STATE OF WISCONSIN
SUPREME COURT
No. 2015AP000207

SCOTT SMITH,

Plaintiff-Respondent-Cross-Appellant,

ALPHA CARGO TECHNOLOGY, LLC,

Plaintiff,

v.

GREG KLEYNERMAN,

Defendant-Appellant-Cross-Respondent-Petitioner,

RED FLAG CARGO SECURITY SYSTEMS, LLC,

Defendant.

On Review of a Decision
of the Court of Appeals, on
Appeal from the Circuit Court for Milwaukee County
Circuit Court Case No. 2011CV18551
Honorable Pedro Colon, Presiding

BRIEF OF PLAINTIFF-RESPONDENT-CROSS-APPELLANT SCOTT SMITH

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

Attorneys for Plaintiff-Respondent-Cross-Appellant Scott H. Smith

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other

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 FACTS

A. Background.

Scott Smith ("Smith") and Gregory Kleynerman ("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.) Smith and Kleynerman occupied the roles of President and Executive Vice President of ACT, respectively. (*See* R.39, PX 12, PX 13, PX 15, DX 67.) 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 in the security seal industry, but assisted in this endeavor by communicating with a security 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.107.) Her illness progressed rapidly and she passed away on September 21, 2007. (*Id.* at 163:6, R-App.108.) 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.147–48; R.152, 96:14-97:25, R-App.158–59.)

Smith's depression affected his ability to run ACT. (R.150, 176:3-9, R-App.119.) 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.109.) 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.112.) 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.116.)

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.200–01.) 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.121.) 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.162; R.139, DX14.) Regarding Smith, Kleynerman told Glaser "[h]e no [sic] nothing about our work with you." (R.139, DX14, R-App.243.)

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.126) 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.198–99.) Kleynerman proposed having Glaser invest in ACT. (R.150, 189:6-7, R-App.124.) 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.124.) Accordingly, Kleynerman volunteered that "he would handle the negotiations." (R.150, 189:12-13, R-App.124.) Smith met Glaser for the first time in early March 2009. (R.150, 187:1-7, R-App.122; 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, DX56, App.161–62.) 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.122–23.)

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.125.) Kleynerman told Smith that they would all be equal partners and that profit would be split evenly. (R.150, 191:17-25, R-App.126.) 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.127; R.139, DX56; App.162.) 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, DX68, App.189–97); the U.S. Patent Assignments (R.139, PX12, App.147–48); the European Patent Assignment (R.139, PX13, App.149–50); and the Sales Representative Agreement (R.139, DX67, App.180–88). The transaction also divested ACT of such assets like customer lists and the goodwill developed by Smith's many years in the industry.

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, DX68, App.189–97.) 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.128–29.) 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.130; R.151, 11:4-8; R-App.140.) 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.125–26; 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.237; 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.237) (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, DX68, App.189–97.) Under

[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.

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, DX68, App.189–97.)

ACT was also required to disclose all customers and potential customers to Red Flag. (R.139, DX68, § 4(f), App.192–93.) 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, DX68, § 3, App.191.)

After transferring all valuable assets to Red Flag, ACT was relegated to being a sales representative tasked with selling products produced by Red Flag. (R.139, DX67, App.180–88.) ACT was contractually designated as an independent contractor of Red Flag. (*Id.*, § 4, App.183–83.) The sales representative agreement was non-exclusive and could be terminated for any reason after one year. (R.139, DX67, §§ 1, 5, App.180, 183.) 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), App.180.) 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, App.181.)

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.139–40.) 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.142.) Glaser introduced Kleynerman as a "partner" in Red Flag in his email correspondence with potential customers and vendors. (R.139, PX45, R-App.240; PX53.) Glaser also gave Kleynerman check signing authority for Red Flag bank accounts. (R.139, PX45, R-App.240.)

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.141.) 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.143–44; 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.242.)

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.145–46; 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.146–47.)

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.146.) 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.146.)

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.146–47.)

Although ACT was terminated, Kleynerman continued working for Red Flag without interruption. (R.154, 86:10-87:4, R-App.203–04; 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.*) In 2011, Kleynerman purchased Glaser's majority (75%) interest in Red Flag for a nominal value with the expectation that Glaser's previous investment would still be treated as a loan secured by Red Flag's assets. (R.154, 89:22-90:16, R-App.205–206.) Due to the way Glaser and Kleynerman coordinated the structure of this transaction, Glaser was entitled to recoup his entire investment, while Kleynerman became majority owner of an improved and better version of ACT. *Id.* 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 even pay Smith or ACT any of the commissions that are due. (R.154, 99:24-100:12.) The Transaction left Smith out in the cold—his life's work in the security seal industry reduced to a fifty percent interest in an LLC without assets, sales opportunities, or any meaningful value. (R.139, DX 67, App.180–88.).

