**COURT OF APPEALS DECISION DATED AND FILED**

**December 23, 2009**

**David R. Schanker**
**Clerk of Court of Appeals**

**NOTICE**

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**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.**

**Appeal No. 2008AP1806**

**Cir. Ct. No. 2005CV860**

**STATE OF WISCONSIN** **IN COURT OF APPEALS DISTRICT IV**

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**BETTY ANDREWS REVOCABLE TRUST, DONALD DERR, ELEANOR A. TORREY, RALPH BENJAMIN, JAMES OESTMANN, JAMO TRUST NUMBER 2 AND GERALD J. & ARLENE B. STORMS LIVING TRUST,**

**PLAINTIFFS,**

**WHI LIQUIDATION, INC. F/K/A WINDSOR HOMES, INC.,**

**PLAINTIFF-RESPONDENT-CROSS-APPELLANT,**

**V.**

**VRAKAS/BLUM, S.C., VRAKAS/BLUM MERGERS AND ACQUISITIONS, INC. AND KARIN M. GALE, CPA,**

**DEFENDANTS-APPELLANTS-CROSS-RESPONDENTS.**

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APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed.*

Before Vergeront, Higginbotham and Bridge, JJ.

¶1 HIGGINBOTHAM, J. This appeal and cross-appeal arise from an action brought by Windsor Homes, Inc. (Windsor), and minority shareholders against Vrakas/Blum[1] for its activities in connection with the marketing and sale of Windsor's assets. Windsor brought direct claims and the minority shareholders brought derivative claims alleging breach of contract, strict responsibility misrepresentation and negligent misrepresentation. Following a bench trial, the circuit court dismissed all of the minority shareholders' derivative claims and Windsor's breach of contract claim. However, the court awarded judgment and damages of $2.9 million to Windsor on its strict responsibility and negligent misrepresentation claims for Vrakas/Blum's nondisclosure of information relating to the marketing and sale of Windsor president Len Linzmeier's stock to a third party.

¶2 Vrakas/Blum challenges the judgment on several grounds. First, it contends that the minority shareholders and Windsor lacked standing to pursue their claims. Second, Vrakas/Blum argues that Windsor's misrepresentation claims must fail because they are barred by the two-year statute of limitations for intentional torts. Third, Vrakas/Blum maintains that Wisconsin courts have never held and should not hold that claims for strict responsibility and negligent misrepresentation can be based solely on nondisclosures. Fourth, Vrakas/Blum argues that it was not required to disclose information relating to Linzmeier's stock sale because Linzmeier's knowledge of the transaction was imputed to Windsor as a matter of law. Fifth, Vrakas/Blum asserts that Windsor failed to

[1] Two Vrakas/Blum entities are parties to this case, Vrakas/Blum, S.C. and Vrakas/Blum Mergers and Acquisitions, Inc. The distinction between the two entities is not pertinent to this appeal, and we therefore do not distinguish between the two. Karin Gale of Vrakas/Blum is also named individually as a defendant. We refer to the defendants collectively as Vrakas/Blum.

prove that Windsor relied on any alleged nondisclosures, and that such nondisclosures damaged Windsor. Finally, Vrakas/Blum maintains that the award of damages must be reversed because Windsor failed to present evidence to support the amount of the award. We reject each of these arguments.

¶3 In its cross-appeal, Windsor argues that the trial court erred in granting Vrakas/Blum's motion on reconsideration to strike that portion of the court's judgment that awarded Windsor prejudgment interest on the damage award.[2] We reject this argument as well. Accordingly, we affirm the trial court's judgment and its reconsideration order.

## BACKGROUND

¶4 The trial court made the following findings, which are undisputed on appeal. In February 1998, Windsor Homes entered into a contract with Vrakas/Blum for the purpose of marketing Windsor for sale.[3] The contract was signed by Len Linzmeier and James Ballweg, Windsor's board president and vice-president, respectively, and Karin Gale of Vrakas/Blum. Vrakas/Blum prepared a confidential sales document that estimated the value of Windsor to be $6,333,000.00.

¶5 At the time Windsor entered into the agreement with Vrakas/Blum, Linzmeier and Ballweg owned 43.75% and 18.75% of the shares in Windsor,

[2] Windsor also contends that the trial court erred in dismissing its breach of contract claim. We do not address this argument, however, because reversal on this issue would not change the award of damages. For purposes of forestalling a retrial on the issue of damages following an appeal, the trial court determined that damages on the breach of contract claim were $2.9 million, the same amount awarded by the trial court on its misrepresentation claims.

[3] This contract superseded a 1997 contract signed by the parties.

respectively. Linzmeier and Ballweg were the only shareholders involved in day-to-day management of the company. The remaining two directors of the company were Peter Uttech and Linzmeier's daughter, Jayna Schultz, who was also employed by Vrakas/Blum.

¶6 In January 1999, Ballweg resigned as an employee and officer of Windsor. Several weeks later, Ballweg reached an agreement with Windsor to redeem his shares. As a result of the agreement, Linzmeier became the majority shareholder in the company. Victor Schultz, Jayna Schultz's husband and Linzmeier's son-in-law, represented Windsor Homes in the Ballweg transaction. Gale and others at Vrakas/Blum knew of the transaction, but none of Windsor's minority shareholders were told about it for many months.

¶7 Shortly after becoming majority shareholder in March 1999, Linzmeier discussed with Gale the possibility of marketing only his share in Windsor, rather than the whole company. This idea was immediately taken up by Gale and the focus of Vrakas/Blum's efforts shifted from selling the company to selling Linzmeier's share of the company.

¶8 In March 1999, Camberwell Companies, Inc., submitted an offer to purchase Windsor. In response, Gale informed a Camberwell accountant of the recent buyout of Ballweg's shares, and indicated that Camberwell could acquire a controlling interest in Windsor by purchasing only Linzmeier's shares instead of the whole company.

¶9 In April 1999, Gale began negotiating with Camberwell president Ron Wald regarding the sale of Linzmeier's shares. In an April 1999 letter to Wald, Gale proposed that Camberwell purchase Linzmeier's 53.85% interest in Windsor for $2,900,000. Gale explained that the purchase of Linzmeier's shares

would benefit Camberwell by "separating the majority shareholder from the minority shareholder[s]." Gale projected that Camberwell could then purchase the remaining shares—representing a 46.15% interest in the company—for only $720,000 based on recent sale prices of shares held by non-active minority shareholders. Gale reminded Wald that Vrakas/Blum had estimated that Windsor was "valued in excess of $5,000,000." Wrote Gale: "[I]t is very possible that you could ultimately gain a 100% ownership interest for $3,620,000 ($2,900,000.00 + $720,000.00)…. You save $1,380,000.00."

¶10 As a result of these discussions, Wald and Linzmeier signed a letter of intent dated May 1999, which stated that Wald and Camberwell agreed to negotiate in good faith with Linzmeier and Windsor to acquire Linzmeier's shares for $2,900,000. The letter of intent contained several contingencies, including that the buyer would secure financing and inform the seller of such financing. The letter required that Vrakas/Blum cease marketing the sale of Windsor to other potential suitors, and that Windsor suspend dividend payments to its shareholders.

¶11 Gale was in regular contact with Camberwell's bank, Wells Fargo Business Credit, Inc., in May 1999, and provided Wells Fargo with audited financial statements for Windsor. In June 1999, Wells Fargo submitted a financing proposal to Wald, which was copied to Gale. Under Wells Fargo's proposal, Camberwell and Windsor would be co-borrowers under a security and credit agreement, and the transaction would be secured by a first real estate mortgage on all real estate property owned by Windsor.

