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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1087
A11-1109
A12-0093

Daniel S. McGrath,
Respondent (A11-1087, A11-1109),
Respondent/Cross –Appellant (A12-93),

vs.

MICO, Inc., et al.,
Defendants (A11-1087),
Appellants (A11-1109, A12-93),

Larry C. McGrath,
Appellant (A11-1087),
Respondent (A11-1109),
Co-Appellant (A12-93).

Filed December 10, 2012
Affirmed
Toussaint, Judge*

Nicollet County District Court
File No. 52-CV-06-682

Daniel Oberdorfer, Ryan Stai, Andrew W. Davis, Jennifer Ives, Leonard, Street and Deinard, Minneapolis, Minnesota; and

Douglas R. Peterson, Wade S. Davis, Mankato, Minnesota (for Daniel S. McGrath)

David F. Herr, Martin S. Fallon, Jennifer B. Benowitz, Haley N. Schaffer, Andrew B. Murphy, Maslon Edelman Borman & Brand, LLP, Minneapolis, Minnesota (for MICO, Inc., Brent P. McGrath, and Glenn Gabriel)

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Considered and decided by Chutich, Presiding Judge; Halbrooks, Judge; and Toussaint, Judge.

U N P U B L I S H E D   O P I N I O N

TOUSSAINT, Judge

These consolidated appeals are taken from judgments entered by the district court in adjudicating a dispute among brothers, appellants Brent McGrath and Larry McGrath and respondent Daniel McGrath (Dan), about their family business, appellant MICO, Inc. Dan sued MICO, his brothers Brent and Larry, and appellant Glenn Gabriel, a corporate employee, asserting claims for (1) a corporate buyout under Minn. Stat. § 302A.751 (2010), against MICO; (2) breach of fiduciary duty against Brent and Larry, (3) tortious interference with contract against Brent, Larry, and Gabriel, (4) retaliation in violation of the Minnesota Whistleblower Act, Minn. Stat. § 181.932 (2010), against MICO, and (5) failure to pay wages owed, against MICO.

The district court conducted a three-phase trial of Dan's claims and ultimately entered a number of judgments, all in favor of Dan, awarding compensatory and punitive damages, and attorney fees, requiring a buyout of his shares, and taxing costs and disbursements. Appellants challenge the judgments on multiple grounds, but we discern no legal error or abuse of discretion and, accordingly, affirm.

FACTS

Until his death in January 2004, Gordon "Mac" McGrath owned the majority of the voting shares issued by appellant MICO, Inc., and thus controlled the business. His wife, Phyllis McGrath, owned the remaining shares. Mac and Phyllis had two sons: appellant Brent McGrath and respondent Dan McGrath. Mac also had two sons from a previous relationship, appellant Larry McGrath and Mark McGrath. Mark McGrath died in 2007.

Before Mac died, he made clear his intention that Brent and Dan would run the company together after he was gone. In 2002, the board voted to elect Brent as president and Dan as executive vice president. Following Mac's death in 2004, his voting shares were divided equally between Brent and Dan; their mother continued to hold voting shares as well. After their mother died in 2007, Brent and Dan inherited the remaining voting shares and thus each held 50% of the voting shares. Brent and Dan also owned nonvoting shares, as did their half-brothers, Larry and Mark. The board of directors was comprised of Brent, Dan, Larry and Mark.

Despite their father's wishes, Brent and Dan proved unable to run the company together. In February 2003, before their parents' death, Brent proposed new bylaws to eliminate annual shareholder meetings and one-year term-limits for board members, which would limit Dan's ability to participate in managing the company as a 50% voting shareholder. Although Mac and Phyllis, as the voting shareholders at the time, were required to approve changes to the bylaws, Brent did not raise the issue at the annual

shareholder meeting. Instead, the bylaws were purportedly passed by the board of directors after the parents had excused themselves from the board meeting.

In early 2004, following Mac's death, Brent hired a friend, appellant Glenn Gabriel, to work for the company. Gabriel had worked for MICO in the past, but Mac did not approve of him being involved with the company, believing that Gabriel had "hitched his wagon to Brent's star with very little regard to Dan's opinion and my opinion." The district court found that "[a]fter Gabriel's return to MICO in early 2004, Brent and Gabriel acted together to significantly reduce Dan's role at MICO and to have Gabriel take over many of Dan's responsibilities."

In May 2004, Dan made what the district court found to be a "reasonable" offer to sell his shares back to the company. Dan received no response to the offer. Also in May 2004, over Dan's objection, Brent and Gabriel terminated the employment of Ed Walles, MICO's director of sales and marketing, who reported to Dan. The district court found the asserted reason for Walles's discharge not credible. The district court also found that the firing of Walles was part of a series of conduct by Brent, Larry and Gabriel "motivated by a desire to force Dan to leave MICO and/or to sell his shares cheaply."

During 2005, Dan was first demoted and then placed on a performance improvement plan (PIP). From before his father's death up until the May 2005 demotion, Dan was responsible for overseeing sales, marketing, and engineering, and had more than 60 employees reporting to him. After the demotion, his responsibilities were limited to international sales, and he had no direct reports. The PIP required Dan to report to Gabriel; it was the first time in the company's history that an officer was required to

report to an employee. The district court found that the asserted justification for these actions—poor job performance as reflected in a retained consultant's report—was pretextual.

Dan objected to Brent, Larry and Glenn's conduct. In September 2005, he emailed that "[t]he demotion is the latest event in what I perceive to be an effort to drive me out of the company. Rather than fight, I am open to sincere conversation about parting our ways – as fellow shareholders, Board members, officers, and employees." In October 2005, Dan emailed Gabriel about the effect that Brent, Larry, and Gabriel's conduct was having on the MICO workforce:

> Every employee goes direct to other employees as needed, but if I am involved it often gets repeatedly questioned, asking for justification by you or Brent. People getting questioned are getting the message to stay away from me.
>
> . . . I have been told recently that it is considered risky talking to me, there is guilt by association and it is considered unwise to even talk to me for fear of retribution.
>
> Employees at MICO that have discomfort talking to me are worried about retribution in pay, advancement and job security. Those that are uncomfortable see me being systematically abused in the hopes that I will get fed up and leave.

