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COURT OF APPEALS OF WISCONSIN
DISTRICT I
Appeal No. 2015AP207

SCOTT SMITH,

Plaintiff-Respondent-
Cross-Appellant,

ALPHA CARGO TECHNOLOGY, LLC,

Plaintiff,

v.

GREG KLEYNERMAN,

Defendant-Appellant-
Cross-Respondent,

RED FLAG CARGO SECURITY SYSTEMS, LLC,

Defendant.

Appeal from the Circuit Court for Milwaukee County
Honorable Pedro Colon, Presiding
Case No. 2011CV18551

COMBINED BRIEF OF APPELLANT-CROSS-RESPONDENT GREG KLEYNERMAN

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INTRODUCTION

Smith summarizes his breach of fiduciary duty claim as follows:

> 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.

(Br.30). *Every* premise of Smith's claim is contradicted by the evidence.

There is no power-of-attorney appointing Kleynerman as Smith's attorney-in-fact. Smith knew about the sale of the patents because he signed the sale agreements and himself negotiated the terms. (R.139, DXs 56-68.) Before Smith signed the agreements, Smith recognized that Red Flag could terminate ACT as a sales representative and decline to work with him after a year. (R.139, DX63, A.App.155.) Thus, Smith knew how the transaction would affect his interests.

Smith ignores this evidence because he has no response to it. It was legal error for the trial court to recognize a fiduciary duty here.

ARGUMENT

I. KLEYNERMAN DID NOT OWE SMITH A FIDUCIARY DUTY.

A. The Memorandum of Understanding Did Not Create a Fiduciary Duty.

Smith agrees (Br.19) that Wisconsin courts analyze purported fiduciary relationships by analogy to paradigm relationships like trustee-beneficiary. Viewed this way, Smith's claim fails.

Smith argues that Kleynerman was Smith's attorney-in-fact. (Br.19.) But lacking here is a power-of-attorney appointing Kleynerman as Smith's attorney-in-fact. This makes Smith's situation entirely different from the estate cases with power-of-attorney documents. *Praefke v. Am. Enter. Life Ins. Co.*, 2002 WI App 235, 257 Wis. 2d 637, 655 N.W.2d 456; *Miller v. Vorel*, 105 Wis. 2d 112, 213 N.W.2d 850 (Ct. App. 1981).

Undeterred, Smith argues that the MOU "granted Kleynerman a power-of-attorney … to act *on behalf of Smith* regarding the affairs of ACT…." (Br.19.) (emphasis added). One searches the MOU in vain for this language. Smith quotes the MOU: "Kleynerman is authorized by Smith to sign binding documents *on behalf of ACT*[,] to assign all patents…." (Br.20.) (emphasis added). But "on behalf of ACT" does not equate to "on behalf of Smith." More disturbingly, Smith tries to create a new obligation by *adding a comma* between "on behalf of ACT" and "to assign all patents…." (*Id.*) The MOU does not give Kleynerman general authority to act on ACT's behalf and no authority to act on *Smith*'s behalf. (R.139, DX56, A.App.141.)

This MOU provision confirms Kleynerman's statutory authority as a member in ACT to sign a document implementing the assignment of patents; it does not render the language "superfluous." (Br.20-21.) Nothing in the MOU makes Kleynerman Smith's fiduciary.

The rule Smith advocates would make members-sellers fiduciaries of each other just because one seller signs an ancillary document on behalf of the entity. No authority supports this, and it would be a bad rule because it would increase costs of every transaction and create uncertainty, permitting a disgruntled seller to sue a co-seller for not doing enough to advance the disgruntled seller's interest in a transaction.

B. Kleynerman Did Not Undertake a Special Duty to Smith in 2007 to Look After Smith's Interests in 2009.

Smith's argues that Kleynerman "assumed an implied fiduciary duty" when he "voluntarily [took] over the operations of [ACT] so that Smith could grieve the loss of his wife." (Br.21.) Smith claims Kleynerman said he would "handle the business" and pay bills and loans to the bank while Smith grieved. (Br.22-23). First, this occurred in *2007*, after Smith's wife died. (R.154, 37:17.) Second, Kleynerman agreed to look after *ACT*, not Smith personally.

Smith points to nothing that Kleynerman said or did in 2009 to agree to act as *Smith's* fiduciary. (Br.21-23.) As a matter

of law, statements made by an LLC member to a grieving co-member, coupled with performance of company bookkeeping, cannot make the member the other's fiduciary, especially concerning a transaction two years later, the terms of which both members discussed, negotiated, and agreed to then. *Zastrow*, the only case Smith cites, certainly does not support this proposition.

C. Kleynerman's Status as a 50% Member Does Not Make Him a Fiduciary.

Smith argues that Kleynerman, a 50% member, was a fiduciary because he was a "controlling member" of ACT under the "circumstances," *i.e.,* Smith's alleged incompetence. (Br.23.)[1] Smith cites no Wisconsin law for this proposition; there is none. Instead, he relies on inapposite cases involving majority shareholders (*Feeley*, *Grognet*, *Morton Restaurants*) who have managerial control through express provisions of operating agreements. What's more, Smith's plea to the "circumstances" ignores the jury's unchallenged finding that Smith was *not*

[1] Perhaps inadvertently, Smith identifies *himself* as "the controlling shareholder of ACT." (Br.23.)

mentally incompetent in 2009 when the transaction occurred. (R.112.)

Smith's assertion that he "was not involved in the daily operations of ACT at the time of the Transaction" (Br.24) is belied by emails showing his negotiation of the Transaction and involvement in ACT. (R.139, PX16, DX57-68, A.App.130, 142-58.) Smith ignores this evidence.

