DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ROBERT KUBICEK ARCHITECTS & ASSOCIATES, INC., an Arizona corporation; HARVEY G. UNTI, a single man; ROBERT W. KUBICEK, a single man, Plaintiffs/Appellants/ Cross-Appellees, v. BRUCE C. BOSLEY and JOANNE M. BOSLEY, husband and wife; THE BOSLEY GROUP, INC., an Arizona corporation, Defendants/Appellees/ Cross-Appellants.	1 CA-CV 11-0416 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)

Appeal from the Superior Court in Maricopa County

Cause No. CV2007-008748

The Honorable Bethany G. Hicks, Judge

AFFIRMED

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O R O Z C O, Judge

¶1 Robert Kubicek Architects and Associates, Inc., Harvey G. Unti, and Robert W. Kubicek (collectively, Kubicek Parties) appeal the trial court's orders granting (1) Bruce C. Bosley, Joanne M. Bosley, and The Bosley Group, Inc. (collectively, Bosley Parties) a new trial on the Bosley Parties' claims against the Kubicek Parties and (2) the Bosley Parties' motion for judgment as a matter of law (JMOL) on the Kubicek Parties' tort claims. Additionally, in the event that we reverse the trial court's order granting a new trial, the Bosley Parties cross-appeal the trial court's denial of their request for attorney fees and costs. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 This appeal arises out of the events surrounding Bruce Bosley's resignation from Robert Kubicek Architects and Associates, Inc. (RKAA). In 1982, Bosley joined the architectural firm of Nelson Kubicek, which later became RKAA. Bosley was named the president of RKAA in 1994.

¶3 In 1996, Bosley became a member of the Board of Directors of RKAA and also assumed management of the Bashas' account from RKAA's Chief Executive Officer, Robert Kubicek. In

the same year, Kubicek, Bosley, and another long-time employee, Harvey Unti, entered into a shareholders' agreement (1996 Agreement) after Kubicek issued fifteen percent of the shares of RKAA to both Bosley and Unti. The 1996 Agreement included a certificate of value stating that the value per share was $23.67 as of the date of the certificate. That agreement also contained information about calculating the purchase price of a minority shareholder's stock.

¶4 Ten years later, Kubicek, Bosley, and Unti executed a new shareholders' agreement (2006 Agreement) because Kubicek wanted to increase the per share value to $75 to obtain $750,000 in life insurance.[1] The 2006 Agreement did not contain any information about the procedure for valuing minority shares; however, a certificate of value was attached to the back of the 2006 Agreement. That certificate stated that RKAA shares were worth $75 "as of the date of this Certificate."

¶5 Later that year, Kubicek decided to retire and sell RKAA. Several RKAA employees were going to participate in a management-led buyout, in which Kubicek would sell his 10,000 RKAA shares to them for $3.5 million. The employees were going to borrow the $3.5 million from M&I Bank; however, negotiations failed after Kubicek and M&I Bank were unable to agree on key

[1] The $75 share value was based on life insurance for Kubicek in the amount of $750,000 divided by Kubicek's 10,000 RKAA shares.

provisions of the buyout. In January 2007, Kubicek proposed partially financing a buyout and the employees also met about selling RKAA to another company. Both buyout attempts failed.

¶6 At the end of February 2007, Bosley learned that Kubicek, Unti, and RKAA's Chief Financial Officer, Chris Steinle, had changed the terms of the proposed management buyout without telling him. Under the new terms, Bosley would receive a twenty percent interest in RKAA, rather than the forty percent that had been originally proposed. On March 7, 2007, Bosley mentioned to a co-worker, Dan Scott, that he felt he could no longer trust the other shareholders, was considering leaving RKAA and might start his own company.

¶7 A week later Bosley resigned, and soon after started a competing architectural firm, The Bosley Group, Inc. (Bosley Group). Subsequently, Scott and several other RKAA employees resigned and joined Bosley Group. Bashas' also informed RKAA that it would use Bosley Group for its future architectural needs.

¶8 Pursuant to the 2006 Agreement, Bosley was required to sell back his shares to Kubicek and Unti. He contacted RKAA on April 5, 2007, and requested $750,000, or approximately $350 per share. This amount was based on the business valuation prepared during the buyout negotiations. RKAA informed Bosley that it

would review his request, but after receiving no further response, Bosley contacted RKAA again on May 2, 2007.