The district court found that "Dan's description of the environment that existed appears accurate."

In December 2005, Dan was placed on an unrequested leave of absence. During their depositions for this case, Brent and Larry professed not to remember why Dan was placed on leave or who made the decision to place him on leave. At trial, Brent testified

that the board—Brent, Larry, and Mark—voted to place Dan on leave, and that he voted for the leave because of Dan's poor performance. Correspondence between the parties' attorneys suggests that the leave was related to negotiations taking place at the time over the redemption of Dan's stock. The district court found that appellants were "evasive and deceptive about who and why they placed Dan on leave," and that, "considering the significance of the event given the pending litigation, the most logical explanation for the lack of recollection is [to] hide or cover up a justification that was improper and/or damaging to their case; most likely retaliation and a desire [to] achieve Dan's exit from the corporation on terms that were financially beneficial to [them]."

After he was placed on leave, Dan's attorney sent a letter to MICO's attorney asserting that "MICO's unilateral decision to place [Dan] on administrative leave is an unjustified act of prejudice, in conflict with MICO's obligations to [Dan] in his capacity as an employee, officer, director, and shareholder." Two days later, Brent forwarded the letter to Larry, and Larry responded: "I want Dan terminated!!!!!!!!!!!!!!!!!!!!!!!!!!! . . . Forget [defense counsel] Dayle [Nolan] and the lawyer talk about what Dan can potentially do. Let him deal with the legal issues and we move on and fire/terminate him and let a judge, if needed, make the decision. . . ." During his administrative leave, Brent and Gabriel removed Dan from the office that he had occupied since before Mac's death.

Also in December 2005, Brent attempted to properly adopt the new bylaws that he had proposed in February 2003. Brent called a meeting of the shareholders, who at that time were the trustees for his parents' estates. He sent Dan's notice to his MICO email despite his knowledge that Dan did not have access to this account during his leave of

absence and that Dan was travelling out of the country. He titled the email "FYI—No action requested or needed" and provided no other explanation. Gabriel forwarded the email to Dan later the same day. Dan gave a proxy to his attorney, who attended the meeting, but the trustees did not attend the meeting, and the bylaws were not ratified. The district court found that "Brent's actions [in relation to the bylaws] were fraudulent" and that "Larry and Gabriel were complicit in and encouraged the fraud."

Dan returned to work for MICO in late February 2006 after negotiations for the redemption of his stock failed, but he was not permitted to office at MICO. Dan's responsibility for the company upon his return was to set up a distributor network in Europe. Gabriel created this position. In an email to Larry, Brent described the limited nature of Dan's new role: "Dan can keep his title but the responsibilities are commensurate with a sales managers role, not a member of senior staff, and with specific budget responsibilities that are appropriate with such a level." Larry noted in an email to Gabriel that Dan's "days as a VP level employee are behind." The district court found that "[d]uring Dan's seven months in the "European Distribution' position, [appellants], primarily through Gabriel, hindered Dan's ability to do his job and made his working life difficult to intolerable. Gabriel hindered Dan from communicating with other employees, removed him from e-mail groups, kicked him out of meetings that he was invited to attend, prevented him from attending regular sales meetings, and reprimanded employees who did communicate with him, and publicly humiliated and insulted him."

In March 2006, Dan sent a formal call for a board meeting to discuss issues including distributions to cover taxes that each brother owed (by virtue of MICO being an

S-corporation), management succession, Dan's duties, the requirement that Dan report to Gabriel, and the redemption of Dan's stock by the company. Around the same time, MICO was considering building a manufacturing facility in Mexico. Dan expected that there would be a board vote on the Mexico expansion, and Brent and Gabriel initially expressed similar expectations.

In response to Dan's attempt to deal with issues at the board level, Larry emailed Brent and Glenn recommending that they eliminate Dan's position and

> [m]inimize board meetings whereby Dan and Mark's votes are needed to approve major business decisions. Isolate their involvement. For example, seeking approval on Mexico. I would suspend the proposed April BOD meeting and have it as a management review. We can hold Board meetings where distributions are needed and annual shareholder meetings are required. If Dan or Mark object they can pursue legal relief. In my opinion, there is ample evidence that both are hostile to your management, my input and they only seek personnel (sic) advantage . . .
>
> Dan or Mark is entitled to call BOD meetings but they can't demand that a quorum be present or that we agree to the agenda items. The reverse is true but there (sic) input is not needed on virtually all-key items. Nothing changes in the Board composition until Dan's role as Shareholder and Director changes or either of us votes in agreement with a DSM proposal or vice versa.

On the same day that Larry sent this email, Brent emailed Gabriel, saying

> I told Dan I was not available Thursday and to go ahead without me . . . . I don't know how badly Larry needs 'help' with taxes. If Larry doesn't need help, AND if he has balls, AND he wants to f--- around with Dan – Larry will simply not participate in the BOD meeting (If he figures that out.). . . I might feel like actively f---ing around with the brethren after I watch this episode.

The next day, Brent emailed Larry and told him not to call in for the board meeting so that there would not be a quorum to address the issues that Dan had placed on the agenda. The district court found that "both Brent and Larry intentionally avoided the Board of directors meeting called by Dan to prevent him from conducting the business at the Board level" and "schemed to prevent Dan and Mark from calling Board meetings and actively participating in MICO's corporate governance."

In July 2006, Brent excluded Dan from a corporate trip to Mexico to visit a potential site for a new MICO manufacturing facility. Brent, Gabriel, and Gabriel's wife went on the trip, leaving one open seat on the plane. Brent wrote in an email to Gabriel that he wanted to keep one seat open to rest his foot, adding that although he would "like to shove my foot up Dan's ass, my upbringing, ethics and morality prevent me from doing so." After MICO went forward with the Mexico expansion without a board vote, Larry emailed Gabriel: "I am very interested in what Dan does now that Brent and you, me etc have moved forward without a board meeting. This is progress!!!!!! I will sleep well tonight . . . . Dan is going to get another lesson that his ownership does not extend to corporate decision making."

In August 2006, Dan again attempted to call a board meeting to authorize a distribution to cover taxes. Brent emailed Larry, copying Gabriel:

> I will not be replying to Dan's email . . .
>
> If you want to have fun, reply to Dan by email telling him that you are following my example and placing him in your spam filter . . .