PROCEDURAL HISTORY

In December 2011, Smith sued Kleynerman and Red Flag for breach of fiduciary duty; intentional misrepresentation; negligent misrepresentation; strict responsibility misrepresentation; rescission of the agreement between ACT and Red Flag due to Smith's mental incompetence resulting from the deep grief and depression at the illness and loss of his wife; breach of the duty of good faith; accounting; unjust enrichment; and violation of section 986.81 of the Wisconsin statutes. (R.2) The focus at trial was on the breach of fiduciary duty, intentional misrepresentation, and rescission claims. (R.112.)

After a lengthy jury trial, the jury found that Kleynerman owed and breached a fiduciary duty to Smith and awarded Smith $499,000 in compensatory damages on that claim. *Id.* The rescission claim was also tried to the jury, but the jury's verdict against Smith on that claim was not contested on appeal. *Id.* The circuit court upheld the judgment in Smith's favor on his fiduciary duty claim (R.122.) The court of appeals affirmed, applying well-settled fiduciary duty law and an agreed-upon jury instruction. *Smith v. Kleynerman*, 2016 WI App. 57, ¶ 24, 370 Wis. 2d 786, 882 N.W.2d 870, App.011–12 (unpublished), App.008.

The court of appeals held that Kleynerman was an officer of ACT who owed a fiduciary duty to Smith. *Id.*, ¶ 26. That holding was based on a

stipulated jury instruction at trial which read: "[a]t all times relevant to this case, Gregory Kleynerman held an officer position with ACT. Officers occupy fiduciary positions and are held to strict rules of honesty and fair dealing between themselves and their employers." (R.112.) This language was not drawn from a pattern jury instruction, instead it was jointly drafted and submitted by agreement of the parties. (R.155, 11:17-18.) In the instruction, Kleynerman explicitly concedes that he served as an officer of ACT, and owed the corresponding fiduciary duties. (R.112.) Kleynerman did not argue on appeal that the instruction was erroneous.

The court of appeals held that Kleynerman breached his fiduciary duty to Smith because he coordinated with his friend and business associate Glaser to effect a transaction that, unbeknownst to Smith, was adverse to Smith's interests, and this coordination constituted disloyalty and unfair dealing. *Smith v. Kleynerman*, 370 Wis. 2d 786, ¶ 32, App.011.

The court of appeals also held that Smith had standing to pursue a direct action against Kleynerman because Smith showed an injury that was personal to him rather than an injury primarily to ACT. *Id.*, ¶¶ 41–42, App.014–15. In addition, the court of appeals rejected Kleynerman's claims regarding Smith's expert testimony and methodology, affirming (in a footnote) the circuit court's holding that Kleynerman's challenges to the expert

testimony went to the weight (not the admissibility) of the testimony, which Kleynerman had ample opportunity to test at trial. *Id.* ¶ 38, n.3, App.014.

STANDARD OF REVIEW

Whether one who has assumed a fiduciary duty has breached his or her duty is a mixed question of fact and law. *Jorgensen v. Water Works, Inc.*, 2001 WI App 135, ¶ 8, 246 Wis. 2d 614, 630 N.W.2d 230. Questions of historic fact are determined by the circuit court and will not be reversed unless they are clearly erroneous. *Id.*; Wis. Stat. § 805.17. However, whether the facts as found constitute a breach of fiduciary duty is a question of law this Court reviews independently. *Zastrow v. Journal Commc'ns, Inc.*, 2006 WI 72, ¶ 12, 291 Wis. 2d 426, 718 N.W.2d 51.

Whether a party has standing presents a question of law that the Court reviews *de novo*. *Krier v. Vilione*, 2009 WI 45, ¶ 14, 317 Wis. 2d 288, 302, 766 N.W.2d 517, 523.

The circuit court is entitled to "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is admissible." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) (applying *Daubert* standard). Accordingly, this Court should "review a discretionary decision only to determine whether the trial court examined the facts of the record, applied a proper legal standard, and, using a rational

process, reached a reasonable conclusion," and cannot "reverse unless the circuit court's use of discretion is wholly unreasonable." *State v. Watson*, 227 Wis. 2d 167, 186, 595 N.W.2d 403 (1999) (quoting *State v. Pittman*, 174 Wis. 2d 255, 268, 496 N.W.2d 74 (1993)).

ARGUMENT

I. KLEYNERMAN OWED SMITH A FIDUCIARY DUTY.

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.

Kleynerman voluntarily assumed fiduciary duties to Smith in numerous ways: (1) as a corporate officer of ACT; (2) as a member of ACT, pursuant to the Wisconsin Limited Liability Company Law (WLLCL); (3) under contractual obligations arising from the MOU; (4) as controlling member of ACT; (5) as a

joint venturer with Smith in ACT; and (6) under common law fiduciary duty principles. Furthermore, this Court should recognize common law fiduciary duties between members of an LLC in order to prevent unfair and self-serving business dealings, such as Kleynerman displayed in this case.