¶12 Over the next few months, Gale and others at Vrakas/Blum continued to negotiate the details of the agreement with Camberwell. In September 1999, Wald wrote to Gale and Linzmeier expressing his concern that

the mortgage on Windsor's assets was a breach of fiduciary duty. In October 1999, Wells Fargo submitted a financing proposal to Wald which listed Camberwell and Windsor as co-borrowers on a $10,000,000 line of credit for the purchase of Linzmeier's shares and "subsequent advances to fund cash flow irregularities experienced during Borrowers normal operating cycle." The proposal stated that a first lien would be placed as collateral on all accounts, inventory, equipment and general intangibles of both Camberwell and Windsor. Finally, the financing would be secured by a first real estate mortgage on all real estate owned by Windsor.

¶13 At trial, Gale denied having knowledge of the details of the financing proposals. The trial court found this testimony to be not credible. It found that Gale knew in June 1999 that Wells Fargo's initial financing proposal included a first mortgage on her client's assets, and that she knew in October 1999 that its subsequent proposal included the same provision. It found that neither Gale nor anyone else at Vrakas/Blum disclosed this information to anyone at Windsor other than Linzmeier, although Gale was aware that Windsor's bylaws required that the board of directors receive sixty days notice before any sale of shares.

¶14 In mid-November 1999, Gale provided financial statements to Wald's attorney which showed that Windsor had $4,369,729 in assets and $257,745 in long-term liabilities. On November 23, 1999, a final stock purchase agreement for Linzmeier's shares was executed.

¶15 Windsor held its annual meeting on December 14, 1999. Minority shareholders in attendance received annual financial statements, which notified them for the first time that Ballweg had redeemed his shares and Linzmeier was

now the majority shareholder. At the end of the meeting, Linzmeier announced that he had received an offer to purchase his shares, and that he would be calling a special shareholders meeting soon.

¶16 A special meeting of the shareholders and directors was held on December 22, 1999. Under Windsor's bylaws, the corporation could match any third-party offer to purchase shares within sixty days of receiving notice of the offer. Director Peter Uttech moved to waive the sixty-day right of first refusal; Linzmeier and Jayna Schultz abstained. Uttech was unaware of the financing for the purchase of Linzmeiers' shares. None of the details of the financing arrangement were disclosed at the December 14th or 22nd shareholder meetings. The trial court found that neither Gale nor anyone else at Vrakas/Blum advised Uttech, Windsor's corporate counsel Gary Hebl, or any minority shareholder regarding any of the details of the financing arrangement with Wells Fargo for the purchase of Linzmeier's shares.

¶17 The sale of Linzmeiers' shares was executed in January 2000. Neither Windsor's corporate counsel, the other directors, nor any attorney for Windsor had learned of the financing provisions until some time after the financial statements for the fiscal year ending September 30, 2000, were issued in March 2001.

¶18 In February 2002, the minority shareholders sued Linzmeier, Windsor and Camberwell among others for breach of fiduciary duty, conspiracy and misrepresentation. The trial court dismissed the minority shareholders' action on summary judgment, concluding that their claims were barred by the two-year statute of limitations for intentional torts. The court determined that by January

2000 the shareholders had sufficient opportunity to discover the facts underlying their claims.

¶19 Windsor ceased operations in 2004, and all of its assets and real estate were sold to a third party.[4] The proceeds of these sales went to Wells Fargo. The parties agree that Windsor is an empty shell with substantial negative value.

¶20 In 2005, the minority shareholders brought this action against Vrakas/Blum for breach of contract, intentional and strict responsibility misrepresentation and civil conspiracy. The minority shareholders made their claims individually and derivatively on behalf of Windsor. Vrakas/Blum moved for summary judgment on all claims, and the trial court granted the motion in part, dismissing the shareholders' direct claims and their derivative claim for conspiracy. The court left for trial the shareholders' derivative claims for breach of contract and misrepresentation.

¶21 In June 2007, the minority shareholders appealed the order dismissing their direct claims for breach of contract and misrepresentation, and their conspiracy claim in its entirety, and we affirmed. *See* ***Betty Andrews Revocable Trust v. Vrakas/Blum, S.C.***, No. 2007AP1414, unpublished slip op. (WI App Nov. 6, 2008).

¶22 A trial was scheduled on the remaining derivative claims. On October 17, 2007, the trial court granted Vrakas/Blum's motion to try the case to the bench rather than a jury. In response to the court's order, the minority

[4] Windsor Homes, Inc. was renamed WHI Liquidiation, Inc. [sic] upon the sale of its holdings. We refer to the company as Windsor throughout.

shareholders convened a meeting later that day, and elected shareholder Don Derr to be a director of Windsor. Derr then appointed himself president, and voted to authorize Windsor to take over the action against Vrakas/Blum. Windsor filed a motion to allow the corporation to assume prosecution of the complaint as a direct action, and for a jury trial. The court denied the request for a jury trial, but allowed the action to proceed as both a direct action by Windsor and a derivative action by the minority shareholders.

¶23 Following a week-long trial, the court issued a written decision containing rulings on outstanding motions, findings of fact, conclusions of law and an order for judgment. The court dismissed the derivative claims, but awarded judgment and damages of $2,900,000 plus interest to Windsor on its direct claims for strict responsibility and negligent misrepresentation based on Vrakas/Blum's failure to disclose certain information to Windsor. The court found that, contrary to its marketing agreement with Windsor, Vrakas/Blum was required to disclose and failed to disclose the following to Windsor:

> A) In March, 1999, that Linzmeier had ceased efforts to sell the corporation as a whole, had imposed conditions on the corporation itself (nonpayment of dividends and restrictions on negotiating with other potential suitors), and was now actively seeking to sell his stake in the company (recently increased to a majority position);
>
> B) That defendants were actively assisting him in this effort and had agreed to stop further efforts to market the corporation as a whole, contrary to the contract;
>
> C) In June, 1999, the possibility that money would be borrowed for the purchase of Linzmeier's stock on which Windsor Homes, Inc. would bear the risk;
>
> D) By no later than December 22, 1999, that Windsor Homes, Inc.'s real estate and other assets would be encumbered to secure all the outstanding debt of Windsor Homes, Inc. and Camberwell, including but not

> limited to that amount borrowed to purchase Linzmeier shares.

The court also determined that Vrakas/Blum breached its contract with Windsor, but concluded that the claim for breach of contract was barred by the two-year statute of limitations for intentional torts because the claim was premised on a breach of fiduciary duty. The court dismissed motions by Vrakas/Blum for a mistrial and to dismiss at the close of evidence.

¶24 Vrakas/Blum moved for reconsideration of the trial court's award of prejudgment interest on the damages. The trial court granted the reconsideration motion, and modified the judgment to strike the award of prejudgment interest. Vrakas/Blum appeals the judgment in favor of Windsor on its direct claims for misrepresentation, and Windsor cross-appeals the judgment against it on its breach of contract claim and the post-judgment order striking the award of prejudgment interest.

## DISCUSSION

¶25 Vrakas/Blum argues on appeal that Windsor's misrepresentation claims must fail because: (1) the minority shareholders lacked standing to pursue the derivative action, and therefore no action existed for Windsor to assume; (2) the claims are barred by the two-year statute of limitations for intentional torts; (3) Wisconsin courts have not held, and should not hold, that claims for strict responsibility and negligent misrepresentation may be based solely on nondisclosure; (4) Linzmeier's knowledge of the sale is imputed to Windsor as a matter of law, and thus Vrakas/Blum's nondisclosure to Windsor is immaterial; (5) Windsor presented no evidence showing that Windsor Homes relied on Vrakas/Blum's nondisclosure; and (6) Windsor presented no evidence that it was

damaged by Vrakas/Blum's nondisclosure, and, regardless, the amount of damages awarded is not supported by the record.

