STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1757

Brian L. Williams,
Respondent,

vs.

Heins, Mills & Olson, PLC, et al.,
Appellants,

Vincent J. Esades,
Defendant.

Filed August 24, 2010
Affirmed
Muehlberg, Judge[*]

Hennepin County District Court
File No. 27-CV-07-6495

Vincent D. Louwagie, Steven M. Pincus, Anthony Ostlund & Baer, P.A., Minneapolis, Minnesota (for respondent)

Alain M. Baudry, Paul Baker Civello, William Z. Pentelovitch, Maslon Edelman Borman & Brand, LLP, Minneapolis, Minnesota (for appellants)

Considered and decided by Minge, Presiding Judge; Hudson, Judge; and Muehlberg, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

MUEHLBERG, Judge

In this appeal from judgment following a jury verdict in respondent's favor, appellants challenge the district court's denial of judgment as a matter of law (JMOL) on respondent's misrepresentation-by-omission claim, and respondent challenges the district court's pretrial dismissal of his fair-value buyout claim under Minn. Stat. § 322B.833 (2008), grant of JMOL dismissing his punitive-damages claim, and calculation of prejudgment interest. Finding no error, we affirm.

FACTS

This case arises out of a dispute between a law firm and one of its former attorneys over his share of four distributions made by the firm during the time that he was a member of the firm. Appellants are Heins, Mills & Olson, PLC (HMO), a Minneapolis law firm specializing in class-action matters, and firm founders Samuel D. Heins and Stacey L. Mills. Respondent Brian L. Williams joined HMO as an associate in June 2000 and was made a partner in May 2003.

In May 2004, Williams became a non-equity member of the firm. Heins and Mills announced Williams's membership (and that of two of his colleagues) at a meeting in the firm's conference room. Heins and Mills told Williams that they were giving him a five percent interest in net firm income, but the parties disagree about how that interest was to be calculated. Williams testified that he was told he would receive a straight five percent of whatever distributions were made; that there would be an opportunity to earn another eighteen percent of the firm's net income based on high performance; and that the firm

would adopt a new member control agreement (MCA) reflecting these terms. Heins and Mills testified that they informed Williams that distributions would be calculated in a manner consistent with the formula in the existing MCA; that Williams would not share in recovered expenses under that formula; and that his five percent interest would be limited to fees earned during the time that he was a member of the firm. It is undisputed that Heins and Mills told Williams that he needed to be a member of the firm at the time the distributions were made in order to receive them and that he would have no interest in distributions after leaving HMO.

In reliance on the representations made in the March 24, 2004 meeting, Williams passed up an employment opportunity with his current employer, another Minneapolis class-action firm founded by former HMO member Dan Gustafson. Williams also worked "probably harder and longer and better than [he] ever had as an attorney," billing 2,400 hours in the year following the March 24 meeting as well as giving up time with his family, and volunteering and coaching opportunities.

Beginning in September 2005, the firm made four distributions following receipt of class-action fee and cost awards. HMO calculated Williams's share of the distributions according to its MCA. Williams received the following distributions: $335,953 on September 21, 2005 (the Broadcom distribution or distribution #8); $11,072 on June 1, 2006 (the Relafen distribution or distribution #9); $4,164,975 on November 2, 2006 (the AOL distribution or distribution #10); and $49,513 on December 6, 2006 (the Laminates distribution or distribution #11). These amounts paid to Williams did not reflect a straight five percent of the total distributions.

Williams resigned from HMO in January 2007, and initiated this lawsuit in March 2007. The complaint asserted eight counts: (1) breach of the MCA; (2) buyout pursuant to Minn. Stat. § 322B.833; (3) promissory estoppel and equitable estoppel; (4) breach of fiduciary duty; (5) fraudulent misrepresentation; (6) misrepresentation by omission; (7) unjust enrichment; and (8) declaratory judgment. Williams's fraud claim was based on the alleged false promise to increase Williams's interest in the firm by up to eighteen percent. Although the complaint asserted that Williams was promised "five 'income points,' with each point representing a right to 1% of the Firm's net income," the complaint did not plead a fraud claim based on this promise/representation.