> If Dan cannot communicate with you, he can't give you notice of the meeting. If you get no notice, there can be no meeting. If Dan cannot prove to me that you got notice, I will object to the meeting. I will not participate in any meeting you do not participate in. If you and I do not participate, there can be no meeting. I feel like we've been through this drill before.

Brent emailed Dan, saying "[t]hanks for the invitation. I have been trying to think of a good reason to attend. I couldn't think of one. I won't be attending. I am by-passing a vote again."

Dan initiated this action on October 2, 2006. Within hours of being served with the complaint, Brent sent an email to Larry with a list of possible retaliatory moves, including deactivating Dan's keys to MICO's building, taking Dan off the computer network, taking Dan off the "Executive bonus," transferring the title of the corporate car Dan drove, cancelling his corporate credit cards, and relieving him of his duties. Larry responded, asserting that they should "terminate Dan" at the next board meeting. He followed up with "another suggestion. Eliminate MICO paying for the health insurance of Board members – that is Dan and Mark. For me, we set-up a consulting agreement that retains me for advising on business matters and the pay is to be included in MICO health plan . . . ." On October 6, 2006, the board voted to cease paying Dan an executive bonus and profit sharing, and placed him on administrative leave for the pendency of the lawsuit.

Dan's legal claims were tried in three phases during October 2010 and February 2011. His claim for relief under Minn. Stat. § 302A.751 and his fiduciary-duty claim were tried to the court and his claims for tortious interference with contract,

whistleblower violations, and failure to pay earned wages were tried to a jury. Following the first and second phases of the trial, the jury returned special verdicts finding liability on each of the jury-tried claims and awarding compensatory and punitive damages on those claims.

By order dated October 25, 2010, the district court issued findings of fact, conclusions of law and an order for judgment, finding liability on the court-tried claims and ordering remedies on those claims, and incorporating the jury's findings and awards. The district court ordered MICO to buy out Dan's interest in the company at a price to be mutually agreed upon or determined during a third phase of the trial. The district court also ordered that Brent and Larry would be jointly and severally liable for the buyout amount to be determined during the third phase of the trial should MICO fail to pay, and for Dan's attorney fees. The district court finally ordered that each appellant would be jointly and severally liable for costs and disbursements to be determined by the court. A partial judgment was entered on October 25, 2010.

Appellants moved for a judgment as a matter of law (JMOL), amended findings, or a new trial on a number of grounds. By order dated April 19, 2011, the district court denied the posttrial motions on most issues, but amended certain findings and remitted one of the jury's damages awards to conform with the evidence. On the same day,

amended partial judgments were entered reflecting the following relief:

	Count II Fiduciary Duty (v. Brent and Larry)	**Count III Tortious Inter. (v. Brent, Larry and Gabriel)**	**Count IV Whistleblower (v. MICO)**	**Count V Wages (v. MICO)[1]**
Loss of bonus income	$275,402	$275,402	$275,402	$275,402
Loss of profit sharing	52,847	0	52,847	52,847
Loss of management participation rights	1,250,000	0	1,250,000	
Future Wage Loss	639,516			
Total Compensatory	**2,217,765**	**275,402**	**1,587,249**	**328,249**
Punitive damages	2,191,000 (Brent) 1,638,000 (Larry)	2,191,000 (Brent) 1,638,000 (Larry)	1,068,000 (MICO)	

On July 18, 2011, following the third phase of the trial, the district court issued an order requiring MICO to purchase Dan's shares for $11,503,000. Judgment was entered the same day. On October 4, 2011, the district court ordered judgment and judgment was entered on Dan's requests for attorney fees, costs, and disbursements. The district court ordered the entry of two attorney-fee judgments: the first for fees incurred during phases one and two of the trial, in the amount of $2,515,508.25 and against MICO, Brent and Larry; and the second for fees incurred during phase three, in the amount of $320,000, against MICO only. The district court ordered the entry of judgments for fees and disbursements, $203,904.89 for phases one and two, and $125,817.50 for the third, against MICO, Brent, Larry, and Gabriel. These appeals follow.

[1] Pursuant to Minn. Stat. § 181.101 (2010), the court also ordered MICO to pay a $16,982 statutory penalty for the wage claim.

D E C I S I O N

I.
Mootness

We begin with Dan's threshold argument that a number of the issues raised in this appeal have been mooted by MICO's satisfaction of some of the judgments, or portions thereof. MICO asserts that it paid the judgments to avoid the disruption and costs associated with Dan's collection efforts. The supplemental record supports this assertion. Accordingly, we conclude that MICO's satisfactions of the judgments were involuntary and thus that it has not waived the right to appeal. *See McCallum v. Western Nat'l Mut. Ins. Co.*, 597 N.W.2d 307, 309 (Minn. App. 1999) (explaining that the purpose of the waiver rule is to "prevent a party who voluntarily pays a judgment from later changing his mind and seeking the court's aid in recovering payment" but that an involuntary payment does not result in waiver). We also agree that, to the extent that the district court imposed joint and several liability against Brent and Larry for the attorney-fees award, MICO's satisfaction of that judgment would not moot Brent and Larry's challenge to that award because MICO could seek contribution or indemnification from them. The only exception is Brent and Larry's challenge to their contingent joint-and-several liability for the buyout. Because MICO has satisfied that judgment and does not challenge the buyout on appeal, and because Brent and Larry were to be liable for that award only in the event that MICO did not timely purchase Dan's shares, we conclude that those portions of Brent's and Larry's appeals are moot.