¶26 In its cross-appeal, Windsor argues that the trial court erred in declining to award pre-judgment interest on the damage award.

¶27 We reject each of Vrakas/Blum's and Windsor's arguments, either on the merits or on forfeiture grounds. We address each argument in turn.

***Minority Shareholders' Standing to Pursue Claims***

¶28 Vrakas/Blum contends that the minority shareholders lacked standing to pursue a derivative action on Windsor's behalf on two grounds. First, Vrakas/Blum asserts that the shareholders failed to prove that they submitted a written demand notifying Windsor of the action pursuant to WIS. STAT. § 180.0742 (2007-08).[5] Second, Vrakas/Blum argues the shareholders lacked standing to pursue a derivative action because they never "fairly and adequately" represented Windsor's interests as required by WIS. STAT. § 180.0741(2).[6]

[5] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted. WISCONSIN STAT. § 180.0742 provides as follows:

> No shareholder or beneficial owner may commence a derivative proceeding until all of the following occur:
>
> (1) A written demand is made upon the corporation to take suitable action.
>
> (2) Ninety days expire from the date on which the demand was made, unless the shareholder or beneficial owner is notified before the expiration of 90 days that the corporation has rejected the demand or unless irreparable injury to the corporation would result by waiting for the expiration of the 90-day period.

[6] WISCONSIN STAT. § 180.0741 provides as follows:

(continued)

Vrakas/Blum maintains that, as a result of the minority shareholders' lack of standing, there was no valid action for Windsor to assume when it requested to take over the suit following the Windsor shareholders' October 17, 2007 meeting at which new officers and directors of Windsor were elected.

¶29 Windsor views Vrakas/Blum's arguments as an attack on the October 17, 2007 shareholder meeting,[7] and argues that Vrakas/Blum itself lacks standing to make such attacks on Windsor's internal operations, citing WIS. STAT. § 180.0304.[8] This section prohibits challenges to a corporation's power to act

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> A shareholder or beneficial owner may not commence or maintain a derivative proceeding unless the shareholder or beneficial owner satisfies all of the following:
>
> **(1)** Was a shareholder or beneficial owner of the corporation at the time of the act or omission complained of or became a shareholder or beneficial owner through transfer by operation of law from a person who was a shareholder or beneficial owner at that time.
>
> **(2)** Fairly and adequately represents the interests of the corporation in enforcing the right of the corporation.

[7] Vrakas/Blum prefaces its standing arguments by criticizing the October 17, 2007 shareholder meeting, which it labels as "highly irregular." However, it would appear that Vrakas/Blum's standing arguments have little to do with the legitimacy of the corporation's actions on October 17, 2007, i.e., the shareholders' election of Derr as a director, Derr's appointment of himself as president and the decision to authorize Windsor to take over the action. Its only legal challenge to the validity of the shareholder meeting itself is a fleeting argument raised in its reply brief that it should be able to challenge the legitimacy of the proceedings as a matter of due process. We decline to address this argument because it is not adequately developed. *See* ***State v. Scherreiks***, 153 Wis. 2d 510, 520, 451 N.W.2d 759 (Ct. App. 1989) ("[W]e need not decide the validity of constitutional claims broadly stated but never specifically argued.")

[8] WISCONSIN STAT. § 180.0304 provides as follows:

> **(1)** Except as provided in sub. (2), the validity of any corporate action or any conveyance or transfer of property to or by the corporation may not be challenged on the ground that the corporation lacks or lacked power to act.

(continued)

except in specified circumstances, which include "proceeding[s] by the corporation, directly, derivatively or through a receiver, trustee or other legal representative, against an incumbent or former director, officer, employee or agent of the corporation." Section 180.0304(2)(b). Vrakas/Blum maintains that this provision plainly allows it to challenge Windsor's power to act against it, as this is a proceeding against an "agent of the corporation," Vrakas/Blum.

¶30 Windsor all but concedes that Vrakas/Blum's interpretation of WIS. STAT. § 180.0304(2)(b) is consistent with the statute's plain language. Nonetheless, it argues that application of § 180.0304(2)(b) in these circumstances would be contrary to the purpose of the provision, which Windsor urges is to allow the corporation to assert that an agent has exceeded its corporate authority, not to allow an agent to challenge the power of the corporation to bring suit against the agent.

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> **(2)** A corporation's power to act may be challenged in any of the following proceedings:
>
> (a) In a proceeding by a shareholder against the corporation to enjoin the act.
>
> (b) In a proceeding by the corporation, directly, derivatively or through a receiver, trustee or other legal representative, against an incumbent or former director, officer, employee or agent of the corporation.
>
> (c) In a proceeding by the attorney general under s. 180.1430(1).
>
> **(3)** In a shareholder's proceeding under sub. (2)(a) to enjoin an unauthorized corporate act, the court may enjoin or set aside the act, if equitable and if all affected persons are parties to the proceeding, and the court may award damages for loss, other than loss of anticipated profits, suffered by the corporation or another party because of enjoining the unauthorized act.

¶31 We decline to decide whether Vrakas/Blum has a right under WIS. STAT. § 180.0304 to challenge the minority shareholders' standing to pursue a derivative action because, assuming for purposes of argument only that Vrakas/Blum has such a right, we conclude in the analysis below that (1) Vrakas/Blum has forfeited its argument that the minority shareholders did not serve the statutory written demand on Windsor, and (2) the minority shareholders fairly and adequately represent Windsor's interests.

¶32 When determining whether an argument was raised in the trial court, we conduct an independent review of the record and will generally refuse to address an argument made for the first time on appeal. *See* ***Preuss v. Preuss***, 195 Wis. 2d 95, 104-105, 536 N.W.2d 101 (Ct. App. 1995). In its reply brief, Vrakas/Blum offers no response to Windsor's assertion that it failed to argue on summary judgment or at trial that the minority shareholders never submitted a written demand to Windsor as required by WIS. STAT. § 180.0742, and we find no indication in the record that such an argument was made. We therefore conclude that Vrakas/Blum has forfeited its right to make this argument.

¶33 We turn now to Vrakas/Blum's claim that the minority shareholders lacked standing to bring a derivative action because they could not fairly and adequately represent Windsor's interests pursuant to WIS. STAT. § 180.0741(2). In both its decision on Vrakas/Blum's motion for summary judgment and its decision following the verdict, the trial court determined that the minority shareholders had demonstrated that they could fairly and adequately represent Windsor's interests, and therefore they had standing to pursue the derivative action under § 180.0741(2).

¶34 Vrakas/Blum argues our review of this determination is de novo because, as a general matter, standing is a legal issue subject to independent review, citing ***Kiser v. Jungbacker***, 2008 WI App 88, ¶10, 312 Wis. 2d 621, 754 N.W.2d 180. As Windsor points out, however, we addressed this issue at length in ***Read v. Read***, 205 Wis. 2d 558, 563-565, 556 N.W.2d 768 (Ct. App. 1996), and concluded that, when the circuit court's determination regarding whether a shareholder has standing to bring a derivative action turns on the court's assessment of the shareholder's ability to fairly and adequately represent the corporation's interests under § 180.0741(2), our review of the trial court's decision is under the erroneous exercise of discretion standard. We thus apply a deferential standard of review to this particular standing challenge.

¶35 In arguing that the minority shareholders cannot fairly and adequately represent Windsor's interests, Vrakas/Blum notes that they sought dissolution of Windsor in their February 2002 action against Linzmeier, Camberwell, Windsor and others. Vrakas/Blum argues that such conduct alone deprives the minority shareholders of standing, citing ***Read***, 205 Wis. 2d at 567. Further, Vrakas/Blum cites trial testimony of Derr and other minority shareholders establishing that the shareholders were motivated by a desire to recover damages for themselves and not Windsor. Vrakas/Blum points to a statement to the trial court by minority shareholders' counsel that, if the shareholders prevailed in this action, they would pursue "a separate claim on the corporation to try to deprive the majority shareholders from receiving all of that or the share of that." Vrakas/Blum's arguments fail to persuade us that the trial court misused its discretion.

