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No. 2022AP1958

Green County Circuit Court

Case No. 2022CV43

**KARIN EICHHOFF, STEVEN SPEER AND
RODERICK RUNYAN,****Plaintiffs-Appellants-Petitioners,****v.****NEW GLARUS BREWING COMPANY
AND DEBORAH A. CAREY,****Defendants-Respondents.**

**DEBORAH A. CAREY'S RESPONSE IN OPPOSITION
TO PETITION FOR REVIEW**

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Introduction

Despite two courts concluding they lack standing and cannot state a claim, Petitioners, Karin Eichhoff, Steven Speer, and Roderick Runyan (“the Shareholders”¹), continue their quest to extract more money from Respondents, Deborah Carey and New Glarus Brewing Co. (“the Brewery”), by suing for “shareholder oppression” and “securities fraud.” This Court should end this quixotic journey. As set forth below, these dissident Shareholders fail to show that the Court of Appeals committed error or that review is otherwise warranted under Wis. Stat. § 809.62(1r).

But, as an initial matter, the Court should not accept review here because the Shareholders press their claims forward with allegations from their amended complaint they *now know are false* or legally inapt (summary judgment in parallel litigation between the parties in Dane County determined that the Shareholders

¹ Eichhoff, Speer, and Runyan are referred to as the Shareholders for ease of reference in this opposition, they are just a few of more than 20 non-Carey Shareholders of the Brewery, none of whom have asserted claims against Carey or the Brewery.

could not raise an issue of material fact and proceed to trial on the vast majority of their identical allegations).² They do this at their own risk—Wis. Stat. § 802.05 prohibits parties and their counsel from “later advocating” a position from a prior pleading that they know to violate the statute’s provisions. Thus, the complaint at the heart of the petition is noncompliant with the rules, which makes review inappropriate. *See* Wis. Stat. § 809.62(3)(c) (opposition to petition for review should identify “any perceived misstatements of fact or law set forth in the petition that have a bearing on the question of what issues properly would be before the court if the petition were granted.”) (cleaned up)³. Based on their petition, the Shareholders are improperly asking this Court to rule on claims

² Pursuant to Wis. Stat. § 902.01, this Court may take judicial notice of the summary judgment decision from the Dane County action, involving the same parties and circumstances. *See Karin Eichhoff et al. v. Deborah A. Carey*, Dane County Case No. 21-CV-2011. (R-App. 04.)

³ This brief uses “(cleaned up)” to indicate that quotation marks, alterations, and citations have been omitted from quotations. *See* Jack Metzler, *Cleaning Up Quotations*, 18 J. App. Prac. & Process 143 (2017). Further, in this brief emphasis is added unless otherwise noted.

the Shareholders know are contrary to the undisputed summary judgment record in Dane County.

Reasons to Deny the Petition

The Shareholders’ petition fails to present a “special and important reason” for this Court to grant review. Wis. Stat. § 809.62(1r). It does not present a novel issue. Pre-existing precedent already answers the Shareholders’ questions—they just want the prior decisions reexamined to get a different result. *Id.* at § (c)2. Nor do they show a real conflict between the Court of Appeals’ decision and any “controlling law”—rather, they point out the obvious that different Wisconsin courts have applied the standard for oppressive conduct from *Jorgensen I* and found for and against plaintiff-shareholders. *Id.* at § (d); *Jorgensen v. Water Works, Inc. (Jorgensen I)*, 218 Wis. 2d 761, 782-83, 582 N.W.2d 98 (Ct. App. 1998).⁴

⁴ Petitioners cite only unpublished cases to show that there is conflict between the court of appeals cases applying the legal standards at issue. Unpublished cases are non-precedential, so they are not “controlling” for purposes of Wis. Stat. § 809.62(1r)(d). Wis. Stat. § 809.23(3).

First, this Court's precedent and Chapter 180 clearly establish guiderails for a shareholder's suit against a corporation's director or majority shareholder relating to the management of the entity: if the primary injury is to the corporation and trickles down to the shareholder, then the shareholder must pursue a derivative claim because "rights of action accruing to a corporation belong to the corporation, and ***an action at law or in equity, cannot be maintained by the members as individuals. . . .***" *Rose v. Schantz*, 56 Wis. 2d 222, 229, 201 N.W.2d 593 (1972); *Marshfield Clinic v. Doege*, 269 Wis. 519, 526, 69 N.W.2d 558 (1955). Only when the primary injury is to the shareholder, may they pursue a direct claim. This is referred to herein as the "shareholder standing rule."

