2019 IL App (2d) 180364-U
No. 2-18-0364
Order filed September 30, 2019

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THOMAS FLEMING,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff and Counterdefendant-Appellant and Cross-Appellee,	)	
	)	
v.	)	No. 15-MR-585
	)	
LOUVERS INTERNATIONAL, INC., and ALFRED J. WALL JR.,	)	
	)	Honorable
Defendants and Counterplaintiffs-Appellees and Cross-Appellants.	)	Diane E. Winter
	)	Judge, Presiding.

PRESIDING JUSTICE BIRKETT delivered the judgment of the court.
Justices McLaren and Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: In this action by Fleming, the minority shareholder, against Wall, the majority shareholder, and Louvers International, Inc., the corporation, we (1) reverse the trial court's judgment against Louvers on Fleming's breach of contract claim; (2) affirm in part and reverse in part the judgment against Wall on Fleming's claim for breach of common-law fiduciary duty and statutory duties; (3) modify the damages award against Wall; and (4) remand for recalculation of prejudgment interest and for Fleming to file a new petition for attorney fees against Wall.

¶ 2 Plaintiff, Thomas Fleming, was employed for many years by Louvers International, Inc. (Louvers). During that time, he became a fellow shareholder in Louvers with its president,

Alfred Wall. Fleming himself became president of Louvers in 2012 after Wall went into semi-retirement from the company. In June 2013, Fleming's health rapidly declined, and in October 2013, Louvers terminated his employment. Fleming subsequently sued Louvers and Wall. His main claims were that Louvers and Wall failed to pay him distributions to which he was entitled as a Louvers shareholder and that Wall charged improper personal expenses to Louvers.

¶ 3 In their affirmative defenses and counterclaims, Louvers and Wall alleged that Fleming previously received the distributions to which he was entitled, though they were not formally labeled as distributions at the time. They also alleged that Fleming himself charged improper personal expenses to Louvers. After a bench trial, the trial court ruled in favor of Fleming on his claims and against Louvers and Wall on their counterclaims. The court awarded Fleming $433,992 in compensatory damages, $46,332 in prejudgment interest, and $105,370 in attorney fees. On appeal, Fleming challenges all three awards as inadequate. Louvers and Wall cross-appeal, challenging the trial court's judgment on Fleming's claims. Louvers and Wall also raise their own challenges to the awards of damages, prejudgment interest, and attorney fees. For the following reasons, we (1) reverse the judgment against Louvers; (2) vacate the awards of damages, prejudgment interest, and attorney fees against Louvers; (3) affirm in part and reverse in part the judgment against Wall; (4) modify the damages award against Wall; (5) vacate the award of prejudgment interest against Wall and remand for recalculation based on the modified damages; and (6) vacate the award of attorney fees against Wall and remand for Fleming to file a new petition for fees.

¶ 4 I. BACKGROUND

¶ 5 A. Pleadings

¶ 6 Fleming initiated this lawsuit in April 2015. In July 2016, he filed his third amended complaint, counts 2 and 4 of which went to trial. Count 2 was titled, "Louvers' Breach of Contract, including its Implied Covenant," and count 4 was titled, "Wall's Oppression." Although the titles to the counts named only one defendant, the prayers for relief in both counts asked for a finding of joint and several liability against both Louvers and Wall. Subsequently, with the parties' agreement, the court struck "the joint and several language" in each count.

¶ 7 In count 2, Fleming alleged as follows. Fleming was an employee of Louvers when, in January 2007, he signed a "Shareholder and Stock Purchase Agreement" (SSPA). Wall signed the SSPA both individually and as Louvers' representative. Fleming agreed through the SSPA to purchase 200 shares, or 20%, of Louvers' stock for $500,000. The remaining 80% of the shares was held by Wall. Section 5 of the SSPA specified the following payment terms:

> "5. Payment. For each year from the effective date of this Agreement until the Final Payment Date, which shall be the earlier of (i) December 31, 2019 and (ii) December 31 of the year in which Wall dies, one half of all amounts otherwise payable to [Fleming] from [Louvers], other than [Fleming's] salary and bonus, shall be paid to [Louvers] and credited against the Purchase Price until the same is paid in full. [Fleming] may, but need not, make additional payments at any time. [Fleming] shall pay any remaining unpaid balance of the Purchase Price on the Final Payment Date."

¶ 8 The SSPA did not charge Fleming interest on the transaction, but section 9 provided for the treatment of imputed interest charged by a taxing authority:

> "9. Tax Matters. In the event that any part of the Purchase Price is deemed by any taxing authority to be imputed or unstated interest, then any and all income attributed to [Louvers] as a result of that decision shall be allocated to [Fleming]."

¶ 9 Section 7 of the SSPA provided for the compulsory buyback of Fleming's shares. Specifically, if a certain "Triggering Event" should occur, including the termination of Fleming's employment,

> "then [Fleming's] rights and obligations under this Agreement, except for this Transfer-Back provision and such other provisions as survive termination pursuant to this Agreement[,] shall immediately terminate and [Fleming] shall immediately transfer the Purchased Stock to [Louvers] which shall return the sums paid by [Fleming] in the reverse order and timing in which he made his prior payments to the Company. *** [Fleming] shall return any and all stock certificates representing any of the Purchased Stock to [Louvers] within 10 business days after the termination of this Agreement."

¶ 10 Fleming further alleged as follows in count 2. Wall, the 80% shareholder of Louvers, took yearly distributions from Louvers from 2007 to 2013, with the exception of 2008. For every year that Wall received a distribution, Fleming, as 20% shareholder of Louvers, was entitled to receive a distribution equal to 25% of the amount Wall received. This requirement of *pro rata* distribution, Fleming alleged, was required "[u]nder ordinary Illinois corporate law, and under the requirements of Subchapter S (which Louvers, Wall, and Fleming agreed to use—which agreement is contained in the SSPA)." Shareholder distributions qualified as payments "other than [Fleming's] than salary and bonus" (per section 5 of the SSPA), one-half of which Louvers could retain under the SSPA as payment for the stock. However, Louvers made no distributions to Fleming in any of the years from 2007 to 2013 in which Wall received a distribution. Thus, Louvers "did not withhold only one half of Fleming's distributions; Louvers withheld *all* of Flemings *pro rata* share of Louvers' profits in 2007 and thereafter." (Emphasis in original). Moreover, after Fleming was terminated from Louvers in October 2013, Louvers

continued to withhold distributions and, to date, had paid Fleming none. Fleming alleged, that, through the foregoing conduct, Louvers violated the requirement of *pro rata* distributions and breached not only the letter of the SSPA but also its implied covenant of good faith and fair dealing.

¶ 11 Fleming alleged that Louvers further breached its obligations to him as shareholder by paying expenses for Wall and his family that were personal and not business-related. Louvers made these payments without Fleming's approval.

¶ 12 In count 4, Fleming alleged that Wall owed Fleming both common-law fiduciary duties and the duty not to oppress a fellow shareholder, as set forth in section 12.56(a)(3) of the Illinois Business Corporation Act (Act) (805 ILCS 5/12.56(a)(3) (West 2016)). Wall breached those duties by (1) failing to cause Louvers to make distributions to Fleming in 2007 and subsequent years when distributions were made to Wall; (2) terminating Fleming "without distributing to Fleming his share of Louvers' profits for the time Fleming was a shareholder"; and (3) "causing or approving Louvers to pay personal expenses to or for the benefit or Wall and others, without Fleming's actual approval."

¶ 13 Louvers and Wall filed separate answers, affirmative defenses, and counterclaims. They claimed that Fleming was estopped from seeking past distributions because he neither asked for them nor was told he could not have them, and because he acquiesced in Louvers' treatment of certain past payments as distributions to him. Louvers and Wall also claimed that they owed Fleming nothing for the buyback of his shares, or in the way of *pro rata* distributions, once appropriate deductions were made for (1) cash advances that Fleming took from Louvers; (2) higher education expenses paid by Louvers on behalf of Fleming's children; and (3) interest imputed by federal law on Fleming's stock purchase and attributed to him pursuant to section 9

of the SSPA. Louvers and Wall asserted as well that Fleming breached his common-law fiduciary duty, and his duty under section 12.56(a)(3), by receiving various non-salary and non-bonus payments from Louvers that benefited himself personally, such as reimbursements for purported business expenses that were, in fact, personal expenses. Louvers and Wall sought return of, or at least a setoff for, these various non-salary and non-bonus payments that Fleming received.

¶ 14 Fleming raised several affirmative defenses to Louvers' and Wall's counterclaims, including: (1) Louvers was estopped from enforcing the SSPA due to its prior breaches of the agreement; (2) Louvers and Wall ratified and acquiesced in the personal expenses charged by Fleming; and (3) Louvers and Wall had unclean hands because Wall himself charged personal expenses to Louvers, with Louvers' acquiescence.

¶ 15 B. Trial

¶ 16 The trial in this matter occurred over several days in March and April 2017. Testimony was received from: (1) Wall; (2) Fleming; (3) Janet Fleming, Fleming's wife and former employee of Louvers; (4) Fleming's daughters, Jennifer and Amanda, who were summer interns at Louvers; (5) Peter Sheridan, Louvers' controller and chief financial officer; (6) David Gribben, an accountant and Fleming's expert witness; (7) Jared Simon, whose firm, R.J. Simon, were Louvers' outside accountants for several years until replaced in 2013 by Porte Brown; and (8) Daniel Karnatz, an accountant with Porte Brown and Louvers' and Wall's expert witness.

¶ 17 1. Overview of Fleming's Career at Louvers

¶ 18 Louvers manufactures components for light fixtures and has between 20 and 30 employees. When Wall founded Louvers in 1986, he was its sole owner, president, and director. He has remained its sole director. Fleming was hired by Louvers in 1987 and became part of its

sales team. In 2007, Fleming was promoted to vice-president. Also that year, he signed the SSPA, which granted him 20% ownership of Louvers. In 2010, Wall took up residence in South Carolina, leaving day-to-day management of the company to Fleming. Wall maintained regular contact with Fleming and Sheridan. In 2012, Fleming became president of Louvers. In June 2013, Fleming suffered a severe cerebral vascular incident and went on medical leave. Wall moved back to Illinois and resumed management of the company. When it appeared that Fleming would be unable to return to work, Louvers directed Karnatz to calculate what Louvers owed Fleming for the buyback of his stock pursuant to section 7 of the SSPA. On January 4, 2014, Louvers informed Fleming that it was deeming his employment terminated as of October 12, 2013. Also on that date, Louvers informed Fleming what it believed he was owed for the stock buyback. Fleming later brought suit.

¶ 19 The trial court ruled during summary judgment proceedings that Fleming's employment with Louvers ended on October 12, 2013.

¶ 20 As of trial, Fleming was suffering from chronic short-term memory loss, which Janet Fleming described in her testimony. Fleming was called as a witness but was unable to describe what his lawsuit was about. The trial court found his testimony "unhelpful and unreliable."

¶ 21 2. Louvers as an S Corporation

¶ 22 Wall founded Louvers as an S corporation, a status that it retained at all relevant times. Several characteristics of S corporations are pertinent to this case. First, there is "pass through" taxation in an S corporation, which means that, in a given year, its shareholders are personally taxed on the corporate income in proportion to their ownership. This taxation occurs whether or not the shareholders receive any of that year's income through distributions. See *In re Marriage of Joynt*, 375 Ill. App. 3d 817, 820 (2007) ("[T]he [S] corporation's income is taxed directly to

its shareholders based on their ownership of corporate stock, whether or not the income is actually distributed to the shareholders.") (citing I.R.C. §§ 1361–1379 (2000)). Second, an S corporation cannot make a distribution to one shareholder without making a distribution to each other shareholder, in proportion to their ownership interests. See 11 Mertens Law of Federal Income Taxation, § 41B:157 (2019) ("Generally, a subchapter S corporation is prohibited from making non-*pro rata* distributions."). For example, Louvers could not make a $100 distribution to Wall without making a $25 distribution to Fleming. Third, shareholder distributions are generally tax-free if they do not exceed the shareholder's basis, which is his portion of the undistributed profits on which he has already paid tax by virtue of pass-through taxation. Each tax-free distribution reduces the shareholder's basis. See *Williams v. Comm'r*, 110 T.C. 27, 29-30 (1998).

¶ 23 3. The GL 1070 and GL 2999 Accounts

¶ 24 Wall testified that, before and after becoming a shareholder, Fleming received a base salary, a "line of credit or loan," and a yearly bonus. In 1990, Louvers established an account designated as GL ("General Account") 1070. Wall testified that the purpose of GL 1070 was to help Fleming in his financial struggles. Wall described the account as a "cash advance account" and a "non-interest bearing loan to [Fleming]." The account allowed Fleming to charge non-business, or personal, expenses to Louvers. As Wall understood it, "[a]ll of those moneys that were in that account were personal," which was "fine" with him because the account was created for that reason. Wall testified that he did not review Fleming's expense reports, or any single expense, until after Fleming suffered his cerebral incident in 2013. Wall stated that Simon eventually advised Sheridan that, because interest was not accruing on the GL 1070 loans, Fleming should begin paying them back. Simon's alternative suggestion to Sheridan was that

Fleming begin paying tax on some of the GL 1070 balance. According to Wall, Louvers had delayed having Fleming repay the balance in GL 1070 because "when [Fleming] became an owner, he could just pay it out of distributions, [and he] wouldn't have to pay taxes on it." Wall testified that he himself had two accounts at Louvers: one for business expenses and the other for personal expenses. Louvers' policy was to reimburse Wall for his business expenses, but according to Wall there were many years, including from 2007 to 2013, in which Louvers could not afford to reimburse Wall.

¶ 25 Sheridan testified that GL 1070 was established in the 1990s. The account was used to record personal expenses that Lovers paid for Fleming. The account was labeled "Cash Advances – T. Fleming" in Louvers' system. Sheridan was not aware who provided the label but agreed that it was a "poor" descriptor. GL 1070 was for Fleming's exclusive use, and he alone at Louvers had an account like GL 1070.

¶ 26 Sheridan testified that his practice was to pay whatever personal expenses Fleming submitted. Fleming was Sheridan's boss, and, moreover, Sheridan understood that Wall had given approval for Louvers to pay some of Fleming's personal expenses. Sheridan testified that Wall was aware of GL 1070 and received Louvers' financial statements, yet Wall never questioned Sheridan's custom of paying whatever personal expense Fleming submitted.