II.
Tortious Interference

Brent, Larry and Gabriel assert that the district court erred by denying JMOL or a new trial on Dan's claim for tortious interference with contract. This court reviews the denial of JMOL de novo and the denial of the motion for a new trial for abuse of discretion. *Daly v. McFarland*, 812 N.W.2d 113, 119 (Minn. 2012) (JMOL standard of review); *Frazier v. Burlington No. Santa Fe Corp.*, 811 N.W.2d 618, 625 (Minn. 2012) (new trial standard of review). "To prevail on a claim of tortious interference with contractual relations, a plaintiff must prove that (1) there is a contract, (2) the defendant knew about the contract, (3) the defendant intentionally procured a breach of the contract without justification, and (4) the plaintiff suffered injuries as a direct result of the breach." *Dyrdal v. Golden Nuggets, Inc.*, 672 N.W.2d 578, 587-88 (Minn. App. 2003), *aff'd*, 689 N.W.2d 779 (Minn. 2004). Brent, Larry and Gabriel argue that respondent failed to prove the first two elements of his claim; Larry also argues that the court erred in instructing the jury on the claim.[2]

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[2] Gabriel also asserts that he cannot be held liable for tortious interference with contract because he was not an officer, director, or shareholder of MICO and lacked authority to alter the conditions of or terminate Dan's employment. By its very nature, however, tortious-interference liability is dependent upon the procurement of a breach by a third party. *Dyrdal*, 672 N.W.2d at 587-88. Thus, the pertinent issue is not whether Gabriel could breach the contract himself, but whether he *procured* a breach without justification. Gabriel also asserts that he cannot be held liable because he merely carried out the orders of MICO's board and officers, but the evidence in the record demonstrates that Gabriel was an independent and active participant in the conduct against Dan. Accordingly, we reject Gabriel's argument that he cannot be held liable on the tortious-interference claim.

<u>Existence of a contract</u>

The general rule is that employment is at will; claims of contracts for lifetime or permanent employment typically are not well-received by the courts. *See, e.g.*, *Gunderson v. Alliance of Computer Prof'ls, Inc.*, 628 N.W.2d 173, 181 (Minn. App. 2001) (explaining presumption of at-will employment), *review granted* (Minn. July 24, 2001), *appeal dismissed* (Minn. Aug. 17, 2001). "To overcome the presumption that employment is at will, an employee must present objective evidence that the employer clearly intended to create a lifetime-employment contract." *Id.* at 181-82. "General statements about job security, company policy, or an employer's desire to retain an employee indefinitely are insufficient to overcome the presumption that employment is at will." *Id.* at 182.

In *Pedro v. Pedro*, this court held that a district court's finding the appellant had a contract for permanent employment with his family's business was not clearly erroneous. 489 N.W.2d 798, 802-03 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992). We explained that, when ascertaining the intent of the parties to an employment contract, district courts "must consider the written and oral negotiations of the parties as well as the parties' situation, the type of employment and the particular circumstances of the case." *Id.* at 803. And, "[i]n a closely held corporation the nature of the employment of a shareholder may create a reasonable expectation by the employee-owner that his employment is not terminable at will." *Id.* (quotation omitted). We concluded

> The unique facts in the record support the trial court's finding of an agreement to provide lifetime employment to respondent. Carl Pedro, Sr. worked at the corporation until

> his death. Eugene Pedro, who worked for over 50 years at TPC, testified that he intended to always work for the company. Carl Pedro, Jr. worked at TPC for over 34 years. Alfred Pedro testified of his expectation of a lifetime job like his father. He had already been employed by TPC for 45 years. Even the corporate accountant testified regarding Carl's and Eugene's expectations that they would work for the corporation as long as they wanted. Based upon this evidence it was reasonable for the trial court to determine that the parties did in fact have a contract that was not terminable at will.

Id. at 803. Thus, under *Pedro*, the nature of the relationship among shareholders in a closely held corporation can support a finding of an implied contract for permanent employment.

The facts in this case are comparable to those in *Pedro*. MICO is a family-owned and run company, and Dan, by virtue of his father's expressed intentions and estate planning, reasonably expected to remain employed by MICO during his lifetime. Brent, Larry and Gabriel urge reliance on *Gunderson* in which this court rejected an argument by a shareholder in a closely held corporation that he had a contract for permanent employment. 628 N.W.2d at 182. But we conclude that *Gunderson* is distinguishable on its facts. In contrast to the family businesses at issue in *Pedro* and this case, *Gunderson* addressed the appellant's expectation of permanent employment with a company founded by individuals unrelated to him, based on his status as a minority shareholder. 628 N.W.2d at 179. Thus, just as this court did in *Pedro*, we conclude that "the unique facts in the record," although they may not compel such a finding, are sufficient to support the jury's finding of a contract between Dan and MICO.

Knowledge of the contract

Regarding the knowledge element of a tortious-interference claim, "[i]t is enough if the defendant had knowledge of facts which, if followed by reasonable inquiry, would have led to complete disclosure of the contractual relations and rights of the parties." *Kjesbo v. Ricks*, 517 N.W.2d 585, 588 n.3 (Minn. 1994) (citing 45 Am. Jur. 2d *Interference* § 11 (1969)). Brent, Larry and Gabriel assert that respondent failed to prove their knowledge of a contract between him and MICO. Larry cites his own, self-serving testimony that he had no knowledge of any allegation of a contract until he read the complaint in this action. The district court rejected this basis for JMOL, relying on documentary evidence acknowledging that, because respondent is a McGrath, his employment could not be terminated. We agree that this evidence is sufficient to support the jury's finding that the individual appellants were aware of respondent's contract with MICO.

Jury instructions

Larry separately challenges the district court's instructions to the jury on the tortious-interference claim. District courts exercise broad discretion to formulate jury instructions, and are reviewed only for abuse of that discretion. *Domalgala v. Rolland*, 805 N.W.2d 14, 29 (Minn. 2011). "Jury instructions must convey a clear and correct understanding of the law of the case as it relates to all the parties involved." *Id.* (quotation omitted). "A jury instruction is erroneous if, when read as a whole, the instruction materially misstates the law, or is apt to confuse and mislead the jury." *Id.* (quotation omitted).

As part of its instructions on the tortious-interference claim, the district court included the following language on determining the existence of a contract:

> [a] contract exists when the parties agree with reasonable certainty about the same thing and on the same terms. In other words, there must be an agreement between the parties on all the essential terms of the contract. . . .
>
> A contract may be made orally or in writing, an express contract, or may arise from the actions, relationship and circumstances of the parties, an implied contract, or a combination of all the above. *In a closely held corporation the nature of the employment of a shareholder may create a reasonable expectation by the employee/owner that he is not terminable at will and thus give rise to a contract for continuing employment. . . .*
>
> In deciding whether a contract existed, consider all the circumstances.

