[Cite as *Scala v. Scala*, 2023-Ohio-2232.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

CHRISTOPHER A. SCALA	C.A. No. 21CA0047-M
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO CASE No. 20CIV0505
WILLIAM A. SCALA, et al.	
Appellees	

DECISION AND JOURNAL ENTRY

Dated: June 30, 2023

CARR, Judge.

{¶1} Plaintiff-Appellant Christopher A. Scala, individually, as trustee of the Christopher A. Scala Trust, and derivatively on behalf of Kenmore Construction Co., Inc. ("Chris") appeals the judgment of the Medina County Court of Common Pleas. This Court affirms in part, and reverses in part.

I.

{¶2} This action is a refiled action that began in 2017 when Chris filed a complaint against two of his brothers, Defendant-Appellee William A. Scala ("Bill") and Michael Scala ("Michael"). Michael passed away in 2018 and Defendant-Appellee Samuel P. Scala, as the executor of the estate of Michael Scala ("the Estate"), was listed as a Defendant in the refiled action. Much of the dispute centers on a 1990 Agreement Restricting Disposition of Shares of Kenmore Construction Co., Inc. ("Shareholders' Agreement") and its subsequent amendments. Kenmore Construction Co., Inc. ("Kenmore") was founded in 1956 by the father of the Scala

siblings ("Father"). The five siblings, Bill, Chris, Michael, Paul Scala ("Paul"), and Margaret Coletta-Scala ("Margaret") inherited the business from Father upon his passing in 1985. The Shareholders' Agreement was signed by all five siblings.

{¶3} The Shareholders' Agreement contained two provisions which became the focus of the dispute: Section 12(B) and Section 15(A). Section 12 is titled "Termination and Amendment of Agreement" and 12(B) states that "[t]his Agreement may be amended or terminated by an agreement in writing signed by Shareholders owning and holding sixty percent (60%) or more of all of the issued and outstanding common shares of Corporation." Section 15 is titled "Miscellaneous" and 15(A) provides that "[t]his Agreement represents the entire and exclusive understanding between the parties hereto as to the subject matter hereof, and may not be modified except in a writing signed by all parties hereto." The conflict between the two provisions was not raised until the litigation began. Each of the amendments that will be discussed below was adopted pursuant to Section 12(B).

{¶4} While the five siblings were equal shareholders, Bill was president, chief executive officer, and chairman of the board and was responsible for much of the daily operations of Kenmore. Bill and Chris did not see eye to eye on many matters with respect to the management of Kenmore. In fact, Chris had a difficult relationship with all of his siblings. Nonetheless, Kenmore prospered financially under Bill's leadership. Its primary business is in the construction of heavy highway systems, although it has additional lines of business.

{¶5} However, in 1992, when Bill returned from a vacation, Chris, Paul, and Michael voted to oust Bill as president. Bill accepted the vote but was asked to come back within hours when the other siblings discovered that the bonding company would not bond Kenmore if Bill was

not president. Bill agreed to come back if Paul and Margaret gave Bill their voting rights for five years.

{¶6} Kenmore's legal counsel recommended that the Shareholders' Agreement be amended to provide for proxies and voting trusts in light of the voting rights Bill sought. Chris and Michael sought separate counsel to see if there was a way to prevent this First Amendment to the Shareholders' Agreement from passing. The attorney informed Michael and Chris that shareholders' holding 60% of the shares could pass an amendment. On May 4, 1992, the shareholders met. Michael ultimately decided to join Bill, Paul, and Margaret in voting to adopt the First Amendment. Chris voted against the adoption of the First Amendment.

{¶7} The dynamics of the shareholders changed further when, effective December 31, 2010, Kenmore redeemed both Paul's and Margaret's shares, leaving Chris, Bill, and Michael as equal 1/3 shareholders in Kenmore.

{¶8} In 2014 or 2015, Michael indicated that he wanted to rid himself of his shares due to health concerns. However, under the Shareholders' Agreement as amended at the time, due to the fact that the shares had to first be offered to Kenmore and then the remaining shareholders pro rata, Bill and Chris would end up as equal shareholders, a situation that Michael wanted to avoid. In fact, neither Bill nor Michael wanted to be a 50% shareholder with Chris. Bill then sought out legal representation. A Second Amendment was then proposed and voted on in January 2016. Chris voted against the amendment, but it was adopted via a 2-1 vote. The Second Amendment to the Shareholders' Agreement provided that if Kenmore declined to redeem the shares, the selling shareholder could then offer the shares to any remaining shareholder or shareholders in a proportion of the selling shareholder's choosing.