¶ 27 Sheridan claimed that he "was told many years ago" that the yearly limit on Fleming's personal expenses was $20,000. Sheridan denied, however, having any discussions with Wall about a yearly maximum for GL 1070. The process of charging to GL 1070 "was something that was more on auto pilot"; it "[j]ust kept going." Despite initial attempts to keep the balance under $20,000, it continued to grow. However, no individual expense was so great that Sheridan believed he should seek Wall's approval.

¶ 28 Sheridan testified that, in the 1990s, Louvers' outside accountant advised him that GL 1070 should not carry a balance indefinitely but that Louvers should periodically "gross up" Fleming's W-2 wages with amounts from GL 1070. Sheridan began occasionally transferring amounts from GL 1070 to Fleming's W-2s. The transferred amounts were included as part of Fleming's wages and he was taxed on them. Fleming was not taxed on the amounts that remained in GL 1070. Though there were yearly transfers from GL 1070 to Fleming's wages, the balance in GL 1070 never reached zero. From 2007 through October 12, 2013, $273,103 in personal expenses were recorded in GL 1070. According to Sheridan, Fleming's base salary was $80,000 and he received a yearly bonus. The "gross up" amounts from GL 1070 were not considered part of Fleming's bonus. Fleming's total W-2 income, including salary, bonus, and GL 1070 gross-ups, ranged from $112,000 to $155,000 between 2007 and 2013.

¶ 29 Sheridan stated that in, May 2013, Fleming asked him to cease making transfers from GL 1070 to wages. The GL 1070 statements admitted into evidence show that Sheridan transferred $4,500 in June 2013 but made no further transfers that year. The balance in GL 1070 was $143,698 as of October 12, 2013. Even after this date, Sheridan continued, at Janet's Fleming's request, to pay personal expenses for Fleming. Sheridan honored those requests because Fleming and his family were in difficult circumstances. From October 13, 2013, through the end of 2014, an additional $45,233 was charged to GL 1070. Fleming was not taxed on the balance in GL 1070 as of October 12, 2013, and afterward.

¶ 30 According to Sheridan, Fleming, like Wall, would submit business expenses for reimbursement. Sheridan was the "gatekeeper" at Louvers who determined whether an expense qualified as a reimbursable business expenses.

¶ 31 Sheridan corroborated Wall's testimony that Wall had an account at Louvers for charging personal expenses. Wall's account was GL 2999, designated as "Less Distributions" in Louvers' system. Amounts recorded in GL 2999 were charged as shareholder distributions to Wall.

¶ 32 Simon testified that Louvers' practice was to "treat[] personal payments to [Fleming] as W-2 gross up." Contrary to Simon's advice, however, Louvers did not transfer all GL 1070 amounts to Fleming's wages each year.

¶ 33 4. The SSPA and Distributions

¶ 34 Wall testified that he devised the SSPA as a means of rewarding Fleming for his years of work and dedication at Louvers. Wall designed the SSPA so that Fleming would not pay for the stock out of pocket. Rather, Louvers would retain a portion of the distributions Fleming was owed and apply it to the purchase price. Louvers would not charge Fleming interest on the transaction. In presenting the SSPA to Fleming, Wall emphasized that Fleming now had the ability to take tax-free distributions from the company:

> "as far as the expenses, I said that's going to really benefit you because any personal expenses that you have will now be paid through distributions because we've already paid taxes on it, *** like on his cash advance account. All of those that he had would now be taken care of with distributions, so he won't have to pay taxes on them, which was a big benefit to him."

¶ 35 Further describing their conversation, Wall testified that he told Fleming that GL 1070 "would now be distributions rather than money moved to his W-2 compensation." Wall advised Fleming that

> "once you became a shareholder, *** everyone has to have equal distributions. Proportionality that is. And it was good news for him because the loan—or advance

money that he had been carrying on the books would be tax free and he wouldn't have to pay on it anymore because it would be taken out of distributions."

¶ 36 Wall testified that he directed Simon to implement the SSPA and change GL 1070 into a "distribution account like [Wall] had assigned to [him]." He told Simon to ensure that he and Fleming were treated equally as shareholders under the SSPA.

¶ 37 Wall acknowledged section 8 of the SSPA, which states:

> "8. Previously Taxed Earnings. Except to the extent otherwise prohibited by law, Wall *** shall be entitled to withdraw from the Company at any time any earnings of the Company which have been allocated to [Wall] for tax purposes. In the event [Fleming] is required to vote in favor of or against such transaction in any capacity he may hold with the Company, including shareholder and director, he shall vote in favor of such distribution and, by virtue of this Agreement, is deemed to have voted in favor of such distribution."

Wall affirmed that he was the person at Louvers to decide whether he received a distribution. Wall acknowledged that distributions in an S corporation must be proportionate to the shareholders' interests in the corporation. Wall believed that Fleming was receiving distributions each year. Wall

> "assume[d] that [the] $20,000 a year plus that [Fleming] was taking out every year from 2007 on was a distribution because it was basically tax free money to him, and if you don't take it out tax free, you are going to have a problem with the IRS if you don't pay any taxes on it."

Wall never told Fleming that he could not receive a distribution, nor did he instruct anyone at Louvers to tell Fleming that he could not have a distribution. Wall never compared his K-1

forms (which report shareholder distributions) to Fleming's or reviewed any of Fleming's tax documents, because Wall believed these were "personal."

¶ 38 Wall testified that he later found out that Simon had failed to change the way that personal expenses were charged to GL 1070. Wall claimed that he never ignored tax advice from Simon or told him "what[] to put on any return or financial statement."

¶ 39 According to Wall, he and Fleming never had a disagreement in their entire time together at Louvers. Fleming testified in similarly positive terms about his work relationship with Wall. Fleming affirmed that nothing would have prevented him from speaking with Wall about distributions.

¶ 40 Sheridan testified that it was not his role at Louvers to determine when a distribution was appropriate. Wall was the person at Louvers to make decisions regarding distributions, and Simon would implement those decisions. Sheridan denied that Fleming ever asked him for a distribution or ever claimed to have spoken to Wall about distributions.

¶ 41 When asked whether Fleming received any distributions from 2007 to October 2013, Sheridan replied that, though amounts from GL 1070 were being transferred only to wages, "we were considering them as distributions." Sheridan was asked the question again, but was now directed to define "distribution" as "what [Fleming] would receive as a shareholder." Sheridan's reply was now that Louvers did not "treat[] [GL 1070] as a distribution" until after Fleming was terminated.

¶ 42 Sheridan was questioned about two amounts that were moved from other ledgers to GL 2999, Wall's distribution account. The first was $51,181, which Sheridan testified was the amount that Louvers paid in 2012 toward the college expenses of Flemings' daughters, Jennifer and Amanda. Louvers made other such education payments for Fleming's daughters in 2008,

2009, 2010, and 2011. Sheridan identified defense exhibit 34 as a summary he prepared of the education expenses that Louvers paid for Jennifer and Amanda. On the exhibit, the $51,181 was noted as "Charged as distribution." Sheridan explained that the $51,181 was initially recorded in GL 8685, titled "Tuition – Scholarships." Subsequently, Simon directed Sheridan to move the $51,181 to "a distribution account," GL 2999, which was Wall's distribution account. Sheridan identified an entry in Louvers' general ledger for December 31, 2012. The entry referenced the $51,181 and bore the notation "To Reclassify." According to Sheridan, this was "an entry in [GL] 2999 that [was] for Mr. Fleming rather than Mr. Al Wall."

¶ 43 The second amount discussed by Sheridan was $10,471. This amount, too, is referenced in a general ledger entry for December 31, 2012. The entry has a notation that is cut off in the printout admitted into evidence: "To record deemed distributions applied t—." Sheridan explained that the $10,471 was moved to GL 2999 from GL 1312, which was the "note payable" account that recorded Fleming's payment on the stock purchase.

¶ 44 K-1 forms filed for Wall report distributions to him in 2007 ($6,139), 2009 ($65,998), 2010 ($183,570), 2011 ($191,366), 2012 ($246,607), and 2013 ($544,184), for a total of $1,237,864. K-1 forms filed for Fleming report distributions in 2009 ($16,500), 2010 ($45,893), 2011 ($47,842), 2012 ($61,652) and 2013 ($276,005) (the K-1s report no distributions for 2007 or 2008).

¶ 45 Fleming introduced exhibits purporting to show what Wall and Fleming actually received in distributions for the years in question. According to plaintiff's exhibit 8, Wall received distributions of $6,139 in 2007, $82,498 in 2009, $229,463 in 2010, $239,208 in 2011, $308,259 in 2012, and $544,184 in 2013, for a total of $1,409,751. According to plaintiff's exhibit 9, Fleming received no distributions from 2007 to 2013.

¶ 46 Simon testified that he prepared compiled financial statements and tax returns for Louvers from 2007 to 2012. A compilation, Simon explained, consists of "taking the information provide by a client and putting it in the proper format, nothing more than that." Simon was not auditing Louvers; he relied on the accuracy of the information Louvers provided him. The record contains each financial statement that Simon prepared for Louvers from 2007 to 2012 Simon's firm prefaced each financial statement with a letter containing the following or a comparable disclaimer:

> "A compilation is limited to presenting in the form of financial statements information that is the representation of management. We have not audited or reviewed the accompanying financial statements, and, accordingly, do not express an opinion or any other form of assurance on them."

¶ 47 Simon stated that the direction he received for preparing Louvers' tax documents came ultimately from Wall, Louvers' sole director. Simon did not have authority to decide whether to record a personal expense as a gross-up to wages or instead as a distribution. Simon did not recall receiving direction from Wall about changing the way that Louvers classified its payments for Fleming's personal expenses. Later in his testimony, Simon acknowledged receiving the SSPA. He "assumed" that Wall sought his advice on how to implement the accounting for the SSPA, but he could not recall what he told Wall. Simon would have followed Wall's direction on how to classify Louvers' payments for Fleming's personal expenses. If Louvers had reclassified any amounts as distributions, the decision would have been made by Wall and Sheridan.

¶ 48 Simon testified that, in preparing Wall's and Fleming's K-1 forms, he would speak to Wall or Sheridan and review the balance in the distribution account. In order to verify that the

distribution amounts he recorded on the K-1 forms were accurate, he would submit them to Wall and Sheridan for review before including them with Louvers' tax returns. Simon recognized that the financial statement he prepared for tax year 2009 shows distributions of $103,122.30 without apportioning them between Wall and Fleming (the financial statements for tax years 2007, 2008, 2010, 2011, 2012, and 2013 likewise lack an allocation of distributions between Fleming and Wall). When Simon prepared the K-1 forms for tax year 2009, he made what he considered the "logical" assumption that the distributions were divided 80% to Wall and 20% to Fleming, consistent with their ownership interests. Simon made the same assumption for the remaining years in which he prepared the K-1 forms. Simon testified that he would not have told Louvers that it actually had to distribute the stated amounts to the shareholders. Simon was unaware that Louvers' general ledger showed no distributions to Fleming for 2009, 2010, and 2011, contrary to what was represented on Louvers' tax returns for those years. According to Simon, if Louvers was making distributions to Wall but not Fleming for those years, the decision would have been Wall's. If Simon had known that Louvers was not making distributions to Fleming for those years, he would have "suggested a correction to either financials or tax return as appropriate."

¶ 49 5. Scholarship Fund

¶ 50 Wall testified that, around 2008, he decided to establish a scholarship fund at Louvers specifically to assist Fleming's daughters, Jennifer and Amanda, in attending college. Wall did so because he understood the severe financial burden of college expenses. Wall instructed Simon to prepare the necessary paperwork for the scholarship fund. Between 2008 and 2012, Louvers paid college expenses for Jennifer and Amanda. Louvers also paid for Wall's son Derek to obtain an MBA, which was a two-year program. Derek had asked for that assistance as a condition of joining Louvers.

¶ 51 Jennifer and Amanda Fleming each testified to receiving a college scholarship from Louvers. Neither of them was required to apply for the scholarship or maintain a minimum academic standard in order to qualify. Each believed she obtained the scholarship simply because she was Fleming's daughter.

¶ 52 Sheridan testified that the education payments Louvers made on behalf of Jennifer and Amanda were recorded in GL 8685, titled "Tuition – Scholarships." Louvers paid the following amounts on behalf Jennifer and Amanda: $11,635 (2008), $31,222 (2009), $46,639 (2010), $64,492 (2011), and $51,181 (2012). Sheridan noted that, subsequent to its initial recording in GL 8685, the $51,181 for 2012 was moved to GL 2999. Sheridan testified that his own daughter received financial assistance through the scholarship program.

¶ 53 Sheridan stated that, in "late 2012 or [2013]," Simon informed him that the scholarship fund had not been set up properly and that education payments could not be deducted by Louvers. Consequently, Louvers "had to change a bunch of stuff."

¶ 54 Sheridan stated that Louvers also paid for Wall's son Derek to obtain an MBA. According to Sheridan, these payments on behalf of Derek were not part of the scholarship program.

¶ 55 6. Tax Issues at Louvers and the Hiring of Porte Brown

¶ 56 Wall testified that, while he was living in South Carolina, he and Fleming began receiving IRS notices. Wall also learned that Simon had failed to set up the scholarship fund properly and had not changed the accounting for GL 1070 as Wall directed. Tax issues for Louvers reached a "crisis point" in January 2013. In the summer of 2013, after Fleming fell ill, Louvers fired RJ Simon and hired Porte Brown to rectify Louvers' tax problems and perform a "forensic" review of its finances. Wall noted that, even after Fleming was off work and no

longer had the company credit card, large bills kept coming to Louvers. Wall directed Sheridan to review Fleming's expenses from January 2007 forward. Wall did not have his own expenses reviewed because he had been electing not be reimbursed for them anyway, for the financial sake of the company. Wall did not have the expenses of any other Louvers' employees reviewed as they were minimal.

¶ 57 When it became apparent that Fleming was unable to resume work at Louvers, Wall directed Karnatz to calculate what Louvers owed Fleming for the buyback of his shares pursuant to section 7 of the SSPA. Wall agreed that the process of computing the buyback amount involved Karnatz "reclassifying *** as distributions" amounts that were charged to GL 1070, including amounts that had already been transferred to wages. Wall further agreed that this reclassification had a dual consequence for Fleming: a dollar for which he had been taxed because it was deemed wages was now reclassified as a distribution, reducing his basis in Louvers' stock.

¶ 58 Sheridan testified that, when Wall returned to assume management of Louvers in late 2013, he directed Sheridan to review the business expenses for which Fleming was reimbursed over the years. Sheridan realized that his original review of the expenses was inadequate because many of them were in fact personal. Sheridan identified defendants' exhibit 90 as a compilation of expenses that Sheridan classified as personal on further review.