A. Kleynerman Admitted to Consciously Undertaking a Special Role as a "Corporate Officer" of ACT.

The court of appeals correctly held that Kleynerman owed Smith a fiduciary duty by virtue of his position as corporate officer of ACT, which was an undisputed fact at trial. *Smith v. Kleynerman*, 370 Wis. 2d 786, ¶ 24, App.008. Kleynerman's admission that he was a corporate officer of ACT came in the form of an agreed jury instruction stating that he "held an officer position with ACT." *Id.* ¶ 26, App.008. The jury instruction was supported by the trial record. The jury heard and saw evidence that Kleynerman was the Executive Vice President of ACT, in addition to owning 50% of the company. (*See* R.39, PX 12.) Kleynerman's position meant that he was "under a fiduciary duty of loyalty, good faith and fair dealing in the conduct of corporate business." *Modern Materials, Inc. v. Advanced Tooling Specialists, Inc.*, 206 Wis. 2d 435, 442, 557 N.W.2d 835 (Wis. Ct. App. 1996). Specifically, as ACT's Executive Vice President, Kleynerman owed a fiduciary duty to both ACT and to Smith, ACT's other owner. *Estate of Sheppard ex rel. McMorrow v. Specht*, 2012 WI App 124, ¶ 8, 344

Wis. 2d 696, 703, 824 N.W.2d 907 ("A corporate director owes a fiduciary duty to both the corporation and its shareholders.") (citing *Yates v. Holt-Smith,* 2009 WI App 79, ¶ 19, 319 Wis.2d 756, 768 N.W.2d 213).

Kleynerman now attempts to cast doubt on the meaning of the jury instruction. But because he did not object in the circuit court, and has never previously argued that the instruction was erroneous, Kleynerman has waived any claim of error regarding this instruction. *See* Wis. Stat. § 805.13. An objection to a particular jury instruction "cannot be made for the first time in a post-trial motion or on appeal." *Durham v. Pekrul*, 104 Wis. 2d 339, 347, 311 N.W.2d 615 (1981). Kleynerman's "failure to make a timely objection is a waiver of any objection to the particular instruction given and is tantamount to a concession that the record posed facts which made the instruction appropriate." *Id.* 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.")

Kleynerman argues now, for the first time, that this key admission in the agreed jury instructions is nothing more than "an accurate statement of

corporate law" and that Kleynerman is an officer of ACT only in that Smith and Kleynerman gave each other corporate titles. (Pet'r Br. 30–31.) The jury instruction is not merely a restatement of corporate law; it is the law that the jury was charged with applying to the facts of the case. Kleynerman did not object at trial to the application of corporate law in the context of the fiduciary duty Kleynerman owed to Smith. The jury instruction is an explicit admission by Kleynerman that he occupied a fiduciary position of trust within ACT, obligating him to act for Smith's benefit and to "fully disclose to [Smith] all information relevant to [his] interest. *Zastrow*, 291 Wis. 2d 426, ¶ 29.

Although Kleynerman paints the jury instruction as inapplicable to the issues at trial, his crucial admission is highly relevant to whether or not Kleynerman owed Smith a fiduciary duty. The jury has a right, and a duty, to follow the law as stated in the instructions. *See, e.g.,* Wisconsin Jury Instructions — Civil No. 100 ("Your duty is to answer [special verdict] questions . . . according to the evidence and my instructions.") Kleynerman has waived and forfeited any right to challenge the fiduciary duty instruction, because he failed to preserve any objection in the circuit court. Wis. Stat. § 805.13

Kleynerman's second argument, with regard to the fiduciary duty jury instruction, is that Smith's and Kleynerman's assignment of corporate-type titles

to each other "did not transform ACT from a limited liability company into a corporation." (Pet'r Br. 30–31.) This argument is irrelevant because Smith is not asserting that ACT was a corporation. However, ACT utilized the flexibility inherent to the WLLCL to assign executive officer positions to individual members in order to carry out the business of the company. *See* Joseph W. Boucher et al., *LLCs and LLPs: A Wisconsin Handbook* § 1.10 (5th ed. 2014) (Flexibility was one of the "overriding goals" of the WLLCL drafters). Under such an arrangement, an LLC member who undertakes a position as an officer of that organization, owes fiduciary duties commensurate with that executive position. *Modern Materials, Inc.*, 206 Wis. 2d at 442.

Kleynerman cannot shirk the responsibilities of his voluntarily assumed position as a corporate officer by arguing that these were merely informal titles Smith and Kleynerman gave to one another internally. (Pet'r Br. 30–31.) Courts have held that such a distinction between officers in "name only" and officers with regard to daily responsibilities is a fictional one. Allowing "a corporate officer or director to escape his fiduciary duties by claiming that he was a mere 'figurehead' would in effect create a second class of officers and directors." *Burroughs v. Fields*, 546 F.2d 215, 217 (7th Cir. 1976) (applying Wisconsin law). Similarly, a person cannot escape the duties of their office by claiming that "positions were in name only." *CSFM Corp. v. Elbert & McKee Co.*, 870 F. Supp.

