IN THE
# ARIZONA COURT OF APPEALS
## DIVISION ONE

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JAMES C. KISNER, et al., *Plaintiffs/Appellees*,

*v.*

JAMES W. BROOME, et al., *Defendants/Appellants*.

No. 1 CA-CV 16-0502
FILED 12-19-2017

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Appeal from the Superior Court in Pima County
No. C20130155
The Honorable Sarah R. Simmons, Judge

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED**

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COUNSEL

Rusing Lopez & Lizardi, PLLC, Tucson
By Rebecca K. O'Brien
*Counsel for Plaintiffs/Appellees*

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By Patric E. Durazzo, Eric Hawkins
*Counsel for Defendants/Appellants*

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**MEMORANDUM DECISION**

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Paul J. McMurdie and Judge Rebecca W. Berch[1] joined.

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**S W A N N**, Judge:

**¶1** Two shareholders in a closely held corporation claimed breach of fiduciary duty on the theory that after shareholder distributions were suspended, all shareholders other than themselves continued to receive payouts in the form of excessive salaries. In a bench trial, the superior court rejected the defendants' statute of limitations defense and found for the plaintiffs on the merits.

**¶2** We affirm the judgment in part, and we reverse in part and remand. The statute of limitations for breach of fiduciary duty is two years from when the plaintiff knows or in the exercise of reasonable diligence should know the facts underlying the claim. The undisputed evidence established that though the plaintiffs knew by at least late 2010 that other shareholders continued to receive payouts in 2009 (and in substantially greater amounts than in the past), the plaintiffs failed to investigate or commence litigation until early 2013. Accordingly, we hold that the breach of fiduciary duty, and dependent civil conspiracy and aiding and abetting claims, are time-barred as they relate to the 2009 payments. But we hold that the claims were timely asserted with respect to the defendants' salaries paid in 2010 and after, because the plaintiffs had no reasonable notice of those salaries until 2011 and after. We find no error in the superior court's decision that the post-2009 salaries were excessive. Nor do we find error in the superior court's method of calculating damages.

**FACTS AND PROCEDURAL HISTORY**

**¶3** Appellees James C. Kisner and Michael Montroy, and appellants James W. Broome and Benedict Anthony, were at all relevant

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[1] The Honorable Rebecca White Berch, retired Justice of the Arizona Supreme Court, has been authorized to sit in this matter pursuant to Article VI, Section 3 of the Arizona Constitution.

times shareholders in Healthcare Innovations, Inc. ("HCI"), an ambulance company in southeast Arizona.

**¶4** Soon after HCI became a for-profit entity in late 2003, all nine of its shareholders were made directors. Three of the shareholders — Broome, Melody Jones, and James Jensen — were also employees and therefore received salaries. But starting in 2005, *all* shareholders began receiving salaries regardless of whether they worked at HCI. Kisner, Montroy, and Anthony were among those given pure "shareholder salaries," in amounts roughly proportional to their ownership interests.

**¶5** In late 2006, Broome and Anthony caused Kisner to be terminated as general manager of Arrowhead Mobile Healthcare ("Arrowhead"), a separate ambulance company in northeast Arizona in which the three were shareholders. Thereafter, Kisner's relationship with Broome and Anthony, and eventually the majority of the other HCI shareholders, turned contentious.

**¶6** At a special HCI shareholder meeting in August 2007, Broome successfully moved, over Kisner and Montroy's objection, to reduce the number of HCI's directors to four. At the next annual shareholder meeting, held in March 2008, Broome, Anthony, Michael R. Gray, and Jerry A. Fink were elected as directors over Kisner and Montroy's objection. Gray was HCI's longtime medical director. Broome, who had retired as HCI's general manager but remained CEO, hired Anthony in 2008 to serve as CFO, and hired Fink to serve as fleet manager the same year. According to Broome, Anthony and Fink negotiated certain salaries and company-purchased vehicles, but they agreed to accept reduced salaries until the company was financially able to meet the agreed-upon obligations.

