STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

District IV Appeal No. 2022AP001958
Circuit Court Case No. 2022CV00043

KARIN EICHHOFF, STEVEN SPEER AND RODERICK RUNYAN,

Plaintiffs-Appellants,

v.

NEW GLARUS BREWING COMPANY AND DEBORAH A. CAREY,

Defendants-Respondents.

On Appeal from the Order and Judgment of the Green County Circuit Court, Honorable Faun Marie Phillipson, Branch 1, Presiding, dated October 6, 2022

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

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ARGUMENT

I. DEFENDANTS HAVE CONCEDED SECTIONS I.A AND I.B OF SHAREHOLDERS' BRIEF.

The Shareholders' first two appellate arguments were that: (1) the wherefore clause of a complaint cannot be considered in determining whether a cause of action has been stated; and (2) the circuit court confused the cause of action with the remedy.[1]

Despite each filing a 9,000+ word brief, neither Defendant addresses these arguments. Where a respondent fails to respond to arguments raised by the appellant, this Court treats those arguments as conceded. *See* ***State v. Chu***, 2002 WI App 98, ¶41, 253 Wis. 2d 666, 643 N.W.2d 878 ("Unrefuted arguments are deemed admitted."). "Respondents on appeal cannot complain if propositions of appellants are taken as confessed, which they do not undertake to refute." ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp***., 90 Wis. 2d 97, 109, 279 N.W.2d 493 (1979). This Court should decide this case on the narrow argument first raised by the Shareholders and conceded by Defendants: the circuit court erred by concluding the Complaint failed to state a claim under Wis. Stat. § 180.1430 based on the wherefore clause, which formed no part of the Complaint.

II. DEFENDANTS HAVE VIOLATED WISCONSIN'S RULES OF APPELLATE PROCEDURE BY INCORPORATING ONE ANOTHER'S BRIEFS BY REFERENCE.

Wisconsin Stat. Rule 809.19(5)(b) states: "In appeals involving more than one respondent, … each respondent may file a separate brief **or** a joint brief with another respondent."[2] The statute sets out two alternatives: separate briefs by each

[1]Plaintiffs-Appellants are referred to as "Shareholders"; Defendants-Respondents as "Defendants"; New Glarus Brewing Company as "Brewery"; and Deborah Carey as "Carey".

[2]Wisconsin Stat. Rule 809.15(5)(b) diverges from its federal counterpart, Fed. R. App. P. 28(i), which specifically permits adopting another party's brief by reference: "In a case involving more than one

respondent or a joint brief – not both. Defendants have done both, each arguing distinct issues while also "join[ing] in full" and "adopt[ing] in full" the other Defendant's brief. Defendants have improperly doubled their word count. *See* Wis. Stat. Rule 809.19(8)(c). Incorporation by reference "is not permissible appellate advocacy; at a minimum, it creates the potential for exceeding the allowable length of briefs and violates the rule addressing the required form of appellate arguments." ***Bank of America, N.A., v. Neis***, 2013 WI App 89, ¶11 n.8, 349 Wis. 2d 461, 835 N.W.2d 527 (citing Wis. Stat. Rule 809.19(1)(e)); *see also* ***Sands v. Menard, Inc.***, 2013 WI 47, ¶5 n.2, 347 Wis. 2d 446, 831 N.W.2d 805 (describing briefs in cross-appeals that incorporated by reference prior response briefs as "disturbing … attempts to circumvent the word limits set forth in Wis. Stat. Rule 809.19(8)(c)").

Defendants' conduct is sanctionable and results in each Defendant conceding arguments on appeal. However, the Shareholders shall – to the extent possible – address Defendants' discrete arguments within the statutory limits.

III. THE SHAREHOLDERS HAVE NOT WAIVED A REQUEST FOR DISSOLUTION AND CAREY HAS NOT ESTABLISHED JUDICIAL ESTOPPEL.

Carey argues that the Shareholders waived any ability to request dissolution, or, alternatively, that judicial estoppel applies. Carey's arguments are based on the faulty premise that the Shareholders have taken inconsistent positions in the circuit court and on appeal. They have not. The Shareholders have maintained that their Wis. Stat § 180.1430 claim is equitable and the circuit court may order judicial dissolution or another remedy.[3] This is precisely why the Complaint's wherefore clause identified alternative remedies. The Shareholders (and the law) have always been clear that regardless of their requests, the circuit court sitting in equity has exclusive authority to determine remedy. (R.52, 39:12-14, APP-199).

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appellant or appellee, … any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief." This is absent from Rule 809.15(5)(b).

[3] At the motion to dismiss hearing, the Shareholders' counsel argued that if dissolution is "the relief the Court deems appropriate the Court has that power to grant that relief." (R.52, 39:12-14; APP-199).