{¶9} In November 2016, a Third Amendment to the Shareholders' Agreement was adopted following a 2-1 vote in favor. Chris again voted against the amendment. The Third Amendment replaced the provision amended by the Second Amendment. The new provision added that a selling shareholder could offer the selling shareholder's shares to one or more lineal descendants under conditions specified in the provision. In addition, at that time, Michael offered his shares to Kenmore. Chris moved Kenmore to accept the offer, but the motion was not seconded. Instead, Bill and Michael moved to decline the offer. Thus, Kenmore did not redeem the shares.

{¶10} In December 2016, Michael sold his shares to Bill. Thus, Bill owned 2/3 of the shares and Chris continued to own 1/3. In May 2017, the Fourth Amendment to the Shareholder's Agreement was adopted following a vote by Bill in favor of the amendment. Chris opposed the amendment. The Fourth Amendment made several substantive changes to the Shareholders' Agreement. These changes included that Kenmore would have the option to purchase shares at the time of a shareholder's death as opposed to an obligation to so. The Fourth Amendment also eliminated the conflicting language from Section 15(A) of the Shareholders' Agreement.

{¶11} The original lawsuit was filed in June 2017. It was dismissed and then refiled July 14, 2020 as a verified complaint. In it, Chris raised 15 causes of action, including one shareholder derivative claim, which is not at issue in this appeal.

{¶12} In his first claim, Chris sought a declaratory judgment that Bill and Michael breached the Shareholders' Agreement by enacting the Second and Third Amendments without a writing signed by all shareholders as provided in Section 15(A). Chris's second cause of action asserted that Bill and Michael breached their fiduciary duties to Chris by amending the Shareholders' Agreement so that Bill could acquire all of Michael's stock without providing Chris

the opportunity to acquire an equal portion. In Chris's third claim, he alleged that Bill and Michael breached the Shareholder's Agreement by having Michael sell his shares to Bill without first making a bona fide offer to sell the shares to Kenmore. Chris alleged in his fourth claim that Bill and Michael breached their fiduciary duties by conspiring to have Michael sell all his shares to Bill without a bona fide offer to sell the shares to Kenmore or equally to Chris and Bill. In the fifth claim, Chris maintained that Bill breached his fiduciary duty by adopting the Fourth Amendment. In the sixth cause of action, Chris alleged that Bill misappropriated company assets and usurped corporate business opportunities with respect to Michael's shares. In the seventh cause of action, Chris asserted that Bill breached a fiduciary duty with respect to the purchase of Michael's shares. In his eighth claim, Chris alleged that Bill tortiously misappropriated Kenmore assets for his own personal benefit through Nova I, Nova II, K-Nova and other business entities. The ninth claim contained allegations that Bill tortiously usurped business opportunities of Kenmore for his own personal benefit through Nova I, Nova II, K-Nova, and other entities. Chris asserted in the tenth claim that Bill has breached and continued to breach his fiduciary duty to Chris through the use of other business entities to tortiously misappropriate Kenmore assets and usurp business opportunities of Kenmore. The eleventh cause of action contained allegations that Bill tortiously misappropriated Kenmore assets and usurped business opportunities of Kenmore through Nova I, Nova II, K-Nova, and other entities to unjustly enrich himself. The twelfth claim involved assertions that Bill had Kenmore Asphalt Products, Inc. ("KAP") make a distribution to Chris, that Bill never delivered it to Chris, and, instead, transferred the funds to Kenmore as a capital contribution without Chris's knowledge or consent, thereby resulting in conversion. Relatedly, Chris alleged in the thirteenth cause of action that Bill breached a fiduciary duty to Chris by failing to return the KAP distribution. The fourteenth cause of action involved alleged

violations of R.C. 1701.38 and 1701.39 by Bill. The fifteenth cause of action was a shareholder derivative claim.