819, 833 (N.D. Ill. 1994). An officer is a "'person holding an office of trust, command, or authority' in a corporation or other institution" and such officers hold "positions of trust, command, and authority . . . and were entrusted with important managerial functions." *Id.*

Kleynerman was entrusted with the important managerial functions of ACT, and he occupied a position of trust and authority with regard to Smith, thereby owing Smith a fiduciary duty.

B. Common Law Fiduciary Duties Should Apply Between Members of LLCS.

Kleynerman relies on the WLLCL's supposed silence with regard to fiduciary duties between members of an LLC. He urges the Court, however, to put too much stock in this perceived silence. Limited liability companies are certainly creatures of statute, and the rights and duties of LLC members are governed by the WLLCL. It is also long-standing Wisconsin law, however, that "a corporation is a creature of statute." *Tift v. Forage King Indus., Inc.*, 108 Wis. 2d 72, 86, 322 N.W.2d 14, 20 (Wis. 1982); *Kappers v. Cast Stone Const. Co.*, 184 Wis. 627, 200 N.W. 376, 378 (Wis. 1924). Despite being a creature of statute, common law fiduciary duties are deeply rooted in Wisconsin's corporate law. *See Beloit Liquidating Trust v. Grade*, 2004 WI 39, ¶ 37, 270 Wis. 2d 356, 677 N.W.2d 298; *see also Timme v. Kopmeier*, 162 Wis. 571, 156 N.W. 961, 962 (1916)

("Directors of a corporation occupy a position of trust and confidence, and are considered in the law as standing in a fiduciary relation toward the stockholders and as trustees for them.")

In addition, Wis. Stat. 183.1302(2) provides that "[u]nless displaced by particular provisions of this chapter, the principles of law and equity supplement this chapter." Accordingly, because the WLLCL does not explicitly disclaim common law fiduciary duties, the principles inherited from the corporate and partnership forms should supplement the provisions of the WLLCL.

This Court is not precluded from finding that there are fiduciary duties between members of an LLC merely because an LLC is an organization created by statute. In fact, there is a growing trend among courts across the country, that common law fiduciary duties apply to the operations of LLCs. *Executive Center III, LLC v. Meieran*, 823 F. Supp. 2d 883, 891 (E.D. Wis. 2011) (collecting cases from Indiana, Kentucky, California, Connecticut, and Idaho that have held that common law fiduciary duties apply to members and officers of LLCs). The *Executive Center* case, although non-binding on this Court, is particularly instructive. There, the district court held that, under Wisconsin law, common law fiduciary duties apply to LLCs. *Id.* at 890, 893. In so holding, the court stated that "[f]iduciary duties exist to protect people who are affected by the actions of those who control businesses" and that it would be nonsensical for a

dishonest business owner to act unfairly by "simply elect[ing] to operate its business as an LLC and claim that no fiduciary duties applied to its actions." *Id.* at 892.

The question at issue in *Executive Center* was whether an LLC owes fiduciary duties to third parties, not, as is the case here, whether or not 50-50 members of an LLC owe one another such duties. The case remains instructive, however, because the court does not appear to limit its holding to the relationship between LLCs and third-parties. *Id.* at 890, 893. Rather, the court's holding looks to be more expansive, as it states that "common law fiduciary duties *do* apply to LLCs in Wisconsin." *Id.* Of course, this Court is under no obligation to adopt or apply *Executive Center* to this case, however, the district court's reasoning is well stated. This Court should apply the same reasoning because its result is consistent with the growing trend in many states and the analysis is similar to the analysis in which this Court must engage.

Kleynerman urges this Court to adopt Justice Roggensack's concurring opinion in *Gottsacker* and urges adoption of a blanket rule precluding the application of common law fiduciary duties to LLCs. This Court should decline to adopt such a rule. The *Gottsacker* decision, which was silent on this issue came down in 2005, before it became clear that the preferred approach, as noted in *Executive Center*, is to draw from the LLC's predecessors, corporations and

partnerships, and apply common law fiduciary duties to LLCs. This Court should hold that fiduciary duties apply between members of Wisconsin LLCs.

C. The WLLCL Does Not Support Kleynerman's Argument that LLC Members Do Not Owe One Another Fiduciary Duties.

Kleynerman also argues that the WLLCL does not impose default fiduciary duties on LLC members. This argument is belied by the very statute he cites for that proposition. Wis. Stat. § 183.0402 sets forth the duties of managers and members in an LLC, significantly:

> (1) No member or manager shall act or fail to act in a manner that constitutes any of the following:
> (a) *A willful failure to deal fairly with the limited liability company or its members in connection with a matter in which the member or manager has a material conflict of interest*.
> (b) A violation of criminal law, unless the member or manager had reasonable cause to believe that the person's conduct was lawful or no reasonable cause to believe that the conduct was unlawful.
> (c) *A transaction from which the member or manager derived an improper personal profit*.
> (d) Willful misconduct.

Wis. Stat. § 183.0402(1) (emphasis added).