**¶7** In August 2008, the four-person board voted to increase director and officer pay by 10%. Later that year, the board rejected Kisner's offer to sell his shares to HCI. Then, in February 2009, the board voted to discontinue shareholder compensation. According to Broome, the company's corporate counsel and its accountant had advised that the "shareholder salaries" were both inappropriate and improvident. The minutes of the February 2009 director meeting, and a notice sent to shareholders several days later, stated that the primary reason for the discontinuation of shareholder compensation was to increase HCI's "rainy day fund." Kisner believed that the action meant that "they were going to stop all shareholders from getting their money that they w[ere] getting, which would have included everybody but [the employee-shareholders] Melody [Jones], Jim Jensen, [and] Jim Broome," whom Kisner believed

"would continue to receive their wages for their services" but would no longer receive "the shareholder payment portion of [their] W-2[s]." Kisner believed that "Anthony should have not had any money coming into him."

**¶8** But in fact, though Kisner, Montroy, Jensen (to the extent that he remained a shareholder),[2] and Fred Shaheen stopped receiving any payments from HCI (except for some annual dividends to pay shareholder taxes), all other shareholders were employees, officers, or directors, and they continued to receive payments. And in March 2009, the board voted to expand by one member and added Shaheen. Accordingly, all shareholders except for Kisner and Montroy continued to receive distributions in at least substantially the same — and, in the case of Broome and Anthony, in substantially greater — amounts as they had in 2007 and 2008. Broome's compensation more than doubled in 2009 to nearly $207,500, and Anthony's almost tripled to nearly $130,000. Broome's and Anthony's salaries thereafter fluctuated somewhat over the years, but they never dipped below $161,000 and $110,000, respectively, between 2009 and 2014. In addition, HCI purchased vehicles for the two. By contrast, Kisner, who had received a "shareholder salary" totaling approximately $21,000 in 2007 and in 2008, and Montroy, who had received a "shareholder salary" totaling approximately $15,000 in 2007 and in 2008, received only a few thousand dollars in 2009 and nothing thereafter.

**¶9** In early 2010, Kisner demanded to inspect HCI records. He requested, among other things, "Compensation paid to Board of Directors for 2008 and 2009." According to Kisner, he asked for compensation data "with the idea that it was a broad enough term that anything that they got paid, they got a check for whatever reason, which would be payroll, 1099's, mowing the lawns, whatever it would be, that that compensation that would be paid to any of those directors would be given to me." He and Montroy inspected records at the HCI office on March 12, 2010, and Kisner thereafter signed a document representing that he had "reviewed and received copies to my satisfaction that I requested per my demand letters." Kisner and Montroy were not provided W-2s or other tax documents, but they were provided a typewritten document, prepared by Anthony, entitled "Board of Directors Compensation." The document lists "13,936" next to Broome, Anthony, Gray, and Fink's names for both 2008 and 2009, as well as "11,256" next to Shaheen's name for 2009.

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[2] Jensen, an employee-shareholder, was terminated before the February 2009 director meeting and sold his shares back to HCI in early 2009, but he did receive some compensation in 2009.

**¶10** Around the same time that Kisner demanded to inspect records, he demanded that the election of directors scheduled for the upcoming annual shareholder meeting be carried out by ballot vote. Kisner's plan was that he and Montroy would vote their shares cumulatively to ensure that one of them would be elected to the board. But after Kisner demanded the ballot vote, Broome issued a notice resetting the meeting from March to April, and at the April meeting a majority of the shareholders, over Kisner and Montroy's objection, immediately amended HCI's bylaws, reduced the board to one member, and elected Broome as the sole board member. Because of the reduction of the board, Kisner and Montroy could not prevent Broome's election by voting cumulatively.

**¶11** At the April 2010 meeting, as at every annual shareholder meeting, all shareholders were provided copies of HCI's financial statement for the previous calendar year. The yearly statements account for, among other things, amounts attributable to salaried-management payroll, with those wages broken down by "Management," "Other Mgt," "General Mgr," "Admin," and, in later years, "IT." The 2008 statement distributed at the 2009 shareholder meeting showed salaried-management wages totaling $390,544. By contrast, the 2009 statement distributed at the April 2010 meeting showed salaried-management wages totaling $582,133 — an increase of $191,589 from the year before—with the significant majority of the increase in the general "Management" category. The 2010, 2011, 2012, and 2013 statements distributed at the meetings from 2011 to 2014 similarly show large "Management" sums and total salaried-management wages of, respectively: $487,088; $505,144; $548,763; and $618,204. According to Kisner, he did not compare any of the statements until around 2012; both Kisner and Montroy further testified that the statements did not inform them who was included in the "Management" category or the breakdown of wages within that category. Montroy testified that he reviewed every line of every statement every year, and "have always been worried about wages, but I don't know what the wages are."