¶9 After receiving Bosley's second letter, RKAA filed suit against the Bosley Parties,[2] alleging that Bosley committed various torts against RKAA while he was a director of the firm. Bosley filed a countersuit, requesting a valuation of his shares and alleging several tort claims against the Kubicek Parties. After filing suit, Kubicek and Unti held a special shareholders' meeting, in which Kubicek and Unti voted to remove Bosley from RKAA's Board of Directors.

¶10 The trial court bifurcated the issues. The first phase of the trial dealt with the Kubicek Parties' three tort claims against the Bosley Parties: breach of fiduciary duty, unfair competition, and intentional interference with contractual relations and business expectancies. After the Kubicek Parties presented their case, the Bosley Parties moved for JMOL on all three tort claims, and the trial court granted the motion.

¶11 During the second phase of the trial, the Bosley Parties presented their tort claims against the Kubicek Parties to the jury and asserted that Bosley was entitled to pro rata distributions of RKAA's net profits and fair value for his

[2] The Kubicek Parties also filed suit against Scott and his wife, but they are not parties to this appeal.

shares.[3] The Kubicek Parties, however, contended that Bosley should receive $75 per share based on the certificate of value attached to the 2006 Agreement.[4]

¶12 While the Bosley Parties alleged that the Kubicek Parties had committed several torts, the jury found in favor of the Bosley Parties only on their breach of contract claim. Additionally, the jury determined that Bosley was entitled to $80.25 per share. The Bosley Parties subsequently moved for a new trial, and the trial court granted their motion.

¶13 The Kubicek Parties timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003) and -2101.5(a) (Supp. 2011).

DISCUSSION

New Trial

¶14 A trial court has considerable discretion to grant or deny a motion for a new trial. *Delbridge v. Salt River Project Agric. Improvement & Power Dist.*, 182 Ariz. 46, 53, 893 P.2d 46, 53 (App. 1994); *Mammo v. State*, 138 Ariz. 528, 533-34, 675 P.2d 1347, 1352-53 (App. 1983) (stating that the trial court has the

[3] Based on the Bosley Parties' expert's business valuation, Bosley's shares were worth approximately $1,188,000, or $554 per share.

[4] At the time of trial, Bosley had already delivered his shares to the Kubicek Parties. The Kubicek Parties had also paid Bosley $160,650 for his shares based on the $75 per share price in the certificate of value attached to the 2006 Agreement.

"greatest possible discretion" with regard to granting or denying a motion for new trial because it had the opportunity to hear the evidence and observe the witnesses). We will not overturn a new trial order "unless the probative force of the evidence clearly demonstrates that the decision of the trial court is a manifest abuse of discretion." *Joy v. Raley*, 24 Ariz. App. 584, 585, 540 P.2d 710, 711 (1975).

Compliance with Arizona Rule of Civil Procedure 59(m)

¶15 The Kubicek Parties contend that the trial court's order granting a new trial failed to meet the particularity requirements of Arizona Rule of Civil Procedure 59(m). That rule provides that "[n]o order granting a new trial shall be made and entered unless the order specifies with particularity the ground or grounds on which the new trial is granted." Ariz. R. Civ. P. 59(m).

¶16 If the trial court's order granting a new trial states its grounds with adequate specificity, appellants have the burden to show that the trial court's stated reasons do not justify relief. *Santanello v. Cooper*, 106 Ariz. 262, 264, 475 P.2d 246, 248 (1970). However, if the trial court's order fails to meet the particularity requirements of Rule 59(m), the burden shifts to appellees to convince us that the trial court did not err in ordering a new trial. *Yoo Thun Lim v. Crespin*, 100 Ariz. 80, 83, 411 P.2d 809, 811 (1966).

¶17 In this case, the trial court's order granting the Bosley Parties' motion for a new trial contained the following explanation:

> [I]t is clear to the Court that whether due to errors in the instructions prepared and accepted by the parties without objection and given by the Court, inability of the jury to understand the facts presented and the legal theories advanced by the parties or the basic complexity of the facts and evidence themselves, including the shareholder's agreements in question, the jury did not understand the issues before them and this lack of comprehension in all probability affected the verdict.

¶18 Rule 59(m) does not require the trial court "to render a written opinion setting forth [its] rationale for granting a new trial motion or to undertake a lengthy review of the facts." *Heaton v. Waters*, 8 Ariz. App. 256, 259-60, 445 P.2d 458, 461-62 (1968). Its purpose is to apprise the parties and this court of the grounds on which the trial court relied in ordering a new trial. *Koepnick v. Sears Roebuck & Co.*, 158 Ariz. 322, 326, 762 P.2d 609, 613 (App. 1988). "Rule 59(m) is designed to serve a practical purpose and should receive a practical construction." *Heaton*, 8 Ariz. App. at 260, 445 P.2d at 462.