D. Members of Wisconsin LLCs Are Not Fiduciaries of Each Other.

Smith also wants this Court to declare that 50/50 members in LLCs are fiduciaries of each other. (Br.25-29.) But the Wisconsin cases Smith cites contradict his proposed rule.

In *Gottsacker*, the Supreme Court held that LLC majority members could be liable to minority under Section 183.0402, if they "willfully fail to deal fairly." 281 Wis. 2d 381, ¶31. After analyzing the Wisconsin LLC Act, the Supreme Court did not extend the fiduciary duties to LLC members. Justice Roggensack concurred, explaining that "[*t*]*he court of appeals improperly engrafted a common law fiduciary duty on* [majority interest-

holders'] status as *members*." *Id.*, ¶45 n.3 (emphasis added). She emphasized that the rights of members to each other are set by Chapter 183, Stats., and "*common law concepts such as … fiduciary duty … are replaced* by statutory obligations." *Id.*, ¶45 (emphasis added).

In *McMorrow v. Specht*, this Court held that a 50% shareholder does not owe a fiduciary duty to another 50% shareholder, 2012 WI App 124, ¶7, 344 Wis. 2d 696, 824 N.W.2d 907, noting that "we cannot declare new law; we are mainly an error-correcting court." Of course, the Court must follow *Gottsacker* and *McMorrow*.[2] Because Kleynerman did not owe Smith a fiduciary duty, the Court can resolve the appeal on this basis alone.

II. KLEYNERMAN DID NOT BREACH A FIDUCIARY DUTY.

Smith argues that Kleynerman breached a fiduciary duty "when he acted in his own self-interest and transferred the

[2] Smith's only other Wisconsin cases, *Jolin v. Oster*, 55 Wis. 2d 199, 198 N.W.2d 639 (1972), and *Knudson v. George*, 157 Wis. 520, 147 N.W. 1003 (1914), involved joint ventures. Smith and Kleynerman were never joint venturers.

patents to Red Flag without Smith's knowledge." (Br.31.) That cannot be a breach because Smith, in fact, knew that ACT's patents were being sold and signed the agreement to accomplish the sale. (R.139, DX68, A.App.176.) Smith is charged with knowledge of the documents that he signed, as shown by the cases he cites. *E.g.*, *Ritchie v. Clappier*, 109 Wis. 2d 399, 405-06, 326 N.W.2d 131 (Ct. App. 1982).

None of Smith's arguments change the fact that he sold ACT's patents as much as Kleynerman did when Smith signed the agreement. Smith faults Kleynerman for not considering "the viability of other options regarding ACT's patents" (Br.30) but cites no authority why this is a breach. Smith also does not identify what those options were, ignoring his own conclusion in January 2009 that ACT was on the verge of closing down. (R.139, DX14, A.App.136) ("[w]e both know we have to close this business or try one last time to make it work.") Likewise, Smith ignores his excitement for the transaction in June 2009. (R.139, DX65.)

Smith says that he was unaware that Kleynerman "was teaming up with Glaser and Red Flag" (Br.31), but Kleynerman was "teaming up" with Red Flag as much as Smith was, in that ACT was going to be Red Flag's sales representative and earn a 50% commission from the sales. (R.139, DX67 §3.4, A.App.161.) Smith knew that Kleynerman was working with Red Flag and its members, just as he was. (R.152, 214:5-11; R.151, 11:1-9.)

That Glaser instructed others not to discuss the relationship between his company, Red Flag, and ACT, or that Glaser gave Kleynerman access to Red Flag's bank account, is not evidence that Kleynerman breached any duty to Smith. (Br. 31).

These undisputed facts scuttle Smith's theory of breach.

III. SMITH'S FIDUCIARY DUTY CLAIM IS TIME BARRED.

Kleynerman is not "sandbagging" by raising the statute of limitations on appeal. (Br.33.) Kleynerman made this argument in support of summary judgment, directed verdict, and post-trial motions. (R.73-74, 111, 116-117.)

The applicability of statutes of limitations is a question of law where facts relating to them are not disputed.[3] *E.g.*, *Smith v. Milwaukee Cnty.*, 149 Wis. 2d 934, 937, 440 N.W.2d 360 (1989); *Gumz v. N. States Power Co.*, 2007 WI 135, ¶¶49-51, 305 Wis. 2d 263, 742 N.W.2d 271 (deciding the statute of limitations issue as a matter of law not error).

Here, the relevant disputed issue was Smith's alleged incompetence, which the jury decided against Smith. Because Smith was *not* incompetent, his claim is time-barred. Smith signed the agreements in June 2009, and the claimed breach (sale of patents without his knowledge) arises from the very event described in the documents—ACT's sale of patents and ACT's appointment as a sales representative.

Smith wrongly suggests that the circuit court denied summary judgment "because there were disputed issues of material fact concerning when Smith learned of Kleynerman's

[3] Kleynerman did not waive the issue by not presenting it to the jury. In *Best Price*, the Supreme Court held that failure to object to the point of law in the instructions constituted a waiver. Kleynerman is not claiming error in the instructions.

breach." (Br.33.) That discussion concerned Smith's *misrepresentation* claims, not his *fiduciary duty* claim. (R.145, 33:7-10.) The circuit court denied summary judgment largely because Smith's alleged incompetency permeated each of his claims, including fiduciary duty. (R.145, 36:13-18). Competency was resolved against Smith, and his fiduciary duty claim goes with it.