Waiver does not apply. The Shareholders have not intentionally relinquished or abandoned any right. *See* ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612. They consistently argued that they pled a claim for judicial dissolution and the circuit court may order that or any other remedy.

Judicial estoppel also does not apply. *See* ***Olson v. Darlington Mutual Insurance Co.***, 2006 WI App 204, ¶4, 296 Wis. 2d 716, 723 N.W.2d 713 (elements of judicial estoppel are (1) a later position that is clearly inconsistent with the earlier position; (2) the facts at issue are the same in both cases; and (3) the party to be estopped must have convinced the court to adopt its position). The Shareholders have taken consistent positions, and Carey cannot establish the first element. Carey also fails on the third element. The Shareholders argued to the circuit court that it had wide latitude to fashion a remedy, including dissolution or a buyout. (R.49:35-36). The only accurate way to explain the proceedings to date is that the circuit court expressly rejected, rather than adopted, the Shareholders' position. The elements of judicial estoppel are not met.

IV. CAREY IS A PROPER PARTY.

Carey argues that she should be dismissed from the dissolution claim because relief is not available against her. (Brief of Defendant-Respondent Deborah A. Carey, 38) ("Carey Br."). Section 180.1431(1) states that it is not necessary to make Shareholders parties *unless* relief is sought against them individually. The Shareholders *do* seek relief against Carey. The Shareholders' claims are based on allegations of wrongdoing by Carey, and the circuit court on remand may order equitable relief directed at Carey, making her a proper party.

V. CAREY MISSTATES OR IGNORES WISCONSIN CASE LAW SUPPORTING ALTERNATIVE REMEDIES.

Carey ignores many of the Shareholders' arguments on alternative remedies and misconstrues the plain meaning of the cited cases. The only Wisconsin law on

point supports the Shareholders' position that courts have equitable authority in dissolution cases to meet the needs of the case. ***Northern Air Services, Inc. v. Link***, 2011 WI 75, ¶¶93-94, 336 Wis. 2d 1, 804 N.W.2d 458; ***Mulder v. Mittelstadt***, 120 Wis. 2d 103, 115, 352 N.W.2d 223 (Ct. App. 1984). Moreover, other jurisdictions follow suit.

Carey harps on the supposed "disparate treatment" that would result from the application of alternative remedies in dissolution cases, insinuating that this would make alternative relief improper. (Carey Br., 45, 68, 70). The sole authority for this proposition is a deliberately misleading citation to ***Strong v. Fromm Laboratories, Inc.,*** 273 Wis. 159, 77 N.W.2d 389 (1956), which Carey quotes as "dissolution 'protect[s] the rights of ***all shareholders.***'" (Carey Br., 45). That is not what the case says. Rather, the ***Fromm*** Court directed the trial court to keep the period of receivership to a minimum because reducing the financial burden of receivership would "fully protect the rights of all shareholders." There is no authority for Carey's supposed proposition.

Carey argues the "plain meaning" of § 180.1430 supports her restrictive reading of remedy. (Carey Br., 42). Carey misses the point that the statute is permissive ("may" vs. "shall") and that it must be read in the equitable context in which it operates. More importantly, Carey fails to confront the fact that the ***Northern Air*** Court, 336 Wis. 2d 1, ¶94, described plaintiff's damages theory requesting alternative relief in the form of a buyout as "well-articulated." Carey's attempts to cast this as mere "dicta" are improper. *See* ***Zarder v. Humana Ins. Co.,*** 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682.

Carey relies on the misapplication of three cases addressing equity in the context of dissolution: (1) ***Strong v. McCogg***, 55 Wis. 624, 13 N.W. 894 (1882); (2) ***Goodwin v. Milwaukee Lithographing Co.***, 171 Wis. 351, 177 N.W. 618 (1920); and (3) ***Fromm***, 273 Wis. 159. First, the reasoning of ***McCogg*** was disavowed in ***Goodwin***, where the court explained that limits suggested by prior cases on a court's equitable authority to dissolve corporations resulted from the nature of *corporations*

themselves in the 1800s, not the nature of equitable authority itself. ***Goodwin***, 177 N.W. at 621. In fact, ***Goodwin*** explicitly recognized that "there is unquestionably a broad power of equity applicable where wrong is shown of such a nature as to arouse the equitable jurisdiction." ***Id***. ***Goodwin*** directly held that courts of equity can and should consider alternative remedies before ordering the corporate death penalty: "where officers and directors … have abused their power … and there is *no other adequate remedy for the protection of the minority stockholders*, a court in equity may, at the suit of the minority stockholder, appoint a receiver[.]" ***Id.,*** 621 (emphasis added).