The shareholder standing rule applies here. Consistent with *Rose*, Wisconsin courts have held that dissolution actions under Wis. Stat. § 180.1430(2)(b) based on oppressive conduct (a "shareholder oppression claim") may not be maintained where the primary injury is to the corporation. *Reget v. Paige*, 2001 WI App

73, ¶ 25, 242 Wis. 2d 278, 626 N.W.2d 302. Similarly, when considering whether a shareholder’s claim for dissolution on the grounds of oppressive conduct that relied on facts that the Court had determined alleged a direct injury—this Court noted that such a shareholder oppression claim is “not a derivative claim.” *Notz v. Everett Smith Grp., Ltd.*, 2009 WI 30, ¶ 34, 316 Wis. 2d 640, 764 N.W.2d 904.

Applying the shareholder standing rule and the well-known legal standard for a direct injury, the Court of Appeals concluded the Shareholders could not pursue a remedy for derivative injuries in a shareholder oppression action. (App. 001-039 at ¶¶ 19, 40, 45, 50, and 53.) The Shareholders do not challenge the Court of Appeals’ characterization of their injuries as derivative. Instead, they want this Court to abolish the shareholder standing rule when a shareholder merely alleges oppression.

Review is not warranted simply because the Shareholders dislike the requirement to support a shareholder oppression claim with a direct injury. This Court does not need to “develop, clarify

or harmonize the law” because the law is clear, and courts have consistently applied it. The Shareholders *say* that courts have expressed confusion or reached inconsistent results, but do not support this claim with anything. The Shareholders’ first issue does not satisfy § 809.62(1r)(c).

Again foiled by well-established law, the Shareholders’ second issue asks for this Court to accept review and expand the definition of oppressive conduct to fit their situation—passive investors who, long ago, purchased shares in a company in which they had little voice because, as they knew, Carey would be the controlling shareholder, sole director, and company president; now, they want the corporation to reverse course, invest less in its business and community, and focus solely on distributing more cash to shareholders (they would also take a buyout at an astronomical price). The Brewery has, of course, maximized shareholder value. In 2019, the Shareholders made a 20,000% return on their initial investment by selling a portion of their shares to the Brewery or Employee Stock Ownership Plan

(“ESOP”) in a voluntary process. (App. 003-004, ¶¶ 3-6.) Additionally, they **do** receive distributions that exceed their pass-through tax liability; this is an undisputed fact in the Dane County action, and just one example of the Shareholders telling this Court something they know to be untrue.⁵ Finally, they complain about Carey proposing an amended shareholder agreement, but fail to tell the Court that amending the shareholder agreement requires unanimous shareholder approval. Nor do they tell the Court their objections to Carey’s proposal stopped the vote before it happened so Carey and the Brewery could consider the Shareholders’ concerns (they sued before Carey could propose a revised amendment). (App. 028, ¶ 66; App. 080-085, ¶¶ 149-165.)

This is not shareholder oppression, and this Court does not need to revisit *Jorgensen I* to conclude otherwise. Existing case law

⁵ The deposition testimony supporting this statement was filed under seal in Dane County. (Dane County Case No. 21-CV-2011, Dkt. 289 at 159:13-159:22, Dkt. 352 at 50:15-52:9, and Dkt. 356.) If the Court is unable to access this testimony via the online court record, Carey will supplement the record on appeal upon this Court’s request.

shows that the Shareholders are not oppressed. There are no controlling (or non-controlling) decisions that suggest otherwise. Indeed, in light of the controlling case law that would need to be reexamined if this Court grants review, it is unclear how the Court of Appeals' decision conflicts with "controlling" opinions of this Court or the court of appeals. To the extent the Shareholders (incorrectly) say the court of appeals' shareholder oppression decisions are in conflict with each other, they point to non-precedential decisions that do not satisfy § 809.62(1r)'s requirement for the lower court decision to be in conflict with "controlling" law.