¶ 59 Sheridan identified email correspondence he had with Karnatz in January 2015. In the correspondence, Sheridan noted that he was unable to find a correlation between the distributions listed on Fleming's K-1 forms and GL 1070. Karnatz replied to Sheridan:

> "It was our understanding that the distributions shown on the K-1s were not the actual distributions made to each respective shareholder during those years. As you say, you

cannot see what GL account [Fleming's] tie to. I could not either and that was why we recalculated what it should have been based on the 20/80 ownership proportion."

¶ 60 7. Karnatz's Calculations

¶ 61 Karnatz testified that his firm, Porte Brown, was hired by Louvers in 2013. Porte Brown assumed the preparation of Louvers' income tax returns starting in tax year 2013. Also, in late 2013, Porte Brown was asked to calculate the amount owed to Fleming under the buyback provision in section 7 of the SSPA. Karnatz himself performed these calculations. Wall told Karnatz that he wanted to pay Fleming what was "right" and "fair" under the SSPA.

¶ 62 In reviewing Louvers' records, Karnatz observed that Wall received distributions for all but one year between 2007 and 2013, yet there was only one year, 2012, in which Fleming was recorded as receiving a distribution. Karnatz affirmed that, if Wall was Louvers' sole director, he would have exclusive discretion to order distributions. Nothing would have prevented Fleming from asking Wall about distributions, but it was nonetheless Wall's obligation to insure that, if he ordered a distribution for himself, he also provided Fleming a distribution in proportion to his ownership share.

¶ 63 Louvers and Wall introduced into evidence Karnatz's written reports detailing his calculation of what Fleming was owed for the stock buyback. Karnatz explained his calculations. His first step was to determine what Fleming paid for the stock, as this was the sum that the buyback provision required Louvers to remit. Karnatz ascertained from Louvers' records that Fleming was credited with having paid only about $10,000 toward the stock. Karnatz inquired further, however, noting that section 5 of the SSPA required Louvers to credit against the purchase price "one half of all amounts otherwise payable to [Fleming] ***, other than [his] salary and bonus." Karnatz proceeded to determine what Fleming received or should

have received in distributions, as these would qualify as amounts other than "salary and bonus." Karnatz noted that Wall received distributions of $6,139 in 2007, $82,498 in 2009, $229,463 in 2010, $239,208 in 2011, and $246,607 in 2012. Also, as of September 30, 2013, Wall received $480,030, for a total of $1,283,945 in distributions. (For 2012, Karnatz did not include $61,652, which consisted of the $51,181 in education payments made in 2012 and the $10,471 credited in 2012 toward Fleming's balance on the stock purchase.) Based on his ownership percentage, Fleming was entitled to distributions totaling $320,986 for those six years.

¶ 64 After determining what distributions Fleming was owed for the period from 2007 to 2013, Karnatz proceeded to ascertain what, if any, distributions Fleming actually received during that period. Karnatz found that Fleming actually received $194,579 in distributions. This was the sum of two amounts: (1) the balance of GL 1070 as of October 12, 2013 ($143,398); [1] and (2) $51,181, which, according to Karnatz, "was an item in shareholder distributions for Mr. Fleming that needed to be accounted for." (The $51,181 represented the 2012 education payments made for Fleming's children; Karnatz did not include any education payments).

¶ 65 From the total distributions Fleming was owed (again, $320,986), Karnatz deducted not only the total distributions Fleming actually received ($194,579) but also $109,415 in imputed interest. This left a net amount of $16,992 due Fleming. However, Karnatz noted that his calculations were based on information current as of September 30, 2013, and that Wall received $19,824 in distributions between October 1 and October 12, 2013. When Fleming's share of that amount ($4,956) was accounted for, the amount due him increased to $21,948.

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[1] Elsewhere in his reports, Karnatz lists the GL 1070 balance as $143,598 as of October 12, 2013. Louvers' documentation shows that the balance as of October 12, 2013, was actually $143,698.

¶ 66 Karnatz defended his characterization of the balances in GL 1070 as distributions. He noted that Louvers was unable to deduct any of the amounts in GL 1070 because they were for Fleming's personal benefit. On the assumption that "you couldn't keep the money in there forever in the cash advance account, couldn't let it *** accumulate from year-to-year," there were three options for handling the amounts charged in GL 1070: (1) Fleming repays them; (2) Louvers treats them as fringe benefits to Fleming and includes them in his wages; and (3) Louvers treats them as distributions to Fleming (before Fleming became a shareholder in 2007, only the first two options were available). Karnatz remarked that there is "no firm rule" on whether personal expenses should be considered taxable fringe benefits or distributions.

¶ 67 As for the education expenses, Karnatz claimed that there was legal precedent in which expenses were "allowed and treated as shareholder distributions."

¶ 68 Karnatz also explained that the IRS code imputes interest on purchases, like Fleming's, that stretch over time. Using a rate of five percent, and assuming that the balance due for the stock decreased each year, Karnatz computed total interest of $109,415 from 2007 to 2013. Louvers reported this amount on its 2013 tax return. The amount passed through to Wall and Fleming as shareholders, who were taxed on it according to their ownership interests. As Karnatz understood section 9 of the SSPA, Fleming was responsible for the imputed interest. Therefore, Karnatz deducted $109,415 from the amount owed to Fleming for buyback of the stock.

¶ 69 In closing argument, Louvers and Wall proposed an adjustment not addressed by Karnatz. They produced evidence that Louvers continued to pay personal expenses for Fleming after October 12, 2013. Louvers and Wall proposed that these payments, totaling $45,233, be deducted from Karnatz's final number, $21,948, leaving a negative balance owed to Fleming.

¶ 70 8. Gribben's Opinion

¶ 71 Gribben claimed that Louvers and Wall acted improperly toward Fleming in the following ways: (1) Louvers failed to provide Fleming shareholder distributions for the years in which was Wall was given them; (2) Louvers reclassified, as distributions to Fleming, amounts that Louvers previously reported as Fleming's wages; (3) Louvers reclassified, as distributions to Fleming, payments for his children's education, but Louvers did not so reclassify the payments for the education of Wall's children; and (4) Louvers deducted, and Wall received reimbursement for, expenses that were not proper business expenses under the tax laws.

¶ 72 Gribben elaborated on these points. First, he asserted that, in failing to provide Fleming distributions for the years in which Wall took them, Louvers violated the requirement of federal tax law that distributions in S corporations be made proportionate to ownership shares. Reviewing Louvers' financials, Gribben saw distributions to Wall recorded in GL 2999 each year from 2007 to 2013 except for 2008. However, Gribben "saw no moneys going to [Fleming] that were coded as distributions" in any year from 2007 to 2013. In contrast, Louvers' tax returns, and Fleming's K-1s, represented that he received distributions each year from 2009 to 2013. According to Gribben, Louvers' tax returns accurately reported the total distributions to Louvers' shareholders each year, but stated falsely that Fleming received a share of those distributions.

¶ 73 Gribben understood that Louvers attempted to rectify the proportionality violation by reclassifying, as distributions to Fleming, payments previously reported as part of his wages. Gribben explained how, in the first instance, those payments came to be classified as wages. Louvers would make payments for Fleming's personal benefit and record them in GL 1070 as asset loans. Sheridan would have frequent meetings with Fleming in which they would decide to

allocate a portion of those loans to Fleming's wages. Gribben recognized that this process was itself a kind of "recharacterization," but he found nothing improper about it. In his view, Louvers could have chosen to classify the loans as distributions instead of wages. Either classification, Gribben explained, has its own consequences for the shareholder. Distributions reduce the shareholder's basis, or his share of the undistributed profits of the corporation on which the shareholder has already been taxed. Distributions up to the amount of basis are generally tax-free. Where, on the other hand, an expense payment is recorded as wages, there are two tax consequences: the payment is included the shareholder's taxable income, but at the same time, there is a reduction in the corporation's profits (and, correspondingly, in the shareholder's pass-through tax liability) because wages are deductible as business expenses.

¶ 74 Gribben objected to what he perceived as Louvers' attempt, through Karnatz, to reclassify amounts previously recorded as wages to Fleming. As Gribben understood Karnatz's method, he deemed as distributions to Fleming the amounts that Louvers previously transferred from GL 1070 to Fleming's wages. Gribben explained that, through this reclassification, the amounts on which Fleming paid taxes (as wages) would now be deducted against his basis (as distributions). The reclassification gave Wall a "double win": deducting Fleming's wages reduced Wall's pass-through taxable income, and lowering Fleming's basis by the deemed distributions meant more "cash sitting in the bank that would have gone to [Fleming] and no longer goes to him." Gribben noted that, to his knowledge, Louvers had filed no amended tax returns reporting these reclassifications to tax authorities.

¶ 75 Upon further questioning, Gribben clarified what he found improper about Louvers' and Wall's treatment of GL 1070. Gribben noted that it would be "consistent with the tax code" to classify, in the first instance, a given amount in GL 1070 as wage or distribution. What Gribben

considered improper was "a marked inconsistency from past behavior to future behavior in a way that benefitted Mr. Wall." When counsel commented that there was "a balance in [GL 1070] at the end of every year," and that there was no inconsistency in treatment, Gribben answered:

> "A. I'm not talking about the balance. I'm talking about five ***, six years of treating that money as wage and in the seventh year treating it as distributions.
>
> Q. It was only treated part of it as a wage, right?
>
> A. Part.
>
> Q. So every year there is a chunk of it they didn't treat as a wage?
>
> A. Uh-huh.
>
> Q. It's permissible under the code to treat that as a distribution?
>
> A. It is.
>
> Q. And if the taxpayer involved, Mr. Fleming asked you to quit putting it on his W-2, it would be completely permissible to count it as a distribution?
>
> A. Hypothetically speaking if a taxpayer says please stop doing this and start doing that, then yes."

¶ 76 Gribben also found that Louvers and Wall improperly discriminated between Wall and Fleming in the treatment of education expenses paid on behalf of their respective children. First, Louvers deducted as business expenses all of the payments made for Derek Wall, but did not deduct all payments made for the Fleming children. Second, the education payments for Fleming's children in 2012 were classified as distributions to Fleming, reducing his basis, yet none of the payments for Derek Wall were classified as distributions to Wall. According to Gribben, the 2012 education payments for Fleming's children should have been accounted as wages rather than distributions, or at least Fleming should have been consulted before a

classification was made. Gribben opined that Louvers and Wall acted "in a way that consistently favor[ed] Mr. Wall *** at the expense of Mr. Fleming."

¶ 77 Gribben testified that, with assistance from Janet Fleming, he reviewed Wall's expense reports from 2009 to 2013. Gribben found a total in $809,046 in expenses that Wall's reports failed to justify as deductible and reimbursable business expenses. Gribben explained that these improper deductions negatively impacted Fleming as shareholder by reducing Louvers' taxable income and, correspondingly, Fleming's basis.

¶ 78 Gribben recognized that Louvers and Wall were in turn questioning the validity of the expenses for which Fleming received reimbursement. However, from Gribben's understanding of Louvers' internal practices, Louvers did not process Fleming's and Wall's expense reports equally. Sheridan reviewed Fleming's expenses, while Wall's expenses were not reviewed by Sheridan or any other Louvers' employee.

¶ 79 As for imputed interest, Gribben agreed with Karnatz's calculation of the interest but disagreed on how to apply the figure. In Gribben's view, where the IRS imputes interest in a transaction, the IRS requires one of the parties to the transaction to report the interest as taxable income. While Fleming was the more appropriate party to report the interest as income, Louvers could permissibly report and pay tax on it. Where Louvers and Wall erred, according to Gribben, was in reducing Fleming's basis by the amount of the interest "as if it had to be paid to Louvers." As Gribben construed the IRS code, "you don't actually have to pay the interest." Indeed, "if it is actually paid, it is no longer imputed. It's real interest at that point."

¶ 80 Gribben opined that Fleming was owed three items of damages. The first item was Fleming's 20% share of Louvers' profits. This share was $479,225 as of October 12, 2013. The second item was the repurchase price of the stock. Gribben believed that this price should be

based on the value of Louvers, which Gribben submitted was $7,348,812 as of December 31, 2013. The repurchase price of the stock would be 20% of Louvers' value, or $1,469,762. The third item was the sum—$809,046—of the non-business expenses for which Wall received reimbursement from 2009 to 2013.

¶ 81 C. The Trial Court's April 2018 Decision

¶ 82 The trial court issued a written decision in October 2017 ruling in favor of Fleming on both counts 2 (breach of contract – Louvers) and 4 (breach of common-law fiduciary and statutory duties – Wall). The court also held that it would award Fleming part of his attorney fees and invited him to file a fee petition. Fleming filed original and amended petitions for fees in November 2017 and January 2018, respectively.

¶ 83 Following posttrial motions, the court filed in April 2018 a detailed, 27-page amended order granting Fleming the same substantive relief.

¶ 84 1. The Trial Court's Specific Findings on Credibility and Reliability

¶ 85 The trial court found Fleming's testimony "unhelpful and unreliable," as he "was at times confused and *** was easily led to a desired answer by both counsel."

¶ 86 The court specifically rejected Wall's testimony that "the first time he looked at the GL 1070 account was in 2013 after Fleming's [accident]" (the court's paraphrase). The court found Wall's testimony on this point "incredible" because he was contradicted by Sheridan, who testified that "Wall knew about the GL 1070 account and that Wall received Louvers' financial statements" (again, the court's paraphrase).

¶ 87 2. Breach of Contract – Louvers

¶ 88 The court found that Louvers breached the SSPA by withholding amounts due Fleming under the SSPA's buyback provision. The court recognized that what Fleming was owed for the

buyback of the stock depended on what Louvers, from 2007 onward, paid or owed Fleming aside from salary or bonus, as one-half of such non-salary and non-bonus payments were to be applied to the purchase price of the stock and later remitted by Louvers as part of the buyback process. Shareholder distributions constituted payments other than salary and bonus, and therefore, would be applied to the stock purchase price. The court noted that "Louvers, as a Subchapter S corporation, was required to make any distributions in proportion to the ownership shares of Wall and Fleming," which was 80% Wall and 20% Fleming. Thus, Fleming, as shareholder, was entitled to distributions for the years in which Wall received distributions: 2007, 2009, 2010, 2011, 2012, and 2013. The trial court determined that Louvers made the following distributions to Wall: 2007 ($6,139), 2009 ($82,498), 2010 ($229,463), 2011 ($239,208), 2012 ($308,259), and 2013 ($544,184). (Notably, the trial court used Wall's year-end distribution total for 2013, when in fact Fleming was owed distributions only until October 12, 2013, the date of his termination.) These amounts totaled $1,409,751. However, the court noted that two amounts, totaling $61,652, were improperly recorded in Louvers' records as distributions to Wall: $51,181 which was paid toward the education expenses of Flemings' daughters, and $10,471, which was credited toward the balance Fleming owed on the stock. Subtracting these amounts reduced Wall's total distributions to $1,348,099. The trial court calculated that Fleming, based on his ownership share, was entitled to $269,620 in distributions (here the trial court erroneously took 20%, rather than 25% of Wall's distributions).