Smith argues that the earliest he could have discovered the breach was May 2010 when Red Flag terminated ACT. (Br.37-38.) This argument is based on an untenable proposition that "[Smith] did not understand the structure of the Transaction." (Br.37.) Smith not only understood that ACT sold the patents to Red Flag and became Red Flag's sales representative, he also understood *before he signed the agreements* that Red Flag could terminate ACT as a sales representative and decide not to work with him thereafter. (R.139, DX.63, A.App.156) ("*Once this deal is signed I have nothing. If I am pushed out a year from now…, I will have to start over.*").

What Smith actually wants is "heads-I-win-tails-you-lose" protection. If the deal that he negotiated and signed worked out, he would make money. If not, he would sue Kleynerman for not securing a better deal for him. Smith's argument that he did not understand the transaction cannot make Kleynerman liable until Smith "understood."

Smith's "continued violation" doctrine is legally unsupported. *Production Credit Ass'n v. Vodak*, 150 Wis. 2d 294, 441 N.W.2d 338 (Ct. App. 1989), rejected the doctrine for a series of transactions. *Tamminen v. Aetna*, 109 Wis. 2d 536, 327 N.W.2d 55 (1982), involved continued medical malpractice, not a documented commercial transaction. Smith's reliance on *White Knight*, an unpublished per curiam decision, is sanctionable. Wis. Stat. § 809.23(3)(a)&(b); *S.P.A. v. Grinnell Mut. Reins.*, 2011 WI App 31, ¶7 n.3, 332 Wis. 2d 134, 796 N.W.2d 874.

Nor do the facts support his theory that Kleynerman had a secret plan to sell patents to Red Flag without Smith's knowledge and to own Red Flag without Smith. Smith's involvement in the

negotiation of the transaction and signing of the agreements contradicts it. If Kleynerman intended from the start to own the patents, why would he sell the patents, then wait several years until Red Flag had large debts and no meaningful revenue, and *then* buy a 75% interest in Red Flag subject to the debt? Kleynerman could have let ACT be dissolved in 2009, distribute its patents to himself and Smith, and then work with Glaser without Smith. Instead, Kleynerman found investors who gave ACT a chance to survive and earn 50% sales commissions. (R.136, DX.67) Kleynerman had no need to "wrest control" of ACT's assets (Br.36) because he already had the rights to them.[4]

IV. SMITH HAS NO STANDING TO RECOVER ACT'S LOST PROFITS.

Smith, as an LLC member, does not have standing to recover any profits ACT may have lost. Lost opportunities claims belong to the entities that own them, not shareholders or

[4] Smith is not prevented from investing in production or selling seals described in the patents. Indeed, Red Flag offered Smith individually to sell and make commissions back in 2010 after Red Flag terminated ACT but Smith did not take the opportunity. Further, Red Flag's seals today are different than those described in the patents. (R.139, DX.120.) (R.152, 252:20-23.)

members. *See Notz v. Everett Smith Grp.*, 2009 WI 30, ¶23, 316 Wis. 2d 640, 764 N.W.2d 904. No case permits shareholder recovery of corporate lost profits.

Even though Smith acknowledges that he presented a lost profits theory at trial, he tries to characterize the award he got as something else. (Br.43, 47). First the award was not a constructive dividend. (Br.42.) In *Notz*, the Supreme Court permitted a minority shareholder to pursue a constructive-dividend theory when a majority shareholder misspent corporate revenue. 316 Wis. 2d 640, ¶¶23-24. Here, Smith is a 50% member, not a minority shareholder. Furthermore, Kleynerman did not receive a dividend or other payment from ACT.

Second, Smith's claim is not a "squeeze out." (Br.43-44.) The "squeeze-out" cases are claims by minority shareholders. Smith's prosecution of this case on ACT's behalf defeats his "squeeze out" argument. Furthermore, he signed the asset sale agreement and kept ACT's website and all content for himself. (R.139, DX64-65.) That is not a squeeze-out under any definition.

Finally, Smith argues that he can recover restitution. (Br.44-45.) *Zastrow* does not support that position. (Br.44.) And no evidence of "unjust enrichment" was presented. Unjust enrichment allows recovery of profits received, not those lost. *Mgmt. Comput. Servs. v. Hawkins, Ash, Baptie*, 206 Wis. 2d 158, 188-90, 557 N.W.2d 67 (1996). Neither Kleynerman nor Red Flag received anywhere near $499,000 in profits, under any calculation.

V. NO *COMPETENT* EVIDENCE SUSTAINS THE DAMAGES AWARD.

It is undisputed that, but for the transaction that Smith claims resulted in a breach of duty, ACT would have been out of business and would have had zero profits. (R.139, DX14, A.App.136.). Rodrigues, Smith's damages expert, declined to say what revenue ACT would have had but-for the transaction, R.153, 164:5-17, A.App.239, opining only that *if ACT had the same revenue as Red Flag* and consistently achieved the profit margin from its two best years of operation, *then* ACT's profit would have been $900,000. (*Id.* at 143:17-25, 145:16-18.) But

ACT could not achieve the same revenue because ACT couldn't manufacture products.

No competent evidence was presented to demonstrate that ACT, on the brink of collapse, would have built a production facility, made product improvements, and achieved profits of nearly $1 million, the basis for Smith's $499,000 award, which was not, accordingly, "within the realm of reason in view of the evidence."

A. Smith's Expert Did Not Calculate Breach of Fiduciary Duty Damages.

Smith's expert's report calculated damages only for misrepresentation. (R.139, PX26, p.4.) Rodrigues was asked point-blank whether he had looked into damages for breach of fiduciary duty. (R.153, 184:23-185:1, A.App.259-60.) Smith's trial counsel objected and then suggested that he was stipulating that Rodrigues was not offering such testimony. (*Id.*, 185:2-7, A.App.260.) Both offers to stipulate followed a question about whether Rodrigues was testifying about damages other than for misrepresentation. (R.153, 182:4-10, A.App.257, 184:23-85:1,

A.App.260.) The only possible thing that Smith's counsel could have been stipulating was that Rodrigues did not opine on fiduciary duty damages. Smith's appellate counsel offers no other explanation.