Following the close of discovery, Williams moved to add a claim for punitive damages and appellants moved for summary judgment dismissing all of Williams's claims except the buyout claim, which already had been dismissed by the district court under rule 12. In opposition to summary judgment, Williams described his fraud theory based on the false promise of additional points, but he also described another fraud theory:

> On March 24, 2004 and thereafter, Heins, Mills and HMO falsely represented that Williams would receive 5% of the Firm's net income at the time of each distribution. Heins, Mills and HMO also failed to disclose to Williams that he did not receive 5% of the Firm's net income at the time of each distribution. Williams is entitled to the difference, plus interest.

Appellants did not address this newly disclosed fraud theory in their summary-judgment reply memo, and none of the parties discussed it at the summary-judgment hearing.

In January 2008, the district court granted Williams's motion to add a punitive-damages claim and granted, in part, appellants' summary-judgment motion, specifically rejecting a fraud claim based upon the allegedly false promise of additional income points. The claims that survived summary judgment were for promissory estoppel, misrepresentation, breach of fiduciary duty, and declaratory judgment "as they relate to the failure to provide plaintiff with five percent of the firm's net income." Appellants sought clarification, arguing that the five percent fraud theory had not been pleaded and declining to consent to litigation of that claim. The district court issued a clarifying order, determining that the appellants had consented to litigate the issue by failing to object during the summary-judgment proceedings and further reasoning that the five-percent fraud theory had been disclosed through Williams's deposition.

Williams served an amended complaint, asserting the same counts as the original complaint, and adding a count for punitive damages. Within the punitive-damages count, Williams alleged that appellants "made false representations of material fact to Williams regarding his right as a Member of HMO to be compensated with five percent of the firm's net income" and/or "omit[ed] material facts that were necessary to give Williams a full and fair understanding of the true facts."

Williams's fraud claims were tried to a jury in June 2008. Williams's theory at trial was that appellants had fraudulently misrepresented or omitted the terms of his compensation at the March 24, 2004 meeting, and that he was entitled to damages equal to the difference between five percent of each distribution and the amount that he actually received—totaling $2,131,828. Williams provided an alternative damages figure of

$1,650,257, which reflected five percent of the distributions after expenses were paid to equity members under the MCA formula. After the close of evidence, the district court granted JMOL dismissing Williams's punitive-damages claim. The jury found for Williams on his misrepresentation-by-omission claim and awarded $1,650,257 in damages.

Appellants moved for JMOL or a new trial, and Williams moved for a new trial on punitive damages and for prejudgment interest. The district court denied the JMOL and new-trial motions, and allowed prejudgment interest from January 2, 2007, construing Williams's resignation letter as a written notice of his claims.

Appellants now challenge the district court's denial of JMOL, and Williams challenges the pretrial dismissal of his claim under Minn. Stat. § 322B.833, JMOL dismissing his punitive-damages claim, and the denial of his request for prejudgment interest from the date of each distribution.

D E C I S I O N

I.

Appellants challenge the district court's denial of JMOL on Williams's misrepresentation-by-omission claim. On appeal from the denial of JMOL, "this court determines whether there is any competent evidence reasonably tending to sustain the verdict." *Bolander v. Bolander*, 703 N.W.2d 529, 545 (Minn. App. 2005) (citing *Blue Water Corp., Inc. v. O'Toole*, 336 N.W.2d 279, 281 (Minn. 1983)); *see* Minn. R. Civ. P. 50.01 (stating standard for granting JMOL). "The jury's verdict stands unless it is manifestly and palpably contrary to the evidence, considered in the light most favorable

to the plaintiff." *Bolander*, 703 N.W.2d at 545 (citing *Stuempges v. Parke, Davis & Co.*, 297 N.W.2d 252, 256 (Minn. 1980)). "Verdicts are upset only in extreme circumstances." *Id.* at 545 (citing *Ralph Hegman Co. v. Transamerica Ins. Co.*, 293 Minn. 323, 327, 198 N.W.2d 555, 558 (1972)).

