

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 18, 2012

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 2008AP2897

Cir. Ct. No. 2005CV127

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**NORTHERN AIR SERVICES, INC., LINK SNACKS GLOBAL, INC. AND
LINK HOLDINGS, INC.,**

PLAINTIFFS-RESPONDENTS,

**TROY J. LINK, LINK SNACKS, INC., L.S.I., INC. - NEW
GLARUS, L.S.I., INC. AND JOHN E. LINK,**

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

JAY E. LINK,

**DEFENDANT-THIRD-PARTY
PLAINTIFF-APPELLANT-CROSS-RESPONDENT,**

V.

**JOHN A. HERMEIER, LAWRENCE J. JARVELA, MICHAEL McDONALD,
RICHARD MAY, LINK BUILDINGS, INC. AND JACK LINK CATTLE
COMPANY, INC.,**

THIRD-PARTY DEFENDANTS-RESPONDENTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Washburn County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Hoover, P.J., Peterson, J., and Thomas Cane, Reserve Judge.

¶1 CANE, J. This case is before us on remand from the Wisconsin Supreme Court. A jury determined that Jack and Troy Link breached their fiduciary duties to Jay Link, a minority shareholder. The sole issue presented is “whether the circuit court erred by limiting the evidence Jay could present to the jury regarding his theory of damages relating to his breach of fiduciary duty claims”¹ *Northern Air Servs., Inc. v. Link*, 2011 WI 75, ¶11, 336 Wis. 2d 1, 804 N.W.2d 458.

¶2 We conclude the circuit court erred by determining that a minority shareholder alleging that majority shareholders breached their fiduciary duties in a “squeeze out” cannot recover the difference between fair value and fair market value for his or her shares where a buyout agreement specifies the latter value. However, we conclude the error was harmless. Jay held his shares throughout the circuit court proceedings, and the sale of his shares at fair market value was not reasonably certain to occur. Accordingly, we affirm.

¹ We recognize Justices Ziegler’s and Crooks’s suggestion that we also review whether a new damages trial is warranted because of the circuit court’s “failure to abide by the statutory requirements in WIS. STAT. § 805.15(6).” *Northern Air Servs., Inc. v. Link*, 2011 WI 75, ¶140, 336 Wis. 2d 1, 804 N.W.2d 458 (Ziegler, J., concurring). A majority of the supreme court, however, refrained from taking up the issue because it had been neither presented nor argued before the court. *Id.*, ¶¶103 n.41, 107 (Bradley, J., concurring). The parties do not raise the issue on remand, either. To the extent we are not bound by the supreme court’s refusal to address the issue, we adopt the supreme court’s reasoning and decline to address an issue not raised by the parties. See *State v. Bodoh*, 226 Wis. 2d 718, 737, 595 N.W.2d 330 (1999).

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

BACKGROUND²

¶3 This case involves an intrafamilial dispute between Jay Link, his brother, Troy Link, and his father, Jack Link. The three family members owned Link Snacks, Inc., which produces and distributes meat and cheese products.³

¶4 In 1995, the three Links agreed to enter into a Buy-Sell Agreement.

Among other things, the Buy-Sell Agreement granted the company “the option to redeem all or a portion” of Jack, Troy, or Jay’s shares if their employment with Link Snacks was terminated, with or without cause. As set forth in the Buy-Sell Agreement, the purchase price for such shares would be the “fair market value” determined by an appraiser mutually agreed upon by the parties.

Link, 336 Wis. 2d 1, ¶13 (footnote omitted). After a series of disagreements between Jay on the one side, and his father and brother on the other, the parties “agreed that Jay would be terminated as an employee and officer of Link Snacks and Link affiliates and the parties would attempt to negotiate an amicable buy-out of all Jay’s interests in the various Link-related companies.” *Id.*, ¶14. The parties were unable to successfully close the purchase of Jay’s shares. *Id.*, ¶15.

¶5 In 2005, Link Snacks, Jack, and Troy filed suit seeking specific performance of the Buy-Sell Agreement and monetary damages for breach of fiduciary duty. *Id.*, ¶17. Jay counterclaimed for breach of fiduciary duty, seeking monetary damages for Jack and Troy’s alleged efforts to remove him as an officer and shareholder. Jay also claimed oppression under WIS. STAT. § 180.1430(2)(b),

² We rely on the facts as stated by the supreme court, adding facts only where necessary to resolve the remanded issue.