{¶13} Bill and the Estate filed an answer and counterclaims. Amended counterclaims were subsequently filed. In the amended counterclaims, Bill and the Estate sought the following declarations: (1) That the Second, Third, and Fourth Amendments to the Shareholders' Agreement were valid and consistent with the Shareholders' Agreement; (2) That Michael followed all necessary and appropriate contractual procedures required by the Shareholders' Agreement as amended in offering his shares to Kenmore and that Kenmore validly declined the offer; (3) That the Fourth Amendment to the Shareholders' Agreement did not impermissibly restrict Chris's transfer of his interest in Kenmore, did not reduce the price Chris would receive for a voluntary transfer or at death, and did not extend the payment period upon death or voluntary sale; and (4) That the agreement between Bill and Michael to purchase Michael's shares did not impermissibly obligate Kenmore to supply corporate assets to effectuate Bill's private purchase of Michael's interest in Kenmore. In addition, Bill and the Estate alleged that portions of Chris's complaint constituted frivolous conduct in violation of R.C. 2323.51.

{¶14} Bill and the Estate moved for summary judgment on all counts of the complaint and amended counterclaims one through four and Chris moved for summary judgment as to count three of the complaint. Following extensive briefing and the submission of thousands of pages of evidentiary materials, the trial court entered judgment in favor of Bill and the Estate and included language in accordance with Civ.R. 54(B).

{¶15} Chris has appealed, raising seven assignments of error for our review.

II.

Summary Judgment Standard

{¶16} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). This Court applies the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.*, 13 Ohio App.3d 7, 12 (6th Dist.1983).

{¶17} Pursuant to Civ.R. 56(C), summary judgment is proper if:

> (1) No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977).

{¶18} The party moving for summary judgment bears the initial burden of informing the trial court of the basis for the motion and pointing to parts of the record that show the absence of a genuine issue of material fact. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293 (1996). Specifically, the moving party must support the motion by pointing to some evidence in the record of the type listed in Civ.R. 56(C). *Id.* Once a moving party satisfies its burden of supporting its motion for summary judgment with acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. *Id.* at 293. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated at trial. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449 (1996).

ASSIGNMENT OF ERROR I

> IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANTS ON ALL COUNTS, THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY MAKING A "FINDING[,"] RATHER THAN DETERMINING WHETHER REASONABLE MINDS COULD DISAGREE, THAT MIKE AND BILL WERE MOTIVATED TO PROTECT THE BEST INTEREST OF KENMORE IN AVOIDING A 50/50 "DEADLOCK" AND THIS FINDING CAUSED THE COURT TO ERRONEOUSLY DISMISS ALL OF PLAINTIFF'S CLAIMS.

{¶19} Chris argues in his first assignment of error that language used by the trial court in its judgment entry warrants reversal. Specifically, Chris finds fault with the following language: "As this court has already found, Bill and Mike were motivated to protect the best interests of Kenmore in avoiding a 50/50 deadlock among the remaining shareholders and potential corporate dissolution. October 1, 2020 Magistrate's Decision, adopted by November 23, 2020 Judgment Entry." (Emphasis omitted.)

{¶20} Chris maintains that "[i]t was prejudicially erroneous for the trial court to have reached back and used an extraneous interlocutory finding purportedly made in a ruling involving the attorney-client privilege to support its Journal Entry granting summary judgment against Plaintiff." However, the language in the trial court's entry includes no reference to a prior magistrate's decision or trial court judgment entry. Further, the language used by the trial court does not include the phrase "As this court has already found[.]" In resolving Chris's second and fourth causes of action, the trial court stated:

> Bill and Mike's pursuit of legal advice on behalf of Kenmore as to how to avoid a 50/50 deadlock, thus giving rise to the amendments, was proper exercise of their business judgment. The corporate actions taken by Kenmore to address Plaintiff's demand that he be an equal owner were legitimate exercise of shareholder power, protected by the business judgment rule, and cannot form the basis of breach of fiduciary duty claims. Bill and Mike were motivated to protect the best interests of Kenmore in avoiding a 50/50 deadlock among the remaining shareholders and potential corporate dissolution.

{¶21} Thus, there is nothing in the language used by the trial court which suggests that the trial court relied on a prior ruling in rendering summary judgment. Accordingly, Chris has not met his burden to demonstrate that the trial court's ruling is based upon prior findings. Any alleged error in the trial court's ruling on Chris's second and fourth causes of action will be further reviewed in discussing Chris's fourth assignment of error.

{¶22} Chris's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN DENYING PLAINTIFF'S SUMMARY JUDGMENT MOTION ON HIS THIRD CAUSE OF ACTION AND CONVERSELY GRANTING DEFENDANTS' SUMMARY JUDGMENT DISMISSING PLAINTIFF'S THIRD CAUSE OF ACTION FOR DEFENDANTS' BREACH OF CONTRACT WHERE THE UNDISPUTED EVIDENCE ESTABLISHED AS A MATTER OF LAW THAT BILL ACQUIRED ALL OF MIKE'S STOCK WITHOUT THE SHARES BEING FIRST TRULY OFFERED TO THE COMPANY AS REQUIRED BY SUBSECTION 1(A) OF THE STOCK RESTRICTION AGREEMENT.