Finally, when the Brewery or the ESOP purchased shares from the Shareholders, neither purchaser guaranteed that the price offered for the shares exceeded any specific classification of value other than that was the price offered. The Brewery and ESOP made no actionable representations about value. In the absence of such a representation or any requirement for the Brewery to provide liquidity to shareholders, the court of appeals

did not err by affirming the dismissal of the securities fraud claim, and there are no concomitant issues with this ruling justifying review. The ruling below was the result of a straightforward analysis of a statute based on a model rule applied to these facts.

The petition for review should be denied.

I. Wisconsin Courts Have Already Concluded a Shareholder Oppression Claim Requires a Direct Injury, So the Petition Does Not Satisfy Wis. Stat. § 809.62(1r).

A fundamental tenet of corporate law is that “rights of action accruing to a corporation belong to the corporation, and an action at law or in equity, cannot be maintained by the members as individuals. . . .” *Rose*, 56 Wis. 2d at 229; Wis. Stat. §§ 180.0741 *et seq.* Shareholders do not have standing to pursue derivative injuries while litigating individually. Only a derivative plaintiff who “fairly and adequately represents” the interests of the Brewery and the other shareholders can pursue a claim for these types of injuries. *See* Wis. Stat. § 180.0741(2). By contrast, when a shareholder’s injury is “direct” or is a personal harm to the shareholder—e.g., losing a right to participate and receive a share

of profits through compensation, employment termination, or being removed from the board—the shareholder may pursue a direct claim against a director or majority shareholder.

Wisconsin courts have ***already concluded*** the shareholder standing rule applies in shareholder oppression actions. Because shareholder oppression claims are a type of direct claim—i.e., “not a derivative claim,” *Notz*, 316 Wis. 2d 640, ¶ 34—the primary injury supporting the claim must be a direct injury to the shareholder. Thus, in order to pursue a shareholder oppression claim, the shareholder ***must*** allege a personal and direct injury. *Reget*, 242 Wis. 2d 278, ¶ 25. A shareholder oppression claim cannot solely arise from injuries to the corporation (e.g., corporate waste, or misappropriation of corporate assets).

Contrary to what the Shareholders argue, the Wisconsin Supreme Court did not rule in *Notz* that an allegation of shareholder oppression moots the firmly-established legal principle that an individual shareholder does not have standing to pursue an individual claim for a derivative injury in “an action at

law or in equity” *Rose*, 56 Wis. 2d at 229. Rather, *Notz* merely observed “that a claim for judicial dissolution based on oppressive conduct, as here, is not a derivative claim.” 316 Wis. 2d 640, ¶ 34 (cleaned up). The “as here” language referred to the fact that *Notz*’s shareholder oppression claim alleged similar injuries to his breach of fiduciary duty claim, which the opinion had earlier concluded involved a direct injury. In this context, stating the shareholder oppression claim was “not a derivative claim” made sense because it stemmed from an injury the Court concluded was direct.

Reget and *Notz* confirm that the Shareholders’ petition fails to present a novel issue. Settled law already answers the question of whether the shareholder standing rule applies in actions brought by a shareholder under the corporate dissolution statute. The issue does not need this Court’s clarification.

The lower courts have had no trouble determining (as courts have for decades) whether allegedly oppressive conduct harms the plaintiff individually and, if not, dismissing the action. *E.g.*, *Jorgensen v. Water Works, Inc. (Jorgensen II)*, 2001 WI App 135,

¶¶ 4, 18, 246 Wis. 2d 614, 630 N.W.2d 230 (permitting direct claim over termination and cessation of management fees to plaintiffs while payments continued for other shareholders); *Reget* 242 Wis. 2d 278, ¶ 16 (rejecting direct claim that claimed injury to corporation from excessive compensation to officers or directors).

The Court of Appeals’ cogent analysis shows that this standard is workable in practice. (*See generally* App. 008-029, ¶¶ 19-68.) The court applied the well-established test for determining if an injury is direct or derivative—whether the “injury resulting from the complained-of action [] was primarily inflicted on the shareholder, not the corporation,” (App. 009, ¶ 21)—and concluded that the Shareholders’ alleged injuries were either derivative or not injuries at all (discussed *infra*). The Court of Appeals’ decision looked for a direct injury in accord with existing precedent, as well as fundamental principles of corporate law and the law of other jurisdictions. But all of the harms the Shareholders have allegedly experienced trickle down to them through owning shares in the Brewery; the primary injury is to the

Brewery (e.g., allegedly overpaying to rent property from Carey, not charging enough to rent space to the Distillery, or employing Carey's very-qualified husband and daughter). Even the Shareholders do not appear to have a problem with how the court of appeals determined the shareholder standing rule barred their claim. Rather, they think the rule does not apply.