³ The Link family also owned numerous other business entities not relevant to this appeal.

and sought either dissolution of the Link Snacks companies or recovery of the fair value of his shares. *Id.*, ¶17.

In order to recover the fair value of his shares, Jay sought to recover the difference between the fair value of his shares and the discounted fair market value price at which Link Snacks was permitted to redeem his shares under the Buy-Sell Agreement. He claimed that the difference between the two prices represented ill-gotten gain associated with Jack's and Troy's wrongful actions.

Id., ¶18.

¶6 The circuit court barred Jay from presenting any evidence regarding the fair value of his shares. Citing the RESTATEMENT (SECOND) OF TORTS § 903 (1979), the court determined that Jay's recovery was limited to compensatory damages that would return him to a pre-breach state. In the court's view, the applicable value calculation for Jay's shares was fair market value under the Buy-Sell Agreement. It further determined that an award of fair market value was a remedy for oppression, but not breach of fiduciary duty. The court limited Jay's recovery for breach of fiduciary duty to a "benefits-of-ownership" measure; that is, benefits or perks received by other shareholders, but not Jay.

¶7 Jack and Troy moved for summary judgment on their claim for specific enforcement of the Buy-Sell Agreement. The circuit court granted their summary judgment motion, but declined to order Jay to immediately sell his shares. As the supreme court recognized, the circuit court's grant of summary judgment was limited to its conclusion that the agreement was a "valid, enforceable, and unambiguous agreement." *Link*, 336 Wis. 2d 1, ¶19. The circuit court left for a bench trial Jay's defense and counterclaim that enforcement of the Buy-Sell Agreement would be oppressive. *Id.*

¶8 The court conducted a six-week jury trial to resolve the parties' legal claims. As relevant to this appeal, the jury concluded that Jack and Troy breached their fiduciary duties to Jay. Jay was awarded compensatory and punitive damages from Jack totaling \$5,736,000, but nothing from Troy. Jay owned his shares, and thus held an interest in the corporation as a going concern, throughout the jury trial.

¶9 After the jury trial, the court proceeded to consider the parties' equitable claims for specific performance and judicial dissolution using the facts as found by the jury. The court declined to order dissolution, finding that, as a matter of law, Jay was not oppressed under WIS. STAT. § 180.1430(2)(b). The court granted Link Snacks' motion to compel specific performance of the Buy-Sell Agreement and ordered Jay to surrender his shares in Link Snacks for \$19,400,000—the appraised fair market value of his shares in accordance with the Buy-Sell Agreement. *Id.*, ¶27.

¶10 Jay appealed, arguing among other things that the circuit court erred by barring him from introducing to the jury evidence of the fair value of his shares. By order, we concluded that Jay voluntarily waived his right to appeal that issue under the benefit-estoppel doctrine by complying with the circuit court's order that he surrender his shares in Link Snacks. *Id.*, ¶31. The supreme court concluded otherwise and remanded the case for us to decide the evidentiary matter raised in Jay's appeal. *Id.*, ¶11.

DISCUSSION

¶11 We review a circuit court's decision to admit or exclude evidence for an erroneous exercise of discretion. *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698. Under this standard, we will uphold a decision to

admit or exclude evidence “if the circuit court examined the relevant facts, applied a proper legal standard, and, using a demonstrated rational process, reached a reasonable conclusion.” *Id.* While our review is highly deferential, *see id.*, if a court “bases the exercise of [its] discretion upon an error of law, [its] conduct is beyond the limits of discretion,” *State v. Hutnik*, 39 Wis.2d 754, 763, 159 N.W.2d 733 (1968).

¶12 We must provide some context for the circuit court’s evidentiary decision. The measure of damages Jay proposed on his breach of fiduciary duty claims was the difference between his shares’ “fair value” and “fair market value.” “Fair value” refers to the value of stock not as a commodity, but as a proportionate share of the enterprise as a whole. *HMO-W Inc. v. SSM Health Care Sys.*, 2000 WI 46, ¶31, 234 Wis. 2d 707, 611 N.W.2d 250. “Fair market value” is the amount for which the stock would sell in the open market, and, in the case of closely held corporations, usually includes a minority discount for noncontrolling shares. *Id.*, ¶24 n.5. The Buy-Sell Agreement obligated Jay, upon termination of his employment, to sell his shares at fair market value. Jay argued the difference between fair value and fair market value represented the amount of Jack and Troy’s ill-gotten gains.