¶ 89 The court noted the parties' disagreement over whether Louvers, for purposes of computing the buyback amount, could properly deem as distributions certain payments that Louvers made for Fleming's benefit between 2007 and 2013. The court rejected Karnatz's attempt to classify, as distributions, Louvers' payments for Fleming's personal benefit as

recorded in GL 1070 and Louvers' payments in 2012 for the college education of Fleming's children. Karnatz's classification was, the court found, a departure from Louvers' past practice, and hence was a "retroactive *re*-classification of the expenses in the GL 1070 and the education payments" (emphasis added).

¶ 90 The court explained this conclusion by first noting the agreement between the parties' experts that Louvers had the legal option of originally treating the payments for personal expenses as wages *or* distributions, and the education payments as taxable fringe benefits *or* distributions. Louvers, however, did not maintain its original treatment of these payments. In various parts of its written order, the court described the ways in which it believed Louvers changed its practice regarding the payments:

> "33. *** [The] expenses[2] were listed on the general ledger as business expenses as they were incurred. It was not until Louvers' [*sic*] needed to account for distributions that were never made that they become a deduction against what was owed to Fleming.
>
> ***
>
> 35. Fleming was never told that he would be charged with the educational expenses of his daughters as distributions or as his own personal income. Louvers had never treated educational expenses as distributions or personal income prior to 2012. ***
>
> ***
>
> 37. The Court further finds the deduction of the balance of the funds remaining in the Louvers GL 1070 account from the balance due to Fleming to be improper. The

[2] It is not clear here if the court meant the personal expenses, the education expenses, or both. Notably, only the education expenses appear to have been listed as business expenses and deducted by Louvers.

> outstanding balance of the GL 1070 account represents pre-tax funds, which Louvers allowed to be paid through the business. Fleming does not owe these funds back to Louvers. The balance in the GL 1070 account was not treated as distributions of profits in the past by Louvers. The GL 1070 account was treated in the past as W-2 income and treating the remaining balance in that way comports with longstanding custom and practice.
>
> * * *
>
> 44. *** Louvers allowed Fleming to accrue personal expenses in the GL 1070 account and did not report the college tuition and personal expense payments as W-2 income or as distributions. This practice changed after Fleming's [accident], when Louvers, rather than reporting the expenses as non-deductible business expenses, reported the education expenses as distribution[s] to Fleming."

¶ 91 Thus, the court found it contrary to past practice for Louvers to treat, as distributions to Fleming, the 2012 education payments and the balance in GL 1070 as of October 12, 2013.

¶ 92 The court also found that Louvers misunderstood how to treat the imputed interest for which Fleming was made responsible under section 9 of the SSPA. In the court's view, the $109,415 of imputed interest reported on Louvers' 2013 tax return "represented an accounting calculation, which never actually existed, but was simply a calculation ('imputed') to charge income tax on it." As the trial court understood section 9, "if taxes on imputed interest becomes [*sic*] payable, that sum will be paid by Fleming," and therefore, "the actual loss to the [*sic*] Louvers is the amount of tax paid, if any, on the interest that was imputed to Louvers." Since "[t]he amount that Louvers may have paid in taxes on the imputed interest was not introduced

into evidence at trial," Louvers could not use imputed interest to reduce the amount owed Fleming.

¶ 93 3. Breach of Fiduciary Duty/Violation of Section 12.56(a)(3) – Wall

¶ 94 The court noted that Wall, "as [Louvers'] sole director and majority shareholder[,] had a fiduciary duty to the minority shareholder," Fleming. The court identified specific ways in which Wall breached his common-law fiduciary duties and also acted in an illegal, fraudulent, or oppressive manner contrary to section 12.56(a)(3) of the Act. First, Fleming did not receive any distributions for the years in which Wall took distributions. Second, Wall signed Louvers' tax returns falsely reporting that Fleming had received distributions. Third, Wall adopted Karnatz's opinion that Louvers could properly consider as distributions the balance in GL 1070 as of October 12, 2013, and the education payments made in 2012 on behalf of Fleming's children. Fourth, Louvers[3] made a counterclaim for a setoff in the amount of "expenses from 2007-2012 that Louvers had previously paid Fleming and deducted as business expenses on the [*sic*] Louvers' corporate returns." Fifth, Wall's expenses reports were not scrutinized as Fleming's were.

¶ 95 The court made the following additional comments about the attempt to reclassify the 2012 education payments as distributions:

> "e. For tax year 2012, $51,181 of scholarship payments made on behalf of Amanda Fleming and Jennifer Fleming were recharacterized as distributions to Fleming. The payments had not originally been paid as a distribution or with the stipulation that the funds had to be a deductible business expense. Further, payments were not paid to or on behalf of Fleming but rather, [they were] paid for Amanda and Jennifer Fleming who

[3] Here the court appeared to overlook that count 4 was against Wall, not Louvers.

were adults at the time. Louvers unilaterally re-classified these payments to the disadvantage of Fleming. Louvers could have reported the payments to the IRS as non-deductible business expense[s].

f. Louvers deducted these payments as business expenses of the company, with Wall receiving 80% of the tax benefit. As of the last date of trial, Louvers had not filed amended corporate tax returns.

g. Education payments made by Louvers for the benefit of Wall's son were not re-characterized as distributions to Wall or added to his W-2."

¶ 96 4. Opposing Claims Regarding Expenses

¶ 97 The court noted that each side in the case was seeking relief based on improper business expenses. Fleming alleged in count 4 that Wall charged business expenses to Louvers that were, in fact, personal in nature, and Louvers and Wall made a like charge against Fleming in their counterclaims.

¶ 98 The court denied all claims regarding expenses. The court explained:

"60. The Court finds that both Wall and Fleming had access to the financial records of the [*sic*] Louvers. Even after Wall moved to South Carolina, he remained in daily contact with Sheridan. Fleming, although a minority shareholder, was the President since 2012 and had access to the company's records and reports. While each shareholder was President, neither objected to the other's alleged excess spending.

61. Each shareholder had a fiduciary obligation to review the financial records of Louvers and to manage the company's finances properly. According to the parties, each shareholder breached this duty which has resulted in Louvers' IRS problems.

62. Each shareholder's request for the Court to off-set or award personal expenses paid by Louvers that they never objected to and which Louvers deducted on its tax returns as business expenses is denied."

¶ 99 5. Relief

¶ 100 a. Profits

¶ 101 The court determined that,

"[d]ue to the unfair tax treatment to which Fleming was subjected, in addition to the withheld distributions and inequitable treatment, he will be awarded 20% of profits for the period in question. The court finds profits to be a good measure of what is fair to Fleming under the unique circumstances of this case. The exact extent of the tax payments that he made due to this treatment is not in evidence. Permitting him to share in the profits on which he paid taxes is a fair resolution of that issue."

¶ 102 The court awarded Fleming $479,225, which was his 20% share of Louvers' profits from 2007 to 2013. Such relief was preferable to awarding Fleming his lost distributions, as this "[would] not account for the retained earnings that Louvers and Wall had the benefit and use of while withholding distributions from Fleming from 2007-10/12/13."

¶ 103 The court directed Fleming to surrender his shares upon receipt of the sums that the court was ordering Louvers to pay.

¶ 104 b. Buyback Price for Shares

¶ 105 The court rejected Fleming's argument that the buyback price for the stock should be its present fair value—over $1 million, according to Gribben—rather than the price for which Fleming purchased the stock, $500,000.

¶ 106 c. Present Balance in GL 1070/Payments Received After 10/12/13

¶ 107 The court agreed with Louvers and Wall that the $45,233 Fleming received from Louvers after October 12, 2013 should be considered a distribution rather than employee compensation. Therefore, the court deducted $45,233 from Fleming's award of profits, reducing it to $433,992.

¶ 108 The court further ruled that Louvers could report the present balance in GL 1070 as W-2 income to Fleming.

¶ 109 d. Punitive Damages

¶ 110 The court denied Fleming's request for punitive damages on count 2 because it was not a tort claim. The court denied punitive damages as well on count 4 because "[t]he award of damages based upon profits rather than distributions, takes into account the constructive fraud that occurred in this case."

¶ 111 e. Prejudgment Interest

¶ 112 The court decided that an equitable award of prejudgment interest was "appropriate in this breach of fiduciary duty case." However, the court would calculate interest based not on the $479,225 in profits awarded as damages, but on the distributions the court found Fleming was owed from 2007 to October 12, 2013. The court qualified that it would award interest only on one-half of the distributions owed:

> "Under the terms of the SSPA, one half of each distribution would have remained in the company as payment for Fleming's shares. Since Fleming would not have had the use of those funds, prejudgment interest should not be calculated on half of each distribution."

¶ 113 The court decided on a rate of 5%. The court stated that it would utilize "amended distribution figures" and directed the parties to present their calculations at a subsequent hearing set for May 2, 2018.

¶ 114 f. Attorney Fees

¶ 115 Section 23 of the SSPA addresses attorney fees:

> "lf any party participates in a legal action in which a party seeks to enforce the terms hereof and/or damages for the breach thereof, then in addition to and not in lieu of any other relief to which a party may be entitled, the party against whom the prevailing party prevails shall reimbursc the other party(ies) for its(their) reasonable attorney's fees incurred in such action. ***."

¶ 116 The court held that Fleming, because of his mixed results at trial, was entitled to only a partial award of attorney fees. The court set Fleming's previously-filed fee petition for hearing on May 2, 2018.

¶ 117 D. May 2018 Order on Prejudgment Interest and Attorney Fees

¶ 118 Prior to the May 2 hearing, Fleming filed a brief on prejudgment interest and attorney fees. Fleming sought total fees of $543,561. He also submitted a proposed calculation of prejudgment interest. Fleming utilized the same distribution totals as the trial court (Wall, $1,348,099, Fleming, $269,620) and also repeated the trial court's error of taking 20%, rather than 25%, of Wall's distributions in order to calculate the distributions Fleming was owed. Fleming computed $38,941 in prejudgment interest.

¶ 119 Louvers and Wall submitted their own proposed calculation of prejudgment interest. They used a lower distribution total for Wall than did the trial court and Fleming. Specifically, for 2013, Louvers and Wall used Wall's distribution total as of October 12 ($499,854), the date of Fleming's termination, beyond which he was not owed any distributions but had to surrender his shares in exchange for the buyback price. With this adjustment, Wall's total distributions were $1,303,769. However, like the trial court and Fleming, Louvers and Wall erroneously

computed 20% of Wall's distributions, which yielded $260,753 as the distributions owed Fleming. Louvers and Wall calculated prejudgment interest at $33,744.

¶ 120 On May 2, the trial court issued an order awarding Fleming prejudgment interest of $46,332. The court included no calculation to support this figure and did not explain how the court departed from both sides' proposed figures.

¶ 121 The court also granted in part and denied in part Fleming's fee petition, awarding him a total of $105,370 in fees.

¶ 122 Fleming appealed. Louvers and Wall cross-appealed and filed joint briefs.

¶ 123 II. ANALYSIS

¶ 124 A. Scope of the Appeals

¶ 125 Fleming did not prevail on all aspects of his substantive claims against Louvers and Wall. For instance, the trial court denied his claim (common to both of his counts) that Wall charged business expenses to Louvers that were, in fact, personal expenses. Fleming, however, does not challenge the disposition of his substantive claims. His appeal is directed only at the relief that the trial court awarded. Fleming argues that the trial court should have found that the buyback price of his Louvers shares was their fair value at the time of trial, not the $500,000 price set in the SSPA. He also argues that the awards of attorney fees and prejudgment interest were inadequate. In his reply brief, Fleming attempts to add an argument that the denial of punitive damages was error. We disregard this argument because points raised for the first time in a reply brief are forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018).

¶ 126 In their cross-appeal, Louvers and Wall challenge on various grounds the judgments in favor of Fleming on his two counts. Louvers and Wall brought several counterclaims below, many of which simply negated Fleming's claims or sought an offset from any recovery he might

obtain. For instance, they sought an offset for imputed interest. They also counterclaimed, however, for an award of damages based on Fleming's charging allegedly improper business expenses. In its decision, the trial court recognized that both sides made claims for allegedly improper business expenses, but the court denied all such claims. On appeal, the only aspect of their counterclaims on which Louvers and Wall seek reversal is their request for an offset for imputed interest.

¶ 127 B. Louvers' and Wall's Cross-Appeal

¶ 128 We address first Louvers' and Wall's cross-appeal because it challenges the underlying judgments in the case.

¶ 129 1. Clarification of Fleming's Counts

¶ 130 Louvers and Wall claim that the trial court's order "fails to distinguish between the liability of Louvers and the liability of Wall" as they were distinguished in Fleming's third amended complaint. Louvers and Wall construe count 2 of the complaint as alleging breach of contract against Louvers alone, and count 4 as alleging breach of common-law and statutory duties against Wall alone. Fleming does not appear to challenge this reading. In our view, Louvers and Wall correctly interpret the counts. We note that Fleming previously brought a count titled "Alfred Wall's Breach of SSPA." This count was dismissed, and Fleming "restated it for the record" in his third amended complaint, now titling it "Wall's Breach of Contract, Including its Implied Covenant." The juxtaposition of this count with the current count 2 confirms Fleming's intent in the latter to allege breach of contract against Louvers only.

¶ 131 The record is equally clear that count 4 is directed against Wall alone. We recognize that Fleming alleges in count 4 that "*Louvers* and Wall have acted arbitrarily, vexatiously, and not in good faith" and that he asks for "a judgment against *Louvers* and Wall, jointly and severally."

(Emphasis added.) However, Louvers and Wall filed a motion to strike the prayer for joint and several liability. They argued that Fleming failed to allege that Louvers violated section 12.56(a)(3) of the Act.[4] With the parties' agreement, the court granted the motion and struck the joint-and-several language. Accordingly, we read count 4 as directed against Wall alone.