But *Reget*, *Jorgensen I*, and *Notz* all stand for the proposition that the shareholder standing rule does apply to shareholder oppression claims. The Shareholders fail to show why the Court should reexamine these cases, let alone how a departure from *stare decisis* and overruling or modifying any of these decisions would be appropriate under the circumstances. See *State v. Johnson*, 2023 WI 39, ¶¶ 20-21, 407 Wis. 2d 195, 990 N.W.2d 174 (explaining when “special justifications exist for overruling precedent”).⁶

⁶ As *Johnson* recognizes, when a decision of the court of appeals has been cited repeatedly, including by this Court, it is best practice to not overrule the decision absent special circumstances. 407 Wis. 2d 195, ¶¶ 20-22.

The Shareholders also offer no good reasons to depart from precedent because, in this situation, they cannot do so. Review and reconsideration of the direct injury requirement in shareholder oppression cases is not necessary. A change to such a fundamental guardrail on intra-corporate litigation risks upending the usual process for resolving internal corporate disputes. Every shareholder upset with management would jump up and down and shout “oppression!” to circumvent the rule of majority control, disregard derivative protections for the entity and other shareholders, and abuse the judicial process to line their pockets. The derivative action statutes would “wither on an unused vine,” as *Rose* cautioned when a shareholder sought an exception to the rule in order to pursue a corporate waste and self-dealing claim against the controlling officers and directors. 56 Wis. 2d at 230.

Applying the shareholder standing rule to oppression claims also fosters consistency within Chapter 180. This statutory chapter requires derivative actions (§§ 180.0740-.0747) and authorizes dissolution actions (§ 180.1430). The plain meaning of

Wis. Stat. § 180.1430 does not provide an exception to the derivative rules when the shareholder pursues a dissolution claim. If the legislature's intent were that the derivative rules did not apply to actions under § 180.1430, it would have said so. *State ex rel. Kalal v. Cir. Ct. for Dane Cnty.*, 2004 WI 58, ¶ 39, 271 Wis. 2d 633, 681 N.W.2d 110 (“Courts must presume that a legislature says in a statute what it means and means in a statute what it says there.”). Further, permitting direct shareholder oppression claims to remedy derivative injuries would render Chapter 180 internally inconsistent and, in all likelihood, render the derivative action statutes meaningless.

It also makes practical sense to demand that a shareholder suing a director or majority shareholder for “oppressive conduct” show a direct injury. The legal standard for an oppression claim requires it insofar as oppressive conduct includes “a lack of probity and fair dealing in the affairs of the company to the prejudice of ***some of its members***”—which necessarily requires a direct injury. *Jorgensen I*, 218 Wis. 2d at 783.

In addition, the rule that a shareholder cannot pursue a shareholder oppression claim for a derivative injury relies on the same broader principles and purposes as the shareholder standing rule does in other corporate disputes, including:

- The derivative procedures allow the corporation or its officials to investigate and remedy potential wrongdoing without litigation;
- The corporation is a separate legal entity from its shareholders, so when the corporation suffers harm, it is the corporation that has the right to sue, not individual shareholders;
- Derivative actions prevent individual shareholders from benefiting at the expense of other shareholders because any recovery goes to the corporation, benefiting all shareholders proportionally; and,
- Allowing individual shareholders to sue for harms to the corporation could lead to a multiplicity of lawsuits, potentially with conflicting outcomes while derivative suits provide a single, unified action.

Additionally, courts in other jurisdictions similarly require an oppressed shareholder to allege a direct injury. *Davis v. Dorsey*, 495 F. Supp. 2d 1162, 1168 (M.D. Ala. 2007) (“Alabama courts recognize oppression and squeeze-out as a distinctly individual and direct cause of action.”); *Landstrom v. Shaver*, 1997 S.D. 25, ¶ 68, 561 N.W.2d 1 (holding the plaintiff could not proceed with her claim for shareholder oppression because she failed to allege injuries which were separate and distinct from those of other shareholders); *Resh v. Bortner*, No. CV 16-02437, 2016 WL 6834104, at *5 (E.D. Pa. Nov. 21, 2016) (“If the court determines that a claim is actually derivative in nature, the plaintiff is precluded from proceeding directly under a shareholder oppression theory.”).

