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SJC-13180

JOHN L. TOCCI & another[1] vs. MICHAEL J. TOCCI & others.[2]

Middlesex. February 4, 2022. - June 17, 2022.

Present: Budd, C.J., Gaziano, Lowy, Kafker, Wendlandt, & Georges, JJ.

Corporation, Close corporation. Conversion. Limitations, Statute of. Practice, Civil, Findings by judge, Objection, Statute of limitations, Additur, Attorney's fees, New trial, Counterclaim and cross-claim, Amendment of complaint. Damages, Conversion, Breach of fiduciary duty, Additur, Attorney's fees. Due Process of Law, Right to hearing.

Civil action commenced in the Superior Court Department on April 4, 2014.

The case was tried before Hélène Kazanjian, J., and posttrial motions were heard by her.

The Supreme Judicial Court granted an application for direct appellate review.

Gavin G. McCarthy for Tocci Corporation & another.
Michael J. Tocci, pro se.
Bradley L. Croft for the plaintiffs.

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[1] Tocci Building Corporation.

[2] Tocci Corporation and William Tocci, interveners.

GAZIANO, J. This case arises out of a protracted dispute between family members in a closely held corporation over asserted conversions of corporate funds. The corporation and one of its shareholders brought suit against an officer, claiming that the officer diverted money from the corporation for the benefit of himself and his individually owned corporation. The jury found that the officer violated his fiduciary duties to the corporation and converted the corporation's assets for his own benefit, ultimately awarding $1 million in damages to the corporation. The corporation appealed, and the shareholder and the officer cross-appealed, each claiming error in the course of the jury trial, as well as in the judge's decisions on posttrial motions for additur, surcharge, and a new trial.

In addressing the parties' claims, we must confront the novel question whether a successful plaintiff in an action for a breach of fiduciary duty may recover its attorney's fees through the use of surcharge, an equitable remedy that holds a fiduciary personally liable for the fiscal impact of his or her breach. We conclude that surcharge may be used to award a plaintiff fiduciary the costs of attorney's fees, where the plaintiff brings the litigation on behalf of a separate entity or common fund, and not where the litigation directly benefits only the

plaintiff. Accordingly, because the corporation here brought the action for its own benefit, the judge did not err in denying the plaintiff's request for surcharge. After carefully considering the parties' remaining arguments, we discern no error and therefore affirm the jury's verdict, the trial judge's decisions on the motions in limine during the jury trial, and the decisions on the posttrial motions for additur, surcharge, and a new trial.

1. Background. a. Facts. We recite the facts the jury could have found, reserving certain facts for later discussion. Tocci Corporation (TC), a closely held, family-owned construction company, was founded in 1975 by Valentino Tocci.[3] Valentino's sons, John Tocci, Michael Tocci, and William Tocci, each received a one-third ownership interest in the company and were appointed to its board of directors.[4] Valentino eventually turned over full control to John, who was named as chief executive officer. Michael and William intermittently performed work for the company as clerk and laborer, respectively. John directed his brothers' work and determined their salaries.

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[3] Tocci Corporation initially did business under the name Will-Mick Construction Company, Inc., and later William Michael Corporation. For simplicity, we refer to the company as Tocci Corporation (TC).

[4] Because they share a last name, we refer to the members of the Tocci family by their first names.

Sometime in the 1980s, John began to express frustration with TC's ownership arrangement. John felt that it was unfair that Michael and William had the same ownership interest as he did even though he performed the bulk of the work. John's frustrations came to a head at a family meeting in 1984, when he threatened to leave TC unless he was given full ownership. The meeting did not result in any changes in ownership, but, rather, dissipated after Michael announced his intention to attend law school so that he could return to the company with another useful skill.

While Michael attended law school and William worked as a laborer, John continued to run the day-to-day operations of the business. In 1984, John paid himself a $500,000 bonus in addition to his $36,669 salary. At that time, the bonus was not disclosed to Michael or William, nor did they receive any distributions.

At some point prior to 1987, John started a separate construction company called Tocci Building Corporation, of which he was the sole owner. Not long thereafter, John purportedly borrowed $131,475 from TC to pay the mortgage on his home. He later allegedly transferred $45,750 from TC to Tocci Building Corporation.

John eventually decided to stop bidding on new construction contracts for TC and began to wind down the corporation's

ongoing affairs, although it continued to exist on paper to pursue litigation pertaining to one of its prior jobs, referred to as the Park West litigation. That matter settled in 1991 for $2.55 million, netting TC approximately $1.25 million after legal fees, although John told Michael and William that the settlement "was a wash." John then distributed approximately $1.1 million of the settlement award to Tocci Building Corporation. According to John, the payment from the settlement proceeds was to reimburse Tocci Building Corporation for resources it expended supporting TC throughout the course of the Park West litigation, as well as payments it had made to subcontractors on TC's behalf.

In 1993, John asked Michael to backdate a document stating that Michael had approved the settlement prior to its acceptance in 1991, in order to "satisfy some 'bean counters'" who were auditing the settlement. Michael refused, but he instead offered to provide John with a deed of transfer, which purported to transfer his entire interest in TC to John. John assured Michael that the document would have no legal effect, and Michael believed that he was simply "helping his brother out of a jam."

With Michael's deed of transfer in hand, and the Park West litigation concluded, in 1995, John unilaterally dissolved TC. He then distributed TC's remaining assets, worth approximately

$69,192, to Tocci Building Corporation, without consulting Michael or William. Michael and William were unaware that TC had been dissolved until 2013, when Michael spontaneously conducted a search through the Commonwealth's corporate record system. Michael then announced his intent to revive the company, which spurred the instant litigation.

b. Procedural background. In 2014, John filed a complaint against Michael in the Superior Court, seeking to enjoin him from reviving TC. The complaint asserted that, as a result of the deed of transfer, Michael no longer had any interest in the company. In his opposition, Michael contested the validity of the deed of transfer and also raised a number of counterclaims against John, including claims for breach of fiduciary duty, conversion, and unjust enrichment. Michael and William ultimately were able to revive TC in 2016; TC then intervened in the litigation, asserting similar claims against John.[5]

Because many of the claims against John would be precluded if the deed of transfer had been effective, the parties moved to bifurcate the trial. They agreed that first a jury-waived trial

[5] William also was added as an intervener. John's wife, Lila Tocci, also was added as a party. Following the jury's verdict, the judge entered judgment in favor of Lila on all counts against her individually. She did not appeal from this ruling and therefore is not a party to this appeal. See Mass. R. A. P. 3 (a) (1), as appearing in 481 Mass. 1603 (2019). William did pursue an appeal and remains a party before this court.

would be conducted on the sole issue whether the deed of transfer had eliminated Michael's interest in TC. The remaining issues, if any, then would be tried before a jury.