In order to prevail on his misrepresentation-by-omission claim, Williams was required to prove that: (1) appellants omitted a past or present material fact unknown to him and that appellants were under a duty to disclose; (2) appellants intended for him to rely on the omission; (3) he did rely on the omission; and (4) he suffered pecuniary damages as a result of his reliance. *See Specialized Tours, Inc. v. Hagen*, 392 N.W.2d 520, 532 (Minn. 1986) (articulating elements of misrepresentation claim); *Richfield Bank & Trust Co. v. Sjogren*, 309 Minn. 362, 366, 244 N.W.2d 648, 650 (1976) (holding omission of facts can support misrepresentation claim if there is a legal duty to disclose). A duty to disclose arises when a party has special knowledge of facts not accessible to another or when the parties have a special relationship, like that shared by fiduciaries. *Richfield Bank & Trust*, 309 Minn. at 366, 244 N.W.2d at 650. Additionally, "[o]ne who speaks must say enough to prevent his words from misleading the other party." *Id.*

As an initial matter, Williams asserts that appellants have not challenged the district court's findings and conclusions on the equitable claims; that this court can affirm the judgment on those claims; and thus that we need not reach appellants' challenges to the fraud verdict. Appellants assert that reversal of the fraud verdict requires reversal of the entire judgment because the district court adopted the jury's findings to support the conclusions of law on the equitable claims. *See Onvoy, Inc. v. ALLETE, Inc.*, 736

N.W.2d 611, 617 (Minn. 2007) (holding that "factual findings that are common to both claims at law and claims for equitable relief are binding on the district court"). Williams asserts that the district court relied only on the jury's finding of a material omission of fact, which is not subject to challenge on appeal.

There is some authority for the proposition that "a judge should continue to be bound by a jury's findings even if its verdict is [reversed], so long as the underlying factfinding is not impugned." *Artis v. Hitachi Zosen Clearing, Inc.*, 967 F.2d 1132, 1138 (7th Cir. 1992). However, it is not clear that the district court's adjudication of the equitable claims in this case incorporated only unimpugned facts. While the district court expressly relied on the jury's finding that appellants failed to disclose material facts, the district court awarded judgment in favor of Williams on his breach-of-fiduciary duty claim without separately addressing causation, presumably because the jury found causation on the fraud claim. *See Padco, Inc. v. Kinney & Lange*, 444 N.W.2d 889, 891 (Minn. App. 1989) (explaining that breach-of-fiduciary duty requires same elements as negligence claim), *review denied* (Minn. Nov. 15, 1989). Also without separate findings, the district court awarded the damages in the amount determined by the jury. Under these circumstances, we decline to affirm the judgment on the equitable claims without addressing the challenges to the fraud verdict.

A.

Appellants first assert error in the district court's submission to the jury of a fraud theory that they claim was disclosed for the first time in Williams's summary-judgment briefing after the completion of discovery. Because the fraud theory was fully disclosed

months before trial, we reject the notion that the failure to plead this theory resulted in an impermissible trial by ambush. For similar reasons, we find inapposite cases addressing whether a party has consented to litigate an issue. *See, e.g., Roberge v. Cambridge Coop. Creamery Co.*, 243 Minn. 230, 233-35, 67 N.W.2d 400, 403-04 (1954) (addressing whether party consented to litigate issue raised for the first time during trial). At the time that the fraud theory was disclosed, the district court had discretion to allow Williams to amend his pleadings. Minn. R. Civ. P. 15.01; *see also Niccum v. Hydra Tool Corp.*, 438 N.W.2d 96, 98 (Minn. 1989) (acknowledging broad discretion of district court to allow amendments to the pleadings, "even though the proposed amendment may change the legal theory of the action").[1]

Appellants assert prejudice arising from the district court's denial of their motion for expedited discovery, including an opportunity to reopen Williams's deposition and question him about the belatedly disclosed fraud theory. The determination of whether to allow additional discovery falls within the discretion of the district court. *Lewis v. St. Cloud State Univ.*, 693 N.W.2d 466, 473 (Minn. App. 2005) ("A district court's decision to deny a motion for a continuance to conduct discovery is reviewed under an abuse-of-discretion standard."), *review denied* (Minn. June 14, 2005). We conclude that the district court did not abuse its discretion by denying appellants' request for additional