(Emphasis added.)

Larry objects to the italicized portion of the instructions, asserting that it improperly allowed the jury to determine that Dan had a contractual relationship with MICO based on his expectations as a shareholder of a closely held corporation, rather than on any actual agreement between the parties. For reasons discussed above in relation to JMOL, we conclude that the district court properly instructed the jury in this regard. Moreover, the jury instructions read as a whole made clear that the jury ultimately needed to determine whether there was an agreement between Dan and MICO. Larry also objects to the district court's rejection of his proposed instruction emphasizing that an offer must be clear and definite. Because the instructions make clear that the parties must agree "about the same things, and on the same terms" and that there must be

"mutual assent," we conclude that the instructions, viewed as a whole, properly stated the law applicable to Dan's claim. Accordingly, we reject Larry's challenges to the jury instructions.

III.
Remedies

Appellants challenge a number of the remedies ordered by the district court. Both the district court's decision on whether to grant a new trial because of excessive damages and its decision to grant equitable relief are reviewed for abuse of discretion, although the availability of particular equitable relief may present an issue of law. *See Advanced Training Sys., Inc. v. Caswell Equip. Co.*, 352 N.W.2d 1, 11 (Minn. 1984) (new trial standard of review); *City of Minneapolis v. Minneapolis Police Relief Ass'n*, 800 N.W.2d 165, 173 (Minn. App. 2011) (equity standard of review), *review denied* (Minn. Aug. 24, 2011). The district court's findings concerning damages awarded on court-tried claims are reviewed for clear error. Minn. R. Civ. P. 52.01.

Offset to the buyout

MICO challenges the district court's order requiring it to pay Dan for any deficiency between distributions made to him and taxes owed for the 2010 and 2011 tax years. The district court exercises broad discretion to fashion appropriate relief under Minn. Stat. § 302A.751, subds. 1, 2. "If the court determines that ordering a buy-out is fair and equitable to all parties under the circumstances, it also has broad discretion both in the process and the ultimate determination of the 'fair value' of the shares to be sold." *Advanced Commc'n Design, Inc. v. Follett*, 615 N.W.2d 285, 290 (Minn. 2000) (citing

Minn. Stat. §302A.473, subd. 7 (1998)). The district court may "[take] into account any and all factors the court finds relevant" and compute fair value "by any method or combination of methods that the court, in its discretion, sees fit to use." Minn. Stat. § 302A.473, subd. 7 (2010).

The district court found that it was appropriate to adjust the buyout price for $1,450,000 in distributions that Dan had received in excess of his tax liabilities (by virtue of MICO's S-Corporation status) since the valuation date. The district court reasoned that, "aside from the extra income tax that inures, the distributions constitute a windfall to Plaintiff." But the district court lacked sufficient evidence to determine whether similar offsets were appropriate for the 2010 and 2011 tax years—or if an addition to the purchase price was appropriate to cover a deficiency between distributions and tax liabilities. Thus, the district court ordered that, in the event that distributions were insufficient to cover Dan's tax obligations in those tax years, MICO should pay Dan the difference. And if there was a surplus, Dan was to pay that surplus back to MICO. We conclude that the district court's inclusion of this offset/addition clause was within its broad discretion to determine fair value.

<u>Damages for loss of management participation</u>

Brent, Larry and MICO challenge the district court's allowance of $1.25 million in damages for Dan's loss of management participation rights on the fiduciary-duty and the whistleblower claims, asserting that there is no legal basis for such an award. But damages for breach of fiduciary duty, a tort claim, extend to all proximate consequences of the breach. *See Marlowe v. Gunderson*, 260 Minn. 115, 119, 109 N.W.2d 323, 326

(1961) ("The rule as to the measure of damages in negligence cases is that one who commits a tort is liable for all the proximate consequences thereof."); *Padco, Inc. v. Kinney & Lange*, 444 N.W.2d 889, 891 (Minn. App. 1989) (explaining that fiduciary-duty claim is sustained on same elements as negligence claim), *review denied* (Minn. Nov. 15, 1989). And the whistleblower act allows recovery of "any and all damages recoverable at law." Minn. Stat. § 181.935(a) (2010). Accordingly, we reject the argument that there was no legal basis for these damages.

MICO, Brent and Larry also rely on caselaw articulating the general rule that "[s]peculative, remote, or conjectural damages are not recoverable at law." *Lassen v. First Bank Eden Prairie*, 514 N.W.2d 831, 839 (Minn. App. 1994) (citing *Cardinal Consulting Co. v. Circo Resorts, Inc.*, 297 N.W.2d 260, 267 (Minn. 1980)), *review denied* Minn. June 29, 1994). This rule applies with greatest force when the *fact* of damages, rather than their *amount* is at issue. *No. States Power Co. v. Lyon Food Prods., Inc.*, 304 Minn. 196, 202-03, 229 N.W.2d 521, 525 (1975); *see also Olson v. Naymark*, 177 Minn. 383, 384-85, 225 N.W. 275, 275 (1929) ("When a breach is committed [the law] is inclined to accept the challenge of the wrongdoer that damages cannot be ascertained; and within reasonable limits it will make an effort to ascertain them through the jury or other tribunal trying facts. For that purpose there are courts and juries."). *But see Polaris Indus. v. Plastics, Inc.*, 299 N.W.2d 414, 419 (Minn. 1980) (denying lost-profits damages because evidence presented did "not furnish a reasonable basis on which to determine plaintiff's loss").

In this case, Dan indisputably was denied the opportunity to participate in the management of his family business. Thus, the *fact* of damages has been proven, and the difficulty was in determining their *amount*. The district court reasoned that the $1.25 million award could be justified with reference to Brent's offer to pay $1.68 million for the voting shares before they were distributed to him and Dan, and MICO's $32.9 million book value in 2006. Under our deferential standards of review, we cannot conclude that the district court clearly erred in making the award on the fiduciary-duty claim or abused its discretion in sustaining the jury's award on the whistleblower claim.