The judge who presided over the first trial issued a written decision finding that the deed of transfer was fraudulently induced and therefore voidable; accordingly, Michael's and TC's claims would be able to proceed. Most of Michael's claims were duplicative of TC's claims, and therefore would be resolved implicitly by the jury's decision on TC's claims. After a hearing at which Michael agreed that his claims were subsumed by the corporation's, TC became the sole plaintiff at the jury trial, and Michael reserved additional equitable claims that were personal to him for the court to resolve following the jury's verdict.

The claims before the jury were based on five alleged conversions of corporate assets: the $500,000 bonus; the $131,475 loan; the $1.1 million settlement payment; the $45,750 transfer to Tocci Building Corporation; and the $69,192 dissolution distribution. The jury were asked to decide (1) whether the claims were brought within the applicable statute of limitations; (2) whether John committed a breach of his fiduciary duties to TC; (3) whether John unlawfully converted money or property from TC; (4) the amount of harm suffered by TC as a result of John's misconduct, if any; and

(5) the amount of unjust enrichment enjoyed by John as a result of his misconduct, if any. The jury heard testimony from each of the Tocci brothers, as well as expert testimony on executive compensation and corporate valuation. Among other evidence, many of TC's financial records and some of John's tax returns were introduced in evidence.

The jury concluded that the claims were timely commenced, and that John had committed a breach of his fiduciary duties and had engaged in unlawful conversion. They determined that TC suffered $1 million in harm, but found that John did not obtain any unjust enrichment. TC and William appealed, and John and Michael cross-appealed. We subsequently granted TC and William's application for direct appellate review.

2. Discussion. The parties assert multiple errors, all arising out of rulings at or after the jury trial. TC contends that the second judge erred in declining to provide the jury with a comprehensive list of each of the factual findings in the first judge's decision following the jury-waived trial. John argues that TC failed to satisfy its burden of proving that its claims were timely commenced, and therefore the judge should have granted his motions for a directed verdict on the statute of limitations issue. TC also maintains that the judge erred in denying two of its posttrial motions. First, TC contends that the judge should have granted its motion for additur because the

jury's award was unreasonable. Second, with respect to the corporation's claims, the judge made an error of law when she denied TC's request to hold John personally liable for its attorney's fees through the equitable doctrine of surcharge. Finally, Michael asserts that the judge should have allowed his motion to amend and that her refusal to hold an evidentiary hearing on his claims deprived him of his right to due process. Discerning no error, we affirm.

a. Presentation of first judge's findings. Prior to the jury trial, the parties filed a joint motion seeking to bifurcate the proceedings. They requested that a jury-waived trial be held prior to the jury trial on the sole issue whether Michael had transferred his entire interest in TC to John in 1993 via the deed of transfer. The parties believed that resolving that issue would "streamline the issues remaining to be tried, shorten the length of the jury trial . . . , and enhance the potential for a global settlement." The presiding judge allowed the motion but cautioned the parties that, at the jury trial, they would not be permitted to relitigate the facts as she found them. The parties agreed, but they did not address how the findings would be presented to the jury were there to be a second trial.

The judge who conducted the jury-waived trial issued a detailed decision and order setting forth her factual findings

and ultimate conclusions of law. In addition to discussing the contested deed of transfer, the decision included a number of findings on the history and operation of TC. The judge determined that the deed of transfer was the product of fraudulent inducement and therefore voidable, which allowed the parties to try the remaining issues at a jury trial; that trial ultimately took place before a second judge.

Although the parties acknowledged, to some extent, that the first judge's factual findings were binding, they disagreed as to which specific findings should be binding and how they should be presented to the jury. TC sought to have the second judge open the trial by providing the jury with a list of sixty-one factual findings, drawn from the first judge's findings, that the jury were to accept as established fact. John argued that the jury should not be provided with specific factual findings but, rather, simply should be instructed to accept as fact that the deed of transfer was voidable. When the parties were unable to agree on which facts to present to the jury, the second judge drafted a list of twelve "basic facts" from the first judge's findings, largely pertaining to the formation of TC and the deed of transfer, which she instructed the jury to accept as fact.[6]

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[6] The second judge instructed the jury to accept the following as established fact: (1) Valentino was the father of John, Michael, and William; (2) Valentino established a successful construction company that predated TC; (3) Valentino

The second judge also decided that all other issues of fact were to be presented through testimony or other evidence. If a witness's testimony differed from the first judge's findings, the parties either could seek to impeach the witness or could ask the second judge to instruct the jury to accept as true the fact as found by the first judge. With one exception,[7] the parties did not request additional instructions, and the second judge did not provide any.

On appeal, TC argues that it was error for the second judge to deny its request to provide the jury with all of the factual findings in the first judge's decision at the beginning of the second trial. In TC's view, the second judge's method of

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established a company for his sons to operate; (4) that company was formed on August 12, 1975; (5) the company eventually came to be known as Tocci Corporation; (6) John, Michael, and William each received a one-third ownership interest in the company; (7) Valentino, John, Michael, and William were directors of the company; (8) Valentino eventually turned control of the company over to John; (9) John established Tocci Building Corporation, and neither Michael nor William had an interest in Tocci Building Corporation; (10) Michael signed a deed of transfer in 1993 that purported to transfer his interest in TC to John; (11) Michael never believed that the deed of transfer was valid, but rather thought that the document would be used only to "help[] John out of some sort of legal bind"; and (12) John fraudulently induced Michael into signing the deed of transfer, and the transfer therefore is voidable.

[7] Following a question related to Michael's previous legal work, TC asked the second judge to instruct the jury on the first judge's findings as to why Michael no longer practiced law. The second judge did not give the requested instruction but, rather, told the jury to disregard the question.

presenting the facts contravened the parties' agreement that the first judge's findings would be binding. Additionally, TC maintains that the second judge's handling of the facts found by the first judge violated the principles of issue preclusion. We conclude that the second judge's method of presenting the first judge's findings to the jury, while certainly unusual and far from straightforward, did not constitute an abuse of discretion.

i. Whether TC's challenge to the presentation of facts was preserved. John argues that TC did not preserve its challenge to the second judge's handling of the first judge's factual findings because it did not object at trial and, to the contrary, consented to the judge's proposed course of action. An issue is preserved so long as counsel "makes known to the [trial] court the action which he [or she] desires the court to take or [counsel's] objection to the action of the court." Commonwealth v. McDonagh, 480 Mass. 131, 138 (2018), quoting Commonwealth v. Fowler, 431 Mass. 30, 41 n.19 (2000). A party is not "permitted to raise an issue before the trial court on a specific ground, and then . . . present that issue to this court on a different ground." Commonwealth v. Clark, 378 Mass. 392, 397 (1979), quoting Commonwealth v. Flynn, 362 Mass. 455, 472 (1972).