[1] Appellants argue that Williams never *actually* pleaded a fraud claim based on the belatedly disclosed theory. But the new theory was articulated both in Williams's summary-judgment briefing and in the punitive-damages allegations of the amended complaint. *See Septran v. Indep. Sch. Dist. No. 271*, 555 N.W.2d 915, 920 n.1 (treating briefs submitted to court in response to request for additional pleadings as amendments to the pleadings).

discovery here, given that the terms of compensation, including the five percent non-equity interest and the discussions at the March 2004 meeting, were relevant to the claims initially pleaded and were well-explored, both at Williams's deposition and at trial.

B.

Appellants next assert that the evidence at trial was insufficient to prove reliance, arguing that Williams did no more than remain at his job, which is insufficient to prove reliance under Minnesota law. *See Hanks v. Hubbard Broad., Inc.*, 493 N.W.2d 302, 309 (Minn. App. 1992) (explaining that, "where an at-will employee merely continues to work and does not claim to have turned down any offers of employment based upon an employer's representations, no reliance will be found"), *review denied* (Minn. Feb. 12, 1993). Appellants also assert that Williams could not have reasonably relied on the omissions throughout the term of his employment because he became apprised during that time that he was not receiving a straight five percent of distributions.

We conclude that the evidence was sufficient to support the jury's finding of reliance. Williams testified that he not only remained employed, but substantially increased his efforts to maximize recoveries in the pending class actions, making significant personal sacrifices to do so. Williams also testified that he turned down another job opportunity and that he did not fully understand the formula used to calculate his distributions, and thus did not know whether he was receiving a straight five percent of distributions, until this litigation.[2] We conclude that this evidence of reliance, while

[2] Appellants assert that Williams's opportunity was not a binding offer of employment, but cite to no precedent imposing that threshold for a finding of reliance.

not overwhelming, was sufficient to support the jury's verdict. *See* Minn. R. Civ. P. 50.01 (providing that verdict survives JMOL if evidence is "sufficient").

C.

Appellants finally argue that the jury impermissibly awarded benefit-of-the-bargain damages on Williams's fraud claim. Minnesota generally subscribes to the out-of-pocket rule for misrepresentation damages. *Brooks v. Doherty, Rumble & Butler*, 481 N.W.2d 120, 128 (Minn. App. 1992) (citing *B.F. Goodrich Co. v. Mesabi Tire Co.*, 430 N.W.2d 180, 182 (Minn. 1988)), *review denied* (Minn. Apr. 29, 1992). The Minnesota Supreme Court has acknowledged, however, that there are some cases in which "the out-of-pocket rule does not work." *B.F. Goodrich*, 430 N.W.2d at 182. The most common case is one in which misrepresentations cause damage to a plaintiff's existing property—sometimes called the economic-loss exception. *Id.* at 183 (explaining that "[t]his direct economic loss is not measurable by the out-of-pocket rule"). Other examples have included the recovery of life-insurance proceeds (rather than premiums) by a plaintiff who was led to believe that she was purchasing life insurance, rather than an annuity, *Lewis v. Citizens Agency of Madelia, Inc.*, 306 Minn. 194, 200, 235 N.W.2d 831, 835 (1975), and rescission of a stock sale based on a misrepresentation as to the purchaser, *Estate of Jones v. Kvamme*, 449 N.W.2d 428, 432 (Minn. 1989).

We conclude that the district court appropriately allowed an alternative measure of damages in this case as well. In so concluding, we observe the reason that the Minnesota Supreme Court has generally favored the out-of-pocket rule; namely, that other types of damages are more speculative. *See B.F. Goodrich*, 430 N.W.2d at 180 (explaining that

"determining what plaintiff would have had if the situation had been different too often involves overly hypothetical and speculative proof"). In this case, it is the calculation of out-of-pocket damages that would be speculative, while the amount that Williams was deprived by appellants' omissions is easily calculated. Notably, appellants do not challenge the jury's findings that they intentionally omitted material facts and intended that Williams rely on those omissions. Thus, appellants effectively seek—through a mechanical application of the out-of-pocket rule—a free pass for their wrongful conduct. *See id* at 183 (explaining that alternative measure of damages is appropriate when "application of the out-of-pocket rule will leave the plaintiff without recompense").