**¶12** Later in 2010, Kisner and Montroy reviewed a rate-adjustment application that HCI had submitted to the state Department of Health and Safety ("DHS") at the beginning of the year. The application included a report of wages paid to HCI shareholders from July 2008 to June 2009. The exhibit stated that Broome received approximately $96,000 for management, Anthony received approximately $47,000 for management, Gray and Fink each received approximately $37,000 for management, Shaheen received approximately $10,000 for management, Kisner received approximately $14,000 for management, Montroy received approximately $10,000 for management, and the non-director employee-shareholders

Jensen and Jones received, respectively, approximately $70,000 and $58,000 in wages.

**¶13** Montroy testified that he did not look at wages when he reviewed the DHS application. But according to Kisner, when he "got the report from the Department of Health Services . . . that was the first time I had seen anything other than that $13,000 on compensation." He further testified that he "was under the impression that all of the shareholders got their wages cut the same as what Montroy and I did, and I didn't find out differently than that until sometime in 2010." Kisner testified that he thought the salaries reported in the DHS application were "high, but they w[ere] not — they didn't go ridiculous on the documents that I had." With respect to the salary reported for Broome, Kisner stated that he "thought it was high, but it was not exorbitantly high." In response to his counsel's question of whether he believed that Broome "just generally paid himself too much money," Kisner explained, "[o]verall, yes, but it was – you know, it was – this salary here was within the ball park I guess."

**¶14** Kisner explained that he believed the amounts in the DHS application were consistent with "[t]he percentage of – [the ownership-interest-based "shareholder salaries"] before they cut us off." He acknowledged, however, that his ownership interest was the same as Gray's and Fink's. And the DHS report showed salaries for Gray and Fink greater than the salary shown for Kisner, and indeed greater than the sum of the salary shown for Kisner and the amounts reported on the "Board of Director's Compensation" document. Kisner agreed with opposing counsel's statement that he "had thought the salaries [on the DHS application] were not right, but [ ] didn't think that they were out of control." And in fact, Kisner submitted a letter at the 2011 shareholder meeting that included, in a list of complaints, the following statement: "Utilizing the report of compensation of directors provided Mr. Kisner, it does not agree with the amounts shown on the DHS application for rate adjustment." According to Kisner and Montroy, they thereafter received no explanation regarding the discrepancy. But neither did they again request to review HCI records. Kisner, after stating that such reviews are "very difficult and . . . very time consuming," explained that in "2011 I was kind of trying to stay away from as much stress as possible."

**¶15** In January 2013, Kisner filed a direct and derivative action that raised multiple claims based on alleged breaches of HCI's shareholder agreement concerning the board's structure and makeup and its suspension of the "shareholder salaries." Kisner named as defendants all other current

and former shareholders. Montroy was changed to a plaintiff by a first amended complaint filed in April 2013.

**¶16** In January 2014, the defendants disclosed a "Shareholder Wage Analysis" chart listing each shareholder's total compensation for each year from 2007 to 2013; three months later, the defendants disclosed shareholder W-2s for 2007 to 2014. According to Kisner, January 2014 was "[t]he first time I knew the true amount that [the defendants] w[ere] getting," and "[u]p to that time, I had had some pieces about things that c[a]me in in 2010."

**¶17** In June 2014, Kisner and Montroy sought leave to file a second amended complaint that added many more claims, including a claim for breach of fiduciary duty against Broome, Anthony, Gray, Fink, Shaheen, and Jones based primarily on the allegation that they received excessive salaries while Kisner and Montroy received nothing. The court granted leave to amend, and the matter proceeded to a seven-day bench trial. The defendants pled and litigated the statute of limitations as a defense to the excessive-salaries claim.

**¶18** The superior court rejected the statute of limitations defense, finding:

> As part of their breach of fiduciary duties, Defendants, or at least Defendants Broome and Anthony, misled Kisner and Montroy. When Kisner specifically asked for compensation relating to the salaries paid to Directors, he was provided with a memorandum prepared by Anthony, which gave such compensation as $13,936 for most Directors and $11,256 for Shaheen. Kisner, perhaps naively, did not ask for W-2s to confirm that information. The Court **FINDS** that Anthony deliberately misled Kisner and Montroy and that this action tolled the statute of limitations. The Court **FINDS** Kisner's testimony is credible and **FINDS** that he had no duty to inquire further. The Court **FURTHER FINDS** that neither he nor Montroy knew the true salaries paid to the Defendants until after this lawsuit was filed, and that therefore the statute of limitations on the breach of fiduciary duty was tolled.