¶ 132 Louver and Wall identify one instance in which the trial court confused Fleming's two counts: the court's remark, in its factual recitation, that "Fleming filed the instant litigation asserting that *Wall and Louvers* breached their fiduciary and statutory duties *** and breached contractual duties [under] the SSPA" (emphasis added). There are two other such instances, but we need not specify them. Instead, we note that, in the summary paragraph of its decision, the court properly distinguished the two counts:

> "The Court finds in favor of the Plaintiff, Thomas Fleming[,] on his claim for 20% of Louvers' profits for the years 2007-2013 in the amount of $479,225 and against *Louvers for breach of contract* and against *Wall for breach of fiduciary duties* under [the Act]." (Emphasis added).

¶ 133 In our view, the court's misstatement of the counts was inadvertent rather than the result of actual confusion. Even if the court was confused, we may still affirm if the record supports the court's decision. See *In re Estate of Funk*, 221 Ill. 2d 30, 96 (2006) (reviewing courts "are not bound by the reasons given by the lower courts for their judgments and may affirm on any grounds which are called for by the record").

¶ 134 In our analysis to follow, we adhere to the counts as pled.

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[4] As for the common-law breach of fiduciary duty claim in count 4, we note that, in Illinois, a corporation owes no such duty to its shareholders. See *Small v. Sussman*, 306 Ill. App. 3d 639, 645 (1999).

¶ 135 2. Breach of Contract – Louvers

¶ 136 Louvers challenges the trial court's holding that it breached the SSPA by withholding shareholder distributions that were due Fleming. To succeed on a claim for breach of contract, the plaintiff must prove (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damage to the plaintiff resulting from the breach. *Carlson v. Rehabilitation Institute of Chicago*, 2016 IL App (1st) 143853, ¶ 13. The interpretation of a contract presents a question of law and is therefore reviewed de novo. *Gallagher v. Lenart*, 226 Ill. 2d 208, 219 (2007). However, whether a breach of contract occurred is a question of fact, and the trial court's finding will not be disturbed on appeal unless it was against the manifest weight of the evidence (*Timan v. Ourada*, 2012 IL App (2d) 100834, ¶ 24), *i.e.*, the opposite conclusion is clearly apparent (*Short v. Pye*, 2018 IL App (2d) 160405, ¶ 53). The manifest weight of the evidence standard affords great deference to the trial court because it was able to observe the witnesses' testimony and so was in a superior position to assess credibility and resolve conflicts in the testimony. *Wade v. Stewart Title Guaranty Co.*, 2017 IL App (1st) 161765, ¶ 59.

¶ 137 a. Personal Expenses Charged to GL 1070 and Education Expenses

¶ 138 Fleming alleged in count 2, and argued at trial, that Louvers breached the SSPA by failing to provide him his *pro rata* share of distributions as Louvers' 20% shareholder. As Fleming recognized, Louvers had the right under section 5 of the SSPA to apply one-half of Fleming's distributions, and other non-salary and non-bonus payments, to the purchase price of the stock, and when Fleming's employment ended, Louvers would remit the payments in exchange for the stock certificate. Fleming argued that Louvers breached the SSPA both during and after his employment. First, Louvers breached the SSPA during his employment by

withholding the portion of his distributions that were not applied to the stock price. Second, Louvers breached the SSPA after his employment by continuing to withhold the distributions that were not applied to the stock price, and also by refusing to remit the remaining distributions as part of the stock buyback. During the buyback discussions, Louvers took the position, which it maintained throughout the case, that Fleming had received amounts during his employment that could properly be deemed distributions, namely the balance of personal expenses charged to GL 1070 as of October 12, 2013 ($143,698) and the education expenses Louvers paid for Fleming's daughters in 2012 ($51,181) Louvers claimed that, when those distributions were accounted for along with other appropriate deductions, Louvers owed Fleming nothing additional in the way of distributions. The trial court rejected Louvers' position and held that it breached the SSPA.

¶ 139 We emphasize that Fleming's claim for breach of the SSPA depends on an obligation independent of the SSPA. The SSPA is the vehicle by which Louvers handles "amounts otherwise payable to [Fleming]," and distributions are the specific amounts that Fleming claims were "payable" to him. However, the SSPA is not itself the source of the obligation to pay Fleming distributions. Section 8 of the SSPA grants Wall the power to unilaterally order distributions, but the SSPA does not require that Fleming receive a distribution whenever Wall receives one. Rather, the requirement of proportionate distributions comes from federal law on S corporations. See 11 Mertens Law of Federal Income Taxation, § 41B:156 (2019) ("Generally, a subchapter S corporation is prohibited from making non-*pro rata* distributions.") (citing 26 C.F.R. § 1.1361-1(l)(1)). It is presumed that parties entered into their contract with knowledge of existing law; therefore, statutes and laws in existence at the time a contract is executed are considered part of the contract. *Braye v. Archer-Daniels-Midland Co.*, 175 Ill. 2d 201, 217

(1997). Such laws enter into and form a part of the contract as fully as if they were expressly referred to or incorporated into its terms. *Schlosser v. Jursich*, 87 Ill. App. 3d 824, 826 (1980). Accordingly, we hold that the requirement of proportionate distributions is part of the SSPA. See *D'Attomo v. Baumbeck*, 2015 IL App (2d) 140865, ¶ 51 (statutory disclosure requirements became part of contract for sale of condominium). Indeed, the parties agree that, for the relevant years—2007 to 2013—Louvers was required to disburse distributions proportionately to shareholders Wall and Fleming.

¶ 140 As to what amount of distributions Fleming was owed for that period, we correct the trial court's calculations in two respects. First, the trial court miscalculated Wall's distributions as a basis for computing the distributions that Fleming was owed. The court took the total of Wall's distributions from 2007 to 2013 as reflected in Fleming's exhibit 8: $1,409,751. The court then subtracted $61,652, representing the $51,181 in education payments made in 2012 combined with the $10,471 that was credited in 2012 toward Fleming's purchase of the stock. This yielded a total of $1,348,099 for Wall. The court erred, however, by including the entirety of Wall's distributions for 2013: $544,184. The court should have included Wall's distributions only as of October 12, 2013, the date Fleming's employment terminated, because beyond this date Fleming was owed no further distributions but was required to surrender his shares in return for the buyback price. Wall received $499,854 in distributions as of October 12, 2013. Thus, his total distributions from 2007 to October 12, 2013 were $1,303,769.

¶ 141 Second, the trial court erroneously took 20%, rather than 25%, of Wall's total distributions. Computed properly, the total distributions owed to Fleming from 2007 to October 12, 2013, were $325,942.

¶ 142 The trial court found that "100% of the distributions *** went to Wall." What the court meant was that, for the seven years in question, Louvers made no payments for the benefit of Fleming that were contemporaneously designated in Louvers' records as distributions to him; to use Gribben's phrase, there were no "coded" distributions to Fleming during those years. Sheridan, notably, agreed that GL 1070 was never formally treated as a distribution account while Fleming was employed at Louvers.

¶ 143 On appeal, the only amounts that Louvers and Wall claim "were accounted for as distributions" to Fleming during the years in question were the $51,181 in education payments and the $10,471 that represented Fleming's payment toward the stock purchase. Gribben's opinion, which the trial court adopted in its findings, was that Louvers' internal records show no distributions to Fleming from 2007 to 2013, despite Fleming's 2012 K-1 form reporting $61,652 (the sum of $51,181 and $10,471) as distributions to him. Louvers and Wall point to Sheridan's testimony about Louvers' internal records. Sheridan, referencing entries from Louvers' general ledger, described how the $51,181 and $10,471 were originally recorded in other ledgers and later transferred to GL 2999, Wall's distribution account. The transfer of the $51,181 was notated, "To Reclassify," but Sheridan pointed to nothing in Louvers' records showing the new classification of this amount. By contrast, the $10,471 had this partial notation: "To record deemed *distributions* applied t—" (emphasis added). The apparent intent here was to record the $10,471 as a distribution, but as the trial court correctly found, it was not a distribution to *Wall* (because, as was undisputed, the amount was credited against what Fleming owed toward the stock). The only alternative is that the $10,471 was an intended distribution to Fleming. Perhaps it was not "coded" in the manner that Gribben would have liked, but then he did not explain what, to his mind, was proper "coding." We uphold the trial court's finding that the $51,181 was

not recorded as a distribution to Fleming, but we reverse its finding that the $10,741 was not recorded as a distribution to him.

¶ 144 Louvers' position is that the absence of formal distributions for the years in question was not a breach of the SSPA. Louvers observes that Fleming received substantial amounts, beside salary and bonus, for the years in question, and Louvers claims that it had the right to deem, after the fact, some of those amounts as distributions, namely the balance of $143,698 in GL 1070 as of October 12, 2013, and the $51,181 in education expenses paid in 2012. Louvers submits that these "deemed" distributions counted as distributions proper for purposes of the proportionate-distribution rule. The trial court, however, agreed with Fleming that Louvers engaged in an unfair "retroactive re-classification of the expenses in the GL 1070 and the [2012] education payments." The court found that "[t]he balance in the GL account was not treated as distributions of profits in the past by Louvers." Rather, it was Louvers' "longstanding custom and practice" to treat GL 1070 as W-2 income. The court found that Louvers also departed from past practice with respect to the 2012 education payments, as "Louvers had never treated educational expenses as distributions or personal income prior to 2012."

¶ 145 Louvers challenges the trial court's resort to "custom and practice." Fleming, however disagrees with Louvers as to what the trial court meant by that verbiage. Louvers submits that the trial court was invoking "custom and practice" as an aid in contractual interpretation. Fleming, however, suggests that the court was instead applying the voluntary payment doctrine to deny Louvers' counterclaim that it was entitled to a setoff in the amount of the personal expenses that Fleming charged to GL 1070. The doctrine, which Fleming raised as an affirmative defense in his closing argument, "provides that, absent fraud, misrepresentation or mistake of fact, money that is voluntarily paid under a claim of right to the payment and with full

knowledge of the facts by the payer cannot be recovered unless the payment was made as a result of compulsion." *Flournoy v. Ameritech*, 351 Ill. App. 3d 583, 587 (2004).

¶ 146 Fleming's reading of the court's analysis is not supportable. The trial court did not mention the voluntary payment doctrine by name or employ any of its terminology. Also, if the court's reliance on custom and practice was in reference to Louvers' counterclaim, then the court left no portion of its discussion for analysis of the breach-of-contract issue. Fleming would have us believe that the court addressed the breach-of-contract issue implicitly but addressed Louvers' counterclaim explicitly. The opposite occurred, in our view.

¶ 147 We examine, then, whether the trial court properly resorted to "custom and practice" as an aid to construing the SSPA. Louvers is correct that a custom or usage cannot of itself create a contract (see *Ozier v. Haines*, 411 Ill. 160, 166 (1952); *Chisolm v. Stephens*, 47 Ill. App. 3d 999, 1007 (1977); *Electrical Contractors, Inc. v. Goldberg & O'Brien Electric Co.*, 29 Ill. App. 3d 819, 823 (1975)), but is pertinent only to interpreting an existing contract. Moreover, "[e]vidence of custom and usage is only admissible to explain uncertain or ambiguous terms." *Nielsen v. United Services Automobile Ass'n*, 244 Ill. App. 3d 658, 663-64 (1993). A contract is ambiguous when it is reasonably capable of being understood in more than one way. *State Farm Fire & Casualty Co. v. Watts Regulator Co.*, 2016 IL App (2d) 160275, ¶ 27. The party asserting custom or usage bears the burden of proving its existence. *Katz v. Brooks*, 65 Ill. App. 2d 155, 160 (1965).

¶ 148 We presume that the trial court attempted to follow the law and, hence, was relying on custom or practice as a guide for construing an existing contract, the SSPA, rather than as a basis for finding an independent agreement. See *Illinois Neurospine Institute., P.C. v. Carson*, 2017 IL App (1st) 163386, ¶ 33 (the reviewing court presumes that the trial court was aware of the law

and followed it). The problem is that the trial court did not identify which aspect of the SSPA it found ambiguous when it applied "custom and practice" to conclude that Louvers' classification of the personal payments and education payments breached the SSPA. Fleming provides no input of his own—so convinced is he, apparently, that the trial court was applying the voluntary payment doctrine. The requirement of proportionate distributions originates in federal law, which is incorporated into the SSPA, but we are directed to nothing in that body of authority that pertains to the classification of past payments as distributions. Sections 5 and 7 of the SSPA govern the terms for payment and buyback but do not speak to the classification question. We conclude that the SSPA is not ambiguous on the question, but silent. Precedent recognizes the distinction between silence and ambiguity. See *Radloff v. Village of West Dundee*, 140 Ill. App. 3d 338, 340 (1986) (a statute's silence on a subject "does not even create an ambiguity in the statute which would require its interpretation," because "[r]ules of construction are used only for the purpose of resolving ambiguities"). We presume that the silence of the parties on the issue of classification was deliberate, particularly in view of section 17's integration clause. See *Gallagher v. Lenart*, 367 Ill. App. 3d 293, 301-02 (2006) ("[W]here a contract purports on its face to be a complete expression of the entire agreement, courts will not add another term about which the agreement is silent."). Therefore, the trial court could not properly invoke custom or usage on the issue of whether Louvers properly classified the personal payments and education payments as distributions.

¶ 149 We note that Fleming also alleged in count 2 that Louvers violated the covenant of good faith and fair dealing. This point was not addressed in the parties' closing arguments or the trial court's written decision, and the parties do not develop any arguments on appeal. Consequently, we do not address the point.

¶ 150 For these reasons, we conclude that the trial court erred in holding that Louvers breached the SSPA by characterizing, as distributions, the balance in GL 1070 as of October 12, 2013, and the education expenses paid in 2012, and by deducting those amounts from what Fleming was owed for the buyback of the stock. Accordingly, we reverse the judgment in favor of Fleming on count 2.

¶ 151 b. Imputed Interest

¶ 152 Louvers alleged in its affirmative defenses and counterclaims that section 9 of the SSPA gave it the right to a setoff in the amount of interest that federal law imputed on the stock purchase. Since we reverse the trial court's judgment on count 2, and with the damages award against Louvers, we do not decide whether Louvers was entitled to a setoff in the amount of imputed interest.

¶ 153 3. Breach of Fiduciary Duty/Violation of Section 12.56(a)(3) – Wall

¶ 154 Fleming alleged in count 4 that Wall breached his common-law fiduciary duty as well as his duties under section 12.56(a)(3) of the Act. The trial court agreed that Wall breached the duties alleged by Fleming, and also found that Wall committed constructive fraud.