Nearly identical language is found in the Wisconsin Business Corporation Law, specifically the section providing corporate directors a shield from liability subject to certain exceptions:

> (1) Except as provided in sub. (2), a director is not liable to the corporation, its shareholders, or any person asserting rights on behalf of the corporation or its shareholders, for damages,

> settlements, fees, fines, penalties or other monetary liabilities arising from a breach of, or failure to perform, any duty resulting solely from his or her status as a director, unless the person asserting liability proves that the breach or failure to perform constitutes any of the following:
>
> (a) *A willful failure to deal fairly with the corporation or its shareholders in connection with a matter in which the director has a material conflict of interest*.
> (b) A violation of criminal law, unless the director had reasonable cause to believe that his or her conduct was lawful or no reasonable cause to believe that his or her conduct was unlawful.
> (c) *A transaction from which the director derived an improper personal profit*.
> (d) Willful misconduct.

Wis. Stat. § 180.0828(1) (emphasis added). Aside from terms particular to each entity, these statutes set forth the same duties: (a) deal fairly with the LLC/corporation and other members/shareholder when a conflict of interest exists; (b) refrain from violating the law; (c) not derive an improper personal profit; and (d) not engage in willful misconduct.

This Court described the duties in Wis. Stat. § 180.0828(1) as "fiduciary duties" in *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 36, 356 Wis. 2d 665, 849 N.W.2d 693. Stating specifically "these exceptions to the substantive shield from liability for a director's actions *identify potential breaches of a director's fiduciary duty*." *Id.* ¶ 36 (emphasis added). Accordingly, Wis. Stat. § 183.0402(1) must also be interpreted to impose fiduciary duties on LLC members and managers to their fellow members.

This Court has held that "members 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 v. Monnier*, 2005 WI 69, ¶¶ 28-31, 281 Wis. 2d 361, 697 N.W.2d 436. Assessed under this standard, Kleynerman had a material conflict of interest in the Transaction, because he was the recipient of loans and investment in his other businesses from Glaser (R.154, 58:20-59:11); he had a separately negotiated deal with Glaser to be paid by Red Flag (R.151, 10:3-11:9); he had an undisclosed role as a "partner" in Red Flag (R.139, PX45, PX53); he actively worked to maintain Smith's misperceptions in the days leading up to the Transaction (R.139, PX44; R.153, 204:3-205:1); and after removing Smith from the picture, Kleynerman ultimately gained a majority interest in Red Flag (R.154, 89:22-90:16). As a result of this material conflict of interest, Kleynerman owed Smith a fiduciary duty to "deal fairly" and to not "derive an improper personal profit." Wis. Stat. § 183.0402(1)(a) and (c). Kleynerman breached each of these duties by engineering the Transaction to benefit himself at the great expense of Smith.

D. The Factual Circumstances Surrounding the Relationship Between Kleynerman and Smith Establish a Fiduciary Duty.

Kleynerman also owed Smith a fiduciary duty due to their personal relationship and business relationship for four additional reasons: (a) the MOU

signed by Kleynerman, Smith, and Glaser created a contractual 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) 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. Because the court of appeals held that Kleynerman owed fiduciary duties to Smith due to Kleynerman's admission that he was a corporate officer of ACT, they stopped short of addressing these other factors which also support a finding that Kleynerman owed fiduciary duties to Smith.

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, DX56, App.162.)

In the court of appeals, Kleynerman argued 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 v. Am. Enter. Life Ins. Co.*, 2002 WI App 235, ¶ 9, 257 Wis. 2d 637, 643, 655 N.W.2d 456, 458 (citing *Alexopoulos v. Dakouras*, 48 Wis. 2d 32, 40, 179 N.W.2d 836 (1970)) (stating that an attorney in-fact has a fiduciary

[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.

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, a key characteristic of all fiduciary relationships. *Praefke*, 257 Wis. 2d 637, ¶ 10; *Zastrow*, 291 Wis. 2d 426, ¶ 31.

Further evidence of Kleynerman's "conscious undertaking" of a special position regarding Smith, thereby imposing fiduciary duties, is his voluntarily assumption of the management of ACT so that Smith could grieve the loss of his wife. *Zastrow*, 291 Wis. 2d 426, ¶ 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.112.) Kleynerman testified that he told Smith "whatever you need" and it

and that he would make payments on ACT's bills and loans. (R.154, 37:11-16, R-App.197.) 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*, 291 Wis. 2d 426, ¶ 28.

Moreover, the MOU and the circumstances surrounding its execution demonstrate that Smith became the controlling shareholder of ACT, giving rise to a fiduciary obligation. Those with the power to direct the affairs of an organization 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

[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.

voting control." *In re Morton's Restaurant Grp. Inc. S'holder's Litig.*, 74 A.3d 656, 665 (Del. Ch. 2013).

Kleynerman had "formidable voting and managerial power" over ACT's affairs. *Id.* At the time of the Transaction, Smith was clinically depressed and had little to no involvement in ACT, and therefore 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 type out emails that Kleynerman dictated to him, but Smith was not involved in the operations of ACT at all. (R.150, 172:8-11, 182:9-15, R-App.117.) Kleynerman 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.119; 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.