The court adopted the plaintiffs' expert's opinion regarding the propriety of Broome and Anthony's salaries, ruled that Broome and Anthony's salaries were excessive and part of a plan to prevent Kisner and Montroy from sharing in HCI's profits, and entered judgment against Broome and

Anthony on the breach of fiduciary duty claim. The court relied on the same findings to rule for the plaintiffs on their claims for judicial dissolution, civil conspiracy as to Broome and Anthony, and aiding and abetting as to Anthony. With respect to remaining claims, the plaintiffs prevailed on several, the defendants prevailed on others, and the balance were withdrawn, dismissed, or deemed moot.

**¶19** The court ordered the defendants to buy out Kisner and Montroy's interests in HCI, and the parties promptly complied. The court assessed damages based on the breach of fiduciary duty by treating the excess portions of Broome and Anthony's salaries as profits that should have been distributed to Kisner and Montroy according to their ownership interests. The court determined that Kisner and Montroy were entitled to attorney's fees based on a separate count on which they prevailed at trial, and that the defendants were entitled to attorney's fees based on several of the counts on which they prevailed. The court denied the defendants' request to award fees on other counts on which they prevailed. The court ultimately determined that the competing awards on the specified counts effectively cancelled each other out, and therefore ordered that the parties bear their own fees and costs.

**¶20** Broome and Anthony timely appeal the entry of judgment against them on the breach of fiduciary duty and dependent claims, and the court's rulings on attorney's fees and costs.

## DISCUSSION

### I. THE PLAINTIFFS' BREACH OF FIDUCIARY DUTY AND RELATED CLAIMS WERE PARTIALLY TIME-BARRED.

**¶21** Broome and Anthony contend that based on the applicable statute of limitations, they were entitled to judgment on the breach of fiduciary duty and dependent claims. We agree in part.

**¶22** The statute of limitation for breach of fiduciary duty is two years. *CDT, Inc. v. Addison, Roberts & Ludwig, C.P.A.*, 198 Ariz. 173, 175, ¶ 6 (App. 2000). Statutes of limitations "identify the outer limits of the period of time within which an action may be brought to seek redress or to otherwise enforce legal rights created by the legislature or at common law." *Porter v. Spader*, 225 Ariz. 424, 427, ¶ 7 (App. 2010). They serve primarily "to protect defendants and courts from stale claims where plaintiffs have slept on their rights," *Gust, Rosenfeld & Henderson v. Prudential Life Ins. Co. of Am.*, 182 Ariz. 586, 590 (1995), and they also protect defendants from insecurity, *Porter*, 225 Ariz. at 427, ¶ 7. But "[o]ne does not sleep on his or

her rights with respect to an unknown cause of action." *Doe v. Roe*, 191 Ariz. 313, 322, ¶ 29 (1998). Accordingly, Arizona applies the "discovery rule" to calculate limitations periods. *Gust*, 182 Ariz. at 599. "Under the 'discovery rule,' a plaintiff's cause of action does not accrue until the plaintiff knows or, in the exercise of reasonable diligence, should know the facts underlying the cause." *Id.* at 588.

**¶23** "[T]he important inquiry in applying the discovery rule is whether the plaintiff's injury or the conduct causing the injury is difficult for the plaintiff to detect . . . ." *Id.* at 590. But the "plaintiff need not know *all* the facts underlying a cause of action to trigger accrual." *Doe*, 191 Ariz. at 323, ¶ 32. Most importantly here, "[c]ommencement of the statute of limitations will not be put off until one learns the full extent of his damages." *Comm. Union Ins. Co. v. Lewis & Roca*, 183 Ariz. 250, 255 (App. 1995). Accordingly, the key inquiry is whether the plaintiff "possess[es] a minimum requisite of knowledge sufficient to identify that a wrong occurred and caused injury," *Doe*, 191 Ariz. at 323, ¶ 32, and has "reason to connect the 'what' to a particular 'who,'" *Walk v. Ring*, 202 Ariz. 310, 316, ¶ 22 (2002). The plaintiff "is charged with a duty to investigate with due diligence to discover the necessary facts." *Doe*, 191 Ariz. at 324, ¶ 37. "[T]he core question is whether a reasonable person would have been on notice to investigate." *Walk*, 202 Ariz. at 316, ¶ 24. "The discovery rule . . . does not permit a party to hide behind its ignorance when reasonable investigation would have alerted it to the claim." *ELM Ret. Ctr., LP v. Callaway*, 226 Ariz. 287, 290, ¶ 12 (App. 2010).