B. The Circuit Court Failed to Assess Whether Smith's Expert Used a Reliable Methodology.

Kleynerman agrees that a trial court's decision to admit expert testimony is reviewed for erroneous exercise of discretion. Here, the court must be reversed because it applied the wrong legal standard—itself an erroneous exercise of discretion. *Christensen v. Economy Fire*, 77 Wis. 2d 50, 252 N.W.2d 81 (1977). Under Section 907.02(1), an expert's opinions must be "reliable." The court, however, applied the pre-revision admissibility test, *e.g.*, *260 N.12th St. v. DOT*, 2011 WI 103, ¶55, 338 Wis. 2d 34, 808 N.W.2d 372, refusing to determine whether Rodrigues' testimony was the product of reliable principles and methods. The court erroneously held that "there's nothing for the court to do" regarding whether Rodrigues was applying

"acceptable principles and methodology." (R.153, 196:1-13, A.App.271.)

C. Kleynerman's Objection to Expert Testimony Was Timely

Neither Section 907.02(1) nor any Wisconsin caselaw requires a challenge to expert testimony by motion-in-limine. (Br.50-52.) Smith's two cases are inapposite. In *Macsenti v. Becker*, 237 F.3d 1223, 1232 (10th Cir. 2001), an objection was not made until after evidence closed. In *U.S. v. Jasin*, 292 F. Supp. 2d 670 (E.D. Pa. 2003), no objection was made at all.

Here, Rodrigues departed drastically from his expert report which calculated damages of $175,000. (R.139, DX26, p.4.) When, in the middle of his trial examination, Rodrigues began to use Red Flag's invoice figures[5] (which include *shipping, travel, and other third-party costs*) as revenues, Kleynerman challenged whether Rodrigues used "acceptable principles and methodology." (R.153, 193:17-97:19, A.App.268-72.) This objection was timely. *E.g.*, *Benjamin v. Peter's Farm Condominium*, 820 F.2d 640, 642

[5] Smith requested and was provided this information in the middle of trial.

n.5 (3d Cir. 1987) (objection made after cross-examination was timely). It should have been sustained.

CONCLUSION

The judgment should be reversed and judgment ordered in Kleynerman's favor.

Dated: November 9, 2015.

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FORM AND LENGTH AND ELECTRONIC BRIEF CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2,954 words.

I have submitted an electronic copy of the brief, which complies with the requirements of § 809.19(12). I certify that the electronic brief is identical in content and format to the paper form of the brief filed as of this date, other than the signature.

Dated: November 9, 2015.

s/ Max B. Chester
Max B. Chester

CERTIFICATE OF MAILING

I hereby certify that on this date I caused the original and 10 copies of Combined Brief of Appellant-Cross-Respondent Greg Kleynerman to be sent by Federal Express for overnight delivery to the clerk, and therefore the brief is filed on this date pursuant to § 809.80(3)(b)(2).

Dated: November 9, 2015.

s/ Max B. Chester
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INTRODUCTION

The verdict form had six questions for Smith's intentional misrepresentation claim. The jury, following the instructions in the verdict form, answered two of them. First, it found that Kleynerman made the following three statements:

- Glaser and Grinberg would invest at least $250,000 in ACT
- Kleynerman and Smith would own 49% of ACT after the sale
- Grinberg and Glaser needed Smith to remain on at ACT after the Transaction because Grinberg and Glaser knew nothing about the security industry

(R.112, A.App.39.)

Second, when the jury was asked "Were any of the marked representations untrue?" it answered "no" and did not proceed to answer the remaining questions relating to a misrepresentation claim, correctly following the instructions in the verdict form. (*Id.*) The jury did not find that Kleynerman knew the statements were false; the jury did not find that

Kleynerman made the statements with intent to deceive; the jury did not find that Smith relied on the statements; and the jury did not award compensatory damages to Smith for misrepresentation. (*Id.*, A.App.39-40.)

Nevertheless, Smith argues that he is entitled to a new trial, arguing that the question in the stipulated verdict form—"Were any of the marked representations untrue?"—was misleading. It plainly was not. And the jury's legally superfluous answer to the punitive damages question does not entitle Smith to a new trial or to reinstatement of the punitive damages award.

This Court should affirm the circuit court on all issues in the cross-appeal.

STATEMENT OF THE CASE

The relevant background facts are set forth in the prior briefing, including Kleynerman's statement of the case in his opening brief.

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED SMITH'S MOTION TO CHANGE THE JURY'S ANSWER TO VERDICT QUESTION 5.

Smith, as plaintiff, had the burden to prove not only that Kleynerman made the supposed statements, but also that they were false. *E.g.*, *Hennig v. Ahearn*, 230 Wis. 2d 149, 164-65, 601 N.W.2d 14 (Ct. App. 1999) (plaintiff must establish that defendant "made a representation of fact that was untrue"); *Sloan v. Brown Cnty. State Bank*, 174 Wis. 36, 38, 182 N.W. 363 (1921) ("The burden of proof was upon plaintiff to establish his case, not, as the court charged, upon the defendant to disprove it."); *Sheldon v. Singer*, 61 Wis. 2d 443, 451-53, 213 N.W.2d 5 (1973). Smith failed to carry his burden. The jury found that Kleynerman made only three of the statements and that Smith failed to show that they were untrue. (R.112, A.App.39.) Smith tries to turn his burden of proof on its head by arguing that "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," (Br.10)—

as if Smith should prevail unless Kleynerman can prove the *truth* of the statements that Kleynerman contends he never made.