Finally, the standard works—it ferrets out oppression claims that arise from derivative injuries, as in *Reget*, and permits meritorious shareholder oppression cases to proceed, as in *Jorgensen II*. The rule strikes a balance between protecting a

shareholder's individual rights and the rights of the corporation and its other shareholders. The standards are clear.

The Shareholders would have this Court foster uncertainty by up-ending established precedent. Mere dislike of existing precedent on the shareholder standing rule in shareholder oppression actions, however, is no reason for this Court to grant a petition for review. *See generally* Wis. Stat. § 809.62(1r). Review is not otherwise appropriate. As shown above, the Shareholders misstate Wisconsin law by claiming there is “confusion” about whether the shareholder standing rule applies in shareholder oppression actions.⁷ This is not a novel issue. *Cf.* Wis. Stat.

⁷ Apparently to sow confusion, the Shareholders make much of the fact that the same shareholder standing rule applies in shareholder breach of fiduciary duty claims. It is unclear how this supports review—*Jorgensen I*, 218 Wis. 2d at 783, stated that “oppressive conduct of those in control is closely related to breach of the fiduciary duty owed”; the legal scholar the Shareholders cite recognizes these two types of claims are closely related (e.g., § 7:11. 2 F. Hodge O’Neal, et al., *O’Neal and Thompson’s Oppression of Minority Shareholders and LLC Members*, § 7:11 (2023)); and, ironically, the Shareholders have relied on largely the same set of allegations to support their breach of fiduciary duty and shareholder oppression claims.

§ 809.62(1r)(c)2. There is no reason for this Court to “develop, harmonize, or clarify” the law because this case merely involves the application of this “well-settled principle” to the Shareholders’ factual allegations. Wis. Stat. § 809.62(1r)(c)1. There is no legitimate question presented by existing case law requiring a direct injury to support a shareholder oppression claim. Therefore, this case does not meet the criteria for review regarding an issue that is likely to recur. Wis. Stat. § 809.62(1r)(c)3.

II. The Shareholders Have Not Been “Squeezed Out,” and There Is No Reason for this Court to Accept Review in Order To Clarify the Well-established Standard for Oppressive Conduct.

The other reason the Court of Appeals affirmed dismissal of the shareholder oppression claim was that the remaining non-derivative allegations did not rise to the level of oppressive conduct. This result was not, as the petition argues, because of a lack of case law or guidance on shareholder oppression or a myopic reading of *Jorgensen I*. The facts alone compel this result.

Simply put, the Shareholders are not representative of the usual plaintiff in a shareholder oppression case. They are (and

always have been) passive minority shareholders. None of the Shareholders contend to have ever had or expected (and lost) any sort of employment with the Brewery. They were not kicked off the Brewery's board (they were just never on it). They were not literally or figuratively "locked out" of the company. And, most critically, they signed up to be minority shareholders in an entity that, for all intents and purposes, Carey would control—the PPM warned the Shareholders this would be the case. (App. 132.) Thus, they knew Carey would own a majority of the voting shares, be the only director, and serve as the Brewery's president/CEO, so an oppression claim based on Carey exercising that control is self-defeating. *Cf. Luther v. C.J. Luther Co.*, 118 Wis. 112, 94 N.W. 69, 73 (1903) (permitting claim by minority shareholder to set aside stock sale arranged by directors to give control to a certain faction of shareholders). It would also be counter-productive because Carey's exercise of this control has made the Plaintiffs millions so far.

Things haven't changed at the Brewery either. It continues to be an iconic Wisconsin brand and a successful business. The Brewery has not changed course. What the PPM said would occur is what has occurred—the Brewery brews exceptional beer with a local emphasis in its business and marketing practices.

And contrary to the usual oppressed shareholder, the Shareholders continue to experience a financial benefit from their investment. First, they made millions by selling only some of their shares when they paid \$10 per share (they sold shares in 2019 for \$2,071 per share). (App. 003, ¶ 3.) They sold these shares as part of a voluntary process; Carey did not force them to sell their shares. And they continue to have the option to offer to sell their shares to the Brewery, the ESOP, or a third-party, with the Brewery having the right of first refusal to purchase the shares at the price offered by the third-party. They also continue to receive distributions that

exceed their pass-through tax liability.⁸ This is all they can expect based on the PPM's clear disclaimers and well-established legal principles. Their situation does not satisfy any recognized standard for establishing shareholder oppression.

