally returned by the jury included the following relevant answers. In Section II of the verdict, regarding Smith's intentional misrepresentation claim, the jury answered Question 4 by placing a checkmark next to three representations Kleynerman made to Smith. (R.112, 2, R.App.104.) These included: "Glaser and Grinberg would invest at least $250,000 in ACT," "Kleynerman and Smith would own 49% of ACT after the sale," and "Grinberg and Glaser needed Smith to remain on at ACT after the Transaction because Grinberg and Glaser knew nothing about the security industry." (*Id.*) Despite the answer to Question 4, the jury marked "No" to Question five, which asked: "[w]ere any of the marked misrepresentations untrue?" (*Id.*) The remainder of Question 5, as well as Questions 6-8 regarding intent and reliance were left blank. (*Id.* at 2-3, R.App.104-105) Question 9 regarding compensatory damages was also left blank. (*Id.*, R.App.105).

In Section III of the special verdict, the jury answered "Yes" to Question 10 which asked: "Did Kleynerman have a fiduciary duty to act in furtherance of Smith's interests as it related to the Transaction between ACT and Red Flag

Cargo?" (*Id.* at 4, R.App.106.) The jury also answered "Yes" to Question 11, which asked: "Did Kleynerman breach his duty to act in furtherance of Smith's interests as it related to the Transaction?" (*Id.*) The jury answered "$499,000" to Question 12, which asked: "What sum of money would fairly compensate Smith for Kleynerman's breach of duty to act in furtherance of Smith's interests as it related to the Transaction?" (*Id.*)

In Section IV of the special verdict, under the heading "Punitive Damages" the jury answered "Yes" to Question 13, which asked: "If any amount of money was written as an answer to Question 9 above, did Kleynerman act maliciously toward Smith, or in an intentional disregard for the rights of Smith by intentionally misrepresenting material facts to Smith?" (*Id.*) According the verdict instructions, the jury proceeded to Question 14 and answered the question: "How much should Smith receive from Kleynerman as punitive damages for Kleynerman's intentional misrepresentation(s)?" by awarding $200,000 in punitive damages to Smith. (*Id.* at 5, R.App.107.)

Red Flag's counterclaim for misrepresentation against Smith was the only counterclaim presented to the jury in the special verdict. (*Id.*) The jury answered "Yes" to the question of whether Smith represented to Red Flag that ACT had the power and authority to enter into the Agreement with Red Flag and to consummate the transaction. (*Id.*) The jury answered "Yes" to the

question: "Was this representation not true?" (*Id.*) The jury proceeded to answer "Yes" to Questions 17-18 regarding negligence and reliance. (*Id.* at 5-6, R.App.107-108.) To Question 19 regarding damages the jury awarded "$0" to Red Flag. (*Id.* at 6, R.App.108.)

Both the Plaintiffs and Defendants filed post-verdict motions. Smith requested that the Court change the jury's answer to Question 5 from "No" to "Yes" on the question of whether any of the representations marked by the jury in Question 4 were untrue. (R.114; R.115.) Smith also moved for a new trial on Questions 6-9 on his intentional misrepresentation claim, citing the evidence presented at trial and the inconsistency with the jury's award of punitive damages on his intentional misrepresentation claim. (*Id.*) In addition, Smith requested a new trial regarding punitive damages. (*Id.*) Smith also requested entry of judgment on verdict Questions 10-12, the breach of fiduciary duty claim and damage award. (*Id.*)

Kleynerman moved for judgment notwithstanding the verdict, change of verdict, or new trial on the breach of fiduciary duty claim. (R.116.) Kleynerman also moved for judgment notwithstanding the verdict on the punitive damages claim and award. (*Id.*) Red Flag moved to change the verdict or grant a new trial related to the issue of damages on the counterclaim of misrepresentation against Smith. (*Id.*)

On the post-verdict motions, the Court ordered:

- Judgment would be entered upon the verdict on the Plaintiffs' rescission claim and the claim was dismissed;
- Judgment would be entered on the plaintiff Smith's intentional misrepresentation claim and the claim was dismissed;
- Judgment would be granted notwithstanding the verdict on Smith's punitive damages claim;
- The jury's award of punitive damage in the amount of $200,000 was vacated;
- Judgment was entered upon the verdict on Smith's breach of fiduciary duty claim, and Smith was granted judgment against Kleynerman in the amount of $499,000;
- Red Flag's motion for reasonable attorney's fees and litigation costs was denied; and
- Judgment would be entered on the verdict on Red Flag's counterclaim against Plaintiff Scott Smith for negligent misrepresentation.