¶ 155 To prevail on a claim for breach of common-law fiduciary duty, the plaintiff must prove that a fiduciary duty existed, that the defendant breached his fiduciary duty, and that the breach proximately caused the plaintiff's injury. *Pippen v. Pedersen & Houpt*, 2013 IL App (1st) 111371, ¶ 22. "Constructive fraud includes any act, statement, or omission that is construable as a fraud because of its detrimental effect upon the public interest and public or private confidence." *Prodromos v. Everen Securities, Inc.*, 341 Ill. App. 3d 718, 726 (2003). "A claim for constructive fraud does not require proof of actual dishonesty or intent to deceive; it involves the breach of a legal or equitable duty that the law declares to be fraudulent, regardless of the

moral guilt of the wrongdoer, because of its tendency to deceive others." *Stathis v. Geldermann*, Inc., 295 Ill. App. 3d 844, 859 (1998). Breach of fiduciary duty is a form of constructive fraud. *Duffy v. Orlan Brook Condominium Owners' Ass'n*, 2012 IL App (1st) 113577, ¶ 33; *LaSalle National Trust, N.A. v. Board of Directors of the 1100 Lake Shore Drive Condominium*, 287 Ill. App. 3d 449, 456 (1997) ("Where there is a breach of a legal or equitable duty arising out of a fiduciary relationship, a presumption of constructive fraud arises.").

¶ 156 A fiduciary duty arises from the relationship of the parties, not from contract. *D'Attomo*, 2015 IL App (2d) 140865, ¶ 66. Directors and officers in a closely held corporation owe mutual fiduciary duties and must deal with each other openly and honestly. *Anest v. Audino*, 332 Ill. App. 3d 468, 476 (2002). They must also "exercise in the management of corporate affairs the degree of care which prudent men, prompted by self-interest, would exercise in the management of their own affairs." *Stamp v. Touche Ross & Co.*, 263 Ill. App. 3d 1010, 1015 (1993). They have the duty to inform themselves of the material facts necessary to exercise their judgment. *Id.* If directors and officers exercise such care, they will not be held liable for honest errors in judgment. *Id.*

¶ 157 Section 12.56 of the Act permits a shareholder in a privately held corporation to seek relief in certain circumstances, including, *inter alia*, where "[t]he corporation assets are being misapplied or wasted" (805 ILCS 5/12.56(a)(4) (West 2016)), or where

> "[t]he directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent with respect to the petitioning shareholder, whether in his capacity as a shareholder, director, or officer" (805 ILCS 5/12.56(a)(3) (West 2016)).

Section 12.56(b) provides various remedies including an award of damages (805 ILCS 5/12.56(b)(10) (West 2016)).

¶ 158 Wall identifies no issues of law in the appeal of count 4; therefore, our review is strictly under the manifest-weight standard. See *Southwest Bank of St. Louis v. Poulokefalos*, 401 Ill. App. 3d 884, 890 (2010).

¶ 159 Count 2 named Wall individually, and the trial court entered judgment against him individually. It is unclear to us whether a corporate officer, director, or shareholder may be held personally liable under section 12.56 of the Act.[5] However, while Wall vigorously challenges the trial court's finding that he acted improperly toward Fleming, he does not claim that he was insulated from personal liability for any of the conduct that the trial court found he committed. Our analysis likewise assumes that there is no obstacle to Wall being held personally liable.

¶ 160 As did Louvers with respect to count 2, Wall claims that it was appropriate for him to classify, as distributions, amounts previously paid for Fleming's person benefit including the personal advances recorded in GL 1070 and the payments in 2012 for the college education of

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[5] The text of section 12.56 does not address the matter of personal liability. Another part of the Act, section 8.65 (805 ILCS 5/8.65 (West 2016)), specifies circumstances in which directors may be held personally liable, and provides that *this* liability is "[i]n addition to any other liabilities imposed by law[.]" The common-law rule is that corporate officers and directors are shielded from responsibility for corporate debts and liabilities but are personally liable for their own wrongdoing. See *People ex rel. Madigan v. Tang*, 346 Ill. App. 3d 277, 284 (2004) (personal liability for torts); *Allabastro v. Cummins*, 90 Ill. App. 3d 394, 398 (1980) (personal liability for breach of fiduciary duty).

Fleming's daughters. Count 4 presents a significantly different legal context than count 2. For purposes of count 2, we were bound by the terms of the governing contract, the SSPA. The question as framed for us on appeal was whether the SSPA was ambiguous such that the trial court could properly consult Louvers' custom and practice in determining whether Louvers justifiably classified the past payments as distributions. We noted that, though the SSPA incorporated the federal mandate of *pro rata* distributions, the SSPA was silent, not ambiguous, on whether Louvers could fulfill that mandate by deeming past payments as distributions. Therefore, the trial court erred in resorting to Louvers' custom and practice as a basis on which to find that Louvers breached the SSPA. *Supra ¶¶* 147-48. Bu contrast, count 4 is not contract-based; we judge Wall's conduct not against the SSPA but against the common law and statutory standards set forth above.

¶ 161 The trial court identified multiple ways in which Wall breached his common law and statutory duties. First, Wall failed to provide Fleming any distributions from 2007 to 2013, where Wall received distributions in 6 of those 7 years. Second, Wall falsely reported to the IRS that Fleming received distributions each year from 2009 to 2013. Third, Wall adopted Karnatz's recommendation to treat, as distributions, past payments made for Fleming's benefit. Fourth, Wall showed a pattern of consistently favoring himself over Fleming.

¶ 162 In addition to this conduct, the court cited the following:

> "After Fleming's [accident], Louvers and Wall identified expenses from 2007-2012 that Louvers previously paid Fleming and deducted as business expenses on the [*sic*] Louvers' corporate returns. Louvers demanded a set-off for these expenses from Fleming."

The court is referencing Louvers' counterclaim for a set off for personal expenses that Fleming charged to Louvers. Wall claims this was error because the court was penalizing a party for seeking relief in court. The more fundamental error, we think, was that the court relied on *Louvers'* pleading as a ground for a finding of liability against *Wall*. The court's error, however, eliminates just one of several bases it cited for holding Wall liable under count 4. There were adequate remaining grounds, as we explain below.

¶ 163 a. Distributions/Reporting to the IRS

¶ 164 Fleming was entitled to a distribution each year in which Wall received a distribution: 2007, 2009, 2010, 2011, 2012, and 2013. From 2007 to 2013, Fleming received only $10,741 that was formally designated in Louvers' records as a distribution (*supra* ¶ 143), yet Louvers reported to the IRS that Fleming received distributions each year from 2009 to 2013.

¶ 165 Some interpretation is necessary in order to ascertain the mental state that the trial court attributed to Wall with respect to the issuing of distributions and reporting to the IRS. At one point in its analysis, the court referenced Simon's testimony:

> "Simon testified that Wall made the distribution decisions and never notified Simon that the distribution figures on the tax returns were not accurate. *Wall knew Fleming was not receiving the distributions he was due under the SSPA*." (Emphasis added.)

Considered in themselves, these comments might have left us questioning whether the court was simply recapitulating Simon's testimony or actually making a finding that Wall had contemporaneous knowledge that Fleming was not receiving distributions. Fortunately, other remarks by the court provide insight. In the next paragraph, the court said:

> "Not only were distributions not paid in the correct proportions as required, but Wall signed tax returns that showed distributions that were not accurate, depriving Fleming of

> distributions to which he was entitled. Wall as sole director and majority shareholder had a fiduciary duty to the minority shareholder. The court finds that the conduct of Louvers and Wall evidenced a cavalier attitude toward proper accounting practices and reporting to the IRS. This attitude resulted in Wall taking 100% of the distributions in violation of the SSPA and his fiduciary duties. Wall breached his fiduciary duties to Fleming and treated Fleming unfairly. This conduct amounted to constructive fraud."

The court also commented:

> "Wall signed tax returns that showed distributions that were not accurate, causing Fleming to pay taxes on profits but receive no *pro-rata* share of the distributions. Wall had a fiduciary duty to the minority shareholder. Based on the testimony at trial, Wall's education included an MBA degree and considerable business experience. Wall understood the need to accurately record shareholder distributions and the inequity of considering amounts paid to an employee through the GL 1070 account as satisfying Louvers' obligation to make the correct distributions. While this is not common law fraud, the breach does constitute constructive fraud."

¶ 166 These remarks clarify that the court was *not* finding Wall had contemporaneous knowledge that Fleming was not receiving formal distributions and that the K-1 forms were false in reporting distributions to Fleming. The court expressly found that Wall lacked the mental state necessary to establish actual fraud. Rather, Wall acted cavalierly and recklessly toward the proportionality requirement and the need to report accurately to the IRS.

¶ 167 According to Wall, the omitted distributions were simply a matter of innocent oversight: "Louvers just failed to identify the money going to Fleming as distributions." Wall attempts to lay blame on Simon. Fleming, Wall says, would have received his distributions if Simon had

followed Wall's directive to classify charges to GL 1070 as distributions to Fleming. Wall relies on his testimony that, after he speaking to Simon, he "assume[d] that [the] $20,000 a year plus that [Fleming] was taking out every year from 2007 on was a distribution."

¶ 168 The trial court, however, rejected Wall's attempt to deny responsibility for Louvers' failure to provide Fleming his formal distributions. The court specifically found that Wall was "cavalier" as to whether Fleming received his formal distributions. The court cited Simon's testimony that Wall made the decisions at Louvers on whether to make distributions. Sheridan ascribed the same role to Wall, though the trial court did not mention it. The court did recognize Sheridan's testimony that "Wall knew about the GL 1070 account and that Wall received Louvers' financial statements" (this was the court's accurate paraphrase). Most significantly, Wall admitted that he decided when he would take a distribution. Of course, by taking a distribution, Wall bound himself to give Fleming a proportionate distribution. It was the trial court's province to weigh the testimony of the witnesses, and we will not disturb its determination that Wall did not exercise the care of a fiduciary in ensuring that Fleming received his *pro rata* distributions.

¶ 169 By depriving Fleming of his rightful *pro rata* distributions, Wall breached not only his common-law fiduciary duty but also his duty under section 12.56(a)(3) of the Act. See *Kovac v. Barron*, 2014 IL App (2d) 121100, ¶¶ 67, 71-75 (50 percent shareholder in an S corporation, by taking excessive compensation for himself and his wife, violated the federal requirement of *pro rata* sharing of profits and also breached his duty under section 12.56(a)(3) of the Act).

¶ 170 Wall claims that the record rebuts any suggestion that he "played an active role in issuing K-1s or specifying the amounts in them." Here again Wall attributes the fault to Simon. He points to Simon's admission that the distribution breakdowns he put on the K-1s for tax years

2007 to 2013 were based on his assumption that the distributions were made according to Wall's and Fleming's respective ownership interests. From this Wall would have us conclude that Simon had ultimate responsibility for the content of the K-1 forms. We are not convinced. The assumption Simon made, besides being entirely reasonable, hardly established that he was the final word on what the K-1 forms would contain. Rather, Simon testified that his practice was to submit proposed K-1 forms to Wall and Sheridan for review. Wall claims that Simon's testimony on this point is undermined by the fact that there is only one tax return (2012) in the record that is accompanied by a letter from Simon to Louvers, and that this letter requests that Louvers sign the return but not that it review the return. We disagree; this fact does not of itself disprove the existence of the review process Simon described.

¶ 171 Wall points also to his testimony that he did not review Fleming's K-1 forms because they were "personal." This is a remarkable claim coming from Louvers' sole director and majority shareholder. Such a *laissez faire* approach to the accuracy of tax documents filed by his corporation would only confirm that Wall was, as the trial court found, "cavalier *** toward proper accounting practices and reporting to the IRS." We also note that Wall's claim is irreconcilable with Simon's and Sheridan's testimony that Wall made the decisions on distributions—from which it is easy to infer that the K-1 forms should only have reflected what Wall directed as to distributions, not some "personal" choices by Fleming. It was the province of the trial court to resolve such conflicts in the testimony, and we cannot say it erred by favoring the testimony that contradicted Wall on this point.

¶ 172 We do note that Wall is correct that the trial court was mistaken in believing that Fleming necessarily incurred tax liability by the (false) reporting of distributions. Fleming was previously taxed on Louvers' income; there would have been a tax consequence only if the reported

distributions exceeded Fleming's basis for a given year (see *Williams*, 110 T.C. at 29), and there is no evidence that this occurred. Regardless, however, of such tax consequences, Fleming was still harmed because he was deprived of the use of the distributions (specifically, the one-half that was not put toward the purchase of the stock).

¶ 173 b. Classification of the GL 1070 Balance

¶ 174 Wall challenges the trial court's finding that he breached his common law and statutory duties by classifying the balance in GL 1070 as distributions. We agree with Wall that the court's finding was against the manifest weight of the evidence.

¶ 175 The trial court believed that Wall engaged in a "retroactive *re*-classification of the expenses in the GL 1070 account." (Emphasis added). The court remarked that *"[t]he balance* in the GL 1070 account was not treated as distributions of profits in the past by Louvers"; rather, "[t]he *GL 1070 account* was treated in the past as W-2 income and treating the remaining balance in that way comports with longstanding custom and practice." (Emphasis added.)

¶ 176 The court's language is susceptible to two constructions. First, the court may have believed that GL 1070 was itself treated as a wage account; hence, the "re-classification" when its entire balance as of October 12, 2013 was treated as distributions. This would have been a factually incorrect position. GL 1070 was historically neither a wage account nor a distribution account. According to Wall's unrebutted testimony, GL 1070 was established as a loan account to relieve Fleming's financial strain. Despite Wall's directive to change GL 1070 to a distribution account, it remained a loan account during Fleming's employment. Only *transfers* from the account were treated as wages, and the account was never reduced to zero.

¶ 177 Second, the court may not have believed that GL 1070 was itself treated as a wage account, but instead believed that Fleming had an expectation, based on past practice, that

amounts transferred from GL 1070 would only be treated as wages. Even here the trial court would have erred because, ironically, its position would have lacked support from Fleming's own expert, Gribben. He distinguished between: (1) the balance in GL 1070 as of October 12, 2013; and (2) amounts previously moved from GL 1070 and accounted as wages. In Gribben's view, to deem those past transfers as distributions would be "a marked inconsistency from past behavior to future behavior in a way that benefitted Mr. Wall." Specifically, when the amounts were treated as Fleming's wages, and deducted from Louvers' taxable income, Wall enjoyed the benefit of lower pass-through taxation. When those same amounts were later treated as distributions to Fleming, and so reduced his basis, Wall enjoyed the benefit of increased retained earnings from which to draw. Gribben clarified, however, that there would have been no inconsistency in Wall classifying the existing balance in GL 1070 as wages or distributions; in either case, there would have been no past classification with which to conflict. This is precisely what Wall did at Karnatz's recommendation: classify, as distributions, only the balance in GL 1070 as of October 12, 2013, and not any of the prior transfers to wages. The trial court failed to recognize that Fleming's theory at trial was undercut by his own expert.