MICO separately challenges the damages for lost management participation awarded by the jury on the whistleblower claim on the basis that Dan cannot recover, on the whistleblower violations, damages that he suffered in his capacity as shareholder rather than as an employee. But MICO cites no authority for this argument, and the plain language of the whistleblower statute permits the recovery of "any and all damages recoverable at law." Minn. Stat. § 181.935(a). Accordingly, we reject MICO's assertion in this regard.

Fiduciary duty damages

Brent and Larry assert error in several aspects of the remedies awarded by the district court in connection with the fiduciary-duty claim.

Wages as damages for breach of fiduciary duty

Brent and Larry initially assert that the fiduciary-duty claim is an equitable claim and that the district court was thus precluded from awarding legal damages for Dan's lost wages under that claim. They further assert that Dan is precluded from seeking equitable

relief because there is an adequate legal remedy. Both of these arguments rely on the premise that the district court was acting only pursuant to its equitable powers when it awarded the fiduciary-duty damages. But the fact that the district court tried Dan's fiduciary-duty claim did not automatically convert it into solely an equitable claim. And although some Minnesota cases have referred to fiduciary-duty claims as equitable, other cases recognize a tort claim with the same elements as a negligence claim. *Compare R.E.R. v. J.G.*, 552 N.W.2d 27, 30 (Minn. App. 1996) (observing that "actions for the breach of a fiduciary duty generally sound in equity") *with Padco*, 444 N.W.2d at 891 (explaining that fiduciary-duty claim requires proof of same elements as negligence claim). In his complaint, Dan sought both legal and equitable relief for Brent and Larry's breaches of fiduciary duties. Accordingly, we reject the assertion that only equitable relief was available to Dan. *Cf. Beckman v. Farmer*, 579 A.2d 618, 651 (D.C. 1990) (recognizing that: "[I]t is basic that the same set of facts can support claims for legal and equitable relief, and that these claims may be tried in the same action.").

Front pay award

Brent and Larry separately challenge the district court's award of $639,516 in front pay, representing 15 years of bonuses that the district court found Dan would not be able to replace in alternative employment. They rely on *Feges v. Perkins Restaurants, Inc.*, and other cases to argue that a "plaintiff's duty to mitigate damages limits front-pay awards to those cases where the plaintiff has been unable to find comparable employment after termination." 483 N.W.2d 701, 710 (Minn. 1992). *Feges* is inapposite because Dan continued to be employed by MICO until the district court ordered MICO to purchase his

shares in July 2011. *See also Soules v. Indep. Sch. Dist. No. 518*, 258 N.W.2d 103, 106-07 (Minn. 1977) (recognizing duty to mitigate damages following nonrenewal of teaching contract). Brent and Larry's reliance on a school district leave-of-absence case is likewise misplaced because Brent and Larry do not argue that Dan failed to mitigate with respect to past wages. *See Pearson v. Sch. Bd. of Ind. Sch. Dist. No. 381*, 356 N.W.2d 438, 442 (Minn. App. 1984) (referencing mitigation duty in leave-of-absence case). Moreover, the district court concluded that it would not have been reasonable to expect Dan to obtain other employment during the pendency of the litigation. Accordingly, we reject Brent and Larry's argument that future (or past) wages were precluded by Dan's failure to mitigate.

Punitive damages

Brent and Larry argue that there is no legal basis for the district court's punitive-damages awards in relation to the fiduciary-duty claim. This argument is based on their faulty assumption, addressed above, that Dan was limited to seeking equitable remedies in this court-tried claim. As one appellate court explained in affirming concurrent equitable and legal remedies for a breach of fiduciary duty:

> [Appellant] is incorrect in assuming that the availability of equitable remedies renders it impossible to make out a prima facie case in tort. Once some injury for which the law provides a remedy has been pleaded and proven, tort damages quantify and compensate the harm suffered by the plaintiff. . . . The trial court here concluded that compensatory damages in tort were 'co-extensive' with the amount to which it found [respondent] entitled in the accounting. Injury quantified as damages flowing from a breach of a fiduciary duty to wind up and account may equal the amount determined to be due in an

> accounting, but it hardly follows that no injury in fact occurred just because it is redressable in equity.

Beckman, 579 A.2d at 651. Appellant relies on a number of Minnesota cases denying punitive damages in connection with purely equitable relief. *See, e.g., Estate of Jones by Blume v. Kvamme*, 449 N.W.2d 428, 432 (Minn. 1989) (reversing punitive-damages award in connection with constructive trust and recessionary damages); *Jacobs v. Farmland Mut. Ins. Co.*, 377 N.W.2d 441, 445-46 (Minn. 1985) (reversing punitive-damages award in connection with equitable rescission of release of claim, because respondent suffered no actual or compensatory damages in connection with the fraudulently induced release); *Kohler v. Fletcher*, 442 N.W.2d 169, 171-72 (Minn. App. 1989) (affirming summary-judgment dismissal of fiduciary-duty damages claim because remedies of beneficiary against trustee are solely equitable), *review denied* (Minn. Aug. 25, 1989). This case is different because Dan sought and obtained legal damages for Brent and Larry's breach of fiduciary duties. Accordingly, we reject Brent and Larry's assertion that punitive damages are inappropriate on the fiduciary-duty claim. *See Evans v. Blesi*, 345 N.W.2d 775, 781 (Minn. App. 1984) (ordering entry of judgment for punitive-damages claim in connection with fiduciary-duty claim), *review denied* (Minn. June 12, 1984); *see also Jordan v. Holt*, 608 S.E.2d 129, 132 (S.C. 2005) (affirming award of punitive damages in connection with fiduciary-duty damages claim); *G&N Aircraft, Inc. v. Boehm*, 743 N.E.2d 227, 245 (Ind. 2001) (same).

IV.
Punitive Damages

MICO, Brent and Larry challenge the amounts of the punitive-damages award against them, arguing that the awards are both excessive in light of statutory standards and unconstitutional. "Since the amount of punitive damages to award is a decision that is almost exclusively within the province of the jury, we will not disturb the award on appeal unless it is so excessive as to be unreasonable." *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 259 (Minn. 1980). If no constitutional issue is raised, an appellate court reviews whether the award is unreasonably excessive under an abuse-of-discretion standard. *Cooper Indus., Inc., v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433, 121 S. Ct. 1678, 1684, 149 L.Ed.2d 674 (2001). But a claim that the amount of punitive damages awarded violates due process presents a constitutional issue, which we review de novo. *Id.* at 436, 121 S. Ct. at 1285-86.