¶36 The trial court noted in its decision on summary judgment that the minority shareholders had made a *prima facie* case that the majority shareholders,

with Vrakas/Blum's assistance, substantially injured the corporation by overleveraging it to finance Camberwell's purchase of Linzmeier's shares. After trial, the court found that this financing deal ultimately caused damage to Windsor. Under these circumstances, we conclude that the trial court reasonably determined that minority shareholders—who were not informed of the decision to mortgage Windsor's real estate and were thus not complicit in the harm that was a substantial factor in Windsor's demise—could fairly and adequately represent Windsor's interests in the derivative action.

¶37 Moreover, Vrakas/Blum reads ***Read*** too broadly. The trial court in ***Read*** determined that a lone minority shareholder who filed motions for the dissolution of the corporation only five months after filing his derivative claim could not fairly and adequately represent the corporation in a derivative action, and this court affirmed. ***Read***, 205 Wis. 2d at 566-69. The ***Read*** court concluded only that the trial court's determination was not a misuse of its discretion; it did not hold, as Vrakas/Blum suggests, that no minority shareholder who files a motion to dissolve the corporation can ever fairly and adequately represent the interests of the corporation in a derivative action. *See **id.*** Further, ***Read*** is distinguishable on grounds that only one minority shareholder sought to represent the entire company's interests there, *see **id.*** at 562-63, while all of Windsor's minority shareholders—representing a 46% ownership stake in the company—brought suit here. We also observe that the minority shareholder's motion to dissolve the corporation in ***Read*** occurred five months *after* the shareholder sought to represent the corporation's interests in a derivative suit. Here, the minority shareholders' action to dissolve the company occurred three years *before* the present derivative action, and, most significantly, after a change in Windsor's

circumstances had placed the minority shareholders in a better position to represent the company's interests in a derivative action against Vrakas/Blum.[9]

¶38 For the reasons set forth above, we therefore conclude that the trial court did not misuse its discretion in determining that the minority shareholders could fairly and adequately represent Windsor's interests in the derivative action, and, accordingly, that the minority shareholders had standing to pursue the action pursuant to WIS. STAT. § 180.0741(2).

***Applicability of Statute of Limitations for Intentional Torts to Windsor's Misrepresentation Claims; Nondisclosure as Sole Basis for Strict Responsibility and Negligent Misrepresentation Claims***

¶39 Relying on ***Zastrow v. Journal Communications, Inc.***, 2006 WI 72, 291 Wis. 2d 426, 718 N.W.2d 51, the trial court determined that the factual basis for Windsor's breach of contract claim was predicated on a breach of Vrakas/Blum's fiduciary duty of loyalty to Windsor, and was therefore barred by the two-year statute of limitations for intentional torts set forth in WIS. STAT. § 893.57.[10] Vrakas/Blum contends that the trial court should have applied a similar analysis to Windsor Homes' claims of misrepresentation, contending that the court based its judgment in favor of Windsor Homes on findings that Vrakas/Blum breached its duties "to act with absolute fidelity and loyalty" and "to

[9] Between the 2002 action and the 2005 action, Windsor had ceased operations, and, as an alleged result of Vrakas/Blum's misrepresentations by nondisclosure relating to the financing arrangement with Wells Fargo, was subsequently forced to sell off its assets with the proceeds going to Wells Fargo.

[10] WISCONSIN STAT. § 893.57 provides as follows: "An action to recover damages for libel, slander, assault, battery, invasion of privacy, false imprisonment or other intentional tort to the person shall be commenced within 2 years after the cause of action accrues or be barred."

disclose material facts," duties Vrakas/Blum maintains are also strictly fiduciary in nature.

¶40 Vrakas/Blum also contends that we should reverse the judgment and dismiss all claims because Wisconsin courts have never held, and should not hold, that strict responsibility and negligent misrepresentation claims can be based solely on nondisclosures. Vrakas/Blum notes that the supreme court stated in ***Kaloti Enterprises, Inc. v. Kellogg Sales Co.***, 2005 WI 111, ¶13 n.3, 283 Wis. 2d 555, 699 N.W.2d 205, it "ha[s] never held that a claim for strict responsibility … misrepresentation or negligent misrepresentation can arise from a failure to disclose," and therefore the issue "remains an open question."[11]

¶41 Windsor argues that Vrakas/Blum has forfeited both of these arguments by failing to raise them in the trial court. We agree and, therefore, do not consider either argument. *See* ***State v. Ndina***, 2009 WI 21, ¶30, 315 Wis. 2d 653, 761 N.W.2d 612 (right to make an argument on appeal is forfeited when not raised in trial court).

¶42 With respect to its statute of limitations argument, Vrakas/Blum argues that it asserted the statute as an affirmative defense in its answer and post-trial briefing. The trial court record shows that, while Vrakas/Blum's answer generically asserts that Windsor's claims are barred by the statute of limitations,

[11] Windsor notes that this court in ***Chevron Chemical Co. v. Deloitte & Touche***, 168 Wis. 2d 323, 332-36, 483 N.W.2d 314 (Ct. App. 1992), concluded that an accountant's failure to inform a client of newly discovered information that impacted the validity of an audit report could be used as a basis for a claim of negligent misrepresentation. *See also* ***Grube v. Daun***, 173 Wis. 2d 30, 56, 496 N.W.2d 106 (Ct. App. 1992) (purchasers of farm buildings stated a claim for misrepresentation by nondisclosure based on real estate agent's failure to disclose existence of gasoline contamination from a leaking underground tank).

its only specific argument to the trial court was that the misrepresentation claims were barred by the six-year statute of limitations applicable to such claims. It did not make the argument made here that the two-year statute of limitations for intentional torts bars Windsor's misrepresentation claims. Vrakas/Blum has thus failed to preserve this argument, and we decline to address it on forfeiture grounds.

¶43 With respect to Vrakas/Blum's argument that Wisconsin law does not recognize misrepresentation by nondisclosure claims, our review of the record shows that Vrakas/Blum did not argue in the trial court that nondisclosure may not serve as a basis for a misrepresentation claim. While we acknowledge that this issue is a legal question of statewide importance, we nonetheless apply the rule of forfeiture and decline to address it. We leave this issue for the supreme court, in light of its statement in ***Kaloti*** that, because the court has never been presented with the issue, whether nondisclosure may serve as a basis for a claim of misrepresentation "remains an open question."

***Imputation of Linzmeier's Knowledge of Sale to Windsor***

¶44 As a general rule, the knowledge of a corporate officer or agent acquired while acting within the scope of the officer's or agent's authority is imputed to the corporation. *See* **Suburban Motors of Grafton, Inc. v. Forester**, 134 Wis. 2d 183, 192, 396 N.W.2d 351 (Ct. App. 1986) (*citing* 3 W. Fletcher, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 790 (rev. perm. ed. 1975)). An exception to the general rule of imputation is the adverse agent exception, which provides that knowledge is not imputed to the corporation when the interests of the officer or agent are completely adverse to those of the corporation. *See* ***First Nat'l Bank of Cicero v. Lewco Sec. Corp.***, 860 F.2d 1407,

1417 (7th Cir. 1989). There is, however, an exception to the adverse agency exception known as the sole actor doctrine. ***Id.*** Under this doctrine, knowledge is imputed to the corporation even if the interests of the officer or agent are adverse to those of the corporation when the adverse agent or officer is the sole actor in the transaction at issue. ***Id.*** at 1417-18.