Though Kleynerman had no burden to prove that the three statements were true, the jury acted reasonably in finding them true. *E.g.*, Wis. Stat § 805.14(1); *see also Richards v. Mendivil,* 200 Wis. 2d 665, 671, 548 N.W.2d 85 (Ct. App. 1996) (circuit court must view evidence in light most favorable to verdict and affirm verdict if it is supported by any credible evidence).

More fundamentally, even *if* the statements had been interpreted as "untrue," they were non-actionable statements about future performance. And, even *if* the statements were made, Smith signed the Asset Sale Agreement and the Sales Representative Agreement that contained the exact terms of the transaction, and he, therefore, could not *reasonably* rely on oral statements suggesting different transaction terms.

Finally, the economic loss doctrine squarely bars Smith's misrepresentation claim.

The Court should affirm the trial court on the cross-appeal.

A. Sufficient Evidence Supported the Jury's Finding That the Statements Were Not Untrue.

1. There Was Evidence That Glaser and Grinberg Intended To Invest at Least $250,000 in Production.

The circuit court correctly held that the jury could have interpreted the first statement to mean that Glaser and Grinberg intended to invest at least $250,000 in production that would benefit ACT. (R.156, 11/25/14 Tr. at 9:19-10:15, A.App.12-13.)

ACT was on the verge of closing in 2009, because it had no revenues and no viable prospects of continuing to do business as before. (*E.g.*, R.154, 9/26/14 Tr. at 34:11-14, 52:8-13.) Before the Transaction, ACT imported security seals from China and Ukraine and resold them to customers in the Americas. (R.153, 9/25/14 Tr. at 254:17-55:23; R.139, DX 180.)

By 2009, ACT could not afford to prepay for orders, the tariffs imposed on the foreign-made seals made them unmarketable, and delays related to shipment also made it difficult for ACT to sell them. (R.154, 9/26/14 Tr. at 31:19-34:2, R.139, DX13.)

In the transaction, Grinberg and Glaser agreed to purchase ACT's patents[1] and invest their own funds into equipment, machinery, and a facility in Milwaukee that would produce seals. (*See* R.152, 9/24/14 Tr. at 179:11-24; R.154, 9/26/14 Tr. at 46:6-17, R.139, DX68, A.App.168.) Notably, the jury did *not* find that Kleynerman made this statement: "ACT, not Red Flag, would open a manufacturing and distribution facility." (R.112, Question 4, A.App.039.)

Therefore, in light of the evidence and the jury's two answers, the jury could have inferred that Grinberg's and Glaser's investment of about $400,000 as capital and loans was an investment in ACT, because it provided ACT with an

[1] No valuation of the patents was made; the minimum price was set at the amount owed by ACT to its patent counsel; ACT had no other assets, so the patents had to be used in the asset sale transaction. ACT owed this sum to its patent counsel. (R.154, 86:22-25; R.139, DX.189.)

opportunity to continue to sell security seals rather than being dissolved. This investment directly benefited ACT by allowing ACT to focus on sales and earn significant income through an extraordinarily high 50% sale commission. (R.139, DX67, A.App.159.) And ACT bore no liability for the funds spent by Red Flag on equipment, machinery and the production facility.

Sufficient evidence, therefore, supported the jury's answer about the first statement.

2. Kleynerman and Smith Still Own ACT Today.

The second disputed statement was that "Kleynerman and Smith would own 49% of ACT after the sale." (R.112, A.App.39.) Smith's argument, boiled down, is that this statement was false because Kleynerman and Smith ended up owning *more* than 49% of ACT after the transaction. (*See* Br.14.)

The second statement, standing alone, is true. The statement does not say that Glaser would purchase 51% of ACT; it simply deals with Smith and Kleynerman's future

ownership stake in ACT. Kleynerman and Smith still today, as they did before the Transaction, each own 50% of ACT. (R.1, Complaint, ¶8.) Thus, the statement is true. The jury's answer regarding the second statement cannot be overturned. Post-Transaction, Smith and Kleynerman do own 49% of ACT, indeed they *each* own *more*.

3. Evidence Supported the Jury's Answer Regarding the Third Statement.

Smith all but admits that the third 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. Smith's appellate brief recounts the testimony of Glaser, who explained, "[w]e needed sales and I didn't have the contacts for sales and they had the knowledge." (R.152, 181:3-4.); (Br.15). That evidence alone shows that the statement was true: Glaser needed Smith's sales knowledge after the transaction.

Smith now argues that in 2010 Red Flag terminated ACT and declined to work with Smith, and, therefore, the statement

must have been false. (*See* Br.15-16.) But the statement presented to the jury did not say that there would be an *ongoing* role for Smith or for ACT with Red Flag after the initial one-year term of the Sales Representative Agreement (R.139, DX67, Sec. 5.1). It states only that Red Flag needed ACT "after the Transaction." The evidence listed in Smith's own brief shows that the statement was true. (Br.15) Smith's real complaint is one that appears throughout his briefing—Smith felt entitled to continue working with Red Flag indefinitely. But he did not negotiate that deal and was never promised perpetual employment. (R.139, DX67, A.App.159.)

Red Flag had every right to terminate ACT later because of the shortcomings in Smith's performance. (*Id.*; R.139, DX.114; R.153, 9/25/14 Tr. at 224:17-24, 227:18-20; R.154, 9/26/14 Tr. at 84:23-25.) Neither Red Flag nor Kleynerman knew in 2009 that Smith would fail to maintain ACT's good corporate standing or that Smith would fail to travel to the most important sales meeting in Mexico. (R. 152, 9/24/14 Tr.

at 225:3-23; R.139, DX.112 at 2, 4/25/10 11:07 p.m. email.) That Red Flag chose to terminate ACT one year after the transaction does not mean that Kleynerman's 2009 statement to Smith that Glaser needed Smith after the transaction was *retroactively* untrue. Glaser worked with Smith and ACT for an entire year after the transaction. Smith was never promised more than that.