For the foregoing reasons, we conclude that the district court did not err by denying appellants' motion for JMOL on the misrepresentation-by-omission claim.

II.

Williams challenges the district court's dismissal of his claim for a buyout of his interest under the Minnesota Limited Liability Company Act (LLCA), Minn. Stat. §§ 322B.01-.975 (2008), and specifically under Minn. Stat. § 322B.833. The district court noted Williams's concession that he was no longer a member of HMO and determined that former members do not have standing to initiate buyout actions under the LLCA. In so concluding, the district court relied both on the language of the statute and an unpublished case from this court addressing a claim under the Minnesota Business Corporations Act (MBCA). *See* Minn. Stat. §§ 322B.03, subd. 30, .833; *Gerring v. Quality Car Wash Operations, Ltd.*, No. A05-2000, 2006 WL 1891919 (Minn. App. July 11, 2006).

The LLCA allows a "member" of an LLC to seek equitable relief from the courts—including a buyout—upon demonstration of fraudulent, illegal, or unfairly prejudicial conduct by the governors of the LLC. Minn. Stat. § 322B.833, subd. 2. A member is defined as "a person reflected in the required records of a limited liability company as the owner of some governance rights[3] of a membership interest of the limited liability company. A person may be a member without having voting rights." Minn. Stat. § 322B.03, subd. 30. Under Minn. Stat. § 322B.306, subds. 1, 3, a membership is terminated by resignation and a "member whose membership has terminated loses all governance rights and will be considered merely an assignee of the financial rights owned before the termination of membership."

On appeal, Williams disputes that his membership ended upon his resignation, relying on *Drewitz v. Motorwerks*, 728 N.W.2d 231, 236 (Minn. 2007), in which the Minnesota Supreme Court held that nothing in the MBCA compels termination of shareholder status when employment ends. But Williams's argument that he remained a member following his resignation is contrary to the terms of the MCA, which provided for reversion of membership interests upon voluntary withdrawal. *See Drewitz*, 728 N.W.2d at 236 (acknowledging that shareholder agreement could provide for concurrent termination of employment and shareholder status).

[3] Governance rights are "all a member's rights as a member in the limited liability company other than financial rights and the right to assign financial rights," Minn. Stat. § 322B.03, subd. 22, and include dissenters' rights. *See id.* 1992 reporter's notes ("This residual category of rights includes not only rights to participate in management (i.e., to vote) but also dissenters rights.").

Even if Williams's argument was not defeated by the language of the MCA, it is unclear whether *Drewitz*, decided under the MBCA, is controlling in the context of the differently worded LLCA. In *Drewitz*, our supreme court was persuaded that shareholder status did not terminate upon termination of employment primarily because a contrary interpretation would deprive former employee-shareholders of dissenters' rights under the MBCA. *Id.* The LLCA, however, expressly provides the circumstances under which a former member is considered a member for the purposes of asserting dissenters' rights. Minn. Stat. § 322B.386, subd. 1(e). Under the doctrine of *expressio unius est exclusio alterius*, the statute's inclusion of former members in the definition of "member" for this purpose suggests that former members are excluded for all other purposes. *See BCBSM, Inc. v. Minn. Comprehensive Health Ass'n*, 713 N.W.2d 41, 44 (Minn. App. 2006) (recognizing the doctrine as a "rule of construction and an aid to determining legislative intent"), *review denied* (Minn. June 28, 2006); Minn. Stat. § 645.19 (2008) (providing that "[e]xceptions expressed in a law shall be construed to exclude all others"). Accordingly, we reject Williams's reliance on *Drewitz* to support his argument that his membership continued after he terminated his employment.

III.

Williams next challenges the district court's grant of JMOL dismissing his punitive-damages claim. The availability of punitive damages in Minnesota is governed by Minn. Stat. § 549.20 (2008), which provides that "[p]unitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant

show deliberate disregard for the rights or safety of others." *Id.*, subd. 1. Deliberate disregard means that the

> defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:
> (1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or
> (2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Id., subd. 1(b)(1), (2).