¶13 The basis for the circuit court’s evidentiary decision was its conclusion that fair value is not a proper measure of damages for breach of fiduciary duty. Relying on comment a. to the RESTATEMENT (SECOND) OF TORTS § 903, the court concluded that Jay was entitled only to those damages that would “place him in a position substantially equivalent in a pecuniary way to that which

he would have occupied had no tort been committed.”⁴ In the circuit court’s view, if Jack and Troy had not breached their fiduciary duties, Jay would have been entitled only to fair market value for his shares under the Buy-Sell Agreement.

¶14 The circuit court’s decision overlooks Jay’s theory for his breach of fiduciary duty claim. In essence, Jay theorized that Jack and Troy violated their fiduciary duties to him as a minority shareholder by secretly plotting his termination in an attempt to purchase his shares at a depressed value. This is a classic “squeeze out” scenario. *See Sugarman v. Sugarman*, 797 F.2d 3, 7 (1st Cir. 1986) (describing devices used by majority shareholders to ensure that minority shareholders do not receive financial benefits from the corporation, including depriving minority shareholders of “corporate offices and of employment by the company”); *see also Jorgensen v. Water Works, Inc.*, 218 Wis.2d 761, 779, 582 N.W.2d 98 (Ct. App. 1998) (citing *Sugarman* with approval). When a minority stockholder agrees to sell out at less than fair value, the majority has won. *Sugarman*, 797 F.2d at 7 (citing *Donahue v. Rodd Electrotype Co. of New England*, 328 N.E.2d 505, 515 (Mass. 1975)).

¶15 Under these circumstances, but for Jack’s and Troy’s breach of fiduciary duties, Jay would have maintained an ownership interest in the Link

⁴ The circuit court isolated this single sentence from the remainder of comment a. of RESTATEMENT (SECOND) OF TORTS § 903 (1979). The gist of comment a. is that, unlike financial harm, the law is unable to fully compensate a person for bodily injury.

The black-letter law of RESTATEMENT (SECOND) OF TORTS § 903 states, “‘Compensatory damages’ are the damages awarded to a person as compensation, indemnity or restitution for harm sustained by him.” This rule has long been the law in Wisconsin. *See White v. Benkowski*, 37 Wis. 2d 285, 290, 155 N.W.2d 74 (1967).

companies.⁵ Because Jay was “squeezed out” in violation of Jack’s and Troy’s fiduciary duties, the valuation component of the Buy-Sell Agreement was immaterial. The breaches deprived Jay of his proportionate share of Link Snacks, and normally he would have been entitled to recover damages sufficient to restore him to that position, to the extent possible, as a remedy.

¶16 The circuit court’s decision also takes a narrow view of both the RESTATEMENT (SECOND) and the law of damages in Wisconsin. Tort law is designed to provide full compensation for persons who are injured by another’s unreasonable conduct. *Merten v. Nathan*, 108 Wis. 2d 205, 211-12, 321 N.W.2d 173 (1982); *Heath v. Zellmer*, 35 Wis. 2d 578, 600, 151 N.W.2d 664 (1967). Unlike contract law, “[i]n tort actions the tortfeasor is liable for all injuries resulting directly from the tort committed whether they were within the contemplation of the parties or not.” *Morse Chain Co. v. T.W. Meiklejohn, Inc.*, 241 Wis. 45, 52, 4 N.W.2d 162 (1942). Comment b. to RESTATEMENT (SECOND) OF TORTS, § 903 is consistent with this approach:

In cases in which a tortfeasor has received from the commission of a tort against another person a benefit that constitutes unjust enrichment⁶ at the expense of the other, he is ordinarily liable to the other, at the latter’s election, either for the damage done to the other’s interests or for the value of the benefit received through the commission of the tort.

⁵ We recognize that the buyout provisions of the Buy-Sell Agreement could have been triggered by legitimate means. However, accepting the facts as found by the jury, Jack’s and Troy’s breach of their fiduciary duties triggered the buyout.