¶19 We find that the trial court's new trial order was sufficient to apprise both parties and this court of the trial court's rationale for ordering a new trial. Therefore, the burden remains with the Kubicek Parties to prove that the trial

court's stated reasons for granting the motion for a new trial do not justify relief.

Grounds for Granting a New Trial

¶20 Arizona Rule of Civil Procedure 59(a) describes several situations when a new trial may be granted, including when there is "[e]rror in the admission or rejection of evidence, error in the charge to the jury, or in refusing instructions requested, or other errors of law occurring at the trial or during the progress of the action" or when "the verdict, decision, findings of fact, or judgment is not justified by the evidence or is contrary to law." The reasons stated in the trial court's new trial order are encompassed in Rule 59(a). In granting the new trial, the trial court focused on the jury's lack of comprehension caused by (1) errors in the instructions prepared and accepted by the parties; and (2) the jury's inability to understand the facts, legal theories, and evidence presented.

¶21 "Confusion of the jury is a proper basis for concluding that a verdict 'is not justified by the evidence or is contrary to law.'" *Standard Chartered PLC v. Price Waterhouse*, 190 Ariz. 6, 38, 945 P.2d 317, 349 (App. 1996) (quoting Rule 59(a)8). The trial court has great discretion to grant a motion for a new trial, particularly if it finds that the verdict was not justified by the evidence. *City of Glendale v. Bradshaw*, 114 Ariz. 236, 238, 560 P.2d 420, 422 (1977) (noting that out of all

the grounds on which a new trial may be granted, Rule 59(a)8 is the "least susceptible to appellate scrutiny"); *Caldwell v. Tremper*, 90 Ariz. 241, 246, 367 P.2d 266, 269 (1962) (stating that the trial court judge acts as a thirteenth juror and the judge must be convinced that the weight of the evidence sustains the verdict or must set the verdict aside).

¶22 The following evidence supports the trial court's new trial order.

Error in Final Jury Instructions

¶23 One of the trial court's reasons for granting a new trial was that the erroneous jury instructions that were prepared and accepted by the parties may have affected the verdict. Absent a sufficient objection, an error in the jury instructions will only support the order for new trial if fundamental reversible error resulted. *Long v. Corvo*, 131 Ariz. 216, 217, 639 P.2d 1041, 1042 (App. 1981). Fundamental error is error that deprives a party of a fair trial, *Maxwell v. Aetna Life Ins. Co.*, 143 Ariz. 205, 212, 693 P.2d 348, 355 (App. 1984), or error that goes to the foundation of the case or takes an essential right away from a party. *Johnson v. Elliott*, 112 Ariz. 57, 61, 537 P.2d 927, 931 (1975).

¶24 One such error involved the lack of a jury instruction on the Bosley Parties' breach of the covenant of good faith and fair dealing claim. The jury realized an instruction was

missing; during deliberations, one member of the jury submitted a question about the instruction that stated, "Breach of the covenant of good faith [and] fair dealing refer to what page in the instructions." After discussing the question with counsel for both parties, the trial court responded, "Relates to Breach of Contract Claim; Page 4- "Share Valuation For Shareholders' Agreement."

¶25 Although the parties and the trial court discussed the appropriate answer to the juror's question, the answer provided was insufficient to properly instruct the jury on the difference between these two claims. A party can breach a provision of a contract without breaching the implied covenant of good faith and fair dealing. *See, e.g.*, *Rawlings v. Apodaca*, 151 Ariz. 149, 157, 726 P.2d 565, 573 (1986) ("Not every breach of an express covenant in [a] contract is a breach of the covenant of good faith and fair dealing."). Alternatively, a party can breach its duty of good faith and fair dealing without actually breaching an express provision of the contract. *See, e.g.*, *Deese v. State Farm Mut. Auto. Ins. Co.*, 172 Ariz. 504, 509, 838 P.2d 1265, 1270 (1992) (holding that the absence of a breach of an express covenant is not fatal to a bad faith claim if the plaintiff can prove a breach of the implied covenant of good faith and fair dealing).

¶26 Because the jury was only provided with an instruction on the breach of contract claim, we find that it was not properly instructed on the breach of the covenant of good faith and fair dealing claim. The Bosley Parties have asserted that failure to properly instruct the jury on a claim amounts to reversible error, and we agree. *See, e.g.*, *Williams ex rel. Dixon v. Thude*, 180 Ariz. 531, 539, 885 P.2d 1096, 1104 (App. 1994) (holding that an improper jury instruction regarding a willful and wanton plaintiff and comparative negligence amounted to fundamental error).