¶ 178 The court not only failed to appreciate the nuances in Gribben's opinion, but also failed to mention testimony relevant to Fleming's expectations regarding GL 1070. The classification of GL 1070 as a *loan* account implied, of course, that Fleming was expected to repay the amounts. Karnatz testified that repaying the balance was not the only option for Fleming. He could also accrue the balance as wages and pay taxes on them, or accrue the balance as distributions with a consequent reduction in his basis. In the 1990s, the balance on GL 1070 was periodically reduced by transfers to wages. Once Fleming became a shareholder, Wall advised him that the "advance money he had been carrying on the books would be tax free and he

wouldn't have to pay [taxes] on it anymore because it would be taken out of distributions." The trial court neglected to mention this unrebutted testimony. Certainly, Fleming might have had reason to believe that these transfers to distributions anticipated by Wall would only be periodic during his employment, like the transfers to wages. However, Fleming should have expected that, when his employment ended, the entire balance of GL 1070 would be considered a distribution to him. Fleming's request, in 2012, that Sheridan cease transferring from GL 1070 to wages was consistent with an understanding that Fleming was not supposed to pay tax on GL 1070 amounts.

¶ 179 c. Classification of the 2012 Education Payments

¶ 180 Wall also challenges the trial court's finding that he breached his common law and statutory duties by classifying the 2012 education payments as distributions. We affirm the trial court on this point.

¶ 181 The trial court held that classifying the 2012 education payments as distributions departed from past practice. The court found specifically:

> (1) "Fleming was never told that he would be charged with the educational expenses of his daughters as distributions or as his own personal income";
>
> (2) "Louvers[6] had never treated educational expenses as distributions or personal income prior to 2012";
>
> (3) "[N]o witness testified the education payments were contingent on Louvers' ability to deduct the expenses through the Louvers International Scholarship fund"; and

[6] At times the trial court seems to have overlooked that count 4 was against Wall alone. However, there is no act that the court attributed to Louvers that was not attributable to Wall as sole director and majority shareholder of Louvers.

(4) "The [2012] payments had not originally been paid as a distribution or with the stipulation that the funds had to be a deductible business expense."

¶ 182 The court further found that, "[u]pon Louvers' new accountant determining the scholarship fund was improperly set up, Louvers and Wall re-characterized the 2012 scholarship payments as distributions to Fleming." Louvers (through Wall) thus "unilaterally re-classified these payments to the disadvantage of Fleming," even though there was the option of treating the payments as "non-deductible business expenses" instead. Moreover, "[e]ducation payments for the benefit of Wall's son were not re-characterized as distributions to Wall or added to his W-2."

¶ 183 There was a crucial difference between Wall's treatment of the balance in GL 1070 and his treatment of the 2012 education expenses. Starting in the 1990s, amounts from GL 1070 were transferred to Fleming's wages. Wall later told Fleming that, once he became a shareholder, the balance in GL 1070 would not be taxed because it would be taken out in distributions. Indeed, as GL 1070 was a loan account, it was reasonable to expect that Fleming would be responsible for reducing the balance in some way. By contrast, the education payments were recorded in a different ledger, designated "Tuition – Scholarships," and there was no evidence that Fleming was ever advised that the scholarship payments would be accounted as distributions or wages. Also significant is the unchallenged testimony of Gribben that Fleming was not asked if he wished to have the education payments reclassified as distributions rather than wages.

¶ 184 Wall disputes the trial court's findings on several grounds. First, Wall claims that Gribben agreed that it was permissible to treat the 2012 education payments as distributions. Wall points to Gribben's testimony about GL 1070, specifically, his opinion that Louvers could, as an initial matter, treat any portion of that account as wage or distribution, but could not then

change the classification. This testimony is inapposite as Gribben was not speaking about the education payments, which, as noted, went into different account than GL 1070.

¶ 185 Next, Wall points out that the court erred in identifying Karnatz, not Simon, as the one who discovered that the scholarship fund had been improperly set up. Wall is correct, but in our view the error was not material to the court's analysis.

¶ 186 Wall also asserts that he did not "cause" the recharacterization of the 2012 education expenses but was simply following the advice of Karnatz. Wall cites no authority that would permit the sole director and majority shareholder of a corporation to rely on the advice of an accountant as a defense to an action for breach of fiduciary duty and shareholder oppression. (Louvers, we note, cited the business judgment in relation to count 2.)

¶ 187 Further, Wall disputes that the education payments could have been reported as "a non-deductible business expense" rather than as distributions. Wall asserts that the Fleming daughters "admittedly provided nothing to Louvers in return for these so-called scholarships," but rather, "[t]he one and only qualification for receiving them was to be Fleming's child." Thus, Wall asserts, "these were not business expenses in the first place." Wall submits that "*[b]oth* experts said [the education payments] had to be reported as distributions or wages" (emphasis added). Wall, however, does not cite Gribben's testimony but only Karnatz's testimony and report. In his testimony, Karnatz simply restates the conclusion of his report as to education payments. As for the report itself, the strongest assertion that Karnatz makes specifically about education payments is that one decision of a tax court has considered such payments as shareholder distributions. The decision, *Hufnagle v. Comm'r*, 51 T.C.M. (CCH) 694 (T.C. 1986), contains no broad statements about education payments but holds that the specific facts of a case determine whether a corporate expenditure for the benefit of a

shareholder's family must be considered a constructive distribution to the shareholder. Wall cites no authority of his own to support his assertion that the education payments in question here did not qualify as nondeductible business expenses. Consequently, we reject his point.

¶ 188 Next, Wall attacks the trial court's comparison of how Wall treated the 2012 education payments for the Fleming children with how Wall treated the payments for Derek Wall's MBA. Wall cites testimony suggesting that Derek's MBA program was completed before 2012, the year in which Wall learned that the scholarship program was not set up properly. Wall reasons that, because no expenses were paid for Derek in 2012, Wall cannot have discriminated by reclassifying, in 2012, the education payments made earlier that year for Fleming's children.

¶ 189 We presume that the trial court had in view the filing of an amended tax return reporting the past payments for Derek's education as distributions or wages. The difficulty we have with the trial court's finding is that we cannot discern on what basis it saw parity between the education payments for Derek and those for the Fleming children. According to Sheridan, the payments for the Fleming children were found to be nondeductible because the scholarship program of which they were part was not properly established under the tax laws. Sheridan further testified that Derek was not part of the scholarship program. Nothing in the record contradicts his testimony. However, the merits of Wall's argument on this particular point are immaterial, for we have already identified sufficient independent grounds for finding that Wall breached his common law and statutory duties by reclassifying the 2012 education payments as distributions.

¶ 190 Wall wonders what "payments" the trial court is referring to in its comments that "Louvers deducted these payments as business expenses of the company, with Wall receiving 80% of the tax benefit," and that Louvers, as of trial, had not filed amended returns. We agree

with Wall that the court is likely referring to the pre-2012 education payments for Fleming's children. We also agree that there was no impropriety with the deductions, at least *vis à vis* Fleming, as they were apparently allocated according to ownership share. Amended returns would have corresponding tax implications for Wall and Fleming.

¶ 191 Wall also challenges court's finding, for which it quotes Gribben, that Wall " 'consistently favor[ed] [himself] in this case at the expense of Mr. Fleming.' " The court did not elaborate, but Gribben was simply referring to how Wall treated, for tax purposes, the education expenses paid by Louvers. We have already assessed the arguments relating to that conduct.

¶ 192 Finally, we note that Wall makes the following point:

> "Louvers pleaded the affirmative defense of estoppel *** and if Fleming cannot assert the distribution-based claim against Louvers, he has no claim against Wall for violation of [section 12.56]. The Amended Order never addresses that affirmative defense."

¶ 193 Wall does not explain how Louvers' affirmative defense to count 2 is relevant to Wall's liability under count 4. Inexplicably, Wall does not reference his own affirmative defense of estoppel. He comes closest in his attempt to broadly disqualify Fleming's complaint about lost distributions. Wall asserts that Fleming had his own fiduciary duties, including the duty to protest if he was not receiving distributions. This position has an ironic opponent: Karnatz himself, who testified that, though Fleming was free to ask Wall about distributions, it remained Wall's obligation, under federal law, to insure that distributions were made *pro rata*. Wall cites no authority applying any estoppel-like theory to the federal requirement of *pro rata* distributions, and we are reluctant to construct one now.

¶ 194 d. Wall's Overall Conduct Toward Fleming

¶ 195 Wall devotes several pages of his argument to an overview of his conduct toward Fleming, in an effort to show that he had no intent to oppress. He makes these individual points: (1) the terms of the SSPA were fair; (2) Wall made financial sacrifices for Louvers that Fleming never did; (3) education expenses for Fleming's children were paid "from Wall's pocket"; (4) Fleming's business expenses were always timely reimbursed, while Wall sometimes had to wait years for reimbursement; and (5) Wall relied in good faith on Karnatz's buyback calculations.

¶ 196 We have held that Wall failed to exercise the care of a fiduciary in complying with the requirement of *pro rata* distributions, in reporting distributions to the IRS, and in classifying the 2012 education payments. Our analysis incorporated all factors directly bearing on those issues. Wall cites no authority for us to make a broader inquiry into his character.

¶ 197 Finally, we note that Fleming argues that Louvers is vicariously liable for Wall's actions. Fleming presents this is an "alternative theory" on which to affirm the trial court. We decline to consider the theory. Count 4 named Wall alone, and Fleming did not argue for vicarious liability at trial. We will not permit Fleming to expand on appeal the legal theory he presented below. See *Price v. City of Chicago*, 2018 IL App (1st) 161599, ¶ 49.

¶ 198 e. Conclusion

¶ 199 For the foregoing reasons, we affirm in part and reverse in part the trial court's judgment on count 4. We affirm the court's holding that Wall breached his common law and statutory duties by classifying as distributions the $51,151 in education payments that Louvers made in 2012 for the benefit of Fleming's children. However, we reverse the court's holding that Wall breached his duties by classifying as distributions the balance of GL 1070 as of October 12, 2013.

¶ 200 C. Fleming's Appeal/Defendants' Cross-Appeal on Damages, Prejudgment Interest, and Attorney Fees

¶ 201 Both sides appeal on the issues of damages, attorney fees, and prejudgment interest. Since we reverse the judgment in favor of Fleming on count 2 against Louvers, we vacate the awards of damages, prejudgment interest, and attorney fees against Louvers.

¶ 202 As for the judgment against Wall on count 4, we affirm it in part and reverse it in part. Further, for the reasons given below, we (1) modify the damages award against Wall; (2) vacate the award of prejudgment interest and remand for recalculation based on the modified damages award; and (3) vacate the award of attorney fees and remand for Fleming to file a new petition for fees against Wall.

¶ 203 1. Damages

¶ 204 The trial court entered a damages award against both Louvers and Wall in the amount of $479,225, representing Fleming's 20% "share" of Louvers' profits from 2007 to 2013. Fleming's sole contention on damages is that Louvers' breach of the SSPA estops it from enforcing the provision in the SSPA that limits the buyback price of the shares to what Fleming paid for them (Fleming claims that Louvers should instead pay the fair value of the shares as of trial). We do not address Fleming's contention because we have vacated the judgment against Louvers on count 2, and count 4 was based not on the SSPA but on common law and statutory duties.

¶ 205 We turn, then, to Wall's contention that the trial court erred in awarding Fleming 20% of Louvers' profits from 2007 to 2013. The court based the award on three factors: (1) Wall's conduct, *i.e.*, "withheld distributions," "inequitable treatment," and "unfair tax treatment," namely the fact that "Wall, by issuing K-1s to Fleming for distributions he did not receive,

caused Fleming to pay taxes on those funds"; (2) there was no evidence of the amount of tax that Fleming paid because of the "unfair tax treatment"; and (3) to award Fleming just his lost distributions would "not account for the retained earnings that Louvers and Wall had the benefit and use of while withholding distributions from Fleming from 2007-10/12/13."

¶ 206 The appropriate measure of damages is a question of fact, and we will not disturb the trial court's assessment unless it is against the manifest weight of the evidence. *Pyramid Development, LLC v. Dukane Precast, Inc.*, 2014 IL App (2d) 131131, ¶ 37. The party seeking damages bears the burden to establish not only that it has sustained damages, but also a reasonable basis for computation of those damages. *Kay v. Prolix Packaging, Inc.*, 2013 IL App (1st) 112455, ¶ 33.

¶ 207 We agree with Wall that the damages award was erroneous. The primary error is in the notion that 20% of Louvers' profits was Fleming's "share." "[R]etained earnings and profits of a subchapter S corporation are a corporate asset and remain the corporation's property until severed from the other corporate assets and distributed as dividends." *Joynt*, 375 Ill. App. 3d at 821. Fleming's rightful share of the profits was what he received, or should have received, in distributions.

¶ 208 The trial court believed that to award Fleming just his lost distributions would not have accounted for Wall's "benefit and use" of the retained earnings. Technically, what the trial court sought to award was not damages but restitution. Damages is measured by the plaintiff's loss, while restitution is measured by the defendant's unjust gain. *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 257 (2004). Restitution is available at both law and in equity. *Id.* The court, however, cited no evidence quantifying to any degree the "benefit and use" that Wall

received from those earnings. There was no evidence, for instance, that Wall took greater distributions because Fleming was not given his distributions.

¶ 209 The trial court preferred an award of profits for the additional reason that there was no proof of the taxes that Fleming paid because of the "unfair tax treatment." As noted (*supra* ¶ 172), the court mistakenly believed that the issuing of inaccurate K-1s "caused" Fleming to pay taxes on the amounts reported as distributions. Due to the nature of pass-through taxation, Fleming would have paid taxes on his proportionate share of Louvers' income regardless of whether it was distributed. Only if the reported distributions exceeded Fleming's basis would he incur tax liability on them, and there is no evidence in the record that his basis was exceeded. A more accurate statement of the prejudice to Fleming would be that he paid taxes on Louvers' profits without the benefit of receiving some profits as distributions. Regardless, it was still Fleming's burden to prove the taxes he paid on Louvers' profits, yet the trial court charged Wall, not Fleming, with the lack of such proof.