⁶ Jack and Troy contend Jay is not entitled to his desired damages measure because he did not counterclaim for unjust enrichment. This argument misses the mark. The comment plainly refers to unjust enrichment as a concept in damages law, not as a formal legal claim. *Watts v. Watts*, 137 Wis. 2d 506, 531, 405 N.W.2d 303 (1987) (describing elements in an unjust enrichment action).

¶17 The principle that a breaching fiduciary becomes liable for any benefit received as a result of wrongdoing is well-established in Wisconsin. The central tenet of the fiduciary relationship is that the beneficiary's interest must be placed before the fiduciary's. *Zastrow v. Journal Commc'ns, Inc.*, 2006 WI 72, ¶28, 291 Wis. 2d 426, 718 N.W.2d 51. In *Pederson v. Johnson*, 169 Wis. 320, 324-25, 172 N.W. 723 (1919), our supreme court determined that when an agent deals with a principal's property for his or her own benefit, the principal becomes entitled to any profit beyond lawful compensation arising out of the agency. Thus, the duty of loyalty demands that a fiduciary be compelled to disgorge any profits received as a result of the breach. *Community Nat'l Bank v. Medical Ben. Adm'rs, LLC*, 2001 WI App 98, ¶8, 242 Wis. 2d 626, 626 N.W.2d 340.⁷

¶18 The jury concluded Jack and Troy breached their fiduciary duties by secretly plotting to squeeze Jay out of their companies. As part of that scheme, Jack and Troy terminated Jay's employment, thereby triggering the buyout provisions of the 1995 Buy-Sell Agreement. Those provisions would have allowed Jack and Troy to purchase Jay's minority shares at fair market value.

⁷ Other jurisdictions have reached the same conclusion. See *Crites, Inc. v. Prudential Ins. Co. of Am.*, 322 U.S. 408, 414 (1944) (any profits resulting from breach of fiduciary duties must be disgorged); *Jackson v. Smith*, 254 U.S. 586, 588-89 (1921) (fiduciary accountable to trust estate for all profits obtained through breach); *Pavlidis v. New England Patriots Football Club, Inc.*, 675 F. Supp. 701, 703 (D. Mass. 1987) (“[O]nce a corporate director appropriates property through a fiduciary breach, he is in a no-win situation. If the property appreciates in value, he is liable for that profit; if it depreciates, he is liable for the principal plus interest.”); *Pedro v. Pedro*, 463 N.W.2d 285, 288 (Minn. Ct. App. 1990) (minority shareholder forced out of closely held corporation was entitled to difference between fair value and fair market value at which he was required to sell his shares under buyout agreement; breaching fiduciaries “cannot benefit from wrongful treatment of their fellow shareholder and must disgorge any such gain”); see also 2 F. HODGE O’NEAL & ROBERT B. THOMPSON, O’NEAL AND THOMPSON’S OPPRESSION OF MINORITY SHAREHOLDERS & LLC MEMBERS § 7:3 at 7-31 (2d ed. 2011) (“If a breach of fiduciary duty claim is successful, plaintiff, instead of being limited to recovery of any losses to the corporation or the minority shareholders, may recover compensation paid to the fiduciary or any profit obtained by the fiduciary due to the breach of duty.”).

Jack and Troy's shares would have seen a corresponding increase in value in the amount of the discount. This profit, derived from Jack and Troy's breach, is a proper measure of damages in a breach of fiduciary duty case involving the squeeze out of a minority shareholder. The circuit court erred in determining otherwise.

¶19 However, erroneous evidentiary decisions do not necessarily lead to a new trial. "The appellate court must conduct a harmless error analysis to determine whether the error 'affected the substantial rights of the party.'" *Martindale*, 246 Wis. 2d 67, ¶30; *see also* WIS. STAT. §§ 901.03, 805.18(2). An error affects the substantial rights of a party when there is a "reasonable possibility that the error contributed to the outcome of the action or proceeding at issue." *Martindale*, 246 Wis. 2d 67, ¶32.

¶20 Although the circuit court erred in determining that ill-gotten gains were not a proper measure of damages, we must nonetheless affirm because neither Jack nor Troy received any such benefits before the circuit court proceedings terminated. The undisputed record demonstrates Jay held his shares throughout the trial. Thus, there had been no sale of the shares at fair market value at the time Jay's case was presented to the jury. For Jay's appeal, this is a fatal fact.