Finally, Kleynerman and Smith's status as joint venturers 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.

Because the members of an LLC are so similar to the 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.

Kleynerman owed Smith a fiduciary obligation as an equal member in ACT. Kleynerman therefore 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.

[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).

E. Sound Public Policy Requires That Common Law Fiduciary Duties Apply To Wisconsin LLCs

This Court has never explicitly addressed whether or not common law fiduciary duties apply to Wisconsin LLCs, and this case presents an opportunity for this Court to prevent unfair and self-serving business dealings by one LLC member against another, such as those practices perpetrated by Kleynerman.

Kleynerman argues that recognizing fiduciary duties between members of an LLC would "create a multitude of perverse incentives for LLC members who are disappointed with the results of any transaction of the enterprise that turns out poorly for them personally." (Pet'r Br. 40.) Despite Kleynerman's attempts to instill a fear of "perverse incentives," the real potential danger is that which comes from declining to impose fiduciary duties between LLC members. If this Court adopts Kleynerman's preferred rule, members will remain largely unprotected from the bad faith and self-serving acts of their fellow members. A prime example is Kleynerman, who took advantage of the grief of his friend and business partner to serve his own interests at the expense of Smith's.

Evidence from other jurisdictions suggests that imposing fiduciary duties upon Wisconsin LLC members will not cause the problems implied by Kleynerman. For one, common law fiduciary duties have been imposed upon

Wisconsin corporations for years, and the corporation remains a popular choice for business organizing within the state. *Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶ 32, 356 Wis. 2d 665, 849 N.W.2d 693; *Racine v. Weisflog*, 165 Wis. 2d 184, 190 (Wis. Ct. App. 1991). There is no evidence that imposing such duties on LLC members will hinder the formation and operations of LLCs, nor that it will cause individuals seeking to organize to choose a different form of organization. Both Kleynerman and the dissent in *Gottsacker*, note that the rights and obligations of LLC members can be adjusted through an operating agreement. *Gottsacker*, 281 Wis. 2d 361, ¶ 45; Pet. Br. 35. While this is true, the same can be said for corporations, to an even greater degree. Corporations often have large numbers of governing documents, often more than LLCs, but Wisconsin courts have still determined that corporations should be subject to common law duties and protections. Therefore, the fact that LLC members may impose fiduciary duties upon one another by operating agreement, while true, does not preclude the imposition of common law fiduciary duties on LLC members.

Justice Roggensack, in her *Gottsacker* dissent, expressed a concern with applying fiduciary duties to LLCs because LLCs are creatures of statute and that, as such, members' obligations should be set by statute. *Gottsacker*, 281 Wis. 2d 361, ¶ 45. Since the Gottsacker decision in 2005, many jurisdictions have

applied common law fiduciary duties to LLC members, with no apparent problems. *Executive Center*, 823 F. Supp. 2d 883, 891–92.

This Court should hold that common law fiduciary duties apply between LLC members because the general trend of the law and sound public policy suggest that such a holding will promote the just and equitable resolution of disputes between LLC members.

II. SMITH HAS STANDING TO RECOVER HIS PORTION OF ACT'S LOST PROFITS BECAUSE HE WAS UNIQUELY INJURED BY KLEYNERMAN'S ACTIONS.

Under Wisconsin law, a party has standing to proceed in a direct action when he shows "an injury that is personal to him, rather than an injury primarily to the corporation." *Reget v. Paige*, 2001 WI App 72, ¶ 12, 242 Wis. 2d 278, 626 N.W.2d 302. An injury caused by an action of a director is an injury to an individual shareholder when the action affects that "shareholder's rights in a manner distinct from the effect upon other shareholders." *Jorgensen v. Water Works, Inc.*, 2001 WI App 135, ¶ 16, 246 Wis. 2d 614, 630 N.W.2d 230.

Smith suffered a "different" harm because Kleynerman's maneuvers behind Smith's back actively benefited Kleynerman to the direct detriment of Smith. In other words, Smith suffered harm while Kleynerman reaped the benefits of that harm. This harm did not result merely because Kleynerman continued to work with Red Flag post-transaction, but rather because

Kleynerman, unbeknownst to Smith, had designed the transaction and his relationship with Red Flag to achieve that end result. The court of appeals held that the record supported the inference that Kleynerman and Glaser engaged in coordinated acts, unknown to Smith, that were adverse to Smith's interests. *Smith v. Kleynerman*, 370 Wis. 2d 786, ¶ 32, App.011.