Inability of Jury to Understand Evidence and Theories

¶27 A significant portion of the trial was spent analyzing several provisions in the 1996 and 2006 Agreements to ascertain the value of Bosley's shares. The Kubicek Parties alleged that Bosley was only entitled to $75 per share based on the certificate of value attached to the 2006 Agreement, while the Bosley Parties requested fair value.

¶28 At the conclusion of the trial, the jury determined that Bosley was entitled to $80.25 for each share and awarded him an additional $11,245.50 over the $160,650 previously paid by the Kubicek Parties. Both parties believe that, in making its determination, the jury used a portion of paragraph 3.b from the 1996 Agreement that dictates the valuation of Kubicek's stock upon his death. That provision stated the value on each

certificate would increase by one-half of one percent per month until a new certificate was executed.

¶29 During his cross-examination, Bosley did mention the incremental increase method addressed in paragraph 3.b of the 1996 Agreement. He stated that he believed that provision depicted the intent that all RKAA shares should be increased to approximate the firm's value.

¶30 However, Bosley also testified that he believed that the 2006 Agreement was the only operative agreement because it had superseded the 1996 Agreement. Paragraph 24 of the 2006 Agreement stated that the agreement contained "the entire understanding of the parties and supersede[d] any prior understandings and agreements." The 2006 Agreement also contained a merger provision that stated that "there is no understanding or agreement . . . on any of the subjects referred to in the foregoing Agreement, other than this written Agreement itself, and that every agreement, representation, warranty or understanding on the said subjects has been merged into this Agreement."

¶31 Not only was the provision about the incremental increase not included in the 2006 Agreement, that provision only applied to Kubicek's shares in the 1996 Agreement. Nowhere in paragraph 3.b does it mention that the incremental increase provision applies to anyone else but Kubicek. The Kubicek

Parties made that argument during their cross-examination of Bosley after Bosley referenced the provision.

¶32 Upon review of the 1996 Agreement, it is clear that the incremental increase provision only applies to Kubicek and not to a minority shareholder who voluntarily terminates his employment with RKAA. Paragraph 7 of the 1996 Agreement discusses the termination of a shareholder's employment with RKAA and, in the event the termination is not the result of bad faith or misconduct, directs readers to paragraph 4 to determine the purchase price for a minority shareholder's stock. Paragraph 4 states that the procedure for purchasing shares from a minority shareholder is the same as the share purchasing procedure upon Kubicek's death, *except* that "the value of the [minority] Shareholders' stock shall be as determined jointly by the Shareholders by meeting at least once a year, within two months after the close of the Company's fiscal year, to execute a Certificate of Value for the remaining Shareholders' shares, on a per share basis." While the purchase procedure is the same for Kubicek and the minority shareholders, the procedure for share valuation is not; accordingly, the incremental increase provision did not apply to minority shareholders.

¶33 During the trial, the Kubicek Parties presented evidence that Bosley's shares were worth $75 per share pursuant to the 2006 certificate of value, while the Bosley Parties

advocated for fair value. Insufficient evidence was presented to support the jury's award of $80.25 per share; therefore, its award supports the trial court's conclusion that the jury failed to comprehend the evidence presented.

¶34 As additional evidence that the jury struggled to understand the legal theories presented, the jury submitted the following question during deliberations: "Re: Constructive trust, is there a minimum dollar amount to put the constructive trust into effect?" When reviewing the question with the attorneys, the trial court stated, "So if they're arguing about how much should go into the trust, before they decide whether there should be a constructive trust, they're sort of missing the mark." The trial court determined that the jury apparently did not understand what a constructive trust was and decided to simply answer no to its question.

Other Errors Raised by the Bosley Parties

¶35 In their brief, the Bosley Parties also discuss other errors that were included in their motion for a new trial but were not discussed in the trial court's new trial order. In seeking to justify a new trial order, the appellee may, by designation of a cross question on appeal, support the trial court's award of a new trial on grounds set forth in the motion for new trial but not relied upon by the trial court in its new trial order. *Santanello*, 106 Ariz. at 264-65, 475 P.2d at 248-

49; *see also CNL Hotels & Resorts, Inc. v. Maricopa Cnty.*, 230 Ariz. 21, 25, ¶ 20, 279 P.3d 1183, 1187 (2012) (holding that when an appellee seeks to support the trial court's judgment using reasons the trial court did not rely on, the appellee is not trying to enlarge his or her own rights, and a cross appeal is unnecessary).