The record does not support John's contention that TC agreed to the court's proposed course of action.[8] To the contrary, TC multiple times raised concerns about the second judge's presentation of the facts.[9] Although counsel for TC did not use the word "object," he nonetheless clearly and promptly made his client's concerns known. See Commonwealth v. Depina, 456 Mass. 238, 248 n.8 (2010) ("We look to the substance of [the party's] objection rather than [to the party's] use of specific language, terms, or phrases"). See also Commonwealth v. Almeida, 34 Mass. App. Ct. 901, 902 n.2 (1993) (issue was preserved where counsel presented his concerns to judge, even though counsel did not say explicitly that he objected to judge's actions).

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[8] TC agreed to provide the jury with a mutually drafted set of facts that it and John previously had agreed upon, but did not agree to the more limited set of facts the second judge ultimately presented after John rescinded his agreement. Although TC eventually agreed with the second judge that she should "limit what [she] instruct[ed] the jury to things that were critical to [the first judge's] decision," the company made clear that it believed all of the facts it sought to have presented to the jury were "critical" to the first judge's decision.

[9] Indeed, TC filed a motion in limine specifically requesting the second judge to present all of the first judge's findings to the jury. Once it was clear that the judge was not going to do so, TC made its objection apparent by counsel's comment that the company had a "problem" with the judge's course of action, which it feared would be "unmanageable" and would allow the jury to credit testimony that differed from the first judge's findings.

TC, however, did waive the argument that the first judge's findings were binding under our jurisprudence on issue preclusion. TC did not argue at the second trial that the first judge's findings were binding as a matter of issue preclusion, but rather specifically stated that "issue preclusion does not apply." TC added that it was the parties' "agreement, not the operation of issue preclusion, that [made] the findings binding." Therefore, we consider whether the second judge's handling of the facts was an abuse of discretion in light of the party's agreement, but we do not consider whether it violated the principles of issue preclusion. See Muzzy v. Cahillane Motors, Inc., 434 Mass. 409, 416 (2001), quoting 9A C.A. Wright & A.R. Miller, Federal Practice and Procedure § 2554 (1995) ("It is axiomatic that '[a] party may not state one ground when objecting . . . and attempt to rely on a different ground for the objection on appeal").

ii. Presentation of first judge's findings to the jury. A trial judge has broad discretion in determining which evidence should be admitted, Commonwealth v. Silva, 482 Mass. 275, 291 (2019), as well as "the method by which [such] evidence is brought to the jury's attention," Commonwealth v. Morales, 440 Mass. 536, 549 (2003), quoting Commonwealth v. Amazeen, 375 Mass. 73, 84 (1978). The party claiming error bears the "burden of showing an abuse of [that] discretion." Amazeen, supra. In

applying the abuse of discretion standard, "'we look for decisions based on whimsy, caprice, or arbitrary or idiosyncratic notions,' and do not disturb the judge's ruling 'simply because [we] might have reached a different result; the standard of review is not substituted judgment'" (quotation omitted). Laramie v. Phillip Morris USA Inc., 488 Mass. 399, 414 (2021), quoting N.E. Physical Therapy Plus, Inc. v. Liberty Mut. Ins. Co., 466 Mass. 358, 363 (2013).

The crux of TC's argument is that it was error for the second judge to decline to provide the jury at the outset with all of the first judge's factual findings. We do not agree. As the second judge recognized, some of the facts identified in the first judge's decision were irrelevant to the issues before the jury and therefore were inadmissible. See Commonwealth v. Mattei, 455 Mass. 840, 850 (2010) ("A judge generally is accorded substantial discretion in deciding whether evidence is relevant . . ."); Mass. G. Evid. § 402 (2022). For example, the first judge's findings included a detailed discussion of TC's corporate record-keeping practices, prior attempts by John to purchase Michael's shares of the company, and Michael's previous law practice, none of which bore on the issues before the jury. Even if the second judge had limited her presentation of the facts to those that were relevant, presenting such a large number of facts at the beginning of trial -- before the jury had

any context for the facts -- could have resulted in unnecessary confusion. See Commonwealth v. Rosa, 422 Mass. 18, 25 (1996) (when determining whether evidence is admissible, judge must consider, inter alia, risk of "prejudice, including confusion of the jury"). Further, the jury might have afforded more weight to the facts that they were instructed to accept than to the evidence elicited through testimony, which could have led to unfair prejudice against John. See Commonwealth v. McNulty, 458 Mass. 305, 322 (2010) (recognizing danger that jurors might give undue weight to evidence presented in certain forms). See also Nipper v. Snipes, 7 F.3d 415, 418 (4th Cir. 1993), quoting Zenith Radio Corp. v. Matsushita Elec. Indus. Co., Ltd., 505 F. Supp. 1125, 1186 (E.D. Pa. 1980), rev'd in part on other grounds, 723 F.2d 238 (3d Cir. 1983), and rev'd on other grounds, 475 U.S. 574 (1986) ("judicial findings of fact 'present a rare case where, by virtue of their having been made by a judge, they would likely be given undue weight by the jury, thus creating a serious danger of unfair prejudice'").

It certainly might have been preferable for the second judge to instruct the jury to accept as fact the first judge's relevant findings. See Bonjorno v. Kaiser Aluminum & Chem. Corp., 752 F.2d 802, 813 (3d Cir. 1984), cert. denied, 477 U.S. 908 (1986) ("It is of course necessary, when conducting a bifurcated trial . . . to inform the second jury about some of

the evidence and results of the first trial"); MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1168 (7th Cir.), cert. denied, 464 U.S. 891 (1983) (recommending that parties in bifurcated trial rely "heavily" on stipulations rather than "reintroduce" prior established facts); Torres v. Automobile Club of S. Cal., 15 Cal. 4th 771, 781 (1997) (in bifurcated trial, second jury may be advised of first jury's findings); Equal Employment Opportunity Comm'n vs. JBS USA, LLC, U.S. Dist. Ct., No. 10-cv-02103-PAB-KLM (D. Colo. Aug. 8, 2011) ("the Phase II jury can be specifically instructed not to re-examine the factual findings of the Phase I jury").

The second judge's chosen method risked the jury making findings that were contrary to those of the first judge if the jury were to discredit certain of the witnesses' testimony. See McDonough v. Vozzela, 247 Mass. 552, 558 (1924) ("it is familiar law that the jury are not bound to give credit to testimony even though uncontradicted"). Moreover, presenting the jury with accepted facts would have increased judicial efficiency by freeing the parties from the burden and expense of reestablishing already established facts. See Commonwealth v. Pariseau, 466 Mass. 805, 813 n.10 (2014), quoting S.J.C. Rule 3:09, Canon 3 (B) (8), as appearing in 440 Mass. 1301 (2003) ("judges in the Commonwealth are expected to 'dispose of all judicial matters promptly, efficiently, and fairly'").