<u>Excessive under statutory standards</u>

Punitive damages are governed by Minn. Stat. § 549.20 (2010), which allows an award when a defendant acts with "deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others." *Id.*, subd. 1. The statute provides a number of factors to be considered by the courts in awarding or reviewing punitive damages. *Id.*, subd. 3.

The district court made extensive findings to support the punitive-damages awards against MICO, Brent, and Larry. The district court again considered the relevant factors

in denying the posttrial motions. MICO, Brent and Larry assert that the statutory considerations for punitive damages do not support an award in this case, arguing that their conduct was targeted at Dan and did not impact other people; that they did not profit from their conduct; and that they did not conceal their conduct from Dan. But the district court found that

> [w]hile [appellants'] actions did not result in any risk of significant physical harm to the public, [their] actions run contrary to acceptable business practices which could affect the continuing viability of the corporation. Hundreds of MICO employees and their families rely on the continuing viability of MICO and could end up being [a]ffected by [appellants'] actions. In this respect, the conduct does pose a serious hazard to a significant portion of the public in the areas where MICO has factories.

The district court also found that appellants did conceal certain conduct from Dan, and that their actions were motivated by a desire to force Dan to sell his shares on terms favorable to them and thus, "could have resulted in significant profitability for [them]." These findings are not clearly erroneous and support the punitive-damages award.

MICO, Brent and Larry also challenge the amount of the punitive-damages award in relation to their ability to pay. The district court rejected this argument, reasoning that appellants seemed "to suggest that any punitive damages award must be capable of immediate satisfaction. There is no support for such an interpretation." We agree, and reject the assertion that the punitive damages awards were excessive in relation to appellants' abilities to pay.

Constitutionality

The constitutionality of punitive damages is reviewed under the Due Process Clause to determine if they are "grossly excessive." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568, 116 S. Ct. 1589, 1596 (1996). The Supreme Court has articulated three guideposts for making this determination: (1) the degree of reprehensibility of the parties' actions, (2) the ratio between the actual harm inflicted and the punitive damages, and (3) the difference between the punitive damages and the civil penalties authorized or imposed in comparable cases. *Id.* at 574-75, 116 S. Ct. at 1598-99. "[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Id.* at 575, 116 S. Ct. at 1599. And with respect to the ratio between actual and punitive damages, the Supreme Court has cautioned that, although there is no rigid mathematical formula, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 1524 (2003) (holding unconstitutional punitive-damages award that was more than 50 times the compensatory damages award).

MICO, Brent and Larry's challenges to the punitive-damages awards focus primarily on proportionality. Subtracting the compensatory damages that they challenge on appeal, which we have upheld above, they argue that there are double-digit ratios between the compensatory and punitive damages. But considering all of the damages awarded on the fiduciary-duty claim (totaling more than $2.2 million), there is a 1:1 ratio for Brent, and the punitive damages against Larry are less than the compensatory

damages. The ratios for the tortious-interference claim (a $275,402 award) are around 1:8 for Brent and 1:6 for Larry, which although closer to double digits are still within constitutional limits. And the award against MICO on the whistleblower claim is also less than the compensatory damages awarded. Accordingly, we reject the argument that the punitive-damages awards are unconstitutional.

V.
Attorney Fees

Both appellants and respondent challenge the district court's attorney-fee awards. The district court exercises broad discretion in this regard and should not be reversed absent an abuse of that discretion. *See In re Stisser Trust*, 818 N.W.2d 495, 509-10 (Minn. 2012).

Fee award against Brent and Larry (jointly and severally)

Brent and Larry challenge the district court's order that they be held jointly and severally liable for the attorney-fee award, arguing that there is no contractual or statutory basis for a fee award against them and that the district court erred by allowing fees as a sanction for bad-faith conduct. Under the well-established American rule, attorney fees are generally not allowed in the absence of a contractual or statutory basis. *Bolander v. Bolander,* 703 N.W.2d 529, 548 (Minn. App. 2005), *review dismissed* (Minn. Nov. 15, 2005). But the district court relied on the supreme court's reference in *Fownes v. Hubbard Broadcasting, Inc*, to "a well-established exception to this rule" for "cases where the unsuccessful party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons." 310 Minn. 540, 542, 246 N.W.2d 700, 702 (1976) (quotation

omitted). This court has also recognized the district court's "inherent authority to impose sanctions as necessary to protect their 'vital function—the disposition of individual cases to deliver remedies for wrongs and justice freely and without purchase; completely and without denial; promptly and without delay, conformable to the laws.'" *Peterson v. 2004 Ford Crown Victoria*, 792 N.W.2d 454, 462 (Minn. App. 2010) (quotation omitted).

We conclude that this is a case in which the unique circumstances justify an exercise of the district court's inherent authority. The district court made extensive findings regarding Brent and Larry's intent to draw Dan into costly litigation. Given our deferential standard of review and the unique circumstances of this case, we conclude that the district court acted within its discretion in imposing the fee award against Brent and Larry.[3]

Failure to apportion fees

Appellants challenge the district court's failure to apportion the attorney fees based on which claims were asserted against which appellants. The district court does not appear to have addressed this argument. Concerning a similar argument that costs should be apportioned, however, the district court explained that it did "not see any logical way of apportioning out the costs and disbursements given the intertwined nature of the claims asserted and the actions giving rise to those claims." The district court cited *Riverview Muir Doran, LLC v. JADT Dev. Group, LLC*, for the proposition that attorney

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[3] As Dan points out in his brief, there is some support in the caselaw for an equitable award of attorney fees. *See, e.g, Pedro II*, 489 N.W.2d at 804 (affirming fees award under Minn. Stat. § 302A.751, subd. 4). But the district court did not assert this basis for the fee award.

fees should not be apportioned when claims are based on a common core of facts. 776 N.W.2d 172, 180 (Minn. App. 2009). We conclude that the district court did not abuse its discretion by declining to apportion the attorney-fees award.