(R.122.)

ARGUMENT

I. THE TRIAL COURT ERRED, AS A MATTER OF LAW, IN DENYING SMITH'S POST-TRIAL MOTION TO CHANGE THE SPECIAL VERDICT.

In a motion after verdict, Smith argued that the trial court should change the jury's answer to Verdict Question 5 from "no" to "yes" because it was inconsistent with the answer to Verdict Question 4 based on the evidence presented at trial. This Court should reverse the trial court's denial of Smith's motion because there is no evidence in the record to support the jury's answer to Question 5.

Upon review of the trial court's denial of a motion to change a special verdict, the court should disturb the verdict when there is no credible evidence that supports the jury's finding under any reasonable view. *Hanson v. Am. Family Mut. Ins. Co.*, 2006 WI 97, ¶¶ 18–20, 294 Wis. 2d 149, 716 N.W.2d 866. To succeed on appeal, an appellant "must show that there is such a complete failure of proof that the verdict could only be based upon speculation." *Krueger v. Tappan Co.*, 104 Wis. 2d 199, 201, 311 N.W.2d 219 (Wis. Ct. App. 1981) (citing *Ernst v. Greenwald*, 35 Wis. 2d 763, 773, 151 N.W.2d 706 (1967)). Evidence is not credible law if: (1) it is in "conflict with the uniform course of nature"; or (2) it is in conflict with "fully established or conceded facts." *Ferraro v. Koelsch*, 119 Wis. 2d 407, 411, 350 N.W.2d 735 (Ct. App. 1984), *aff'd*, 124 Wis. 2d 154, 368 N.W.2d 666 (1985).

There was no credible evidence at trial to support the jury's finding in Question 5 that any of the three representations established by Question 4 were true. Once the jury made the finding that those three representations were made, the only conclusion supported by the evidence at trial was that the representations were untrue. The dispute at trial centered on whether or not the representations were made—not whether they were true. (*See* R.154, 51:18-21, R.App.261; R.150, 190:6-8, 17-21, R.App.187.) Therefore, Question 4 was the

dispositive decision during deliberations on the intentional misrepresentation claim. It was undisputed that the statements, if made, were untrue.

A. NO CREDIBLE EVIDENCE SUPPORTS THE JURY'S VERDICT THAT KLEYNERMAN'S REPRESENTATION REGARDING A $250,000 INVESTMENT IN ACT WAS TRUE (I.E., "NOT UNTRUE").

No evidence was introduced at trial to support the jury's verdict that "Glaser and Grinberg would invest at least $250,000 in ACT." (R.112.) The Transaction documents do not reflect any investment in ACT. In fact, the only money flowing to ACT was the $45,000 to $70,000 owed under the Asset Sale Agreement and the possibility of future sales commissions under the Sale Representative Agreement. (R.139, PX15, R.App.311, DX67, R.App.304.) Kleynerman and Glaser's testimony was that their plan never included an investment by Glaser or Grinberg in ACT. (R.154, 51:18-21, R.App.261; R.152, 179:11-12, 191:2-3.) Kleynerman testified that he never told Smith that Glaser would invest in ACT, stating: "[F]rom beginning never was conversation [sic] or something that Bruce first told that he will invest company to Alpha Cargo Technology." (R.154, 51:18-21, R.App.261.) Glaser testified similarly, stating: "I required that I have a separate company from ACT." (R.152, 179:11-12.) Glaser also recounted that "I was only willing to do this if I created two new companies."(*Id.*, 191:2-3.)

At the hearing on post-verdict motions, the trial court denied Smith's motion to change the answer to Question 5 on the verdict form from "no" to "yes" because it agreed with Kleynerman's argument that the jury could have inferred that the representation that "Glaser and Grinberg would invest at least $250,000 in ACT" meant that Glaser and Grinberg agreed to invest money in production that would directly benefit ACT. (R.156, 9:19-10:15, R.App.292-293.) The record reveals that the trial court was "clearly wrong" to deny this motion, as there is no credible evidence that supports such an inference. *Richards v. Mendivil*, 200 Wis. 2d 665, 672, 548 N.W.2d 85 (Ct. App. 1996).