Nonetheless, given the legitimate concerns about the jury being presented with irrelevant and, in some instances, highly prejudicial facts, we cannot say that the judge abused her discretion in declining to instruct the jury on all of the first judge's findings.

b. Statute of limitations. At the close of TC's case at the jury trial, and again at the close of all the evidence, John moved for a directed verdict on the ground that TC had failed to establish that its claims had been brought within the applicable period in the statute of limitations. The second judge denied both motions.

At trial, William agreed to feeling, as early as 1990, that "John had reneged on his commitments to [William] as a shareholder," and Michael said that he felt that, beginning in the 1980s, John had "defrauded" him and had attempted to "marginalize [his] position in the business." Michael also conceded that he had been aware as early as 1986 that Tocci Building Corporation was using TC's assets as surety and testified that, in 1992, he requested, but never received, TC's financial records, which would have revealed many of the alleged conversions. Nonetheless, Michael testified that he did not suspect any sort of conversion until he discovered in 2013 that John had dissolved TC. William similarly testified that he did

not learn of the conversions of the corporation's assets until the present litigation began in 2014.

In reviewing a judge's ruling on a motion for a directed verdict, we "must determine, on viewing the evidence in the light most favorable to the nonmoving party, whether a reasonable inference could be drawn in favor of the nonmoving party, or if the moving party is entitled to a judgment as a matter of law." Donaldson v. Farrakhan, 436 Mass. 94, 96 (2002). A motion for a directed verdict must be denied if "anywhere in the evidence, from whatever source derived, any combination of circumstances could be found from which a reasonable inference could be made in favor of the [nonmovant]" (alteration in original). O'Brien v. Pearson, 449 Mass. 377, 383 (2007), quoting Turnpike Motors, Inc. v. Newbury Group, Inc., 413 Mass. 119, 121 (1992). Where a defendant raises the statute of limitations as an affirmative defense, the plaintiff bears the burden of proving that the action was timely commenced. Parr v. Rosenthal, 475 Mass. 368, 376 (2016).

Claims for breach of fiduciary duty and conversion are governed by G. L. c. 260, § 2A, which establishes a three-year period of limitation. See Patsos v. First Albany Corp., 433 Mass. 323, 327 n.6 (2001). Where claims arise out of a fiduciary relationship, the statute of limitations is tolled "until a plaintiff has 'actual knowledge' that [he or] she has

been injured by the fiduciary's conduct."[10] Doe v. Harbor Schs., Inc., 446 Mass. 245, 254 (2006), quoting Lattuca v. Robsham, 442 Mass. 205, 213 (2004). The statute of limitations does not begin to toll once a plaintiff gains knowledge of any wrongdoing by the fiduciary, but, rather, begins only once the plaintiff gains knowledge of the particular harm forming the basis for his or her claim. See Crocker v. Townsend Oil Co., 464 Mass. 1, 9 (2012) (statute of limitations is tolled until "the plaintiff has actual knowledge of the wrong giving rise to his [or her] cause of action"); Doe, supra at 255 ("Mere suspicion or mere knowledge that the fiduciary has acted improperly does not amount to actual knowledge that the plaintiff has suffered harm"). Constructive knowledge is irrelevant; "[o]nly when the beneficiary's harm at the fiduciary's hands has 'come home' to the beneficiary does the limitations clock begin to run" (citation omitted). Doe, supra, quoting Akin v. Warner, 318

[10] Under G. L. c. 260, § 12, if a defendant fraudulently concealed the cause of action, the statute of limitations is tolled until a plaintiff attains actual knowledge of the defendant's wrongdoing. See Puritan Med. Ctr., Inc. v. Cashman, 413 Mass. 167, 175 (1992). "Where a fiduciary relationship exists, the failure adequately to disclose the facts that would give rise to knowledge of a cause of action constitutes fraudulent conduct and is equivalent to fraudulent concealment for purposes of applying § 12." See Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 519 (1997) (Demoulas I). Here, John conceded that he did not timely disclose the alleged conversions to Michael or William, notwithstanding his duty as a fiduciary to do so. See id. at 530-531. Accordingly, John properly does not contest that the actual knowledge standard is applicable.

Mass. 669, 676 (1945). Where, as here, the plaintiff is a corporation, a disinterested director's or shareholder's knowledge is imputed to the corporation. See Demoulas v. Demoulas Super Mkts., Inc., 424 Mass. 501, 518-519 (1997) (Demoulas I).

We discern no error in the second judge's decision to deny the motions for a directed verdict. Evidence indicating that Michael was aware that Tocci Building Corporation had used TC's assets as surety, and that Michael and William both felt that John had committed a breach of his duties to them as fellow shareholders, is irrelevant, because TC did not seek recovery for such misconduct. See Crocker, 464 Mass. at 9; Doe, 446 Mass. at 255. Rather, the statute of limitations only began to run once TC acquired actual knowledge of the harm it had sustained as a result of the five alleged conversions. John argues that we should infer actual knowledge of such harm from Michael's failure to investigate John's refusal to provide TC's financial records. John notes that, as a shareholder and a director, Michael owed a fiduciary duty to the corporation and therefore should have investigated the withholding of the financial records and informed himself of the financial status of the corporation. See Selmark Assocs., Inc. v. Ehrlich, 467 Mass. 525, 552 (2014) (shareholders and directors of closely held corporation owe fiduciary duty to corporation). In John's

view, the jury could have inferred actual knowledge from the combination of the duty to investigate and the failure to do so.

John's argument, however, misconstrues the standard for demonstrating actual knowledge in the context of corporate fiduciaries. In determining whether a beneficiary had actual knowledge, we do not require the beneficiary "to have made an independent investigation" in order to discover a fiduciary's breach. See Demoulas I, 424 Mass. at 520 (rejecting "argument that the plaintiff [in action for breach of fiduciary duty] should be held to a reasonable diligence standard"). Therefore, what a fiduciary not in breach, such as Michael, reasonably should have discovered has no bearing on a determination of what the beneficiary actually knew at a given time. See id. at 522 (concluding corporation did not have actual knowledge of breach, even though shareholders not in breach "had signed documents alluding to [the breach]," given that "they had not read those documents because of the express trust they placed in [the fiduciary who committed the breach]"). Even if the evidence before the jury could have supported an inference of actual knowledge, the jury were entitled to credit Michael's and William's statements to the contrary. See Commonwealth v. Webster, 480 Mass. 161, 167 (2018), quoting Commonwealth v. Barbosa, 477 Mass. 658, 666 (2017) ("To 'the extent that conflicting inferences may be drawn from the evidence, it is for

the jury to decide which version to credit'"). Accordingly, the judge did not err in denying John's motions for a directed verdict.

c. Motion for additur. The jury returned their verdict on a special verdict form that asked for, inter alia, "the total amount of harm to [TC]" and "the total amount of unjust enrichment" that John received as a result of the value of Tocci Building Corporation. See Demoulas I, 424 Mass. at 557-558. The special verdict form did not ask the jury to indicate which specific conversions they found had occurred. The jury determined that John's misconduct resulted in $1 million of harm to TC, but did not find that John retained any unjust enrichment. TC then filed a "Motion for Additur or New Trial on Remedy," in which it argued that the jury's verdict was unreasonable in light of the evidence. The judge concluded that the verdict was supported by the evidence and accordingly denied the motion.