Because Smith did not prove that Kleynerman made untrue statements, the jury *properly followed the instructions in the verdict form* when it did not answer Questions 6-9. Smith is not entitled to a new trial.

B. Statements Concerning Future Performance Are Not Actionable.

If the Court does not resolve this issue on the evidence above, Smith's misrepresentation claim still fails because each of the disputed statements is about future performance and, therefore, not actionable misrepresentation. The law requires that "the representations must relate to *present* or *pre-existing* facts." *Alropa Corp. v. Flatley*, 226 Wis. 561, 565-66, 277 N.W.

108 (1938) (emphasis added). Under this "pre-existing fact" rule, promises of future performance cannot constitute actionable, factual statements. *See Wausau Med. Ctr., S.C. v. Asplund*, 182 Wis. 2d 274, 291, 514 N.W.2d 34 (Ct. App. 1994) ("[P]romises or representations of things to be done in the future are not statements of fact.") (quoting *U.S. Oil Co. v. Midwest Auto Care Servs.*, 150 Wis. 2d 80, 87, 440 N.W.2d 825 (Ct. App. 1989)).

The only time a future promise is actionable as a misrepresentation is when the plaintiff can demonstrate that the "promissor ha[d] a present intent not to perform." *Alropa*, 226 Wis. at 566. That exception could not apply here because each of the disputed statements involved *Kleynerman*'s understanding, during negotiations, of *Glaser*'s post-Transaction intentions.

Each of the statements involves *future* performance: (1) how much Glaser and Grinberg "would invest"; (2) what percentage of ACT Kleynerman and Smith "would own . . .

after the sale"; and (3) whether "Grinberg and Glaser needed Smith to remain at ACT *after the Transaction.*" (R.112, A.App.39 (emphasis added).) Under any interpretation, three pre-Transaction statements about what the state of affairs "would" be "after the Transaction" are statements of future performance.

These claims are, therefore, barred by established Wisconsin law.

C. Smith Could Not Reasonably Rely on His Misinterpretation of These Statements When He Signed the MOU, the Asset Sale Agreement, and the Sales Representative Agreement That Contained the Terms of the Transaction.

Additionally, Smith could not *reasonably* rely on any oral statements that conflicted with the MOU, Asset Sale Agreement, and Sales Representative Agreement that he signed, *see Ritchie v. Clappier,* 109 Wis. 2d 399, 404, 326 N.W.2d 131 (Ct. App. 1982), and his misrepresentation claim fails on this additional ground, *Kiefer v. Fred Howe Motors, Inc.*, 39 Wis. 2d 20, 29, 158 N.W.2d 288 (1968). As a

sophisticated business person, who purportedly "built" ACT through "years of hard work" (Br.37), Smith should have carefully reviewed the Transaction documents before signing them. *See Williams v. Rank & Son Buick, Inc.*, 44 Wis. 2d 239, 246, 170 N.W.2d 807 (1969) ("Whether the falsity of a statement could have been discovered through ordinary care is to be determined in light of the intelligence and experience of the misled individual.").

The precise terms of Glaser's investment, Smith's future ownership, and ACT's role were detailed in the Transaction documents. (R.139, DXs.56, 67-68, A.App.140, 159, 168.) Smith cites these documents in his brief, *e.g.*, Br. at 15, but he largely ignores that he signed each of them, too. Smith had every opportunity to read these documents so that any imprecision, or "falsity," in the statements could be "known"; the terms he complains about were not added at the last minute. *Williams*, 44 Wis. 2d at 246; *cf. Hennig*, 230 Wis. 2d at 170.

And the evidence showed that Smith not only read the transaction documents, but actively negotiated their contents. (*E.g.*, R.139, DXs 55-67.) Smith negotiated and signed the MOU, which stated that Glaser and Grinberg wanted to establish separate entities for production and marketing so as not to assume ACT's liabilities. (*Id.*; R.139, DX56, A.App.140.) In other words, the MOU demonstrated that Glaser and Grinberg would not be funneling $250,000 directly into ACT, but instead to new companies (Red Flag's predecessor), one of which also bore the name "ACT"—Alpha Cargo Technology Marketing LLC. (R.139, DX56, A.App.140.) That was consistent with the jury's finding that Kleynerman did *not* state that "ACT, not Red Flag, would open a manufacturing and distribution facility." (R.112, Question 4, A.App.39.)

Smith argues that he was not an active participant in these negotiations—that "Kleynerman persuaded Smith to sign the Transaction documents," (Br.15)—but that argument does not save his failed misrepresentation claim. Even if Smith did

not actually learn of, or observe, the imprecision of the representations, he is imputed with knowledge of the contents of the agreements that he negotiated and signed. *Kellar v. Lloyd*, 180 Wis. 2d 162, 175-76, 509 N.W.2d 87 (Ct. App. 1993); *Paper Express, Ltd. v. Pfankuch Maschinen GmbH*, 972 F.2d 753, 757 (7th Cir. 1992) ("[I]t is a fundamental principle of contract law that a person who signs a contract is presumed to know its terms and consents to be bound by them."). Wisconsin law does not allow Smith to plead ignorance now that he no longer likes the terms of the Transaction that he negotiated.