**¶24** A limitations period is tolled, however, if "the defendant has wrongfully concealed facts giving rise to the cause of action in such a manner as to prevent a plaintiff from reasonably discovering a claim exists within the limitations period." *Anson v. Am. Motors Corp.*, 155 Ariz. 420, 426 (App. 1987). "Fraud practiced to conceal a cause of action will prevent the running of the statute of limitations until its discovery." *Walk*, 202 Ariz. at 319, ¶ 34 (citation omitted). Further, such fraudulent concealment "relieve[s the plaintiff] of the duty of diligent investigation required by the discovery rule and the statute of limitations is tolled 'until such concealment is discovered, or reasonably should have been discovered.'" *Id.* at ¶ 35 (citation omitted). The defrauded plaintiff's "duty to investigate arises only when [the plaintiff] 'discovers or is put upon reasonable notice of the breach of trust.'" *Id.* (citation omitted). Accordingly, "an actual knowledge standard applies to triggering the statute of limitations for a plaintiff who establishes a breach of the fiduciary duty of disclosure." *Id.* But importantly, the "actual knowledge standard" does not mean actual

knowledge of all contours of a claim—it means "actual knowledge of the possibility of [the claim]." *Id.* at 321, ¶ 42.

**¶25** The question of when a limitations period begins to run typically is for the trier of fact to decide, *Doe*, 191 Ariz. at 323, ¶ 32, and we generally will defer to the factfinder's findings unless they are clearly erroneous or unsupported by any credible evidence, *see Imperial Litho/Graphics v. M.J. Enters.*, 152 Ariz. 68, 72 (App. 1986). And the statute of limitations defense generally is not favored. *CDT*, 198 Ariz. at 175, ¶ 5. But we review de novo findings that address mixed questions of fact and law or that are legal conclusions, and we may substitute our own analysis of the record when the facts are undisputed. *Tovrea Land & Cattle Co. v. Linsenmeyer*, 100 Ariz. 107, 114 (1966).

**¶26** When a claim is "clearly brought outside the relevant limitations period" based on undisputed facts, it is "conclusively barred." *Montano v. Browning*, 202 Ariz. 544, 546, ¶ 4 (App. 2002) (reversing denial of motion to dismiss claim under statute of limitations); *see also Doe*, 191 Ariz. at 323, ¶ 32 (holding that defendant would have been entitled to summary judgment based on statute of limitations had his argument regarding application of discovery rule "gone unanswered or unexplained"); *Hall v. Romero*, 141 Ariz. 120, 125, 127 (App. 1984) (holding that defendant was entitled to summary judgment based on statute of limitations given "[t]he undisputed facts"); *Coronado Dev. Corp. v. Superior Court (Gesky)*, 139 Ariz. 350, 352 (App. 1984) (holding that defendants were entitled to summary judgment based on statute of limitations because evidence established that plaintiffs were not misled, and therefore limitations period was not tolled).

**¶27** Kisner and Montroy's primary breach-of-fiduciary-duty theory was that the salaries paid to Broome, Anthony, and other shareholders were excessive and sham, designed to effectively continue profit distributions to all shareholders other than Kisner and Montroy. The superior court found that the statute of limitations was tolled, and Kisner and Montroy's duty to investigate suspended, because Broome and Anthony fraudulently concealed the other shareholders' true compensation when they provided the "Board of Directors Compensation" document in March 2010.

**¶28** But even assuming the "Board of Directors Compensation" document misleadingly suggested that the approximately $14,000 salary it listed for most other shareholders constituted those individuals' total compensation rather than merely their compensation for serving as directors, the undisputed evidence established that Kisner and Montroy

were soon thereafter made well aware that the document provided an incomplete picture. They obtained additional information that, at the least, made continued reliance on the March 2010 document unreasonable. In April 2010, they received a financial statement for 2009 that revealed a 49% increase in the wages paid to salaried management as compared to the previous year. Though the statement did not break down the wages by individual, the more-than-$191,000 increase was sufficient to dispel any reliance on the March 2010 document and trigger the duty to investigate.