Additur appropriately is granted "where the judge concludes that the [jury's] verdict is sound except for the amount of damages." Baudanza v. Comcast of Mass. I, Inc., 454 Mass. 622, 629-630 (2009), quoting Service Publ., Inc. v. Goverman, 396 Mass. 567, 580 (1986). The inadequacy of the award of damages must "descend to the level of unreasonableness," Freeman v. Wood, 379 Mass. 777, 785 (1980), such that "a miscarriage of

justice [would] result" if the verdict were to stand, Walsh v. Chestnut Hill Bank & Trust Co., 414 Mass. 283, 292 (1993), quoting Bartley v. Phillips, 317 Mass. 35, 41 (1944).

We review a judge's ruling on a motion for additur for an abuse of discretion. See Baudanza, 454 Mass. at 629. Because "[t]he field of discretion of the trial judge in these matters is very broad," Bartley, 317 Mass. at 44, quoting Bresnahan v. Proman, 312 Mass. 97, 101 (1942), only in "exceedingly rare" cases will we conclude that there was such an abuse, see Loschi v. Massachusetts Port Auth., 361 Mass. 714, 715 (1972), quoting Hartmann v. Boston Herald-Traveler Corp., 323 Mass. 56, 61 (1948). As a general rule, we will decide there was an abuse of discretion where there was "no evidence from which the jury could have concluded" as it did (emphasis added). See Thibault v. Mack, 19 Mass. App. Ct. 916, 917 (1984).

A jury's "award of damages must stand unless . . . to permit it to stand was an abuse of discretion on the part of the court below, amounting to an error of law." Labonte v. Hutchins & Wheeler, 424 Mass. 813, 824 (1997), quoting Mirageas v. Massachusetts Bay Transp. Auth., 391 Mass. 815, 822 (1984). "It is an error of law if 'the damages awarded were greatly disproportionate to the injury proven or represented a miscarriage of justice.'" See Reckis v. Johnson & Johnson, 471 Mass. 272, 299 (2015), cert. denied, 577 U.S. 1113 (2016),

quoting Labonte, supra. "Damages are also excessive when they are 'so great . . . that it may be reasonably presumed that the jury, in assessing them, did not exercise a sound discretion, but were influenced by passion, partiality, prejudice or corruption'" (alteration in original). Reckis, supra, quoting Bartley, 317 Mass. at 41. See Baudanza, 454 Mass. at 629-630.

Therefore, in determining whether the judge abused her discretion in denying the motion for additur, we look to our jurisprudence on the breach of fiduciary duty. Shareholders, directors, and officers of a closely held corporation owe a duty of loyalty to the corporation. See Chokel v. Genzyme Corp., 449 Mass. 272, 278 (2007); Donahue v. Rodd Electrotype Co. of New England, 367 Mass. 578, 593 (1975). The duty of loyalty prohibits fiduciaries from engaging in "self-dealing," which occurs when a fiduciary is positioned on both sides of a transaction or otherwise stands to benefit personally from the transaction. See Starr v. Fordham, 420 Mass. 178, 183 (1995). If a fiduciary engages in self-dealing without the approval of disinterested shareholders or directors, he or she bears the burden of proving that the transaction was "intrinsically fair" and "did not result in harm to the corporation." See Demoulas I, 424 Mass. at 530-532, quoting Meehan v. Shaughnessy, 404 Mass. 419, 441 (1989). Failure to satisfy this burden

warrants a finding that the fiduciary committed a breach of his or her duty of loyalty. See Meehan, supra.

If such a breach is established, a plaintiff may be awarded either the amount that would place the plaintiff in the position the plaintiff would have been in but for the breach, see Woodward Sch. for Girls, Inc. v. Quincy, 469 Mass. 151, 174 (2014), or the amount of unjust enrichment retained by the defendant, see Demoulas I, 424 Mass. at 556. Where the alleged breach involves transferring resources from one corporation to another, unjust enrichment includes "all gains and profits that are attributable to the diversions of corporate assets . . . but not the portions of [the recipient corporation's] valuation[] that ha[s] a different source." Id. at 557. "The burden of proof is on the defendant[] to show how much of [the recipient corporation's] assets are not the direct or indirect result of the violations of fiduciary duty." Id. at 557-558.

TC argues that John failed to meet his burden[11] to establish intrinsic fairness with regard to at least three of the alleged

[11] John bore the burden of proving that each transaction was fair to the corporation. See Meehan v. Shaughnessy, 404 Mass. 419, 441 (1989). John conceded that he awarded himself the bonus, that he distributed virtually the entirety of the settlement payment to his own corporation, and that, at dissolution, he distributed the funds to his own corporation; thus, he unquestionably engaged in self-dealing. John also agreed that he never told Michael or William that he had distributed the settlement payment or that he had issued the dissolution distribution to Tocci Building Corporation. John

conversions: the $1.1 million settlement payment, the $500,000 bonus, and the $69,192 distribution upon dissolution.[12] Because the cumulative total of these amounts exceeds $1 million, TC asserts that the jury's verdict was per se unreasonable. TC also argues that it was unreasonable for the jury to find that John acquired no amount of unjust enrichment because he did not present evidence as to what, if any, amount of Tocci Building Corporation's worth was independent of the assets transferred from TC.

The reasonableness of the jury's award turns on whether John satisfied his burdens of proof, as it would be unreasonable for the jury to refuse relief for any breach on which John did not meet his burden. See Robertson v. Gaston Snow & Ely Bartlett, 404 Mass. 515, 520, cert. denied, 493 U.S. 894 (1989), quoting Hartmann, 323 Mass. at 60 (jury findings should be set aside if jury "failed to exercise an honest and reasonable judgment in accordance with the controlling principles of law").

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argued that he eventually told Michael that he took the bonus, and that Michael ratified the transaction. Michael denied any such ratification, but even if he had ratified the transaction, it would be without legal significance, as transactions that involve self-dealing require the approval of a majority of the shareholders or directors. See Demoulas I, 424 Mass. at 557-558.