The evidence at trial showed that Glaser would only invest in production facilities for Red Flag, "a separate company from ACT." (R.152, 179:11-12, 191:2-3.) Even then, the "investment" was not guaranteed, but would only happen if Red Flag "determine[d] in the exercise of its business judgment that it [wa]s prudent to do so." (R.139, DX67, § 2.2, R.App.301.) Furthermore, the amount that Glaser and Grinberg agreed to invest in production facilities for Red Flag was structured as a loan. (R.152, 228:6-230:23; R.139, DX50.) These potential investments benefited only Red Flag, which acquired all of the technology, patents, and customer contacts without the risk of paying any more than a total of $70,000 for all of ACT's valuable assets. (R.139, PX15, § 3, R.App.311.)

ACT was transformed into a mere shell of a company; its sole means of generating revenue was a one year deal to sell Red Flag's products as an independent contractor. (R.139, DX 67, § 4, R.App.302-303.) Accordingly, the trial court erred by denying Smith's motion to change the verdict, because the jury's finding was not supported under any reasonable view of the evidence.

B. NO CREDIBLE EVIDENCE SUPPORTS THE JURY'S VERDICT THAT KLEYNERMAN'S REPRESENTATIONS REGARDING 49% OWNERSHIP OF ACT AND A CONTINUING ROLE FOR SMITH WERE TRUE (I.E., "NOT UNTRUE").

In its ruling on the post-verdict motion to change the verdict, the trial court did not address the other two representations, regarding 49% ownership and a continuing role for Smith. (R.156, 10:18-11:4, R.App.293-294.) It is therefore unclear that the trial court ever considered whether the evidence supported a reasonable inference that the other two representations were accurate. As with the investment representation, there is no credible evidence that either of these representations was true.

The only controversy was whether Kleynerman told Smith that they would together own 49% of ACT after the sale, or that the group needed Smith to remain on after the Transaction. (R. 154, 51:18-21, R.App.261.) The jury answered that Kleynerman did make these representations to Smith. It was

undisputed that under the terms of the Transaction, these statements, if made, were untrue.

The jury erred in finding that Kleynerman's statement regarding 49% ownership was true. The Transaction was a purchase of ACT's assets, not a purchase of shares. (R.139, PX15, R.App.309-317.) Glaser was also explicit that he never contemplated purchasing any portion of ACT, let alone a controlling share. (R.152, 179:11-12, 191:2-3.) Accordingly, the jury's finding that this statement was true, is completely unsupported under any reasonable view of the evidence.

Furthermore, no credible evidence at trial supported the jury's finding that the statement "Grinberg and Glaser needed Smith to remain on at ACT after the Transaction because Grinberg and Glaser knew nothing about the security industry" was true. (R.112, R.App.104.) Glaser wanted Smith's access and connections to get Red Flag started, but did not envision a continuing role for Smith. Kleynerman testified that he wanted Glaser to be aware that Smith was "connected" because of his status as Chairman of the National Cargo Security Association and that the cargo security seal industry was "[Smith's] industry." (R.154, 50:11-15, R.App.260.)

Smith was therefore brought into these early discussions because he was the only person with connections within the security seal industry. Bruce Glaser

also testified that Smith's contacts in the security industry, as well as his position as chairman of a security trade association were "key" to his decision to invest money in the venture. (R.152, 192–93.) Glaser explained, "[w]e needed sales and I didn't have the contacts for sales and they had the knowledge." (*Id.* at 181:3-4.)

After Kleynerman persuaded Smith to sign the Transaction documents, Smith's connections and contacts within the industry were no longer valuable to Red Flag. As part of the Transaction, Red Flag received a list of all of ACT's customers and potential customers, and ACT was further required to forward all new customers and contacts to Red Flag. (R.139, PX15, § 4(f), R.App313; DX67, § 2.1(b), R.App.300.) The only reasonable inference the jury could draw from this evidence is that Glaser and Grinberg wanted Smith involved at the *beginning* of the relationship due to his contacts within the security industry, but not after the Transaction, because by then Red Flag had access to all potential customers and sales opportunities.