Kleynerman asserts 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 against Kleynerman because Kleynerman's breach of fiduciary duty only damaged ACT and could only be asserted through a derivative action. (Pet'r Br. 44.) However, in this case, Kleynerman's course of conduct gave rise to *both* direct and derivative claims for breach of fiduciary duty. *See, e.g.*, *Park Bank v. Westburg*, 2013 WI 57, ¶ 44, 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.*, ¶ 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* Part I.) 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. Smith is entitled to these damages because "a member's interest in a limited liability company is personal property." *Gottsacker*, 281 Wis. 2d 361, ¶ 50 (Roggensack, J. concurring), citing Wis. Stat. § 183.0703. Accordingly, Smith had a personal "right to receive a share of the profits and losses of [ACT] and the right to "vote or participate" in the management of [ACT]." *Id.*, citing Wis. Stat. § 183.0102(11). In addition, the traditional reasons for the "enduring distinction" between direct and derivative claims, such as concerns about dividing the share of the recovery, are not present in this case. *Park Bank*, 348 Wis. 2d 409, ¶ 44. ACT's only members are Kleynerman and Smith, and Smith's damages are the unique losses he sustained due to Kleynerman's actions.

The profits that 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.*, ¶ 18. Likewise, the *Notz* Court held that due diligence expenses that were paid for by all shareholders of a company that only one shareholder later acquired was a constructive dividend to the acquiring shareholder of which other shareholders were deprived. *Notz*, 316 Wis. 2d 640, ¶¶ 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.*, ¶ 28; *Jorgensen II*, 246 Wis. 2d 614, ¶ 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*, 316 Wis. 2d 640, ¶ 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 direct and unique 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*, 291 Wis. 2d 426, ¶ 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.

Kleynerman's actions affected Smith's interest in ACT, by removing all value from the LLC, and thereby eliminating any right for Smith to receive his share of the profits or losses of ACT. Kleynerman was not similarly affected because he had secured a significant benefit to himself, namely the acquisition

of all of ACT's intellectual property, business goodwill, and client information, by cutting Smith out of the picture and eventually acquiring ownership of Red Flag.

Because Kleynerman's breach of fiduciary duty uniquely injured Smith personally, while benefitting Kleynerman personally, Smith has standing to recover his personal damages in the form of his share of the lost profits.

III. THE COURTS BELOW PROPERLY ADMITTED SMITH'S EXPERT TESTIMONY.

Kleynerman next argues that the "circuit court ignored its gatekeeping function, and the court of appeals only compounded the error" by failing to apply the *Daubert* test to the admission of testimony by holding that Kleynerman's belated challenges to the expert's testimony "that reliability of methodology goes to weight and not admissibility." (Pet'r Br. 49.) This misinterprets the court of appeals' footnote on the issue, which merely states that the court of appeals agrees with the circuit court's holding that "Kleynerman's *challenges* go the weight, not the admissibility, of Rodrigues's testimony." *Smith v. Kleynerman*, 370 Wis. 2d 786, ¶ 38, n.3, P.App.014 (emphasis added). In fact, the trial court and the court of appeals properly understood that Kleynerman's challenges were not to the methodology, namely simple mathematical calculations, but rather to certain assumptions applied by the

expert. A challenge of that type goes only to the weight to be given to testimony, and not the admissibility of that testimony. *State v. Giese*, 2014 WI App 92, ¶ 28, 356 Wis. 2d 796, 854 N.W.2d 687, *review denied*, 2015 WI 24, ¶ 28, 862 N.W.2d 602.

Kleynerman's argument misapplies the Wis. Stat. § 907.02(1) (*Daubert*) standard by attacking the assumptions Rodrigues utilized to form his opinion, (Pet'r Br. 56) without acknowledging that such factors bear on the weight to be given to expert testimony, but not the admissibility of expert testimony. Kleynerman's argument also glosses over the fact that he did not sufficiently articulate a challenge to Rodrigues' opinion or testimony, in either a pretrial *Daubert* motion or by raising a specific objection during trial.

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." Wis. Stat. § 907.02(1). 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, 364 Wis. 2d 692, 869 N.W.2d 493, *review granted sub nom. Seifert v. Balink*, 2016 WI 2, ¶ 15, 365 Wis. 2d 741, 872 N.W.2d

668. "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, when applying the *Daubert* standard, 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*, 364 Wis. 2d 692, ¶ 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.189–90.) 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").

In addition, the trial court's ruling on Kleynerman's belated challenge

does not support a claim that the circuit court "ignored" the gatekeeping function. "When issuing oral rulings on *Daubert* questions, trial judges need not recite the *Daubert* standard as though it were some magical incantation." *Walker v. Soo Line R. Co.*, 208 F.3d 581, 590 (7th Cir. 2000) (internal quotation omitted). Kleynerman's objection to the Rodrigues testimony was vague, undeveloped and failed to articulate any specific principle or methodology that lacked a reliable foundation. (R.153, 193:17–194:1, 195:21-196:1), and was accordingly 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 testified that he had significant education, training and experience in the field of accounting. (R.153, 104-111, R-App.173–80; R.139, PX26.) Rodrigues also testified that he 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.), and has served as a forensic accounting investigator for United States Bankruptcy Court for the Eastern District of Wisconsin. (*Id.*, 108:4-12.) The record reflects that Rodrigues has provided expert opinions and testimony in numerous cases, including lost profit calculations. (*Id.*, 108:2-109:2.)

Rodrigues' methodology 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.181–82; 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 2011. (*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.)