¶36 In its new trial order, the trial court only addressed errors in jury instructions that both parties accepted and to which neither party objected. However, in their motion for a new trial, the Bosley Parties discussed an error in an instruction on the waiver defense to which they objected during the trial. The Bosley Parties have properly raised this error on appeal as a cross question, in order to support the trial court's new trial order.

¶37 During the trial, the following instruction was given to the jury on the defense of waiver:

> A waiver may be either an express, voluntary, and intentional relinquishment of a known right, or may be conduct that is inconsistent with an intent to reserve or assert the right.
>
> If you find that Mr. Bosley did not complain about the lack of distributions or otherwise failed to assert his right to receive distributions of net profits . . . then Mr. Bosley has acted in a manner inconsistent with an intent to reserve or assert his right to receive distributions of net profits and therefore has waived his right to the distributions.

The Bosley Parties objected to this instruction and requested that additional language be included after the conditional statement to reflect that Bosley had knowledge of the right.[5] The trial court declined to modify the instruction.

¶38 To prove that a waiver occurred, a party must show either the relinquishment of a known right or conduct that would warrant an inference of an intentional relinquishment. *Am. Cont'l Life Ins. Co. v. Ranier Constr. Co.*, 125 Ariz. 53, 55, 607 P.2d 372, 374 (1980). The party seeking to prove that waiver of a right by conduct occurred must introduce evidence of acts inconsistent with the intent to assert that right. *Goglia v. Bodnar*, 156 Ariz. 12, 19, 749 P.2d 921, 928 (App. 1987). A clear showing of an intent to waive is necessary. *Id.*

¶39 In this case, the conditional statement included in the jury instruction does not require the jury to find that an intentional relinquishment occurred. Instead, the conditional language required the jury to find waiver of the right to distributions only if it determined that Bosley failed to complain about the lack of distributions or failed to assert his right to the distributions. The Bosley Parties' language should

[5] While discussing the final instructions, the Bosley Parties requested an additional paragraph at the end of the instruction that stated "But if you find Mr. Bosley did not know what Mr. Kubicek had distributed to himself and others, then there could be no waiver as Mr. Bosley did not have knowledge of the facts constituting his claim."

have been included. It required the jury to find that Bosley had knowledge of the right to distributions. Without the language added to the conditional clause, the jury could find that Bosley waived his right to distributions, even though he had no knowledge of this right. This error could have affected the jury's verdict on both the breach of fiduciary duty claim and the oppression of a minority shareholder claim because both claims dealt with the pro rata distribution of RKAA's net profits.

¶40 Considering the foregoing evidence, we find that substantial evidence supports the trial court's decision that the lack of jury "comprehension in all probability affected the verdict." The Kubicek Parties have not met their burden of proving that the trial court abused its discretion in granting a new trial; therefore, we affirm the trial court's order granting a new trial on all of the claims decided by the jury.[6]

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[6] Based on the errors and juror confusion addressed above, we find that all of the claims addressed during the second phase of the trial were in some way affected. However, as further evidence that a new trial on all of the issues is warranted, we find that the issues are so interrelated that granting a partial new trial could cause confusion and injustice. *See In re Estate of Thompson v. Renaud*, 1 Ariz. App. 18, 23, 398 P.2d 926, 931 (1965) (stating that this court has never held that granting a new trial on all of the issues, not just on particular issues, is erroneous), *abrogated on other grounds by McKillip v. Smitty's Super Valu, Inc.*, 190 Ariz. 61, 63-64, 945 P.2d 372, 374-75 (App. 1997); *see also Englert v. Carondelet Health Network*, 199 Ariz. 21, 27, ¶ 15, 13 P.3d 763, 769 (noting that partial trials are not recommended unless the issues are not intertwined and can be separated without prejudice to the parties).

Judgment as a Matter of Law

¶41 The Kubicek Parties contend that the trial court erroneously granted the Bosley Parties' motion for JMOL on the Kubicek Parties' tort claims. We review de novo a trial court's order granting a motion for JMOL. *McBride v. Kieckhefer Assocs., Inc.*, 228 Ariz. 262, 265, 265 P.3d 1061, 1064 (App. 2011). A trial court should grant a motion for JMOL "only if the facts presented in support of a claim have so little probative value that reasonable people could not find for the claimant." *Shoen v. Shoen*, 191 Ariz. 64, 65, 952 P.2d 302, 303 (App. 1997); Ariz. R. Civ. P. 50(a)(1) (providing for JMOL when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue"). We review each of the Kubicek Parties' tort claims below.