Petitioners' only remaining "evidence" of oppressive conduct is the amendments to the shareholder agreement that Carey proposed and the shareholders ***did not adopt*** (revisions to the shareholder agreement require unanimous consent and petitioners freely exercised their right to oppose the initial proposed draft). (App. 028, ¶ 66; App. 080-085, ¶¶ 149-165.) The court ruled this was not oppressive because it was impossible for Carey to impose a new shareholder agreement without unanimous shareholder approval. (*Id.*) The court properly concluded that Carey asking shareholders to change the shareholder agreement,

⁸ The petition claims (in a few spots) that the Brewery pays distributions that only cover the Shareholders' pass through tax liability. The undisputed facts in the Dane County litigation establish that the distributions have often exceeded each Shareholder's individual pass-through tax liability. *Supra* at n. 5.

when those shareholders had the right to block any proposed changes to the shareholder agreement, was not oppressive. Participating in corporate governance by blocking a proposal is the antithesis of oppression.

Factual issues aside, the petition fails to meet the criteria for review because it is a run-of-the-mill application of two, well-known cases: *Jorgensen I* and *Reget*. The Shareholders are correct that the Court of Appeals applied those cases; which are controlling law. The Court of Appeals' decision shows that existing law readily answers the questions here, and the Shareholders identify no valid reason why these precedents ought to be reexamined.

The legal standard for “oppressive conduct” is well-known, frequently applied and beyond question in this case. *Jorgensen I* adopted a “broad and flexible” standard for oppressive conduct:

Burdensome, harsh and wrongful conduct; a lack of probity and fair dealing in the affairs of the company to the prejudice of some of its members; or a visual departure from the standards of fair dealing, and a violation of fair play on which every

shareholder who entrusts his money to a company is entitled to rely.

218 Wis. 2d at 783. The standard for oppressive conduct is closely related to a claim for breach of fiduciary duty by a director or controlling shareholder. *Id.* In certain cases, the shareholder’s “reasonable expectations” help a court to determine whether oppressive conduct occurred.

Jorgensen I is emblematic of a more-common shareholder oppression case in the context of a closely-held company. *Jorgensen I* involved what is commonly understood as a “squeeze out”—following a disagreement, the defendants excluded the plaintiffs from all participation in the business, including cutting off “management fees” that were effectively how the business distributed profits.

The court of appeals applied this standard a few years later in *Reget*. The court had no trouble applying the standard outside of the traditional context of a “squeeze-out” in a closely-held corporation and concluding that no oppressive conduct occurred (or that any injuries were derivative). The court of appeals affirmed

dismissal of the oppression claim, ruling that a passive investor could not rely on allegations of shareholder oppression to seek a remedy for perceived injuries (the corporation's failure to maintain a market for its stock or to issue distributions).

On separate occasions, this Court has had the opportunity to reexamine *Jorgensen I* and *Reget*. The Court cited the cases approvingly instead. *Notz*, 316 Wis. 2d 640, ¶¶ 23-28; *Northern Air Services, Inc. v. Link*, 2011 WI 75, ¶ 75 n.32, 336 Wis. 2d 1, 804 N.W.2d 458. The Shareholders are also wrong that the Wisconsin Supreme Court hasn't applied the dissolution statute other than in *Notz*, because it did so in *Northern Air Services, Inc.*

Existing law already answers the questions posed by the Shareholders' petition. Therefore, this Court should decline the Shareholders' invitation to reexamine the standard for oppressive conduct expressed in *Jorgensen I* and *Reget*.

Finally, the Shareholders do not establish that the court of appeals decision conflicts with any controlling decisions. *Edler v. Edler*, No. 2006AP1215, unpublished slip op., 2017 WL 1494609

(Wis. Ct. App. Apr. 26, 2017) (App. 219) is an unpublished and per curiam decision, so it is not “controlling.” Nor is the decision on point (or in conflict with the court of appeals’ decision in this case). *Edler*, a two-shareholder family business, the defendant fired the plaintiff (the defendant’s brother) and removed him as an officer—which the Court found was contrary to his reasonable expectations—and stripped him from receiving *any* financial benefit of being a shareholder. This plainly oppressive conduct caused a direct injury to the minority shareholder that is not present here.