¶45 Vrakas/Blum asserts that the minority shareholders' misrepresentation by nondisclosure claims fail because Windsor already had knowledge—imputed to it by Linzmeier—of the financing for Linzmeier's transaction with Camberwell, and that the circuit court erred by concluding otherwise. Vrakas/Blum contends that the adverse agency exception to the rule of imputation does not apply because Linzmeier's stock sale was not adverse to Windsor's interests. Vrakas/Blum notes that Linzmeier wanted to leave the business, and urges that the sale of his shares to Camberwell kept the business in operation for the benefit of the remaining shareholders and the corporation. Alternatively, Vrakas/Blum contends that, to the extent that Linzmeier's interests were adverse to those of the company, the sole actor doctrine applies because, it argues, he was the only corporate actor involved in the transaction.

¶46 Windsor responds that the circuit court correctly determined that Linzmeier's interests were adverse to those of Windsor, and maintains that the sole actor exception does not apply.[12] We agree with Windsor.

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[12] Windsor also argues that it could not have known of the financing arrangement because Linzmeier himself did not know about it prior to the December 22, 1999 shareholders' meeting, citing Linzmeier's own testimony. However, this assertion is contrary to the trial court's findings, which state that Gale of Vrakas/Blum understood in June 1999 that Wells Fargo's financing proposal called for a mortgage on Windsor's assets, and that she disclosed this information to Linzmeier. The court found that "[n]either [Gale] nor anyone else at Vrakas/Blum

(continued)

¶47 Neither party addresses the standard of review that should be applied to the trial court's ruling that Linzmeier's knowledge was not imputed to Windsor. We observe that the court's imputation analysis is brief; the court merely concluded that Linzmeier's knowledge was not imputed to Windsor because Linzmeier "was in an obvious conflict of interest and acting on his own behalf to the detriment of the corporation at all times material." To the extent that this statement represents a factual finding, we conclude that it is not clearly erroneous and thus must be upheld. ***Ndina***, 315 Wis. 2d 653, ¶45. We observe that this statement implicitly rejects Vrakas/Blum's view that Linzmeier was acting in favor of (or at least was not completely adverse to) Windsor's interests because the sale of his shares to Camberwell kept the business in operation for the benefit of the remaining shareholders and the corporation.

¶48 To the extent that the trial court's statement that Linzmeier was "acting on his own behalf to the detriment of the corporation at all times material" represents a legal conclusion that the adverse agency exception applies under these facts, we agree. With Linzmeier's knowledge, Vrakas/Blum marketed his majority stake in Windsor instead of Windsor as a whole, contrary to the marketing agreement Linzmeier signed on Windsor's behalf. As the trial court found, Linzmeier was aware that Windsor would become a co-borrower in the financing of the purchase of his shares, and that the deal would be secured by a mortgage on Windsor's assets. This information was not disclosed to anyone else within the company until after the December 22, 1999 shareholders meeting. We conclude, under these circumstances, that the adverse agency exception applies,

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ever disclosed this information to anyone at Windsor Homes, Inc. *other than Linzmeier* ...." (Emphasis added.)

and thus Linzmeier's knowledge of the relevant facts not disclosed were not imputed to Windsor.

¶49 Vrakas/Blum argues in the alternative that the sole actor doctrine applies, an issue that the trial court did not address. It appears from our review of the record that Vrakas/Blum failed to raise its sole actor argument in the trial court. Accordingly, we conclude that Vrakas/Blum has forfeited its right to make this argument here.[13] *See* ***Preuss***, 195 Wis. 2d at 104-105.

¶50 For the reasons discussed above, we conclude that Linzmeier's knowledge of information not disclosed to any other representative of Windsor is not imputed to Windsor, and thus the misrepresentation claims cannot be dismissed on grounds that Windsor already had knowledge of the information that Vrakas/Blum failed to disclose to it.

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[13] We doubt that the outcome would have been different had we chosen to disregard forfeiture and addressed Vrakas/Blum's sole actor argument. First, Linzmeier was not the sole actor in the transaction; Vrakas/Blum, ostensibly an agent of Windsor, was involved as well. Second, even if Vrakas/Blum and Linzmeier are viewed as a single actor because Vrakas/Blum represented Linzmeier's interests and not those of Windsor in the transaction, it appears that application of the sole actor doctrine to these facts would likely run counter to the purposes of the doctrine. "The reason for the 'sole actor' rule is that, where the officer in question is the sole representative of the corporation, there is no one to whom to impart his or her knowledge and no one from whom he or she may conceal it." 3 FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 827.10 (rev. perm. ed. 2002). Here, Linzmeier could have shared his knowledge with other directors and minority shareholders in the corporation. In fact, the suit is about his (and Vrakas/Blum's) failure to share information with others within the company. Linzmeier is not a "one-man bank" defending himself against a third-party suit, a more typical "sole actor" situation. *See* ***Jacobson v. Federal Deposit Ins. Corp.***, 407 F.Supp. 821, 825-26 (D.C. Iowa 1976) (bank president's knowledge that tainted funds were used to pay maker's note to bank could be imputed to the bank under the "sole actor" doctrine where president of a "one-man bank" was the bank's principal operating officer, performed all banking functions and held himself out to the community as "the man-in-charge" of the bank); *see also* ***United States v. One Parcel of Land Located at 7326 Highway 45 North, Three Lakes, Oneida Co., Wis.***, 965 F.2d 311, 317 (7th Cir. 1992) ("Through the sole actor exception, courts protect third parties who unwittingly deal with adverse agents if the corporation abdicated responsibility to the adverse agent.").

### *Reliance*

¶51 Vrakas/Blum contends that Windsor failed to present any admissible evidence showing that it relied on any nondisclosure by Vrakas/Blum to Windsor's detriment, and thus the trial court erred in rejecting its motion to dismiss at the close of evidence. Vrakas/Blum maintains that, to prove reliance, Windsor had to show that, had the financing terms of the sale of Linzmeier's shares been disclosed, someone in a position of authority at Windsor at the time would have attempted to prevent the sale, whether by pressing for Windsor to match Camberwell's offer on Linzmeier's shares within sixty days, as provided in Windsor's bylaws, or by seeking injunctive relief. We disagree, and conclude that the evidence presented supports a determination that Windsor relied on Vrakas/Blum's nondisclosures to its detriment.

¶52 "All misrepresentation claims share the following required elements: 1) the defendant must have made a representation of fact to the plaintiff; 2) the representation of fact must be false; and 3) the plaintiff must have believed and relied on the misrepresentation to his detriment or damage." ***Tietsworth v. Harley-Davidson, Inc.***, 2004 WI 32, ¶13, 270 Wis. 2d 146, 677 N.W.2d 233. In addition to these requirements, strict responsibility misrepresentation requires proof that: (1) the reliance was justifiable; (2) the misrepresentation was "made on the defendant's personal knowledge or under circumstances in which he necessarily ought to have known the truth or untruth of the statement," and (3) "the defendant … ha[d] an economic interest in the transaction." *See* ***Ollerman v. O'Rourke Co.***, 94 Wis. 2d 17, 25, 288 N.W.2d 95 (1980) (citation omitted). Negligent misrepresentation requires proof that the defendant was negligent in making the untrue representation of fact. ***Chevron Chem. Co. v. Deloitte & Touche***, 168 Wis. 2d 323, 331-32, 483 N.W.2d 314 (Ct. App. 1992).