Last, the ***Fromm*** Court**,** 273 Wis. at 173-74, condoned dissolution of a successful business enterprise, effectively rejecting any contention that a court's authority to dissolve a corporation was "circumscribed" to situations involving corporate ruin. (Carey Br., 61). ***Fromm*** supports the Shareholders' arguments. Contrary to Carey's assertions, ***Fromm*** did not find that "no alternative corrective remedy" was available because of statutory limits on the court's equitable authority. ***Id***. Instead, ***Fromm*** held that there was no alternative remedy available "in the instant case" only because the situation could not be fixed any other way – the directors' deadlock made it legally impossible for the corporation to continue to exist. ***Id***. Moreover, the court remanded with directives for the lower court to attempt equitable alternatives to liquidation, largely because the company was successful. ***Id***.

Carey implies the Shareholders must prove they have no adequate remedy *at law* or exhaust other remedies before they can be awarded equitable relief. (Carey Br., Section II.D.). Carey also argues that the Legislature "chose not to include equitable remedies in judicial dissolution actions." These arguments are perplexing, given that dissolution *is* an equitable remedy and courts proceeding under the dissolution statute are doing so in equity. ***Gull v. Van Epps***, 185 Wis. 2d 609, 517 N.W.2d 531 (Ct. App. 1994). Carey points to no authority that a minority shareholder proceeding under § 180.1430 must exhaust other remedies or that relief can only be had if the shareholder proves that no *legal* (i.e. monetary) remedies are available.

Carey's arguments concerning the principles of statutory interpretation are unpersuasive. The relevant principle is whether the exercise of the court's equitable authority conflicts with a "statutory mandate" and a "clear and valid legislative command." ***GMAC Mortg. Corp. v. Gisvold***, 215 Wis. 2d 459, 476, 572 N.W.2d 466 (1998). The statute at issue is permissive and nothing in its plain language can be read to curtail the court's long-standing authority to apply a broad array of equitable remedies. ***Mulder,*** 120 Wis. 2d at 115-16; ***Goodwin***, 177 N.W. at 621.

Moreover, the presence of broader remedies in the close corporation statutes is not convincing. When "a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort, or even uniform construction by inferior courts … they are to be understood according to that construction." ***Estate of Miller v. Storey***, 2017 WI 99, ¶51, 378 Wis. 2d 358, 903 N.W.2d 759. "Legislative inaction in the wake of judicial construction of a statute indicates legislative acquiescence." ***Id.*** No Wisconsin court has ever interpreted § 180.1430 in the extreme and limited manner Carey proposes. Rather, courts have indicated support for the availability of alternative equitable remedies in such cases. Legislative inaction in the presence of such authority is fundamental acquiescence to the court's broad authority.

VI. THE SHAREHOLDERS HAVE STATED A CLAIM UNDER § 180.1430.

The Brewery's brief – which is almost entirely non-responsive to the Shareholders' opening brief – argues that the Shareholders have failed to state a claim under § 180.1430 because: (1) the Complaint relies on legal conclusions, rather than factual allegations; and (2) the Complaint does not allege direct injuries to the Shareholders.

The Shareholders' Complaint contains detailed factual allegations setting out a pattern of oppressive conduct, as argued in the Shareholders' opening brief. (Brief of Plaintiffs-Appellants, 17-23). Section I.A. of the Brewery's brief argues that the Shareholders "rely on legal conclusions" and "ignore the clear propriety" of the acts

comprising the alleged oppression. (Brief of Defendant-Respondent New Glarus Brewing Company, 22) ("Brewery Brief"). The Brewery mischaracterizes the Complaint and ignores the breadth of its allegations. (Brewery Br., 14, 18, 21).

In Sections I.B. and I.C. of its brief, the Brewery mixes several arguments, including arguments that: the conduct alleged in the Complaint is not oppressive as a matter of law; the Shareholders' claims are speculative; and there are no allegations supporting direct injuries to the Shareholders. Citing ***Reget v. Paige***, 2001 WI App 73, 242 Wis. 2d 278, 626 N.W.2d 302, and ***Jorgensen v. Waterworks, Inc.***, 218 Wis. 2d 761, 783, 582 N.W.2d 98 (Ct. App. 1998), the Brewery argues the Complaint fails to allege oppressive conduct. The Brewery picks and chooses conduct that it deems "not oppressive as a matter of law" while ignoring the fact that the relevant inquiry reviews the course of conduct as a whole and its cumulative effect on the minority Shareholders. *See* ***Jorgensen***, 218 Wis. 2d at 776, 784. The Brewery cites to ***Reget***, 242 Wis. 2d 278, ¶15, to argue that the Brewery has no obligation to pay distributions. This misinterprets the Shareholders' argument: although distributions are not *required*, hoarding $100 million in retained earnings while refusing to distribute profits beyond tax obligations in favor of stockpiling millions of dollars in uninvested cash or funneling it to Carey's family foundation is *evidence* of oppression. (R. 49:28-29).