Breach of Fiduciary Duty

¶42 A corporation's director owes a fiduciary duty to the corporation and its shareholders. *Atkinson v. Marquart*, 112 Ariz. 304, 306, 541 P.2d 556, 558 (1975). The duty requires the director to act honestly and in good faith and not to breach any specific duty owed to the corporation. *Tovrea Land & Cattle Co. v. Linsenmeyer*, 100 Ariz. 107, 121, 412 P.2d 47, 57 (1966). The Kubicek Parties allege that Bosley breached his fiduciary duty to RKAA by running a competing business, diverting Bashas' business

from RKAA to Bosley Group, and soliciting several RKAA employees to resign from RKAA and join Bosley Group, all while he was still serving as a director of RKAA. In evaluating whether Bosley breached his fiduciary duty, we will consider whether he (1) remained a director after submitting his March 14, 2007 letter of resignation; and (2) breached any specific duties owed to the corporation before his resignation.

Period from March 14, 2007 to June 18, 2007

¶43 The Kubicek Parties' main contention is that Bosley's March 14, 2007 letter of resignation merely stated that he was "resigning [his] employment" with RKAA; therefore, Bosley remained a director of RKAA until he was removed from the Board of Directors at a special shareholders' meeting held on June 18, 2007. The evidence presented at trial, however, does not support their argument.

¶44 First, Kubicek testified that nothing that Bosley did indicated that he was still a member of RKAA's Board of Directors after he submitted his letter of resignation on March 14, 2007. Kubicek testified further that from March 14, 2007 to June 18, 2007, he did not ask Bosley to do anything as a director.

¶45 Additionally, at RKAA's October 2004 annual meeting, the Board of Directors unanimously approved a corporate resolution that stated that "terminated employees [would] automatically be removed from the board." During the trial,

Kubicek testified that he believed that "terminated employees" referred to employees who were involuntarily terminated by RKAA, not employees who resigned. However, "terminated" in the employment context is not synonymous with "fired." "Terminated" merely refers to the "complete severance of an employer-employee relationship," while "fired" refers to "discharg[ing] or dismiss[ing] a person from employment." Black's Law Dictionary (9th ed. 2009). Furthermore, Kubicek admitted on cross-examination that an employee can voluntarily terminate his employment relationship by resigning from a company and that Bosley terminated his relationship with RKAA by submitting his letter of resignation.

¶46 As further evidence that a special shareholders' meeting was not necessary to remove Bosley as a director from RKAA, no special shareholders' meeting was held to remove Scott as a director from RKAA. During cross-examination, Kubicek testified that he thought Scott's letter of resignation, which stated only that he was resigning and "leaving the firm of [RKAA]," was sufficient to remove Scott from the Board of Directors; on the other hand, Kubicek believed a meeting was necessary to remove Bosley because of Bosley's shareholder status. We find, however, that the fact that Bosley was a shareholder was irrelevant in determining whether he remained a director of RKAA after he resigned.

¶47 Because both the employer and the employee can terminate the employment relationship, we find that Bosley's March 14, 2007 resignation letter was sufficient to trigger the resolution's automatic removal provision and to terminate both Bosley's employment with RKAA and his duties as a director. Therefore, Bosley no longer owed a fiduciary duty to RKAA after March 14, 2007. *See, e.g.*, *Standage v. Planned Inv. Corp.*, 160 Ariz. 287, 291, 772 P.2d 1140, 1144 (App. 1988) (stating that when a corporate officer resigns or is removed, the fiduciary relationship ceases).

Breaching Duties Before the Letter of Resignation

¶48 Although Bosley's fiduciary duty ended when he resigned from RKAA, we must still determine whether he breached his fiduciary duty before resigning as a director on March 14, 2007.

¶49 In making our determination, we find *McCallister Co. v. Kastella*, 170 Ariz. 455, 825 P.2d 980 (App. 1992), instructive. In that case, the plaintiff company accused the defendant of breaching her fiduciary duty by improperly soliciting the company's clients and employees. *Id.* at 458, 825 P.2d at 983. The defendant had informed her co-workers and several clients that she was resigning and intended to start her own competing company. *Id.* At trial, the defendant testified that she did not offer any of her co-workers a job but that when several of them asked if they could work for her new company, she told them "that

would be fine if the new company 'got up and running.'" *Id.* Additionally, the plaintiff testified that he had no evidence that the defendant had solicited any client and that when asked, three of the clients said they were leaving because they wanted to continue working with the defendant. *Id.* Because the plaintiff failed to raise a factual issue on its breach of fiduciary duty claim, this court affirmed the trial court's grant of summary judgment in favor of the defendant. *Id.* at 460, 825 P.2d at 985.