The principles and methodologies Rodrigues utilized in order to state his opinion amounted to nothing more than simple mathematics, applied to a new set of numbers. Kleynerman's objection, as it is now articulated, is presumably not a dispute with the addition and multiplication used to make these calculations, but is really a dispute with the assumptions Rodrigues made in order to provide his damages testimony. A challenge to underlying assumptions

in an expert opinion is exactly the type of question that "go to the weight of the evidence, not to its admissibility." *Giese*, 356 Wis. 2d 796, ¶ 28. It is clear that *Daubert's* reliability inquiry "is not intended to supplant the adversarial process." *Bielskis v. Louisville Ladder, Inc.,* 663 F.3d 887, 894 (7th Cir. 2011).

Kleynerman was not prevented from challenging the underlying facts, or the accuracy of Rodrigues' assumptions, or even from proposing an alternative theory for the calculations in front of the jury. In fact, Rodrigues was vigorously cross examined on the facts and assumption behind his calculations. (R.153, 161:14-190:3, 191:16-192:6). Fact and credibility questions, such as those underlying Kleynerman's objections, are properly reserved for a jury to determine. *State v. Giese*, 356 Wis. 2d 796, ¶ 28, *see also State v. Abbott Labs.,* 2012 WI 62, ¶ 69, 341 Wis.2d 510, 816 N.W.2d 145. Such an approach is entirely consistent with the standard set forth in *Daubert*, that "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert,* 509 U.S. at 596.

Finally, Kleynerman attempts to fault Rodrigues for not offering an opinion "that ACT would have been able to achieve the same revenue as Red Flag," or maintain the same profit margins, 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. (Pet'r Br. 56.) A calculation of damages is proper if "the jury can estimate with reasonable probability what would have happened had the injury not occurred" *State v. Abbott Labs.*, 2012 WI 62, ¶ 79, 341 Wis. 2d 510, 816 N.W.2d 145, citing *Schulz v. St. Mary's Hosp.,* 81 Wis.2d 638, 657, 260 N.W.2d 783 (1978). Accordingly, 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.*, 341 Wis.2d 510, ¶ 80.

Kleynerman cross-examined Rodrigues on the assumptions underlying his opinion (R.153, 161:14-190:3, 191:16-192:6), and made these same arguments to the jury in closing arguments (R.154, 68:12 - 71:4). After listening to all of the testimony and considering Kleynerman's arguments, the jury awarded $499,000 to Smith. (R.112). The jury's award is certainly "within the realm of reason in view of the evidence." *Abbott Labs.*, 341 Wis.2d 510, ¶ 26 (*citing Rupp v. Travelers Indem. Co.,* 17 Wis.2d 16, 26, 115 N.W.2d 612 (1962)). The trial court and the court of appeals properly concluded that Rodrigues' testimony was admissible.

CONCLUSION

This Court should affirm the court of appeals' decision in favor of Smith on his breach of fiduciary duty claim because Kleynerman owed Smith a fiduciary duty due to Kleynerman's position as corporate officer of ACT and because public policy supports the application of fiduciary duties to LLC members. Furthermore, Smith had standing to pursue an individual claim because Kleynerman's breach of fiduciary duty caused a unique and different injury to Smith. Finally, under *Daubert*, Smith's expert provided competent admissible evidence.

November 30, 2016,

HANSEN REYNOLDS LLC

By: _____

Timothy Hansen, SBN: 1044430
thansen@hrdclaw.com
Andrew Kramer, SBN: 1055182
akramer@hrdclaw.com
Danielle M. Nardick, SBN: 1097696
dnardick@hrdclaw.com
316 N. Milwaukee St., Suite 200
Milwaukee, WI 53202
Office: (414) 455-7676
Fax: (414) 273-8476

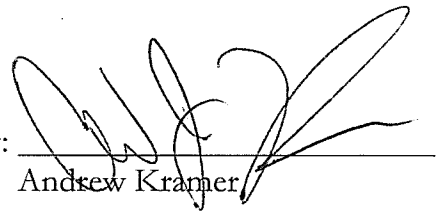
Attorneys for Plaintiff-Appellee-Respondent Scott Smith

CERTIFICATION AS TO FORM, LENGTH AND ELECTRONIC FILING

I hereby certify that this brief meets with the form and length requirements of Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of the brief is 10,875words.

I hereby certify that I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that the electronic brief is identical in content and format to the printed form of the brief filed as of this date.

Dated: November 30, 2016

By: 
Andrew Kramer

CERTIFICATION OF SERVICE

I hereby that on November 30, 2016, I filed with the Court by messenger an original and twenty-one copies and served three copies of the Response Brief and Appendix of Plaintiff-Respondent-Cross-Appellant Scott H. Smith upon counsel for the parties by electronic and first class mail:

Thomas L. Shriner, Esq.
Max B. Chester, Esq.
Philip C. Babler, Esq.
Foley & Lardner LLP
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Dated: November 30, 2016

By: _____
Andrew Kramer