[12] TC concedes that the jury reasonably could have concluded that John repaid the $131,475 loan and that the $45,750 transfer to Tocci Building Corporation did not occur.

But, contrary to TC's assertions, the jury reasonably could have found that John satisfied his burden of proving that transferring the $1.1 million settlement payment to Tocci Building Corporation was fair to TC. John testified that $511,000 of the transfer was a "continency payment" to reimburse Tocci Building Corporation for resources it expended in support of TC throughout the course of the Park West litigation, including John's time and that of Tocci Building Corporation's staff. John testified that TC did not pay him between 1986 and 1991, even though he spent approximately 9,000 hours participating in the advancement of the Park West litigation on TC's behalf. Although John did not introduce expert testimony indicating what would have constituted reasonable compensation for his efforts, he did testify as to the process he used to calculate the contingency payment. If the jury credited John's testimony, they reasonably could have concluded that the $511,000 transfer constituted fair payment for services. See Berish v. Bornstein, 437 Mass. 252, 273 (2002) ("A person may testify as to the value of his [or her] own services. Expert testimony is not necessary to establish the fair value of services that a person has rendered" [citation omitted]).

The remainder of the $1.1 million payment to Tocci Building Corporation, according to John's testimony, was to reimburse it for payments it made to subcontractors on TC's behalf, because

TC was insolvent at the time. John testified that Tocci Building Corporation did not receive any benefit, such as interest, from the transfer. If the jury credited this testimony, they reasonably could have found that the transfer was a fair repayment. See Matter of the Estate of Stacy, 96 Mass. App. Ct. 447, 460 (2019) (2020) ("A witness's testimony alone, without corroboration, may meet a party's burden of proof"). Because John satisfied his burden of demonstrating that the settlement payment was fair, the jury were not, as TC asserts, required as a matter of law to award more than $1 million.

Moreover, the jury reasonably could have determined that John did not retain any unjust enrichment as a result of the $69,192 dissolution distribution. John did not dispute that the distribution occurred, nor did he argue that it was fair to TC. Accordingly, John bore the burden of proving what amount of Tocci Building Corporation's value, if any, was independent of this distribution. See Demoulas I, 424 Mass. at 557-558.

Although an expert witness testified that Tocci Building Corporation was worth approximately $16 million, the jury were not required to accept this valuation and could have concluded that the company was worth substantially less. See Loschi, 361 Mass. at 716 ("The jury may use their general knowledge and experience in evaluating [the value of] property and are not

required to follow blindly the opinions of experts"). Moreover, John introduced evidence of other significant contributors to Tocci Building Corporation's growth; most notably, surety bonding, approximately $500,000 in loans, and John's sweat equity. Taken together, the jury could have concluded that the dissolution distribution did not add significant value to Tocci Building Corporation. The jury's findings on both the harm to TC and the amount of unjust enrichment retained by John therefore were reasonable in light of the evidence adduced at trial; accordingly, the judge did not abuse her discretion in denying TC's motion for additur.

d. Motion for surcharge. Following the jury verdict, TC filed a motion for equitable relief. See Demoulas v. Demoulas, 428 Mass. 555, 580 (1998) (Demoulas II) ("A court has the power to grant equitable relief when there has been a violation of fiduciary duty . . ."). Specifically, TC sought to hold John liable for its attorney's fees through the use of a surcharge, an equitable remedy that originated in the context of trusts, whereby a fiduciary is held personally liable "for a loss resulting from [his or her] breach of duty, or to prevent [his or her] unjust enrichment." See CIGNA Corp. v. Amara, 563 U.S. 421, 441-442 (2011) (Amara). The judge denied TC's motion on the ground that there were "no Massachusetts cases applying [surcharge] outside the context of trusts and trustees, or to

the payment of attorney's fees." Although we typically review a judge's allowance or denial of equitable relief for abuse of discretion, see Cavadi v. DeYeso, 458 Mass. 615, 624 (2011), here the judge's ruling was based solely on her conclusion that surcharge was unavailable as a matter of law; accordingly, we review her determination de novo, see Anastos v. Sable, 443 Mass. 146, 149 (2004).

The "usual rule in Massachusetts," colloquially known as the American Rule, "is to prohibit successful litigants from recovering their attorney's fees and expenses." Preferred Mut. Ins. Co. v. Gamache, 426 Mass. 93, 95 (1997). Pursuant to their equitable powers, however, courts may award attorney's fees where justice so requires. See Sears v. Nahant, 215 Mass. 234, 240 (1913). This power "is one of great delicacy and is to be applied with caution." Hayden v. Hayden, 326 Mass. 587, 596 (1950). Consequently, "the list of exceptional circumstances in which we have sanctioned the departure from our traditional approach -- in the absence of a statute or court rule -- is not long." See Bournewood Hosp., Inc. v. Massachusetts Comm'n Against Discrimination, 371 Mass. 303, 312 (1976), and cases cited.

Although we have affirmed the use of surcharge to remedy a fiduciary's breach in the context of trusts, see Matter of the Trusts under the Will of Crabtree, 449 Mass. 128, 145-146

(2007), we have not considered whether surcharge can serve as an equitable exception to the American Rule where a closely held corporation sues a fiduciary for breach of loyalty. Arguing that a fiduciary in breach may be surcharged for a beneficiary's attorney's fees where, as here, the applicable law is based on trust law, TC urges us to answer in the affirmative.

In the context of trusts, surcharge is used "to repair the damage [a fiduciary's] breach of duty inflicted upon the corpus he [or she] was charged to protect." See Acument Global Techs., Inc. v. Towers Watson & Co., 998 F. Supp. 2d 111, 114 (S.D.N.Y. 2014). See also Jennings v. Murdock, 220 Kan. 182, 214 (1976) ("Surcharge is a remedy designed to make the trust estate whole . . ."); Shelton v. Fairley, 72 N.C. App. 1, 12-13 (1984) ("the purpose of surcharge is to reimburse the estate for losses incurred as a result of some act or omission of the representative constituting a breach of trust"). To this end, surcharge consistently has been used in other jurisdictions to hold a trustee in breach liable for a successful plaintiff's attorney's fees. See, e.g., Estate of Gerber, 73 Cal. App. 3d 96, 118 (1977); Estate of Stowell, 595 A.2d 1022, 1026 (Me. 1991); Matter of the Estate of Kerns v. Western Sur. Co., 802 P.2d 1298, 1299 (Okla. Ct. App. 1990); Allard v. Pacific Nat'l Bank, 99 Wash. 2d 394, 407-408 (1983). See also Restatement (Third) of Trusts § 100 comment b(2) (2012) ("The 'make whole'