¶53 The alleged misrepresentation in the present case is based on the nondisclosure of material facts that Vrakas/Blum had a duty to disclose. As a general rule, silence or a failure to disclose does not constitute misrepresentation unless the defendant had a duty to disclose. *See* ***Ollerman***, 94 Wis. 2d at 25. Vrakas/Blum does not dispute that it had a duty to disclose to Windsor the material facts, or that it failed to make such disclosures. It argues, rather, that Windsor failed to prove that it relied on Vrakas/Blum's nondisclosures to its detriment.

¶54 Reliance in a claim of negligent misrepresentation "is equivalent to the causation element" in a traditional negligence claim. ***Ramsden v. Farm Credit Servs. of North Cent. Wis. ACA***, 223 Wis. 2d 704, 721, 590 N.W.2d 1 (Ct. App. 1998); *see also* ***Cuene v. Hilliard***, 2008 WI App 85, ¶19, 312 Wis. 2d 506, 754 N.W.2d 509. The defendant's negligence is a "cause" when it is a "substantial factor" in producing the plaintiff's injury. *See* ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, ¶24, 277 Wis. 2d 21, 690 N.W.2d 1. To fulfill this element, the negligent conduct "need not be the sole factor or the primary factor, only a 'substantial factor.'" ***Clark v. Leisure Vehicles, Inc.***, 96 Wis. 2d 607, 617, 292 N.W.2d 630 (1980). As noted above, reliance must be justifiable in a claim of strict responsibility misrepresentation. *See* ***Malzewski v. Rapkin***, 2006 WI App 183, ¶19, 296 Wis. 2d 98, 723 N.W.2d 156.

¶55 We review a trial court's denial of a motion to dismiss for sufficiency of the evidence de novo, applying the same methodology as the trial court. ***Poluk v. J.N. Manson Agency, Inc.***, 2002 WI App 286, ¶24, 258 Wis. 2d 725, 653 N.W.2d 905. We must consider all credible evidence and all reasonable inferences that can be made from it in the light most favorable to the party against whom the motion is made. ***Id.***; *see* WIS. STAT. § 805.14(1).

¶56 Windsor argues that we need look no further than Linzmeier's testimony to find evidence of reliance. Windsor notes that Linzmeier testified that Gale of Vrakas/Blum never disclosed to him where Camberwell was getting the money to buy his shares. Linzmeier also testified that, before resigning as an officer and director at Windsor, he was unaware that Camberwell planned to obtain a loan secured by Windsor's assets. As Windsor notes, Linzmeier testified that if he had thought that there was something illegal or wrongful or harmful about the sale of his shares to Camberwell, he would not have closed the deal. Windsor contends that this testimony proves that Vrakas/Blum did not disclose even to Linzmeier the financing arrangement, and that, had he known, he would not have sold his shares to Camberwell. The problem with this argument is that the trial court apparently did not believe this testimony, finding that "[n]either [Gale] nor anyone else at Vrakas/Blum ever disclosed [Wells Fargo's financing proposal] to anyone at Windsor Homes, Inc. *other than Linzmeier*." (Emphasis added.)

¶57 Windsor next points to testimony of Don Derr, the Windsor shareholder elected as a director and appointed president of Windsor at the October 2007 shareholder meeting. Derr testified that he had been a Windsor shareholder since 1974, and first served as a director from approximately 1981 to sometime in the mid-1990s. In 1999, Derr owned 12 of the 104 total shares issued by Windsor, an 11.54% stake in the company.

¶58 Derr testified that no one from Vrakas/Blum provided him with financial information about the sale of Linzmeier's shares. Derr further testified that, had he known that Vrakas/Blum was marketing the sale of Linzmeier's shares only, and that Windsor was borrowing money for a third party to purchase

Linzmeier's shares and that the deal was secured by a mortgage on Windsor's assets, he would not have "voted in favor" of these actions.

¶59 Vrakas/Blum argues that, because Derr was not on Windsor's board of directors at the time, he could not have "voted in favor" of certain actions in 1999, and thus his testimony about how he might have voted was speculative, and was erroneously admitted over Vrakas/Blum's objections. We review a trial court's decision to admit evidence under the erroneous exercise of discretion standard. *See* ***Kettner v. Kettner***, 2002 WI App 173, ¶14, 256 Wis. 2d 329, 649 N.W.2d 317.

¶60 We conclude that the trial court's admission of Derr's testimony was an appropriate exercise of its discretion. To prove reliance, Windsor had to elicit testimony about how certain individuals may have acted had they known the information that was not disclosed to them. Specifically, Windsor needed to establish that certain stakeholders in the company may not have acquiesced to the financing for Camberwell's purchase of Linzmeier's shares had they known about it. Thus, some degree of speculation was relevant and necessary to establish whether stakeholders in Windsor may have acted differently had they known the information Vrakas/Blum withheld from them. *Cf.* ***Affiliated Ute Citizens of Utah v. United States***, 406 U.S. 128, 153-54 (1972) (noting the difficulty of proving reliance where the alleged misrepresentation is based on the seller's failure to disclose).

¶61 Moreover, we reject Vrakas/Blum's view that the only testimony competent to prove reliance had to come from a director. Vrakas/Blum is correct that Derr was not a director, and thus would not have had a "vote" had Windsor's board taken up a motion to block the Linzmeier-Camberwell transaction.

However, Derr was a long-time shareholder with an 11.54% stake in the company and a former director who was in a position to influence others in positions of authority such as Peter Uttech, the lone director who had no personal interest in the transaction. The proper inquiry is whether the failure to disclose to Derr was a significant factor in inducing Windsor's reliance, not whether Derr himself could have called a board vote on whether to either match Camberwell's offer to purchase Linzmeier's shares or seek an injunction to block the sale. Derr's status within the company as a long-time shareholder, former director and an owner of 11.54% of the company's shares, and his testimony that he would not have "voted in favor" of the financing for the purchase of Linzmeier's shares, are sufficient to establish Windsor's reliance on Vrakas/Blum's misrepresentation by nondisclosure.

¶62 Finally, Windsor argues that the transaction required the assent of the shareholders because the mortgage on the company's assets was for the benefit of an individual stockholder, citing ***Western Industries, Inc. v. Vilter Manufacturing Co.***, 257 Wis. 268, 278, 43 N.W.2d 430 (1950). "'Undoubtedly a private corporation may … even without consideration … give away its assets, or mortgage its property for the benefit of individual stockholders or officers, *where all the stockholders assent to any such transaction*, and where there are no corporate creditors and there is no statute expressly forbidding such transaction.'" ***Id.*** at 277 (*quoting* 3 Thompson, CORPORATIONS (3d ed.) sec. 2301, page 989) (emphasis added). Vrakas/Blum does not respond to this argument in its reply brief, and we take its failure to respond as a concession. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (arguments not refuted may be deemed conceded). On this basis, we conclude that Derr (and all of the other shareholders without a personal interest in the transaction—i.e., all of the minority

shareholders) would have had a vote on the transaction. This fact, taken with Derr's testimony that he would not have "voted in favor" of the transaction, is sufficient to prove Windsor relied on Vrakas/Blum's nondisclosure of the financing arrangement to its detriment.

¶63 For the reasons provided above, we conclude that the record contains sufficient evidence to support a determination that Windsor relied on Vrakas/Blum's nondisclosure of the financing terms of the Linzmeier-Camberwell transaction to its detriment, and therefore the trial court did not err in denying the motion to dismiss.

¶64 With regard to the strict responsibility misrepresentation claim only, Vrakas/Blum also argues that the trial court erred in denying its motion to dismiss because the evidence presented did not support a determination that Windsor's reliance on Vrakas/Blum's nondisclosures were justifiable. Vrakas/Blum notes that Linzmeier gave the lone disinterested director, Peter Uttech, and the minority shareholders a copy of his stock purchase agreement with Camberwell before Uttech waived Windsor's right to match Camberwell's offer. The copy of this agreement, Vrakas/Blum argues, gave Uttech and the shareholders all they needed to know to discover any information they deemed pertinent, including the financing arrangement. We disagree.