Arrowhead Systems, Inc. v. Grant Thornton, LLP, No. 2019AP2268, unpublished slip op., 2020 WL 6065838 (Wis. Ct. App. Oct. 15, 2020) (App. 200) is another unpublished decision, so it is not “controlling.” It also is not even a shareholder oppression case; it merely refers to the doctrine to illustrate why a sole shareholder of a corporation was not himself a client of the corporation’s accounting firm and, thus, lacked standing in an action against the accounting firm.

Finally, the Shareholders try to throw a wrench in things by saying the PPM makes this case unique or shouldn't inform a court's analysis of their reasonable expectations. This effort is unavailing. The PPM and the shareholder agreement offer important disclaimers and determine the rights possessed by shareholders. Of course these documents are an important consideration to a reasonable-expectations analysis. *Regan v. Nat. Res. Grp., Inc.*, 345 F. Supp. 2d 1000, 1012 (D. Minn. 2004) ("Written agreements among shareholders or between shareholders and the corporation carry great weight in determining a shareholder's reasonable expectations."); *see also Tufail v. Midwest Hosp., LLC*, 2013 WI 62, ¶ 28, 348 Wis. 2d 631, 833 N.W.2d 586 (holding contract language is interpreted according to its ordinary meaning, which for a business contract, means the "manner that it would be understood in the business to which the contract relates.") The court of appeals did not err by relying on the PPM, shareholder agreement, or bylaws to conclude

the Brewery's path did not frustrate the Shareholders' *reasonable* expectations.

Ultimately, the Shareholders ask this Court to "elevate subjective minority shareholder dissatisfaction to constitute oppression," *Landstrom*, 1997 S.D. 25, ¶ 52. But they have failed to present a compelling reason why mere dissatisfaction merits review under Wis. Stat. § 809.62(1r).

III. Wisconsin's Uniform Securities Law is Plain and Unambiguous, so this Court's Review is Not Needed to Review the Statute's Application to Straightforward Facts.

Simple statutory language and well-established legal principles often make a court's job interpreting a statute more efficient. The lower courts' interpretation of Wis. Stat. § 550.501(2) presents such an example. The petitioners have not presented any compelling reasons for the Wisconsin Supreme Court to grant review of the Court of Appeals' decision affirming dismissal of the Shareholders' complaint under the criteria in Wis. Stat. § 809.62(1r).

The Shareholders complain that the Brewery misrepresented facts or omitted facts when it purchased some of their shares. The Court of Appeals disagreed and correctly ruled that because Carey, the Brewery or the ESOP made no representations about price, the Shareholders' fraud claim failed:

The crux of the securities fraud claim is that, as a result of the alleged misrepresentations and omissions, the Brewery and the ESOP offered a purchase price that was allegedly below the shares' fair market value.

The allegations as to the purchase of Eichhoff's and Speers' shares fail to state a claim because there is ***no allegation that Carey and the Brewery made any representation that the purchase price was based on the shares' fair market value.***

The allegations as to the purchase of Runyan's shares fail to state a claim because ***the purchase agreement explicitly provides that the price would be at or below fair market value.***

(App. 029, ¶ 69.)

The lack of a representation about price was crucial because the Brewery was under no duty to provide liquidity to

shareholders. The PPM established that there was no market for the Brewery's stock. (*Id.* at ¶ 57 (“The Private Placement Memorandum provided to the plaintiff shareholders in 1993 stated, ‘NO PUBLIC MARKET FOR THE STOCK NOW EXISTS OR IS LIKELY TO DEVELOP.’”)). *Reget*, of course, re-affirmed that a private corporation, absent agreeing to do so, has no obligation to provide an exit to shareholders. 242 Wis. 2d 278, ¶¶ 6-9 (explaining a private corporation is under no obligation to “maintain a market” for its shares, let alone at a price the shareholders deem fair). This is the well-known aspect of investing in a privately-held company that differs from investments in companies traded on public markets.