objective . . . of recovery from a trustee . . . may include, in an appropriate case, the attorney fees and other litigation costs of a successful plaintiff . . ."); Robinson, Embracing Equity: A New Remedy for Wrongful Health Insurance Denials, 90 Minn. L. Rev. 1447, 1466 (2006) ("Courts award surcharge not only for lost income or gain, but also for costs incurred by the beneficiary because of the breach of fiduciary duty, including attorney fees"). Such recovery, however, generally is "limited to situations in which the [plaintiff's] participation in the proceeding is beneficial to the trust . . . rather than merely the [plaintiff] in question." See Restatement (Third) of Trusts § 88 comment d (2007). See, e.g., Matter of the Estate of Rogers, 71 Or. App. 133, 137 (1984) (attorney's fees "may be awarded to a party who at his own expense and not for his sole benefit successfully brings suit to benefit an estate or trust as a whole"); Allard, 99 Wash. 2d at 407 (in determining whether to award attorney's fees, "[t]he court's underlying consideration must be whether the litigation and the participation of the party seeking attorney fees caused a benefit to the trust").

In such situations, surcharge is available because the plaintiff's attorney's fees are thought to be necessary for the administration of the estate and therefore should be payable from the trust estate. See Dunbar v. Broomfield, 247 Mass. 372,

385 (1924), quoting Trustees v. Greenough, 105 U.S. 527, 532 (1881) ("It is a general principle that a trust estate must bear the expenses of its administration"). See also Bankers Trust Co. v. Duffy, 295 A.2d 725, 726 (Del. 1972) (attorney's fees should be paid out of trust estate where "the attorneys' services were necessary for the proper administration of the trust" or "otherwise resulted in a benefit to the trust"). Because the estate bears the cost of the plaintiff's attorneys, the litigation results in a withdrawal from the trust estate, occasioned by the trustee's breach, for which the trustee is personally liable. See Estate of Stowell, 595 A.2d at 1026 (surcharge could be used to reimburse plaintiff's attorney's fees because withdrawn attorney's fees constituted "damage or loss to the estate directly resulting from [the defendant's] breach of fiduciary duties"); Allard, 99 Wash. 2d at 408 ("Ordinarily, the trust estate must bear the general costs of administration of the trust, including the expenses of necessary litigation. Where litigation is necessitated by the inexcusable conduct of the trustee, however, the trustee individually must pay those expenses" [citation omitted]). See also A. Newman, G.G. Bogert, & G.T. Bogert, Trusts and Trustees § 970 (3d ed. 2010) (Bogert on Trusts) (trustee is liable for damage to trust estate caused by trustee's breach of trust).

Although some courts have extended the concept of surcharge to fiduciaries outside the context of trusts, see, e.g., Amara, 563 U.S. at 444 (benefit plan administrator); Nedd v. United Mine Workers of Am., 556 F.2d 190, 211 (3d Cir. 1977), cert. denied, 434 U.S. 1011 (1978) (pension fund administrator); Maguire v. Puente, 120 Misc. 2d 871, 873-874 (N.Y. Sup. Ct. 1983) (debtor in possession of bankrupt corporation), we are aware of no court that has used surcharge to award attorney's fees where a plaintiff filed a complaint solely for the plaintiff's personal benefit. See Bogert on Trusts, supra at § 871 (award of beneficiary's attorney's fees may be permissible where "the successful party benefitted or enhanced the trust estate"); 76 Am. Jur. 2d Trusts § 667 (2022) (beneficiary's attorney's fees "are properly allowed where [the] action serves to protect the entire trust res"); Annot., Allowance of Attorneys' Fees in, or Other Costs of, Litigation by Beneficiary Respecting Trust, 9 A.L.R.2d 1132, § 36 (1950) ("The propriety of an allowance of costs or fees out of the trust estate is frequently made to depend upon whether or not the litigation was for the benefit of the trust as a whole rather than the individual benefit of the trustee or one or more of the beneficiaries").

Indeed, such an award would appear to be contrary to the equitable purposes of surcharge. The equitable rationale

underlying surcharge as an exception to the American Rule is twofold: first, it would be inequitable to require an individual plaintiff to bear the cost of attorney's fees where a suit primarily benefits a separate entity; and second, failure to award attorney's fees would require a successful plaintiff to suffer a loss without any direct benefit, which would create disincentives for any plaintiff to pursue necessary litigation on behalf of all beneficiaries. See Bogert on Trusts, supra at §§ 871, 970.

Where a plaintiff brings suit for the benefit of the trust estate, the estate as a whole benefits, not simply the plaintiff him- or herself. Thus, awarding attorney's fees to such a plaintiff tracks the long-standing principle of equity in the Commonwealth that plaintiffs who bring suit for the benefit of others ought not bear the burden of attorney's fees singlehandedly. See Shaw v. Harding, 306 Mass. 441, 450 (1940) ("an expense incurred by one, resulting in the creation of a fund for the general benefit of many other persons, ought not to be borne entirely by the one whose action has resulted in the realization of such a fund"); Sagalyn v. Meekins, Packard & Wheat, Inc., 290 Mass. 434, 440-441 (1935) (court may award attorney's fees to plaintiff who brought derivative action on behalf of corporation). See also Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980) ("persons who obtain the benefit of a

lawsuit without contributing to its cost are unjustly enriched," and therefore "a court [may] prevent this inequity by assessing attorney's fees against the entire fund").

Moreover, where a suit is brought for the benefit of a trust estate, any award typically is paid directly to the estate rather than to the plaintiff. See, e.g., Estate of Blanpied v. Robinson, 163 Colo. 433, 437 (1967) ("When a surcharge is adjudged against a fiduciary, the amount is required to be paid into the estate forthwith"); Jennings, 220 Kan. at 214; Shelton, 72 N.C. App. at 12-13. See also 1 J. Story, Commentaries on Equity Jurisprudence § 525 (12th ed. 1877) ("A surcharge is appropriately applied to the balance of the whole account . . ."); Harthill, A Square Peg in a Round Hole: Whether Traditional Trust Law "Make-Whole" Relief is Available Under ERISA Section 502(A)(3), 61 Okla. L. Rev. 721, 758-759 (2008) ("Surcharge in an accounting action would . . . have typically been paid through the trust estate"). If the plaintiffs' attorney's fees were not reimbursed, plaintiffs who brought suit for the benefit of the estate would not receive any direct benefit, regardless of their success, and would be required to pay the attorney's fees out of pocket. Although the American Rule tolerates that a party's "benefit may in practice be reduced by attorney's fees," see Wilkinson v. Citation Ins. Co., 447 Mass. 663, 671-672 (2006), a successful plaintiff who

sues for the benefit of the trust estate receives no immediate benefit -- only immediate loss. The loss is likely to be substantial, as claims for breach of fiduciary duty are "often highly complex and heavily litigated proceedings" that may incur substantial attorney's fees. See Matter of the Liquidation of Freestone Ins. Co., 143 A.3d 1234, 1257 n.19 (Del. Ch. 2016). Thus, without the possibility of their attorney's fees being repaid, plaintiffs would have less incentive to pursue a lawsuit necessary to rectify breaches of fiduciary duty for all beneficiaries, and such breaches more often would go unremedied. See In re The Mills Corp. Sec. Litig., 265 F.R.D. 246, 263 (E.D. Va. 2009) ("one object of an award of attorneys' fees should be to counteract this deterrence and [create incentives for] competent attorneys to pursue these cases when necessary").