The evidence at trial further established that, within a mere four months of the Transaction, Glaser, Kleynerman, and Grinberg effectively cut Smith out of sales activity, with Glaser stating "we're not relying on Scott for our sales." (R.139, PX 51, R.App.328.) Additionally, the transaction was intentionally structured so that Smith could be terminated after only one year. (R.139, DX

67, § 1, 5, R.App.300, 303-305). There was no credible evidence presented at trial to support the jury's finding that the representation that Smith would be needed at ACT after the transaction was true.

Because the jury found that each of these three representations were made and the undisputed evidence is that that those representations were untrue, then the only jury finding supported by the evidence is that the statements were untrue. There is no "reasonable view" of the evidence that would support a finding that while the statements were made, they were not untrue. *Delaney v. Prudential Ins. Co. of America*, 29 Wis. 2d 345, 349, 139 N.W.2d 48, (1966).

A new trial is also warranted to address the issues presented in Questions 6-9 of the Special Verdict form. The jury was instructed to answer Question 6, only if it answered "yes" to Question 5, repeating a similar instruction for each successive question. (R.112, R.App.104-105.) The jury answered "no" to Question 5 in error, and did not reach Questions 6-9 as a result of that error. A new trial is needed not only to resolve the inconsistency created by the jury's answers to Questions 4, 5, 13, and 14, but also by its failure to answer Questions 6-9, which would have been answered had Question 5 been answered correctly. The trial court erred in not granting a new trial based on these numerous

inconsistences in the verdict. Therefore, this Court should now grant a new trial on Smith's intentional misrepresentation claim.

II. SMITH IS ENTITLED TO A NEW TRIAL, AS A MATTER OF LAW, ON HIS INTENTIONAL MISREPRESENTATION CLAIM BECAUSE OF AN INCONSISTENT VERDICT RESULTING FROM JURY CONFUSION.

Smith is also entitled to a new trial on his intentional misrepresentation claim because the jury verdict is inconsistent and the result of jury confusion. An inconsistent verdict is one that contains answers that are "logically repugnant to one another." *Kain v. Bluemound E. Indus. Park, Inc.*, 2001 WI App 230, ¶ 40, 248 Wis. 2d 172, 635 N.W.2d 640 (citation omitted). Inconsistency exists when answers cannot be reconciled or cannot be reconciled without eliminating or altering an answer. A jury verdict is only upheld on review for inconsistency "when the record is such that the jury could have made both of the findings that are claimed to be inconsistent." *See Sharp ex rel. Gordon v. Case Corp.*, 227 Wis. 2d 1, 20, 595 N.W.2d 380 (1999).

A. THE JURY'S ANSWERS TO QUESTIONS 4, 5, AND 13 ARE LOGICALLY INCONSISTENT.

Here, the jury's answers to Questions 4, 5, and 13 on the Special Verdict form are "logically repugnant to one another." *Kain*, 248 Wis. 2d at ¶ 40. In Question 4, the jury answered that three representations were made. (R.112, 2,

R.App.104.) In Question 5, it answered that none of those three representations were untrue, in other words, they were accurate. (*Id.*) As discussed above, however, the jury's answer to Question 5 is against the great weight of the evidence. Additionally, in Question 13, the jury answered that Kleynerman either acted maliciously, or with an intentional disregard for Smith's rights by *intentionally misrepresenting material facts to Smith.* (R.112, R.App.106 (emphasis added)). When construed together, the jury's answers to these three questions are logically inconsistent. According to the verdict form, Kleynerman, on the one hand either acted maliciously or intentionally disregarded Smith's rights by intentionally misrepresenting material facts, as set forth in Question 4. (*Id.*) On the other hand, however, the jury answered that Kleynerman did not make any untrue statements, the key to an intentional misrepresentation claim. (R.112, R.App.300.) The jury concluded that Kleynerman both did and did not intentionally misrepresent facts to Smith, which is the definition of an inconsistent verdict.