¶ 210 In response to Wall's argument on damages, Fleming cites case law allowing for "a complete forfeiture of any salary paid by a corporation to its fiduciary during a time when the fiduciary was breaching his duty to the corporation" (*Levy v. Markal Sales Corp.*, 268 Ill. App. 3d 355, 373 (1994)). According to Fleming, the trial court had discretion to order the forfeiture of Wall's wages ($1,309,187), distributions ($1,348,099), and the payments he received for improper business expenses ($904,816)—for a total of $3.5 million. Fleming remarks that "[t]he trial court's award of only 20% of Louvers' profits ($479,225) falls easily under that maximum."

¶ 211 Fleming is not asking for actual forfeiture of the amounts specified;[7] his point is that, because the trial court could have awarded a forfeiture of up to $3.5 million, the lesser award of

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[7] In the court below, the only amounts Fleming asked to be forfeited by Wall were

$479,225 was proper. We decline to render an opinion on a question not before us for decision. See *In re James W.*, 2014 IL 114483, ¶ 18 ("Courts of review will generally not decide questions which are abstract, hypothetical, or moot.").

¶ 212 For these reasons, we hold that the trial court's damages award was against the manifest weight of the evidence. We therefore modify the award pursuant to our authority under Supreme Court Rule 366(a)(5) (eff. Feb.1, 1994). To compute the proper amount of damages, we begin with $325,942, which is 25% of the distributions received by Wall from 2007 to 2013. From this amount we subtract $143,698 (the balance in GL 1070 as of October 12, 2013) and the $45,233 that Fleming received after October 12, 2013. This leaves total damages of $137,011.

¶ 213 2. Prejudgment Interest

¶ 214 Prejudgment interest is proper when authorized by statute or agreement of the parties, or when warranted by equitable considerations. *Tully v. McLean*, 409 Ill. App. 3d 659, 684-85 (2011). In its April 2018 decision, the trial court held that an award of interest on equitable grounds was warranted. The court decided on a rate of 5%. The court noted that it would compute interest not on the profits awarded as damages but on Fleming's lost distributions ($269,620 in total, as calculated by the court). Further, interest would be computed on only half of the lost distributions. After receiving proposed calculations by both sides, the court ultimately awarded $46,332 in prejudgment interest.

¶ 215 The parties raise several challenges to the award of interest, starting with whether interest was appropriate at all. "In Illinois, prejudgment interest may be recovered when warranted by

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Louvers' payments for his allegedly improper business expenses. The trial court denied that request, and Fleming did not appeal the denial.

equitable considerations, and disallowed if such an award would not comport with justice and equity." *In re Estate of Wernick*, 127 Ill. 2d 61, 87 (1989).

> "The rationale underlying an equitable award of prejudgment interest in a case involving a breach of fiduciary duty is to make the injured party complete by forcing the fiduciary to account for profits and interest he gained by the use of the injured party's money. [Citation.] The injured party is thus compensated for any economic loss occasioned by the inability to use his money. Prejudgment interest in this context acts as a concept of fairness and equity and not as a sanction against the defendant. [Citation.] Fundamental principles of damages and compensation dictate that when money has been wrongfully withheld the victim receive interest for the wrongdoer's retention of his money." *Id.*

An award of prejudgment interest is reviewed for abuse of discretion. *Id.* The trial court has abused its discretion when no reasonable person would agree with its decision. *In re Marriage of Heroy*, 2017 IL 120205, ¶ 24, 89 N.E.3d 296, 305

¶ 216 Wall argues that Fleming was entitled to no prejudgment interest because he breached his own fiduciary duty by failing to protest that he was not receiving distributions. We addressed and rejected this point above. *Supra* ¶ 193.

¶ 217 Fleming, for his part, asserts that the trial court erred by awarding prejudgment interest on just half of the distributions owed him. The court reasoned that, because "one half of each distribution would have remained in the company as payment for Fleming's shares," Fleming "would not have had the use of those funds[.]" Fleming contends, however, that once Wall wrongfully withheld the first distribution(s) due Fleming in 2007, Wall prospectively lost the right to withhold any amount of distributions, even the half designated as payment under the SSPA. Fleming cites the rule that "where a party has materially breached a contract he cannot

take advantage of the terms of the contract which benefit him nor recover damages from the other party to the contract" (*Niemoth v. Kohls*, 171 Ill. App. 3d 54, 70 (1988)). Assuming, *arguendo*, that Wall was a party to the SSPA, we note that Fleming's position is incoherent, for if Wall lost the right to withhold distributions (as payment for the stock), then Fleming lost the right to retain his stock and, hence, his right to further distributions. Moreover, Fleming's suggestion that Wall breached the SSPA fails for the same reason that we reversed the trial court's judgment on count 2: the SSPA is silent on whether Louvers or Wall had the right to re-designate past payments as distributions. *Supra* ¶¶ 148-49.

¶ 218 Fleming alternatively argues that October 12, 2013, the last day of Fleming's employment, was the latest date that Wall could properly withhold the portion of distributions applied to the stock purchase. Thus, according to Fleming, prejudgment interest on the withheld portion should be computed from that date. Fleming appears to assume that the withheld distributions would have to be returned all at once. He is mistaken. Section 7 of the SSPA states that, upon termination of the SSPA (as by, for instance, the termination of Fleming's employment), Fleming "shall immediately transfer the Purchased Stock to [Louvers] which shall return the sums paid by [Fleming] in the reverse order and timing in which he made his prior payments to [Louvers]." Section 7 contains this example:

> "[I]f [Fleming's] employment with [Louvers] ended in 2009 and he had made payments of $50,000 in 2007 and $75,000 in 2008, [Louvers] would pay to [Fleming] $75,000 in 2010 and $50,000 in 2011."

¶ 219 If Fleming had received distributions for the years in which Wall received them, one-half of each year's distributions would have been properly withheld and credited as payment for the stock (and Fleming would not have had use of those withheld sums, as the trial court found).

Further, once the SSPA was terminated, the withheld sums would be returned in the same interval—yearly—in which they were withheld. Thus, Fleming would not have received the withheld amounts in a lump sum.

¶ 220 Next, Fleming asserts that the 5% interest rate used by the trial court was too low. Five percent is the current minimum rate under section 2 of the Interest Act (815 ILCS 205/2 (West 2016)). Fleming claims that "[t]he proper rate of prejudgment interest is the rate a third party was (or would have been) charging the defendant at the time." As examples, Fleming cites two cases, *Wernick* and *Tully*, where, as here, prejudgment interest was awarded on equitable grounds. Neither case is of help to Fleming here.

¶ 221 In *Tully*, members of a limited liability company sued fellow member entities, several of which were controlled by co-defendant Daniel McLean. The plaintiffs alleged breaches of fiduciary duty consisting of transfers of funds from the member entities controlled by McLean to outside enterprises also controlled by him. This "interest-free financing," as described by the trial court, created financial hardship for the LLC. *Tully*, 409 Ill. App. 3d at 673. The court awarded damages as well as prejudgment interest at the rate of 13%. On appeal, the defendants argued that the rate was punitive and proposed instead the prime rate of 4.3%. The appellate court disagreed, holding that McLean was "not entitled to benefit from" such a low rate because, instead of borrowing from a bank at or near the prime rate, he "misappropriated funds from a private company." *Id.* at 685. The appellate court noted that the trial court selected the 13% rate because it was the rate charged by McLean in 2001 for a loan to one of his business enterprises. *Id.* The appellate court approved:

> "So, apparently, 13% is a reasonable rate of interest for a loan between an individual and a private business. Given the circumstances of this case, 13% prejudgment interest was

> not excessive compensation to plaintiffs for McLean's taking the 'interest-free loans' and the court did not abuse its discretion in entering the award." *Id.*

¶ 222 Fleming proposes a rate of 9% based on Wall's explanation for why he chose not to charge Fleming interest on the stock transaction:

> "I didn't think it would be fair to Tom. I thought it would be a burden. *I thought the interest charges at that time were nine percent.* That's $45,000 a year. And his portion of distributions would be only maybe $15,000, and that would penalize him $30,000, which wasn't fair." (Emphasis added.)

¶ 223 As Fleming notes, the trial court provided no reasons for using a rate of 5%. We presume, however, that the trial court duly considered Wall's testimony since it was the only evidence of interest rates. See *Young v. Herman*, 2018 IL App (4th) 170001, ¶ 68 (no affirmative evidence to rebut presumption that the trial court considered a particular item of evidence). The trial court evidently concluded that the testimony did not support a rate of 9% for an award of prejudgment interest. In our view, the court could have justifiably found that Wall's testimony lacked probative value because he did not speak with certainty about the interest rate, but only "thought" that the rate was 9% in 2007. See *Williams v. BNSF Railway Co.*, 2015 IL App (1st) 121901-B, ¶ 44 ("A trial court may reject evidence on grounds of irrelevancy if it has little probative value due to its remoteness, uncertainty, or unfair prejudicial nature."). Wall's testimony contrasted with the definite evidence in *Tully* of a past loan transaction. We note that, from the record we have (which lacks a report of proceedings from the May 2 hearing on prejudgment interest), Fleming apparently did not present any additional evidence during posttrial proceedings to support his proposed rate of 9%.

¶ 224 Fleming asserts that, in *Wernick*, the supreme court approved a rate of 9% for prejudgment interest. Fleming misreads the case. The 9% award in *Wernick* was for *post*judgment interest, and it was not appealed. *Wernick*, 127 Ill. 2d at 75. Fleming also mentions the *Wernick* court's comment that "the interest statute is a remedy separate from the equitable powers of the court to make an injured party whole." *Wernick*, 127 Ill. 2d at 89. The court elaborated:

> "In past cases where awards of equitable interest were allowed to compensate the injured party, Illinois courts often looked to the prejudgment interest statute to establish a rate sufficient to compensate. Over the past century, *** the statutory rate for prejudgment interest has not been changed to reflect the escalating interest rates in the market. As a result, the statutory rate does not provide an accurate measure of compensation for money wrongfully withheld." *Id.* at 87-88.

The court vacated the trial court's award of prejudgment interest that was based on the statutory rate, because that rate was "not sufficient to make the petitioners whole." *Id.* at 89. The court remanded for calculation of prejudgment interest based on the prime rate, "to be ascertained based upon available data." *Id.*

¶ 225 We do not read *Wernick* as suggesting that an interest rate of 5%, which was the statutory rate then (Ill.Rev.Stat.1983, ch. 17, par. 6402) and now, is never appropriate for an equitable award of prejudgment interest. The court's comments were dated, based as they were on market trends as of 1989 when the case was published. We will not presume that the economic picture is the same or similar today, 30 years later. Accordingly, we cannot say that, under *Wernick*, the trial court's use of 5% was error.

¶ 226 We vacate the current award of prejudgment interest and remand for recalculation based on the modified damages award of $137,011. The trial court is directed to use the same methodology and interest rate (5%) that it used computing the current award of prejudgment interest.

¶ 227 3. Attorney Fees

¶ 228 Under the "American rule," prevailing parties are prohibited from recovering their attorney fees from the losing party absent express authorization by statute or by contract between the parties. *State ex rel. Schad, Diamond & Shedden, P.C. v. My Pillow*, Inc., 2018 IL 122487, ¶ 17.

¶ 229 In the court below, Fleming sought fees on two bases. The first was section 23 of the SSPA, which provides:

> "If any party participates in a legal action in which a party seeks to enforce the terms hereof and/or damages for the breach thereof, then in addition to and not in lieu of any other relief to which a party may be entitled, the party against whom the prevailing party prevails shall reimbursc the other party(ies) for its(their) reasonable attorney's fees incurred in such action. ***."

¶ 230 The second basis Fleming cited was section 12.60(j) of the Act (805 ILCS 5/12.60(j) (West 2016)), which states:

> "If the court finds that a party to any proceeding under Section 12.50, 12.55, or 12.56 acted arbitrarily, vexatiously, or otherwise not in good faith, it may award one or more other parties their reasonable expenses, including counsel fees and the expenses of appraisers or other experts, incurred in the proceeding."

¶ 231 The court held that Fleming was entitled to an award of fees under both the SSPA and section 12.60(j), but that it would be *partial* award because he did not prevail on all of his claims:

> "The Court finds that Fleming's main cause of action was based on the failure to pay distributions when large amounts of money were being distributed to the majority shareholder and sole director of the corporation. The claim sounded in breach of contract (the SSPA) and violations under the [Act]. He has been awarded substantial damages and is a prevailing party as to his claim the SSPA was breached and the [Act] violated. However, Fleming spent considerable time pursuing a claim for reimbursement of Wall's personal expenses taken as business expenses which the Court denied, and which was not a claim under the SSPA. Further, Fleming was also unsuccessful in seeking an award of 'fair value' for his shares, punitive damages, and a finding of procedural unconscionability and undue influence. Therefore, the Court will consider a partial award of attorney fees for the Plaintiff, which are recoverable both under the SSPA and the [Act]."

Following a subsequent hearing on fees on May 2, the court issued an order making various deductions to Fleming's requested fees, ultimately awarding him $105,370 against Louvers and Wall.

¶ 232 We vacate the entire fee award because the trial court did not allocate fees between the two counts and we are reversing the trial court's judgment against Louvers on count 2. Since count 4 was not an action to enforce the SSPA, the only potential basis for fees against Wall was section 12.60(j) of the Act. The record supports the trial court's finding that Wall, in his dealings with Fleming, "acted arbitrarily, vexatiously, or otherwise not in good faith," so as to support an

award of fees against Wall under section 12.60(j). We express no opinion on what amount of fees should be awarded against Wall. We remand for Fleming to file a new petition for fees associated with count 4.

¶ 233 III. SUMMARY

¶ 234 To summarize, we (1) reverse the judgment against Louvers on count 2; (2) vacate the awards of damages, prejudgment interest, and attorney fees against Louvers; (3) affirm in part and reverse in part the judgment against Wall on count 4; (4) reduce to $137,011 the damages award against Wall under count 4; (5) vacate the award of prejudgment interest against Wall and remand for recalculation based on the modified damages award; and (6) vacate the award of attorney fees against Wall and remand for Fleming to file a new petition for fees associated with count 4.

¶ 235 IV. CONCLUSION

¶ 236 For the foregoing reasons, we affirm in part and reverse in part the trial court's judgment and remand for further proceedings.

¶ 237 Affirmed in part and reversed in part.

¶ 238 Cause remanded.