**¶29** And later in 2010, Kisner and Montroy discovered additional information: the DHS application's wage report. The wage report shows that for the 2008 to 2009 fiscal year, the other shareholders received far more for "management" than the amounts reported on the "Board of Directors Compensation" document. Though Kisner asserted he believed the amounts were consistent with the payment of "shareholder salaries" during part of the period covered by the report, the wage report shows that persons with the same ownership interest as Kisner received "management" wages more than double the approximately $14,000 in such wages attributed to Kisner. Moreover, Kisner specifically acknowledged that the wage report created a discrepancy in his mind: he testified at trial that the report marked "the first time I had seen anything other than that $13,000 on compensation" and the first time he was dispelled of his "impression that all of the shareholders got their wages cut the same as what Montroy and I did," and he stated that he had thought the salaries reported there were "not right" and "high." And in 2011, he noted the discrepancy in the letter he submitted at the annual shareholder meeting. But Kisner and Montroy chose not to pursue the matter by commencing an action or requesting to review additional records — even though he admitted having "some pieces about things [regarding the defendants' salaries] that c[a]me in in 2010."

**¶30** Kisner and Montroy contend that they cannot be charged with knowledge based on the DHS application's wage report because the report is inaccurate. But whether the report is accurate is beside the point. Even if the report did not disclose the defendants' true salaries, it placed the plaintiffs on notice that the defendants were receiving large payments and the plaintiffs were being cut out. The occurrence of harm and the extent of damages are distinct concepts. *Comm. Union Ins. Co.*, 183 Ariz. at 255. By late 2010, Kisner and Montroy had information that rendered any obfuscation by other shareholders immaterial. Though we do not quibble with the finding that Kisner and Montroy were the targets of deception, the undisputed facts showed that they knew of the injury and the identities of the wrongdoers more than two years before they filed their complaint.

Though it is true that fraudulent concealment relieves the plaintiff of the duty to investigate, it does not create an indefinite extension of the statute of limitations that permits the plaintiff to delay action when he or she has actual knowledge of a possible claim and is on notice of any need to undertake investigation to discover more details.

**¶31** The initial wrong giving rise to an actionable breach of fiduciary duty claim occurred in 2009, and 2009 salary excesses were reasonably discoverable by at least late 2010. Accordingly, the portion of the plaintiffs' breach of fiduciary duty claim related to the salaries paid for 2009, even when related back to the date of the original complaint filed in January 2013 (as proper here under Ariz. R. Civ. P. 15(c)), was outside the bounds of the two-year limitations period. And so were the civil conspiracy and aiding and abetting claims as related to the 2009 salaries. *See Wells Fargo Bank v. Ariz. Laborers, Teamsters & Cement Masons Local No. 395 Pension Tr. Fund*, 201 Ariz. 474, 485, 498, ¶¶ 34, 99 (2002) (holding that civil conspiracy and aiding and abetting claims require accomplishment of underlying tort); *see also Am. Master Lease LLC v. Idanta Ptrs., Ltd.*, 171 Cal. Rptr. 3d 548, 570 (Cal. Ct. App. 2014) (holding that aiding and abetting breach of fiduciary duty is subject to same limitations period as underlying tort). The superior court therefore erred by failing to enter judgment for the defendants with respect to the claims as related to the 2009 salaries.[3]

**¶32** We agree with Kisner and Montroy, however, that the claims as related to salaries of which they were informed within two years of their complaint — i.e., the salaries paid from 2010 forward, which they were reasonably notified of starting in 2011 — are not time-barred. No Arizona

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[3] Kisner and Montroy contend that they remain entitled to the judgment entered by the superior court award despite any issue with the statute of limitations for breach of fiduciary duty because they timely pled unjust enrichment (which has a longer limitation period) in the alternative, and in denying that claim the superior court stated that the salaries were excessive but the court had already provided a remedy. Kisner and Montroy misconstrue the elements and purpose of unjust enrichment. Unjust enrichment is an equitable doctrine. *Wang Elec., Inc. v. Smoke Tree Resort, LLC*, 230 Ariz. 314, 318, ¶ 10 (App. 2012). Though unjust enrichment may provide grounds for recovery in "the absence of a remedy provided by law," *id.*, equity would not be served if that element were held to include cases where the absence of a remedy at law is the result of the plaintiff's own lack of diligence in pursuing an otherwise-available legal remedy, *see Nutt Corp. v. Howell Road, LLC*, 721 S.E.2d 447, 450–51 (S.C. Ct. App. 2011).