<u>Failure to reduce fees for block billing</u>

MICO, Brent and Larry challenge the district court's failure to reduce the attorney-fees request based on block billing, relying on federal caselaw reducing fees based on block billing. The district court rejected this argument, reasoning

> Where multiple tasks have been included in a "block entry," the Court is capable of determining whether the activities engaged in were reasonable and necessary. The Court is familiar with the complexity of the case, the issues involved, and the nature and extent of attorney time that may be necessary. It does not appear to the Court that where multiple tasks have been included, that the amount of time is excessive given the tasks identified and the nature of the case and issues involved.

We conclude that the district court did not abuse its discretion in this regard.

<u>Fees on fees and fees on collection efforts</u>

By notice of related appeal, Dan challenges the district court's denial of his request for attorney fees incurred in preparing and litigating the fee petition—so-called fees-on-fees—and in collecting the judgment, relying primarily on federal cases allowing such fees in civil-rights actions. *See, e.g., Jones v. MacMillan Bloedel Containers, Inc.*, 685 F.2d 236, 239 (8th Cir. 1982) (holding that plaintiff was entitled to attorney fees incurred in preparing fee petition in civil rights case); *Balark v. Curtin*, 655 F.2d 798, 803 (7th Cir. 1981) (holding that plaintiff was entitled to attorney fees incurred in collecting civil-rights judgment). Appellants cite cases from other jurisdictions denying fees-on-

fees. *See, e.g., Mediplex Constr. of Fla., Inc. v. Schaub*, 856 So.2d 13, 13 (Fla. Dist. Ct. App. 2003) (denying fees incurred in litigating entitlement to attorney fees). Neither this court nor the Minnesota Supreme Court has addressed the issue in a published opinion.

In its initial fee order, the district court considered the fees related to the fee petition and collections activity to be "collateral" to the judgment and thus not recoverable under the applicable fee-shifting statutes. This prompted Dan to suggest that the district court acted under an erroneous view of the law and that this court should at least remand with instructions for the district court to exercise its discretion to grant or deny such fees. In a later order, however, the district court noted that "[a]t best, it would be within a trial court's discretion to award or not to award such fees" and again declined to award such fees. Given the absence of Minnesota authority controlling the district court's discretion to award fees-on-fees or on collection efforts, we conclude that the district court did not abuse its discretion by declining to include these requested amounts in the fee award.

VI.
Costs

Under Minn. Stat. § 549.04 (2010), the district court is required to award to the prevailing party "reasonable disbursements paid or incurred." The district court must carefully review a request for costs and disbursements to determine whether the costs were both reasonable and necessary. *Stinson v. Clark Equip. Co.*, 473 N.W.2d 333, 338 (Minn. App. 1991), *review denied* (Minn. Sept. 13, 1991). This court reviews the district court's award of costs for an abuse of discretion. *See Lake Super. Center Auth. v.*

Hammel, Green & Abrahamson, Inc., 715 N.W.2d 458, 482 (Minn. App. 2006), *review denied* (Minn. Aug. 23, 2006).

The district court's order awarding costs and disbursements reflects its careful review of the costs requested by respondent: the district court made findings concerning each category of costs requested. Appellants assert that the district court erred both by failing to apportion costs among them based on their relative liability and by awarding particular types of costs. We reject the objection to the failure to apportion for the same reasons discussed above regarding attorney fees. *See also Craft Tool & Die Co. v. Payne*, 385 N.W.2d 24, 28 (Minn. App. 1986) ("It is within the discretion of the trial court to determine the fair proportion of costs and disbursements to be taxed against each defendant under Minn. Stat. § 549.04 (1984)."). The objections to particular types of costs are addressed in turn below.

<u>Computer-assisted research</u>

Appellants challenge the district court's taxation of approximately $46,900 in computer-assisted research costs, relying on federal caselaw and an unpublished decision from this court to argue that such costs are not taxable disbursements. We conclude that the district court did not err by including computer-assisted research costs in the award of disbursements. Section 549.04 does not define a disbursement, but the term is generally understood to mean "[m]oney paid out" or an "expenditure." *Amer. Herit. Dict.* 514 (5th ed. 2011). Thus, in contrast to the federal costs statute, which delineates the specific costs that may be allowed, *see* 28 U.S.C. § 1920 (2012), the Minnesota statute does not expressly limit the types of disbursements that can be awarded. Accordingly, we

conclude that the district court did not abuse its discretion by awarding computer-assisted research costs and disbursements under section 549.04.

<u>Fees for consulting (nontestifying) expert witnesses</u>

Appellants argue that the district court erred by taxing as disbursements $9,900.25 in fees paid to experts who were consulted, but who did not testify, in relation to valuation issues. The court found that the experts were retained "for advice concerning MICO, Inc.['s] ability to obtain financing to purchase [Dan's] shares" and "for advice concerning tax liabilities related to [Dan's] ownership in MICO, Inc."; that "[b]oth were available to testify at trial"; and that the fees for these experts "were reasonably expended by [Dan] considering the complex circumstances of this case." Appellants cite *Olson v. Alexandria Indep. Sch. Dist. No. 206*, 680 N.W.2d 583 (Minn. App. 2004), for the proposition that only just and reasonable expert costs can be awarded. In *Olson*, this court affirmed the district court's exercise of discretion to tax fees charged by an expert for trial preparation. *Id.* at 589. The expert in *Olson* testified, and thus costs were available under Minn. Stat. § 357.25 (2002) (allowing district court to award costs for testifying experts). The request in this case did not fall under section 357.25, but appellants cite no authority precluding the court from taxing fees for nontestifying experts under section 549.04. Accordingly, we conclude that the district court did not abuse its discretion in this regard.

<u>Fees for wage damages expert</u>

Appellants challenge the district court's allowance of fees charged by Melissa Snelson and the Stonehill Group, arguing that the district court mistakenly associated

Snelson with the Shenehon Company valuations of MICO in its findings and that fees are not appropriately taxed because the district court rejected Snelson's present-value calculations. Notwithstanding the district court's mistaken reference to Shenehon (rather than Stonehill) in addressing Snelson's fees, it expressly found that "costs incurred with the Stonehill Group were necessary and reasonable, and that such costs in the amount of $31,718.00 should be recovered." We conclude that the district court did not abuse its discretion in this regard.

Affirmed.