B. AN INCONSISTENT VERDICT MUST RESULT IN A NEW TRIAL.

When a verdict is inconsistent, such verdict, if not timely remedied by reconsideration by the jury, must result in a new trial. *Westfall by Terwilliger v. Kottke*, 110 Wis. 2d 86, 98, 328 N.W.2d 481(1983). When an inconsistent verdict

is presented to the trial court, the court should reinstruct the jury and direct the jury on its duty to produce a verdict that conforms to the court's instruction. *Id.* at 96.

Here, the trial court saw an inconsistency in the jury's findings as to the award of punitive damages despite no finding of intentional misrepresentation and sent the jury back twice to deliberate and correct the inconsistency. (R. 155, 84–86, R.App.278-280.) When the jury remained unable to correct the inconsistency, the court should have "reinstructed [it] and directed [it] again on its duty to produce a verdict that conforms to the court's instructions." *Westfall*, 110 Wis. 2d at 96. Rather than order the jury to deliberate again to correct the inconsistency, the trial court accepted the verdict as it was. (R.155, 93:12-14, R.App.287.) In post-verdict motions, Smith moved for a new trial due to the jury's special verdict answers that although three of the specified representations were made, none of those representations were untrue, in light of the fact that the jury clearly found that punitive damages were warranted due to misrepresentations. (R.156.)

The court, rather than grant a new trial on the intentional misrepresentation claim due to the "clearly inconsistent" verdict, chose to strike Questions 13 and 14 from the verdict. (R.156, 24:23-25, R.App.295.) The court's decision was in error. The court explicitly stated that the verdict was

inconsistent, and each time the jury returned from deliberations, it returned with that same, inconsistent, verdict. (R.156, 24:7-16, R.App.295.) Because the verdict was inconsistent and it was not timely rectified by the jury's reconsideration, there was no proper remedy for the trial court to grant but a new trial; likewise, there is no proper remedy for this Court but to remand for a new trial on Smith's intentional misrepresentation claim.

C. A NEW TRIAL MAY BE GRANTED WHEN JUROR CONFUSION RESULTS FROM A MISLEADING VERDICT QUESTION.

The jury's confusion and inconsistent verdict likely resulted from the confusing and inconsistent language utilized in special verdict Question 5 which aims to ascertain whether certain representations were true of false. Question 5 reads: "Were any of the marked representations untrue?" (R.112, 2, R.App.104.) A similar, although differently worded question was presented to the jury in Question 16, which relates to Red Flag's misrepresentation claim that is otherwise not at issue in this appeal. (R.112, 5, R.App.107.) That question reads: "Was this representation not true?" (*Id.*) The difference in the questions is subtle, but the phrasing of Question 16 allows a "yes" or "no" answer more readily than the awkward and confusing phrasing of Question 5. The jury attempting to answer Question 5 must grapple with the difficult concept of a particular statement being "not untrue." (R.112, 2, R.App.104.) The

requirement of a double negative in a jury verdict is both awkward and confusing. This awkwardly phrased question plausibly explains the jury's answer to Question 5, which is both inconsistent with their own answers to Question 13 and 14, as well unsupported by any credible evidence. The inclusion of a misleading question in a jury verdict which may lead to jury confusion is a sufficient basis for a new trial. *Behning v. Star Fireworks Mfg. Co.*, 57 Wis. 2d 183, 188, 203 N.W.2d 655 (1973).

III. SMITH IS ENTITLED TO A NEW TRIAL, AS A MATTER OF LAW, ON THE PROPRIETY OF PUNITIVE DAMAGES.

A. SMITH SHOULD ALSO BE GRANTED A NEW TRIAL ON THE ISSUE OF PUNITIVE DAMAGES.

As discussed above, the jury verdict indicated that punitive damages were appropriate in this case. The jury found that certain representations of fact were made (R.112, 2, R.App.104.) The jury also found that "misrepresentations," or untrue representations, were made by Kleynerman (*Id.* at 2, 5, R.App.104, 106), and that the misrepresentations were intentional (*Id.* at 5, R.App.106) (stating that Kleynerman "intentionally misrepresented material facts to Smith."). Finally, the jury found that Smith was harmed, and awarded compensatory damages (albeit on the fiduciary duty claims) in the amount of $499,000, and awarded him $200,000 in punitive damages. (*Id.* at 4, 5,

R.App.106-107.)