Williams asserts that the fraud found by the jury in this case provides a substantive basis for a punitive-damages award and that the district court erred by removing the issue from the jury. *See, e.g.*, *Hanks*, 493 N.W.2d at 311 (affirming punitive-damages award based on evidence of intentional misrepresentations). It is generally the jury's province to determine whether evidence of deliberate disregard is sufficient to support an award of punitive damages. *Huebsch v. Larson*, 291 Minn. 361, 364, 191 N.W.2d 433, 435 (1971). Notwithstanding, JMOL dismissing punitive-damages claims is appropriate in some cases. *See Beniek v. Textron, Inc.*, 479 N.W.2d 719, 723 (Minn. App. 1992) (affirming grant of JMOL in product-defect case because there was not clear and convincing evidence of malicious conduct), *review denied* (Minn. Feb. 19, 27, 1992); *Yost v. Millhouse*, 373 N.W.2d 826, 832 (Minn. App. 1985) (reversing JMOL on fraud claim but affirming JMOL on punitive-damages claim).

After a careful review of the record, we conclude that the district court did not err by granting JMOL dismissing Williams's punitive-damages claim here. Importantly,

Williams was required to prove by clear and convincing evidence that appellants acted with intentional disregard or deliberate indifference for Williams's rights. *See, e.g.*, *Swanlund v. Shimano Indus. Corp.*, 459 N.W.2d 151, 154 (Minn. App. 1990) (explaining that "the trial court must view the evidence presented through the prism of the substantive evidentiary burden" (quotation omitted)), *review denied* (Minn. Oct. 5, 1990). Here, the district court determined that the evidence presented was not sufficient to "permit a jury to conclude that it [was] highly probable that [appellants] acted with deliberate disregard for the rights or safety of others." We agree.

IV.

Williams also challenges the district court's denial of his request for prejudgment interest from the date of each distribution. By statute, prejudgment interest is available from "the time of the commencement of the action or a demand for arbitration, or the time of a written notice of claim." Minn. Stat. § 549.09, subd. 1(b) (2008). But under common law, prejudgment interest on an unliquidated claim that is "readily ascertainable" runs from the time that the claim arose. *Trapp v. Hancuh*, 587 N.W.2d 61, 63 (Minn. App. 1998). *But see Duxbury v. Spex Feeds, Inc.*, 681 N.W.2d 380, 391 n.5 (Minn. App. 2004) (observing disagreement among cases over whether Minn. Stat. § 549.09 supersedes common-law rule).

Damages are readily ascertainable if they can be determined "by computation or reference to generally recognized standards such as market value and not where the amount of damages depended upon contingencies or upon jury discretion (as in actions for personal injury or injury to reputation)." *Potter v. Hartzell Propeller, Inc*., 291 Minn.

513, 518, 189 N.W.2d 499, 504 (1971). The requirement that the damages be ascertainable is based on the theory that it would be "unreasonable to require defendant to compensate plaintiff for this loss where defendant could not have readily determined the amount of damages himself either by computation or reference to generally recognized standards such as market value." *Id.*

Williams challenges the district court's finding that his claims were not readily ascertainable at the date of each distribution. This court reviews that finding for clear error. Minn. R. Civ. P. 52.01 (providing that district court findings of fact will not be reversed unless clearly erroneous). Under the theory presented at trial, Williams's damages were easily calculated as five percent of each distribution, and the jury awarded the amount requested by Williams under this theory. Thus, this case is distinguishable from one in which the parties dispute the calculation of damages, and the jury is required to exercise discretion. *Potter*, 291 Minn. at 518, 189 N.W.2d at 509. Nevertheless, there was significant confusion in this case regarding the calculation of Williams's compensation, as is evidenced by changes in his theories of liability from the time of the distributions to his resignation to commencement of this action and, finally, to trial. Accordingly, and particularly in light of the fairness considerations outlined in *Potter*, we conclude that the district court did not err by denying prejudgment interest for periods before commencement of this action.

Affirmed.