¶65 "The general rule in Wisconsin, as elsewhere, is that the recipient of a fraudulent misrepresentation is justified in relying on it, unless the falsity is actually known or is obvious to ordinary observation." ***Hennig v. Ahearn***, 230 Wis. 2d 149, 170, 601 N.W.2d 14 (Ct. App. 1999). A review of the eighteen-page stock purchase agreement shows that it contains only a passing reference to the existence of financing ("pursuant to Buyer's proposed financing facility with

[Wells Fargo Business Credit, Inc.],") within the context of committing Linzmeier to make reasonable efforts to persuade Windsor to waive the sixty-day period Windsor had to match Camberwell's offer. The trial court did not find that this passing reference made obvious to ordinary observation the fact that Camberwell's stock purchase was secured by a mortgage on Windsor's assets, and such a finding would be inconsistent with the trial court's ruling. Vrakas/Blum points to no other evidence that would suggest that Windsor's reliance was not justified. Accordingly, we conclude that the evidence presented demonstrated that Windsor's reliance on Vrakas/Blum's nondisclosures was justified, and thus the trial court did not err in denying Vrakas/Blum's motion to dismiss.

### *Damages*

¶66 Vrakas/Blum next contends that Windsor failed to prove that its nondisclosures caused damage to Windsor, and that, despite this failure of proof, the trial court erred in failing to grant its motion to dismiss at the close of evidence. It further argues that Windsor presented no evidence to establish the amount of its damages, and thus the court's damage award is unsupported by the record. We disagree on both counts, and address each argument in turn.

¶67 Like its reliance argument in the prior section, Vrakas/Blum's argument that Windsor failed to prove the existence of damages relates to the causation element of the misrepresentation claims. As noted, causation exists when the defendant's conduct is a "substantial factor" in producing the plaintiff's damages. *See* ***Wolnak v. Cardiovascular & Thoracic Surgeon*****s**, 2005 WI App 217, ¶15, 287 Wis. 2d 560, 706 N.W.2d 667. As noted, our review of the trial court's denial of the motion to dismiss for sufficiency of the evidence is de novo,

considering all of the evidence in the light most favorable to the nonmoving party. ***Poluk***, 258 Wis. 2d 725, ¶24.

¶68 Vrakas/Blum maintains that Windsor failed to present any admissible evidence to establish that a lien was placed on Windsor's assets in connection with the Linzmeier-Camberwell transaction. Vrakas/Blum asserts that the document on which the trial court relied in establishing the existence of the lien—the credit and security agreement executed by Camberwell, Windsor and Wells Fargo and marked as Exhibit 49—was not admitted into evidence until after Windsor rested its case and was therefore erroneously admitted over Vrakas/Blum's objections on lack of foundation, hearsay and authenticity grounds. Further, Vrakas/Blum notes that it presented uncontroverted expert testimony establishing that Windsor's demise was not caused by the lien on its assets, but by adverse market conditions, a loss of personnel and poor management decisions, and that Windsor presented no expert testimony on the issue of causation. Vrakas/Blum argues Windsor's failure to present expert testimony on causation constituted an insufficiency of proof because a determination of causation in this case involves complex, technical and unusually complicated issues, citing ***Netzel v. State Sand & Gravel Co.***, 51 Wis. 2d 1, 7, 186 N.W.2d 258 (1971).[14]

¶69 Windsor does not take issue with Vrakas/Blum's assertion that the trial court mistakenly admitted Exhibit 49, arguing instead that it proved by other

[14] Vrakas/Blum also argues that Windsor failed to prove that Vrakas/Blum's nondisclosure of the fact that it had stopped marketing the entire company in March 1999 and began marketing only Linzmeier's shares caused Windsor harm because no one ever made an offer to purchase all of Windsor's assets or stock. We do not address this argument because the court's damage award did not include the value of the lost opportunity to sell the entire company. The calculation of damages was based only on Vrakas/Blum's failure to disclose the existence of the mortgage on Windsor's assets.

evidence that its damages were caused by Vrakas/Blum's nondisclosures. We agree that the record supports the trial court's finding that Vrakas/Blum's nondisclosures were a substantial cause of Windsor's damages.

¶70 First, as discussed, the record contains evidence to support the trial court's implicit determination of reliance. In a misrepresentation claim, reliance is one means of establishing the causal connection between the defendant's misconduct and the plaintiff's injury. ***Cuene***, 312 Wis. 2d 506, ¶19.

¶71 Second, additional evidence was presented to further prove causation, including evidence relating to the lien. Wells Fargo's financing proposal of October 1999, entered into evidence as Exhibit 31, states that, as collateral, "[a] first lien" will be placed "on all accounts, inventory, equipment, general intangibles of both Camberwell and Windsor, and all subsidiaries…. In addition the loan will be secured by a first real estate mortgage on all real estate owed by Windsor …." In specifically rejecting testimony of Vrakas/Blum's Gale that she was unaware of the financing proposal, the trial court found that "Gale knew of a substantial risk, perhaps even probability, that Wells Fargo's financing would involve pledging her client's corporate assets to secure a corporate loan to fund the purchase of Linzmeier's shares by []Camberwell."

¶72 Finally, we reject Vrakas/Blum's argument that Windsor's failure to present expert testimony to establish how the nondisclosure harmed Windsor constituted an insufficiency of proof. We conclude that the issue of causation in this case is not of such a technical or scientific nature, *see* WIS. STAT. § 907.02, that Windsor's failure to introduce expert testimony was fatal to its case. Whether the nondisclosure of the fact that Camberwell's purchase of Linzmeier's shares was secured by a first mortgage on the company's assets was a substantial factor

in producing harm to Windsor is a question that is within the ken of the ordinary layperson. This case does not involve particularly complex financial instruments or transactions, and was tried to the court and not a jury. In these circumstances, expert testimony was not required to determine causation.

¶73 We turn next to Vrakas/Blum's contention that Windsor failed to present evidence establishing the amount of its damages, and thus the court's award of damages lacks support in the record. We view this argument as a challenge to the sufficiency of evidence supporting the court's verdict on the damage award. Our review of a challenge to a verdict's award of damages is highly deferential. We may not disturb the fact finder's finding of the amount of damages "[i]f there is any credible evidence which under any reasonable view supports the … finding." ***D.L. Anderson's Lakeside Leisure Co., Inc. v. Anderson***, 2008 WI 126, ¶26, 314 Wis. 2d 560, 757 N.W.2d 803.

¶74 "For negligent misrepresentation, the measure of damages is the 'sum of money that will fairly and reasonably compensate the plaintiff for his [or] her out-of-pocket loss.'" ***Schwigel v. Kohlmann***, 2002 WI App 121, ¶11, 254 Wis. 2d 830, 647 N.W.2d 362 (*citing* WIS JI—CIVIL 2403 suggested special verdict question 7). The measure of damages for a strict responsibility misrepresentation claim is the sum of money that will fairly and reasonably compensate the plaintiff for his or her loss of the bargain. WIS JI—CIVIL 2402 suggested special verdict question 5.

¶75 Vrakas/Blum argues that Windsor's damages cannot be calculated under either methodology because (1) Windsor had no out-of-pocket expenses and (2) Windsor failed to show that it missed out on any bargain and failed to present evidence to establish its fair market value at the time Linzmeier's shares were sold

or at any time thereafter. We conclude that Windsor's damages were readily ascertainable using the out-of-pocket expense methodology, and that the record contains sufficient evidence to support the award.