¶50 Here, the Kubicek Parties have also failed to raise a factual dispute on their claim. The only evidence Kubicek produced about Bosley's alleged solicitation of employees was an email between Bosley and Scott on March 7, 2007. In that email, Scott wrote that "this is something [another employee] is interested in too and it may bear discussion" and that "[b]ased on our conversation this morning, I wonder what your thoughts are on these things and a jr. partnership role." Bosley responded that he was "open to same" and thought he and Scott "should talk."

¶51 However, Scott testified that his email to Bosley was the result of a "gripe session," in which Bosley told Scott that he was unhappy with a change in the terms of the management buyout, was considering leaving RKAA, and might start his own firm. Scott stated that he sent the March 7, 2007 email to

Bosley to determine if Bosley was serious about resigning and starting his own firm. Bosley's email to Scott stating that they should talk was not nearly as definite as the defendant's response to her co-worker's job inquiries in *Kastella*, and that response was deemed not to be solicitation.

¶52 Additionally, seven employees who left RKAA to work at Bosley Group, including Scott, submitted affidavits stating that Bosley had never solicited them while he worked at RKAA and that he did not cause their decision to resign. As in *Kastella*, no evidence was presented during the trial that Bosley solicited any of his co-workers while he was still employed at RKAA.

¶53 Furthermore, the Kubicek Parties presented no evidence that Bosley solicited Bashas' before his resignation. During their cross-examination of Kubicek, the Bosley Parties asked, "What evidence do you have that . . . [from] February 1, until the day Mr. Bosley left that he called Bashas' or talked to anyone at Bashas' and said, I'm leaving RKAA and I want your business?" Kubicek admitted that he did not have any evidence, except for a phone call with RKAA's contact person from Bashas', Mr. Hamm. During that call, which occurred six months to a year before Bosley resigned, Mr. Hamm stated that if Bosley ever left RKAA, Bashas' would be going with him. Kubicek later admitted that Mr. Hamm may have been trying to express how valuable he felt his relationship was with Bosley. Moreover, Kubicek

admitted that he had started his own firm after working for another architectural company, and that nothing would have been wrong with a client following him to his new firm because the client has the choice of which architectural firm to use.

¶54 Kubicek also claims that Bosley breached his fiduciary duty by forwarding two emails with attached drawings pertaining to two Bashas' projects from his work email to his personal email a few hours before he resigned. However, we do not see how this amounted to a breach of Bosley's fiduciary duty to RKAA. The Kubicek Parties did not introduce any evidence that Bashas' transferred those two projects over to Bosley Group; instead, Kubicek testified that Bashas' continued working with RKAA after Bosley's resignation to allow RKAA to complete some unfinished Bashas' projects.

¶55 Additionally, the Kubicek Parties did not introduce any evidence that Bosley needed those drawings for his work at Bosley Group. Kubicek testified that after Bosley's resignation, Bashas' asked RKAA to deliver drawings and specifications for one of its stores to Bosley Group, and RKAA complied with the request.

¶56 Based on the foregoing evidence, we find that the facts presented in support of the Kubicek Parties' breach of fiduciary duty claim have so little probative value that no reasonable juror could have found in their favor; therefore, we affirm the

trial court's decision to grant JMOL in favor of the Bosley Parties on this claim.

Intentional Interference with Contractual Relations and Advantageous Business Expectancies

¶57 The Kubicek Parties contend that the trial court erroneously granted the Bosley Parties' motion for JMOL on the Kubicek Parties' intentional interference with contractual relations and advantageous business expectancies claim. To prevail on this tort claim, the Kubicek Parties had to prove that: (1) a valid contractual relationship or business expectancy existed; (2) the Bosley Parties knew of the relationship or expectancy; (3) the Bosley Parties intentionally induced or caused a breach or termination of the relationship or expectancy; and (4) as a result, the Kubicek Parties were damaged. *Antwerp Diamond Exch. of Am., Inc. v. Better Bus. Bureau of Maricopa Cnty., Inc.*, 130 Ariz. 523, 529-30, 637 P.2d 733, 739-40 (1981).