¶21 A plaintiff may not recover for injuries that *might* occur sometime in the future. Recovery for damages is only possible when the plaintiff has suffered "reasonably certain injurious consequences of the tortfeasor's ... conduct, not for merely possible injurious consequences." *Sopha v. Owens-Corning Fiberglas Corp.*, 230 Wis. 2d 212, 226-27, 601 N.W.2d 627 (1999) (quoting *Brantner v.*

Jenson, 121 Wis. 2d 658, 663-64, 360 N.W.2d 529 (1985)). A claimant cannot recover for speculative or conjectural damages. *Id.* at 227.

¶22 Jay counters that his damages were reasonably certain because the circuit court had granted Link Snacks’ pretrial motion for summary judgment on its claim for specific performance of the Buy-Sell Agreement. Jay contends this ruling effectively meant that he would, at some point, be compelled to sell his shares at fair market value.

¶23 We disagree. The circuit court reserved ruling on whether Jay would be required to sell his shares until it took up Jay’s oppression defense and counterclaim. As the supreme court recognized, the circuit court granted summary judgment on Link Snacks’ claim for specific performance “only to the extent that the circuit court concluded it was a valid, enforceable, and unambiguous agreement.” *Link*, 336 Wis. 2d 1, ¶19. The record shows that the circuit court was still considering the enforceability of the Buy-Sell Agreement after the jury trial, and only in the final judgment did the circuit court order Jay to “perform any further acts and execute and deliver any documents that may be reasonably necessary to carry out the provisions of the Buy-Sell Agreement”⁸ At no time prior to the jury trial was Jay ordered to sell his shares.

¶24 Nor was the sale of Jay’s shares a reasonable certainty with Jay’s oppression claim pending. One remedy for oppression of a minority shareholder is dissolution, in which case Jay would have remained a stockholder entitled to a *pro rata* portion of the company’s net assets. But dissolution, as Jay recognized

⁸ The circuit court deemed section 9 of the Buy-Sell Agreement, which required Jay to sign a noncompete agreement, unenforceable as an equitable matter.

before the circuit court, is one of many potential equitable remedies for oppression. See *Dickman v. Vollmer*, 2007 WI App 141, ¶27, 303 Wis. 2d 241, 736 N.W.2d 202 (“Dissolution does not automatically result even upon proper proof. Dissolution is discretionary.”). The circuit court could have required Jack and Troy to turn over complete ownership in the company to Jay, or fashioned some other equitable remedy. The point is that Jay still owned his shares at the time his breach of fiduciary duty claims were presented to the jury, and might never have been subject to a buyout at fair market value.⁹ Thus, the circuit court’s erroneous evidentiary decision did not affect Jay’s substantial rights.

¶25 We are not oblivious to the hardship Jay suffered as a result of the order in which the case was presented before the circuit court. By deferring resolution of Jay’s dissolution claim until after the breach trial, the circuit court effectively prohibited Jay from pursuing a fair value award if the court determined that Jay was not oppressed. That, of course, is what ultimately happened.

¶26 However, we decline to order to a new trial in this case simply because Jay might have been adversely impacted by the manner in which the circuit court handled the case. Although Jay has not directly invoked our power of discretionary reversal under WIS. STAT. § 752.35, we note that such authority is to be used only in exceptional cases, which this is not. See *Vollmer v. Luety*, 156

⁹ As a practical matter, we recognize that our decision in this matter may require a minority shareholder aggrieved by a fellow shareholder’s breach of fiduciary duty to select a remedy. If the aggrieved shareholder retains ownership of the shares throughout trial, he or she can seek fair value for the shares through an action for judicial dissolution under WIS. STAT. § 180.1430. If the shareholder has relinquished the shares, he or she is entitled to damages for their fair value in an action for breach of fiduciary duty. In either case, the aggrieved shareholder may also recover, in an action for breach of fiduciary duty, damages for benefits received by other shareholders but denied to him or her.

Wis. 2d 1, 11, 456 N.W.2d 797 (1990). Wisconsin courts have inherent power, within the limits of their discretion, to control their own dockets. *Parker v. Wisconsin Patients Comp. Fund*, 2009 WI App 42, ¶9, 317 Wis. 2d 460, 767 N.W.2d 272. The record shows that Jay acquiesced in, if not affirmatively advocated for, the approach taken by the circuit court following its resolution of Jack and Troy's motion for summary judgment.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