¶76 The trial court awarded Windsor damages of $2.9 million, applying the out-of-pocket methodology:

> Due to defendants' misrepresentations by omission, Windsor Homes, Inc. was directly damaged by its inability to protect itself against the illegal appropriation of corporate assets for Linzmeier's and []Camberwell's gain. In particular, $2,900,000 worth of Windsor Homes, Inc.'s real estate and assets were wrongfully pledged to Wells Fargo to secure the loan used to purchase Linzmeier's shares by []Camberwell, with no advantage to the corporation. The transaction was a *fait accompli* long before anyone acting for the corporation knew anything about it.
>
> … Here as [a] result of the misrepresentations by omission, both negligent and strict responsibility, Windsor Homes, Inc. suffered an immediate direct net loss at the time of closing on January 11, 2000 totaling at least $2.9 million ….

¶77 The following evidence is sufficient evidence to support the damage award of $2.9 million. Under the stock purchase agreement, signed by Len and Betty Linzmeier and Ron Wald of Camberwell on November 23, 1999, and entered into evidence as Exhibit 37, Camberwell agreed to purchase Linzmeier's shares for $2.9 million. As noted, the stock purchase agreement referred to the existence of financing provided through Wells Fargo Business Credit, Inc. The October 1999 Wells Fargo financing proposal listed Camberwell and Windsor as co-borrowers on a $10,000,000 line of credit, and stated that a portion of the loan would be used "to finance the purchase of 54% of the stock of Windsor Homes." The same financing proposal noted that a first lien would be placed on Windsor's assets, and that the "loan will be secured by a first real estate mortgage on all real

estate owed by Windsor ….” An invoice from Vrakas/Blum to Linzmeier dated January 18, 2000, entered into evidence as Exhibit 39, for services related to the “sale of your stock in Windsor Homes, Inc. for $2,930,554,” discloses the actual sale price of Linzmeier’s shares. Finally, Windsor’s 2000 annual report, entered into evidence as Exhibit 55, discloses the existence of a $3.1 million “note receivable,” the amount Windsor had taken on its line of credit that year to purchase Linzmeier’s shares ($2.9 million) and for other expenses.

### ***Prejudgment Interest***

¶78 In its cross-appeal, Windsor contends that the trial court erred in reversing on reconsideration that portion of the verdict that had granted prejudgment interest on the damage award. Whether a party is entitled to prejudgment interest on an award is a question of law subject to de novo review. ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶42, 265 Wis. 2d 703, 666 N.W.2d 38.

¶79 Prejudgment interest is not available when “the existence of multiple defendants prevents any single defendant from knowing prior to trial the precise amount of his [or her] liability.” ***Johnson v. Pearson Agri-Systems, Inc.***, 119 Wis. 2d 766, 781, 350 N.W.2d 127 (1984). In ***Teff***, we explained that, as a rule, the prejudgment interest may be recovered

> only when damages are either liquidated or liquidable, that is, there is a reasonably certain standard of measurement by the correct application of which one can ascertain the amount he or she owes. The most frequently stated rationale for the rule is that if the amount of damages is either liquidated or determinable by reference to some objective standard, the defendant can avoid the accrual of interest by simply tendering to the plaintiff a sum equal to the amount of damages.

***Teff***, 265 Wis. 2d 703, ¶43 (citations omitted). Prejudgment interest is not available when the calculation of damages turns on the resolution of factual disputes. *See* ***id.***, ¶45 (*citing* ***Loehrke v. Wanta Builders, Inc.***, 151 Wis. 2d 695, 707, 445 N.W.2d 717 (Ct. App. 1989)).

¶80 Windsor argues that it is entitled to prejudgment interest because, while there are multiple defendants, the apportionment of liability is not an issue in this case. Windsor argues that the rationale for the rule denying prejudgment interest when there are multiple defendants does not pertain because the defendants in this case acted as one and were all represented by an attorney hired by the sole insurer in the case, Continental Casualty.

¶81 Vrakas/Blum does not take issue with Windsor's assertion that the multiple-defendant rule should not apply. Instead, Vrakas/Blum argues that Windsor is not entitled to prejudgment interest on grounds that the amount of damages was not readily ascertainable. Vrakas/Blum notes that Windsor, in its post-trial brief, made two competing requests for damages of approximately $5.4 million plus interest and $2.9 million plus interest each, based on two different measures of damages. Citing these competing requests, Vrakas/Blum argues that the amount of Windsor's putative damages was not readily ascertainable, and therefore Windsor is not entitled to prejudgment interest under ***Teff***. Vrakas/Blum adds that Windsor was not entitled to prejudgment interest on the additional ground that the court's damage award was dependent on the resolution of factual disputes. We agree with Vrakas/Blum's arguments.

¶82 First, as Vrakas/Blum notes, Windsor made competing requests for damages after trial using two different measures of damages. Under the heading "Benefit of Bargain and Out of Pocket," Windsor requested damages of

$5,442,439 based on a determination of Windsor's fair market value plus $2,176,976 in interest. Alternatively, Windsor requested damages of $2,930,544 based on the purchase price of Linzmeier's shares plus $1,172,218 in interest under the heading of "Out of Pocket Damages Based on Loan." Windsor's competing damage requests illustrate that there was not "a reasonably certain standard of measurement by the correct application of which" Vrakas/Blum could "ascertain the amount [it] owes." ***Teff***, 265 Wis. 2d 703, ¶43.

¶83 Moreover, while we have already concluded that the court's award of $2.9 million was reasonable and was supported by the record, and $2.9 million was the lower of the two amounts requested by Windsor, we cannot conclude that Vrakas/Blum was on notice that its liability was at least $2.9 million. For example, the court could have made factual findings that would have justified a reduction in the award from $2.9 million for the benefits Windsor received as a result of Vrakas/Blum's misrepresentations by nondisclosure. Following the sale of Linzmeier's shares to Camberwell, Windsor continued operations for four more years. Based on evidence that Vrakas/Blum had been unable to find a buyer for the entire company, evidence that Linzmeier wanted out of the business, and testimony that no one then associated with the company other than Linzmeier could have operated the business, the trial court could have found that, without the deal with Camberwell, Windsor might have ceased operations prior to 2004.

¶84 For the foregoing reasons, we thus conclude that the trial court correctly concluded that Windsor is not entitled to prejudgment interest because the award is not readily ascertainable using a reasonably certain standard of measurement, and is at least partially dependent on factual findings relevant to the calculation of damages.

## CONCLUSION

¶85 In sum, we conclude that the trial court did not misuse its discretion in determining that the minority shareholders could fairly and adequately represent Windsor's interests in the derivative action, and the minority shareholders thus had standing to pursue the action pursuant to WIS. STAT. § 180.0741(2). Further, we decline to address on forfeiture grounds Vrakas/Blum's arguments that Windsor's misrepresentation claims must fail because they are barred by the two-year statute of limitations for intentional torts, and because Wisconsin courts do not recognize claims of strict responsibility and negligent misrepresentation based on nondisclosure. We also conclude that Linzmeier's knowledge of information not disclosed to any other representative of Windsor is not imputed to Windsor, and thus Windsor did not already have knowledge of the information that Vrakas/Blum failed to disclose.

¶86 Additionally, we conclude that the trial court did not err in denying Vrakas/Blum's motion to dismiss at the close of evidence because sufficient evidence was presented to demonstrate that Windsor relied on Vrakas/Blum's misrepresentations by nondisclosure to its detriment, and that Windsor suffered damages as result of the nondisclosures. Moreover, we conclude that the record contained sufficient evidence to reasonably support the trial court's award of $2.9 million in damages. Finally, we conclude that the trial court properly denied Windsor's request for prejudgment interest on the award. Accordingly, we affirm the trial court's judgment and its reconsideration order.

*By the Court.*—Judgment and order affirmed.

Not recommended for publication in the official reports.