¶58 The Kubicek Parties presented no evidence during trial that RKAA had a valid contractual relationship or business expectancy with Bashas'. Kubicek testified that RKAA typically had written contracts with its clients, but it did not have a written contract with Bashas' because Kubicek and Bashas' president and CEO decided not to have a contract. Kubicek further admitted on cross-examination that Bashas' could have taken its business to another architectural firm at any time and

for any reason because the choice between architectural firms rests solely with the client. When asked whether the only expectation he had was that Bashas' would continue to use RKAA's services "so long as the work was performed and so long as Bashas' wanted to stay [with RKAA]," Kubicek answered in the affirmative.

¶59 Furthermore, the Kubicek Parties presented no evidence during the trial that the Bosley Parties interfered with RKAA's contractual relationship with the employees who left RKAA and began working at Bosley Group. Kubicek testified that none of the employees who left RKAA to work at Bosley Group had employment contracts or non-competition agreements. He also stated that those employees were all free to work for one of RKAA's competitors and compete with RKAA for business and client accounts.

¶60 After reviewing the record, we find insufficient evidence that RKAA had a contractual relationship with, or a business expectancy of continued work for, Bashas'. Additionally, Kubicek presented no evidence that RKAA had a contractual relationship with any of the employees who resigned from RKAA to work at Bosley Group. Therefore, we affirm the trial court's JMOL on this claim.

Unfair Competition

¶61 The Kubicek Parties also contend that the trial court erroneously granted the Bosley Parties' motion for JMOL on the Kubicek Parties' unfair competition claim. Unfair competition encompasses several tort theories, including false advertising, misappropriation, trademark infringement, and "palming off." *Fairway Constructors, Inc. v. Ahern*, 193 Ariz. 122, 124, ¶ 9, 970 P.2d 954, 956 (App. 1998); *see Boice v. Stevenson*, 66 Ariz. 308, 315, 319, 187 P.2d 648, 653, 655 (1947) (finding unfair competition when the public was likely to be deceived or misled by the defendant's conduct).

¶62 On the unfair competition claim, Kubicek testified that he thought it unfair that a director of RKAA would start a competing firm and take RKAA's largest client. As previously discussed, however, Bosley was no longer a director when he started a competing firm, and he was free to leave RKAA at any time and start Bosley Group because he did not have an employment contract or a covenant not to compete. Also, Bosley did not "take" Bashas' from RKAA; as Kubicek testified, the decision to use Bosley Group instead of RKAA belonged to Bashas'.

¶63 The Kubicek Parties also claimed that the Bosley Parties unfairly competed with RKAA because Bosley sent two emails with drawings and specifications for Bashas' projects from his work email to his personal email prior to resigning. But

Kubicek introduced no evidence that this conduct deceived or misled the public or Bashas'. In fact, Kubicek testified that Bashas' probably already possessed hard copies of the work that Bosley took. Additionally, Kubicek stated that after Bosley resigned, RKAA complied with Bashas' request to deliver Bashas' drawings to Bosley Group.

¶64 We fail to see how the Bosley Parties' conduct amounted to unfair competition, and the Kubicek Parties introduced no evidence that the Bosley Parties acted dishonestly in competing with the Kubicek Parties. We therefore affirm the trial court's decision to grant the Bosley Parties' motion for JMOL on this claim.

Cross Appeal

¶65 The Bosley Parties filed a cross-appeal, requesting that we reverse and remand the trial court's denial of their application for attorney fees and costs. However, the Bosley Parties stated in their brief that their cross-appeal is contingent on this court reversing the trial court's new trial order. Because we affirm the trial court's order, we need not address this issue on appeal.

Attorney Fees

¶66 Finally, we address each party's request for attorney fees on appeal. The Bosley Parties request both their costs and attorney fees incurred in connection with this appeal pursuant to

A.R.S. § 12-342 (2003) and paragraph 19 of the 2006 Agreement. As the prevailing parties on appeal, we award the Bosley Parties their reasonable attorney fees incurred litigating those claims that arose out of the 2006 Agreement, subject to their compliance with Arizona Rule of Civil Appellate Procedure 21. The Bosley Parties are also entitled to their costs incurred in this appeal upon their compliance with Arizona Rule of Civil Appellate Procedure 21. We deny the Kubicek Parties' request for attorney fees because they did not prevail on appeal.

CONCLUSION

¶67 For the foregoing reasons, we affirm.

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PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

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MAURICE PORTLEY, Presiding Judge

/S/

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RANDALL M. HOWE, Judge