case law addresses the question whether a minority shareholder's claim for breach of fiduciary duty may be apportioned for purposes of the statute-of-limitations analysis. We hold that the answer to the question depends on the nature and context of the wrongful acts. *Cf. Roemmich v. Eagle Eye Dev., LLC*, 526 F.3d 343, 351 (8th Cir. 2008) (observing, for purposes of determining cumulative harm under the "continuing wrong doctrine," that "myriad wrongful acts may trigger a freeze-out claim, and some could conceivably be continuing wrongs"). We recognize that here, the plaintiffs' claims could be viewed as arising from a single time-barred act: the initial decision to implement an unfair payment scheme. *See Thorndike v. Thorndike*, 910 A.2d 1224, 1226–28 (N.H. 2006) (holding that various wrongful acts in corporate "freeze-out" case, including suspension of plaintiff's salary and continuation of defendant's salary, were wholly time-barred even though they created conditions that continued within the limitations period).

**¶33** But the effect of such reasoning would be to apply the statute of limitations to immunize defendants from wrongs that have not yet occurred, and such a result would not serve the statutory purpose of eliminating stale claims. Instead, we interpret Kisner and Montroy's claims as challenging the defendants' implementation and continued approval and repeated application of an ongoing scheme of excessive payments. This view accords with our general policy favoring resolution of disputes on the merits. *See Gust*, 182 Ariz. at 590; *see also Doe*, 191 Ariz. at 325, ¶ 39 & n.12 (declining to address questions regarding application of statute of limitations on separate or continuous tort theory, but noting 1906 Arizona case posing hypothetical repeated-trespass scenario and stating that purpose and effect of statute of limitations would not be served were years-later claim barred with respect to recent trespasses "for no other reason than . . . tolerat[ion of] [some of] the acts for years beyond the period of statutory limitation" (second alteration in original)). It is also consistent with case law recognizing partial survival of claims otherwise time-barred where the underlying acts arise from continuing duties and discrete instances of performance. *See Anonymous Wife v. Anonymous Husband*, 153 Ariz. 573, 578 (1987) (holding that stepfather's claim for child-support reimbursement from child's biological father was not wholly time-barred because biological father had continuing obligation, meaning that new cause of action for reimbursement accrued each time stepfather expended funds from his share of community estate to support child); *Builders Supply Corp. v. Marshall*, 88 Ariz. 89, 95 (1960) (holding that claim for breach of contract based on underpayments was not wholly time-barred because each successive underpayment constituted separate breach). The superior court

did not err by deciding the plaintiffs' claims on the merits with respect to the post-2009 salaries.

## II. THE SUPERIOR COURT'S JUDGMENT WAS SUFFICIENTLY SUPPORTED WITH RESPECT TO TIMELY BREACH OF FIDUCIARY DUTY AND RELATED CLAIMS.

**¶34** We discern no error in the superior court's entry of judgment for Kisner and Montroy on the breach of fiduciary duty and related claims to the extent they were based on post-2009 salaries. Sufficient evidence supports the superior court's determinations that the salaries were excessive and that the defendants engaged in tortious collusion.

### A. The Superior Court Did Not Err by Adopting the Opinion of the Plaintiffs' Expert That the Salaries Were Excessive.

**¶35** Broome and Anthony contend that the superior court erred by adopting the opinion of the plaintiffs' expert witness rather than that of the defense expert regarding the propriety of the salaries.[4]

**¶36** "The trial court, not this court, weighs the evidence and resolves any conflicting facts, expert opinions, and inferences therefrom." *In re General Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 198 Ariz. 330, 340, ¶ 25 (2000). When the trial court makes "findings that, although disputed, are fully supported by the evidence, . . . we will not second-guess the court's factual findings, but rather, will uphold them unless they are shown to be clearly erroneous." *Id.* We discern no clear error in the superior court's factual determinations here.