Smith's claim that he was not an active participant in the negotiations is belied by the record. Indeed, Smith carefully reviewed the drafts of the agreements, offered numerous changes to them, including a last minute change to keep ACT's website and content for his own consulting business. (R.139, DXs 56-68.) And, Smith asked to keep ACT's website and content for himself because he understood that a

year after the transaction Red Flag could terminate ACT and choose not to work with Smith again. (R.139, DX63, A.App.156).

As to the structure of the transaction, Smith acknowledged that he understood that Glaser and Grinberg were not buying ownership interests in ACT. (R.139, DX63, A.App.155-56.) Again, Smith cannot plead ignorance, *Ritchie*, 109 Wis. 2d at 404, 326 N.W.2d at 134, and could not have *justifiably* relied on a contrary statement regarding his post-Transaction stake in ACT.

Further, to the extent that Smith believed ACT necessarily would remain a sales representative of Red Flag for more than a year after the Transaction, he could not have justifiably based that belief on Kleynerman's statement. First, the statement said nothing about duration. Indeed, it implied that Smith would be needed only so long as he had sales knowledge superior to Glaser and Grinberg's. Second, ACT's Sales Representative Agreement, which Smith signed, was

subject to termination after one year. (R.139, DX67, A.App.162.); *Ritchie,* 109 Wis. 2d at 404. Smith, of course, *actually* knew that ACT could be terminated as sales representative after one year, and he negotiated the deal with that possibility in mind. (R.139, DX63, A.App.155-56, 5/26/09 6:46 p.m. email.)

Because Smith cannot show justifiable reliance, his intentional misrepresentation claim fails as a matter of law. *See Kiefer*, 39 Wis. 2d at 29.

D. Smith's Misrepresentation Claims Are Barred by the Economic Loss Doctrine.

A fourth ground for affirming the judgment on Smith's misrepresentation claim is that the claim is barred by the economic loss doctrine, which preserves the distinction between contract law—the basis for Smith's principal claims—and tort law. *Digicorp, Inc. v. Ameritech Corp.*, 2003 WI 54, ¶¶34-35, 262 Wis. 2d 32, 662 N.W.2d 652 ("The economic loss doctrine exists to preserve the distinction between tort and contract law."). The doctrine "operates generally to preclude

contracting parties from pursuing tort recovery for purely economic or commercial losses associated with the contract relationship." *Van Lare v. Vogt, Inc.*, 2004 WI 110, ¶19, 274 Wis. 2d 631, 683 N.W.2d 46 (quoting *Tietsworth v. Harley–Davidson, Inc.*, 2004 WI 32, ¶23, 270 Wis. 2d 146, 677 N.W.2d 233). Under the doctrine, a fraud in-the-inducement claim may be brought only "where the fraud is extraneous to, rather than interwoven with, the contract." *See Kaloti Enterprises, Inc. v. Kellogg Sales Co.*, 2005 WI 111, ¶42, 283 Wis. 2d 555, 699 N.W.2d 205 (quoting *Digicorp,* 262 Wis. 2d 32, ¶47).

By Smith's admission, Br. at 12-13, each of the disputed representations went to the very heart of the Transaction—how much would be invested, who would own the entities, and what role Smith and ACT would have post-Transaction. *See Digicorp*, 262 Wis. 2d 32. Wisconsin's economic loss doctrine bars tort claims for intentional misrepresentation going to the heart of a transaction documented in signed agreements.

II. SMITH IS NOT ENTITLED TO A NEW TRIAL ON INTENTIONAL MISREPRESENTATION.

The jury verdict on Smith's misrepresentation claim was not "inconsistent," nor was it "the result of jury confusion," (*contra* Br.17), and Smith is not entitled to a new trial.

A. The Jury Could Not Have Been Confused by the Verdict Questions.

"Were any of the marked representations untrue?" (R.112, A.App.39.) That question is the purportedly misleading question. It is obviously not misleading. The jury understood the question by answering "No." And, in any event, Smith stipulated to the verdict form. (R.155, 9/29/14 Tr. at 5:16-25.) He is not entitled to a new trial because he does not like the way the jury *answered* the verdict form. *See* Wis. Stat. § 805.13(3).

Smith's citation to *Behning v. Star Fireworks Mfg. Co.*, 57 Wis. 2d 183, 203 N.W.2d 655 (1973), Br. at 21, is misplaced. In *Behning*, the Supreme Court affirmed the trial court's decision to grant a new trial because a misleading jury question misstated the facts on which the plaintiff was pursuing the claim. *Id.* The *Behning* jury question directed

the jury to pay attention only to the defendants' actions "At or immediately prior to" a misfire of fireworks, even though the alleged basis for liability was the defendant's control over the fireworks three hours before the misfire. *Id.* at 188-89. Here, there is no misstatement in the question and no basis to upset the answer.

Nor did the verdict form here conflict with the instructions, another frequent source of juror confusion. For example, in *Runjo v. St. Paul Fire & Marine Ins. Co.*, 197 Wis. 2d 594, 541 N.W.2d 173 (Ct. App. 1995), the instructions directed the jury to award damages regardless of answers it made to the liability questions, while the special verdict form instructed the jury to award damages only if it determined the defendant was liable. *Id.* at 603-05. There is nothing remotely similar here.

Unlike the misleading verdict questions and instructions in *Behning* and *Runjo*, no questions in the Special Verdict Form required the jury to dismiss Smith's entire argument, nor

has Smith pointed to a conflict between the instructions and the form. While Smith may now believe that the "awkward phrasing" of Question 5 cost him his misrepresentation claim, he did not object to the language of Question 5 when he stipulated to the Special Verdict Form, and his challenge to it is, therefore, waived. (R.155, 9/29/14 Tr. at 5:16-25); Wis. Stat. § 805.13(3) ("At the close of the evidence ... [t]he court shall inform counsel on the record ... of the instructions and verdict it proposes to submit. Counsel may object to the proposed instructions or verdict on the grounds of incompleteness or other error, stating the grounds for objection with particularity on the record. Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict.").