These equitable considerations are inapplicable where, as here, a plaintiff is suing a fiduciary in breach directly for its own benefit. See Wilkinson, 447 Mass. at 670-671 (declining to extend exception to American Rule to situations where policy underlying exception did not apply). See also Fields v. District of Columbia, 443 F.2d 740, 743 (D.C. Cir. 1970) ("Equitable considerations must play a major part in determining whether equitable relief should be granted"); Appalachian Volunteers, Inc. v. Clark, 432 F.2d 530, 537 (6th Cir. 1970), cert. denied, 401 U.S. 939 (1971) (courts "must apply equitable

principles in determining whether [litigants are] entitled to equitable relief"); Wilansky v. United States, 326 F. Supp.3d 784, 790 (D. Minn. 2018), quoting Black Hills Inst. of Geological Research v. United States Dep't of Justice, 967 F.2d 1237, 1239 (8th Cir. 1992) (equitable relief "should be exercised cautiously and subject to general equitable principles"); Matter of the Estate of Freudmann, 23 Misc. 2d 763, 769 (N.Y. Surr. Ct. 1959) (equitable relief "should be shaped by equitable considerations").

Here, there is no distinction between the entity benefiting from the litigation and the party paying the attorney's fees: the award went to TC's own coffers, and the company can pay its attorney's fees from those funds. That TC would not be made entirely whole as a result of having to pay its own attorney's fees "is the expected (if difficult) result in a jurisdiction that follows the American Rule." Wilkinson, 447 Mass. at 672. TC thus is in a position that is no different from that of any other plaintiff, and we discern no reason to craft a new exception to the American Rule. Accordingly, while we agree that, in some circumstances, surcharge may be used to hold a fiduciary liable for a plaintiff's attorney's fees, such a

remedy is not appropriate where, as here, the plaintiff is the only entity directly benefiting from the action.[13]

e. Motion to amend. Following the jury's verdict, Michael sought leave to amend his counterclaim so that he could seek a judgment declaring that, as a result of John's misconduct, (1) John abandoned his ownership interest in TC pursuant to the Uniform Partnership Act, G. L. c. 108A, § 38, and (2) Michael attained a one-third ownership interest in Tocci Building Corporation under the doctrine of de facto merger. The judge denied the motion after concluding that the proposed amendments were unduly delayed and would have been futile. In his cross appeal, Michael claims that the judge erred in denying his motion to amend and that the denial violated his constitutional right to due process. Michael requests a new trial to resolve these issues.

"We review the denial of a motion to amend the complaint for abuse of discretion." Nguyen v. Massachusetts Inst. of Tech., 479 Mass. 436, 461 (2018). Under Mass. R. Civ. P. 15 (a), 365 Mass. 761 (1974), leave to amend should be "freely

[13] In light of the conclusion we reach, we need not consider whether surcharge generally is available to corporations to remedy a breach of fiduciary duty. See Brigade Leveraged Capital Structures Fund Ltd. v. PIMCO Income Strategy Fund, 466 Mass. 368, 376 n.11 (2013) (declining to address party's argument where "the answer would not change our analysis or conclusion").

given when justice so requires." Nonetheless, leave may be denied if, inter alia, such a motion was unduly delayed or the amendment would be futile. Doull v. Foster, 487 Mass. 1, 22 (2021).

General Laws c. 108A, § 38, creates certain rights for partners in a partnership as defined by the Uniform Partnership Act; those rights, however, are not generally available to shareholders of a corporation organized under G. L. c. 156D, the Massachusetts Business Corporations Act. See G. L. c. 108A, § 6 (2) ("any association formed under any other statute of this state . . . is not a partnership under this chapter"). Because TC is such a corporation, any claim under the Uniform Partnership Act would have been unavailing.[14]

Any claim that Michael were to pursue under the doctrine of de facto merger would be similarly unavailing. De facto merger is a common-law doctrine that allows courts to hold a successor corporation liable for the debts of its predecessor in order to protect the rights of creditors. See Milliken & Co. v. Duro

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[14] Business associations formed under other statutes may be considered partnerships for purposes of the Uniform Partnership Act if they "would have been a partnership in [the Commonwealth] prior to [January 1, 1923]." G. L. c. 108A, § 6 (2). Corporations, however, have been recognized as distinct from partnerships since the Massachusetts Business Corporations Act was first enacted in 1903. See Pacific Wool Growers v. Commissioner of Corps. & Taxation, 305 Mass. 197, 203-204 (1940). This exception therefore is inapplicable.

Textiles, LLC, 451 Mass. 547, 556 (2008). Although some courts have extended the doctrine of de facto merger to provide certain rights to dissenting shareholders following a merger or other corporate consolidation, we are aware of no decision that has used the doctrine to provide the sort of relief Michael seeks, that is, a declaratory judgment that a shareholder of a predecessor corporation obtained proportionate shares in a successor corporation, and he has not identified any. See 20 Am. Jur. Proof of Facts 2d 609, § 1 (2022). Accordingly, the judge did not abuse her discretion in denying Michael's motion to amend.

Michael also maintains that the second judge violated his constitutional right to due process because he was not afforded an evidentiary hearing on his equitable claims, which were reserved for judicial disposition following the jury trial. Due process, however, does not require an evidentiary hearing where, as here, it is clear from the filings that a plaintiff's claim cannot succeed as a matter of law. See Demoulas II, 428 Mass. at 589, quoting Equal Employment Opportunity Comm'n v. Steamship Clerks Union, Local 1066, 48 F.3d 594, 609 (1st Cir.), cert. denied, 516 U.S. 814 (1995) ("Due process does not require any particular type of hearing, and 'many matters can lawfully -- and satisfactorily -- be heard on the papers'").

3. Conclusion. The second trial judge's denial of TC's motion in limine regarding the first trial judge's factual findings is affirmed, as are the denials of John's motions for a directed verdict on the issue of the statute of limitations. The denials of TC's motion for additur or a new trial on remedy, TC's motion for surcharge, and Michael's motion to amend and special motion for a new trial also are affirmed.

So ordered.