Taken together, these two factors mean the defendants could not have violated § 551.501 in the way the Shareholders say. In purchasing the Shareholders' shares, the Brewery and Carey could not have misrepresented the value of the shares—they didn't, by the way, as an independent, third-party appraisal firm conducted the valuation—because they did not make any representations

that the price offered was above any sort of benchmark. (App. 034, ¶ 77.) The Brewery set the price and the Shareholders could, *but did not have to*, sell. If they felt the price was too low or were too hesitant to sell without seeing more financial data underlying the ESOP valuation, *they did not have to sell*.

Next, the Brewery has no obligation to buy shares from its shareholders. The price it offered did not have to comply with any statutory or contractual standard. It was not paying “book value” under an agreement, or “fair value” under the dissenters’ rights statutes (Wis. Stat. §§ 180.1301-1331). As a result, by offering a certain price per voting share, the Brewery was not implicitly representing that the shares were worth anything other than the offered amount. In addition, because there was no legal duty to purchase the Shareholders’ shares, the respondents could not have had the duty to disclose suggested by the Shareholders (such a duty likely would not exist even if the Brewery had to purchase the shares, and it would be satisfied by the Brewery’s reliance on a certified third-party appraiser to develop the share price).

There's nothing groundbreaking about this analysis, and certainly nothing that suggests this Court needs to wade in. The petition presents no questions about what the statute means, nor does it present a colorable challenge to *Reget*. Essentially, the petition claims the lower courts got it wrong by applying the plain statutory text to the facts alleged in the complaint, but this is a law-developing, not an error-correcting, court. Review here does not satisfy Wis. Stat. § 809.62(1r).

First, the Shareholders do not contend the Court of Appeals' decision presents any significant questions of law, constitutional or otherwise, other than the general complaint that they wish there were more published decisions applying Wis. Stat. § 551.501.

Second, Supreme Court review is not necessary to develop, clarify or harmonize the law of securities fraud. The securities fraud statute, Wis. Stat. § 551.501(2), is plain and unambiguous. It clearly requires either a misrepresentation or an omission of a material fact that the defendant had a duty to disclose. The Court of Appeals' decision was a routine interpretation of the parties'

agreements. Carey made no representations to Eichhoff or Speer that the price per share was based on fair market value, and Runyan's purchase agreement expressly states the price would be at or below fair market value. There was, consequently, no misrepresentation or omission regarding price. The Court of Appeals' decision was also routine application of the well-settled principle that a fraud claim based on omission requires a duty to disclose the allegedly omitted information, which the Shareholders fail to establish. The Shareholders cite no conflicting authority on these issues to warrant review.

The Shareholders emphasize an alleged lack of Wisconsin case law addressing securities fraud claims.⁹ However, the absence of precedent does not in itself warrant Supreme Court review, especially where, as here, the court of appeals had no difficulty applying established legal principles to the allegations in the complaint.

Third, the case-specific question of whether Carey or the Brewery had a duty to disclose the particular information at issue here is not the type of recurring legal issue that requires Supreme Court resolution. In addition, the Shareholders' remarkably high return on the transaction confirms this is not the type of case that

⁹ The dearth of case law is "alleged," but not accurate. Seventeen cases on Westlaw cite § 551.501. This statute is also based on a model rule, which has been adopted by more than 20 states and territories. *Securities Act*, UNIFORM LAW COMMISSION, <https://www.uniformlaws.org/committees/community-home?CommunityKey=8c3c2581-0fea-4e91-8a50-27eee58da1cf> (last visited Apr. 8, 2024). Thus, there are numerous decisions from other jurisdictions applying substantively-identical statutory language that may provide guidance. The petition does not identify any case law from anywhere applying this statutory standard inconsistently with the Court of Appeals' analysis.

warrants the Supreme Court's discretionary intervention. It also confirms this is not a case likely to recur—how many private company investments result in a return in excess of 20,000%?

CONCLUSION

For the reasons set forth above, the petition should be denied.

Respectfully submitted and dated at Milwaukee, Wisconsin
this 8th day of April, 2024.

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FORM AND LENGTH CERTIFICATION

Pursuant to Wis. Stat. §809.19(8g), I certify that this brief conforms to the rules contained in Wis. Stat. §809.62(4) and Wis. Stat. §809.19(8)(b) and (bm) for a document produced with proportional serif font. The length of this brief is 5,940 words.

Dated this 8th day of April, 2024.

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E-FILING CERTIFICATE OF SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 8th day of April, 2024.

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