**¶37** Broome and Anthony first contend that the plaintiffs' expert witness did not actually opine that their salaries were excessive. Our review of the record reveals otherwise. The expert's written report specifically stated that the "salaries were excessive," and she testified to that effect at trial. Broome and Anthony next raise a host of complaints regarding the bases for the expert's opinion. They contend that she failed to consider their credentials, the FLSA-exempt nature of their positions, and the results of their leadership. They also contend that she based her conclusions on comparison data from non-comparable companies while ignoring data from the parallel Arrowhead company. All of these arguments fail. Though defendants might disagree with the expert's

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[4] Broome and Anthony also contend that the plaintiffs' testimony was not credible. They point to a mistake in Kisner's testimony that he later acknowledged and that is, in any event, immaterial to the issues before us.

methodology and conclusions, we discern no clear error in the trial court's adoption of the plaintiffs' expert's conclusion of excessiveness.

B. Sufficient Evidence Supports the Judgments on Timely Civil Conspiracy and Aiding and Abetting Claims.

**¶38** Broome and Anthony further contend that insufficient evidence was presented on civil conspiracy and aiding and abetting. We discern no error in the superior court's resolution of those claims in the plaintiffs' favor (to the extent they were based on timely asserted breaches of fiduciary duty). Civil conspiracy requires that (1) two or more individuals agree to commit a tort, and (2) they do so. *Wells Fargo*, 201 Ariz. at 498, ¶ 99. Aiding and abetting tortious conduct requires that (1) the primary tortfeasor commits a tort that injures the plaintiff, (2) the defendant knows that the primary tortfeasor's conduct constitutes a breach of duty, and (3) the defendant substantially assists the primary tortfeasor in achieving the breach. *Id.* at 485, ¶ 34. The evidence at trial reasonably supports the inference that Broome and Anthony, the two insiders who exercised the most control over corporate decisions and enjoyed the greatest benefit from the excessive-salary scheme, agreed to work together and succeeded in their efforts to intentionally accomplish a wrongful freeze-out.

III. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY ASSESSING DAMAGES ON A CONSTRUCTIVE DIVIDEND THEORY.

**¶39** Broome and Anthony next challenge the superior court's decision to structure damages by viewing the excess portions of their salaries as undistributed shareholder dividends. "The computation of the amount of damages [that] are not fixed is a matter within the discretion of the trial court — a factual determination — and unless clearly erroneous, will not be reversed on appeal." *Elar Invs., Inc. v. Sw. Culvert Co.*, 139 Ariz. 25, 30 (App. 1983). We discern no error in the superior court's approach here. The record supports the conclusion that the excess portions of the salaries were constructive dividends, regardless of whether the plaintiffs would otherwise have a right to receive dividends. Of course, in view of our decision that the plaintiffs' claims arising from the 2009 salaries are time-barred, the superior court's damages calculation must be adjusted accordingly.

IV. THE SUPERIOR COURT ACTED WITHIN ITS DISCRETION TO LIMIT THE DEFENDANTS' POTENTIAL ATTORNEY'S FEES AWARD.

**¶40** Broome and Anthony finally contend that the superior court erred by deeming them eligible to recover attorney's fees on only some of the contract-based claims on which they prevailed. The superior court has broad discretion to award or deny fees under A.R.S. § 12-341.01(A). *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 570 (1985). Here, the court explained that it chose not to award fees to the defendants on the relevant claims because

> [w]hile Defendants prevailed on those claims, . . . [t]he claims could have been avoided by Defendants[']willingness to treat Plaintiffs fairly, . . . the awarding of attorney's fees in this case would discourage other parties with tenable claims or defenses in closely held corporations from pursuing those claims no matter how badly they believe they are being treated, . . . [and] at least some of these claims involved technical violations of the governing documents of the corporation which were later corrected.

We discern no abuse of discretion in the superior court's reasoned decision.

## CONCLUSION

**¶41** We hold that Kisner and Montroy delayed in bringing their breach of fiduciary duty and related claims alleging excessive salaries paid to the defendants in 2009, and that those claims therefore are time-barred. We hold that the claims are timely as to salaries paid in 2010 and after, and that the superior court did not err by resolving the timely claims in the plaintiffs' favor. We further discern no abuse of discretion in the superior court's method of calculating damages.

**¶43** We reverse the superior court's judgment, including the award of damages, with respect to the claims related to the 2009 salaries. We otherwise affirm the judgment, but remand for recalculation of damages consistent with this decision.


AMY M. WOOD • Clerk of the Court
FILED: AA