The Brewery's argument that the Shareholders cannot make claims regarding conduct that has been threatened or will occur in the future is contrary to the language of § 180.1430(2)(b), which permits oppression claims premised upon allegations "that those in control … *will act* in a manner that is illegal, oppressive or fraudulent." (emphasis added). The cases cited by the Brewery in support of this argument deal with entirely different scenarios (proof of damages and ripeness of a declaratory judgment action).

The Brewery next argues that Defendants' actions did not cause direct injuries to the Shareholders. First, the Wisconsin Supreme Court has conclusively stated "that a claim for judicial dissolution based on oppressive conduct … is not a derivative

claim." ***Notz v. Everett Smith Group, Ltd.***, 2009 WI 30, ¶34, 316 Wis. 2d 640, 764 N.W.2d 904 (citing 12B William Meade Fletcher, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5820.10 (rev. ed. 2000). The Brewery's assertion that Carey's decision-making should be viewed under the business judgment rule is also incorrect. The Brewery relies on ***Reget***, 242 Wis. 2d 278, ¶¶17-18, but the section of ***Reget*** dealing with oppression does not discuss or mention the business judgment rule. ***Id.***, ¶¶23-26. The business judgment rule is not a shield for oppressive conduct.

Last, the Brewery argues that there is no oppression as a matter of law, ignoring vast swaths of the Complaint and asking this Court to prematurely weigh the allegations, all of which must be taken as true. ***Kohlbeck v. Reliance Const. Co., Inc.***, 2002 WI App 142, ¶9, 256 Wis. 2d 235, 647 N.W.2d 277. The conduct alleged in the Complaint makes a substantial case for oppression, surpassing the nature of allegations in cases like ***Jorgensen***.

The Shareholders stated a claim under § 180.1430.

VII. THE SHAREHOLDERS STATED A CLAIM FOR SECURITIES FRAUD.

The Brewery attempts to distinguish cases cited by the Shareholders, arguing there are strong public policies supporting intentional misrepresentation claims in other contexts. The Brewery attempts to distinguish ***Ollerman v. O'Rourke, Co.***, 94 Wis. 2d 17, 288 N.W.2d 95 (1980), arguing that decision was based on strong public policies specific to real estate transactions. The Brewery ignores the fact that the public policy for securities fraud is supported in case law and direct legislative action through Ch. 551. The public policy that ***Ollerman*** references mirrors the language within Wis. Stat. § 551.509(3), which imposes liability on a buyer to the seller unless the buyer can prove that the buyer did not know that information was being omitted or undisclosed. The statute shifts the burden in a securities context to require the insider to prove that it did not know information was being withheld and, failing in that proof, an innocent seller is able to recover damages for selling shares based on

incomplete information.

The Brewery further mistakenly argues that the securities fraud claim must fail because the Shareholders knew information was being withheld. The Shareholders' claim goes far beyond the withholding of information contained within the stock valuations, including Defendants' failure to disclose outside offers at specific prices seeking to buy Carey's shares which information would impact the decision of any reasonable investor. (R.32, ¶¶174-182, APP-048-053).

Second, the securities fraud claim arises both from information that was not disclosed, but also which the Shareholders were entirely unaware of until they later received the valuations. The Complaint alleges Defendants knew they were concealing fraud when they ignored requests for the valuation reports. Meanwhile, the Shareholders had no way of knowing that there would be information in the valuation reports that would lead a reasonable investor to refuse the sale on the proposed terms.

The Shareholders' securities fraud claim is not barred by the statute of limitations. The Shareholders did not learn of facts constituting the alleged securities violations until June 2021. (R.32, ¶177). The statute of limitations contained in § 551.509(10) states an action must be filed "within the earlier of 2 years after discovery of the facts constituting the violation or 5 years after the violation." The claim was brought within that timeframe.

The Brewery's argument regarding Runyan's claim fails because § 551.509(7) provides for joint and several liability for violations of Ch. 551. The Complaint alleges that Carey and the Brewery were responsible for the misrepresentations and omissions, even if the ESOP ultimately purchased the shares. (R.32, ¶145).

The dismissal of the Shareholders' claims was improper.

CONCLUSION

The Shareholders ask this Court to reverse the circuit court's order granting the Defendants' Motions to Dismiss, and to remand the case to the circuit court for

further proceedings.

Dated this 20th day of April, 2023.

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FORM AND LENGTH CERTIFICATION

I hereby certify that this Reply Brief of Plaintiffs-Appellants conforms to the rules contained in § 809.19(8)(b), (bm) & (c) for a brief. The length of this brief is 2,996 words.

Dated this 20th day of April, 2023.

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