B. The Jury's Legally Superfluous Answer to the Punitive Damages Question Does Not Entitle Smith to a New Trial.

Smith seeks a new trial because, he says, the jury's answers on the misrepresentation questions were logically inconsistent with its award of punitive damages. (Br.17.) However, rather than being *logically inconsistent*, the punitive

damages answer was *legally superfluous*. Therefore, the Court should affirm the circuit court's decision to set aside the punitive damages award.

Mackenzie v. Miller Brewing Co., 2000 WI App 48, 234 Wis. 2d 1, 608 N.W.2d 331, provides the framework for the analysis. There, a jury found that a party was not liable for any compensatory damages but nevertheless awarded punitive damages. *Id.*, ¶75. The circuit court set aside the punitive damages award, and this Court affirmed, *Id.*, ¶¶75-76, explaining that an award of punitive damages without compensatory damages was legally superfluous, and not logically inconsistent, so no new trial was required. *Id.*, ¶84.

The Court should affirm here, too. The jury found that Kleynerman was not liable on the misrepresentation claim but nevertheless awarded punitive damages. (R.112, A.App.39-42.) A punitive damages award is unavailable if there is no liability for compensatory damages. *Tucker v. Marcus*, 142 Wis. 2d 425, 439, 418 N.W.2d 818 (1988). Therefore, the Court

properly struck the punitive damages award. And ultimately, Smith's stipulation to the verdict form, R.155, 9/29/14 Tr. at 5:16-25, precludes his current challenge to it, *Mackenzie*, 234 Wis. 2d 1, ¶84.

This case is, therefore, dissimilar from the "inconsistent verdicts" line of cases that Smith invokes. In those cases, serial questions regarding a single claim were inconsistent with each other. For example, in *Westfall v. Kottke*, 110 Wis. 2d 86, 91, 328 N.W.2d 481 (1983), a verdict was inconsistent when the jury found that one party was not causally negligent but it nevertheless apportioned 10% of the comparative negligence to that person. (In Smith's other two cases, the verdict was *not* inconsistent.)

Here, the questions regarding misrepresentation (Questions 4 to 9) were answered correctly and consistently with each other: the jury found that three of the six purported statements were made and found that none of them were untrue. (R.112, Questions 4 to 9.) Then, the jury did not

answer the Questions 6 to 9 regarding Kleynerman's knowledge of the statements' untruthfulness, intent to deceive, justifiable reliance, and compensatory damages, because the form instructed it to skip ahead to Question 10. (R.112, A.App.40, Questions 4 to 9.) This verdict lacks the "inconsistency" that was present in Smith's one on-point case.

Under *Mackenzie*, Smith is not entitled to a new trial.

III. SMITH IS NOT ENTITLED TO A NEW TRIAL ON PUNITIVE DAMAGES, NOR IS HE ENTITLED TO REINSTATEMENT OF THE PUNITIVE DAMAGES.

Smith's argument for a new trial on punitive damages, Br. at 21-22, mirrors his argument for a new trial on the misrepresentation claim, *see id.* ("As discussed above…. as discussed in Sections I and II *supra*), and it fails for the same reason. No independent action exists for punitive damages when there are no compensatory damages, so the failure of his misrepresentation claim takes with it his punitive damages claim. *E.g.*, *Hanson v. Valdivia*, 51 Wis. 2d 466, 474, 187 N.W.2d 151 (1971). Therefore, Smith is not entitled to another trial on the punitive damages question.

Nor is Smith entitled to transfer the award of punitive damages from his misrepresentation claim to his fiduciary duty claim, because he never sought punitive damages for breach of fiduciary duty. At trial, Smith's counsel acknowledged "that the jury wanted to award punitive damages. They can only do that if they answered Question 9 yes and they hadn't gotten that far because they answered an earlier question with blanks." (R.155, 9/29/15 Tr. at 85:13-16.) This acknowledgment confirmed an earlier conference regarding the verdict form, where Smith's counsel also confirmed that "punitive damages questions . . . have to do with the misrepresentation." (R.154, 9/26/15 Tr. at 109:15-17.) Smith was not seeking punitive damages for breach of fiduciary duty.

Nevertheless, Smith unapologetically argues here that he should be able to keep the punitive damages for the fiduciary duty claim. (Br.22-24.) The Court should reject this new argument. Because Smith never sought punitive damages for breach of fiduciary duty, and he did not even seek judgment

on the punitive damage question after trial, R.114-115, he cannot receive an award of them from this Court in the first instance. *See Segall v. Hurwitz*, 114 Wis. 2d 471, 489-90, 339 N.W.2d 333 (Ct. App. 1983).

CONCLUSION

This Court should affirm the circuit court on all issues in the cross-appeal.

Dated: November 9, 2015.

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FORM AND LENGTH AND ELECTRONIC BRIEF CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 4,095 words.

I have submitted an electronic copy of the brief, which complies with the requirements of § 809.19(12). I certify that the electronic brief is identical in content and format to the paper form of the brief filed as of this date, other than the signature.

Dated: November 9, 2015.

s/ Max B. Chester
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CERTIFICATE OF MAILING

I hereby certify that on this date I caused the original and 10 copies of Combined Brief of Appellant-Cross-Respondent Greg Kleynerman to be sent by Federal Express for overnight delivery to the clerk, and therefore the brief is filed on this date pursuant to § 809.80(3)(b)(2).

Dated: November 9, 2015.

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