The jury's findings support an award of punitive damages, except for that portion of the verdict which was "logically repugnant" and inconsistent and for which Smith is entitled to a new trail, as discussed in Sections I and II *supra.* Instead of accepting the inconsistent verdict and later dismissing the jury's punitive damages award, the trial court should have required additional jury deliberations on this issue. The remedy for such an error is a new trial on the issue of punitive damages. *Schwigel v. Kohlmann*, 2002 WI App 121, ¶ 26, 254 Wis. 2d 830, 647 N.W.2d 362. Accordingly, Smith should be afforded a new trial on not just the intentional misrepresentation claims, but also on the issue of punitive damages.

B. IN THE ALTERNATIVE, THE PUNITIVE DAMAGES AWARD SHOULD BE REINSTATED.

An alternate and equally reasonable perspective is to view the jury's answers to Questions 13 and 14 as an award of punitive damages based upon Kleynerman's breach of fiduciary duty.

The construction and flow of the special verdict form could have led the jury to this result because the standard jury instructions on punitive damages focused on the type of conduct giving rise to such an award. (R.112, 29-30, R.App.132-3.) The jury was presented with credible evidence that Kleynerman's

breach of his duty to Smith involved a malicious or intentional disregard of Smith's rights sufficient to support a punitive damages award.

The Punitive Damages questions appeared directly after questions related to breach of fiduciary duty on the same page of the special verdict. (*Id.*) After answering the fiduciary duty questions the verdict form instructed the jury to "[p]roceed to Question 13," the first punitive damages question, which is framed in terms of Kleynerman acting maliciously toward Smith or with intentional disregard for Smith's rights. (*Id.*) The jury answered affirmatively and then awarded $200,000 in punitive damages in Question No. 14. (*Id.*)

The trial court could have reasonably inferred that the jury understood the punitive damages questions in the context of and related to the breach of duties questions it had just answered on the same page and for which it had just assigned a damages award. This reasonable inference is also consistent with the requirement of viewing the evidence supporting the verdict in the light most favorable to the verdict. *Lang v. Lowe*, 2012 WI App 94, ¶ 16, 344 Wis. 2d 49, 820 N.W.2d 494.

"[T]he purpose of punitive damages is to punish and deter, not to compensate the plaintiff for any loss." *Reyes v. Greatway Ins. Co.*, 220 Wis. 2d 285, 303, 582 N.W.2d 480 (Ct. App. 1998) *aff'd*, 227 Wis. 2d 357, 597 N.W.2d 687 (1999). If the jury intended to award punitive damages in order to punish and

deter Kleynerman's breach of fiduciary duty, then the trial court erred in vacating those punitive damages. Accordingly, under this interpretation of the verdict, the matter should be remanded to the trial court with instructions to reinstate the punitive damages award, or for a new trial on the issue of punitive damages premised upon Kleynerman's breach of fiduciary duty.

CONCLUSION

The trial court erred in dismissing Smith's intentional misrepresentation claim, and in not granting a new trial on both Smith's intentional misrepresentation claim and his punitive damages claim. Smith respectfully requests that this Court overturn the jury's inconsistent verdict and remand for a new trial on the issues of intentional misrepresentations and punitive damages. Alternatively, Smith requests remand for reinstatement of the $200,000 in punitive damages awarded to Smith.

October 9, 2015,

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CERTIFICATION AS TO FORM/LENGTH

I certify that the foregoing Brief of Cross-Appellant meets with the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4,599 words.

Dated this 9th day of October, 2015

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CERTIFICATION

In accordance with Wis. Stat. § 809.19(12)(f), I hereby certify that the text of the electronic copy of the Cross-Appellant's Brief is identical to the text of the paper copy of the Cross-Appellant's Brief.

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CERTIFICATION OF SERVICE

I hereby certify that on October 9th, 2015, I filed with the Court by messenger ten copies and served three copies of the Combined Brief of Respondent and Cross-Appellant Scott Smith and supporting appendix upon counsel for the parties by electronic and first class mail:

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RESPONDENT'S BRIEF APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with Wis. Stat. § 809.19(2)(a) and that contains, at a minimum:

(1) a table of contents;

(2) the findings or opinion of the circuit court;

(3) a copy of any unpublished opinion cited under Wis. Stat. § 809.23(3)(a) or (b); and

(4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court'sreasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentialityand with appropriate references to the record.

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