{¶23} In the second assignment of error, Chris argues that the trial court erred in its ruling with respect to Chris's third cause of action for breach of contract. Chris argues that Michael did not truly offer his stock to the company as required by Section 1(A) of the Shareholder's Agreement.

{¶24} Here, Chris only challenges the trial court's ruling as to count three of the complaint and has failed to address the trial court's related ruling as to the second amended counterclaim. The ruling on the second amended counterclaim resulted in a declaratory judgment in favor of Bill and the Estate. As noted by the trial court in its judgment entry, the second amended counterclaim sought "Declaratory Judgment that Mike did exactly as the Shareholders' Agreement required in offering his shares to Kenmore." The trial court found that Michael's "November 4, 2016 offer of his shares to Kenmore complied with the Shareholders' Agreement requirement that a divesting

shareholder first present their shares to the company." Ultimately, the trial court concluded that "Defendants are entitled to judgment as a matter of law on Count 3 of Plaintiff's Complaint and Count 2 of the [Amended] Counterclaim." Thus, the trial court effectively declared that Michael complied with the Shareholders' Agreement in offering his shares to Kenmore and that declaration is not challenged on appeal. Because of that, we fail to see how Chris can demonstrate that the trial court erred in granting Bill and the Estate summary judgment as to count three of the complaint as well. Chris has not met his burden on appeal.

{¶25} Chris's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GRANTING SUMMARY JUDGMENT DISMISSING PLAINTIFF'S CLAIM AGAINST DEFENDANTS FOR THEIR BREACH OF CONTRACT IN PREVENTING PLAINTIFF FROM PURCHASING HIS PRO-RATA SHARE OF MIKE'S STOCK.

{¶26} Chris argues in his third assignment of error that the trial court erred in finding in favor of Bill and the Estate with respect to his first cause of action for breach of contract. Specifically, Chris maintains that the trial court erred in determining that Section 12(B) controlled over Section 15(A) with respect to amending and modifying the Shareholders' Agreement. While Chris frames his argument in terms of breach of contract, his first claim actually sought a declaratory judgment that Bill and Michael breached the Shareholders' Agreement by enacting the Second and Third Amendments to the Shareholders' Agreement without a writing signed by all shareholders as required by Section 15(A) of the Shareholders' Agreement.

{¶27} However, in ruling on this count of the complaint, the trial court also ruled on the first amended counterclaim. In that counterclaim, Bill and the Estate sought a declaratory judgment that "the Second, Third and Fourth Amendments to the Shareholders' Agreement are

valid and consistent with the Shareholders' Agreement, to which Plaintiff agreed, as the same were approved by Shareholders holding no less than 60% of the shares of outstanding stock of Kenmore." The trial court not only found in favor of Bill and the Estate on count one of the complaint, it also found in their favor on the first amended counterclaim. In so doing, it stated, that "Section 12(B) controls over Section 15(A) regarding any change to the Shareholders' Agreement." It went on to determine that:

> [A]ny changes, amendments, or modifications to the Shareholders' Agreement made by vote of 60% or more of the outstanding voting shares in Kenmore, pursuant to Section 12(B) of the Shareholders' Agreement, are valid and binding. The Court further finds that because the Second, Third, and Fourth Amendments to the Shareholders' Agreement were passed upon shareholder votes meeting or exceeding the 60% shareholder requirement, these Amendments are facially valid and binding upon the shareholders as a matter of law.

{¶28} Again, given that Chris has failed to challenge the trial court's ruling as to the first amended counterclaim, we fail to see how he can demonstrate the trial court erred in granting summary judgment to Bill and the Estate on the first count of the complaint. To hold otherwise, would essentially invalidate a declaratory judgment that is not being challenged on appeal.

{¶29} Chris's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

> THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GRANTING SUMMARY JUDGMENT DISMISSING PLAINTIFF'S SECOND AND FOURTH CAUSE OF ACTION FOR DEFENDANTS' BREACH OF FIDUCIARY DUTY IN DENYING PLAINTIFF AN EQUAL OPPORTUNITY TO ACQUIRE HIS PRO-RATA SHARE OF MIKE'S STOCK.

{¶30} Chris argues in his fourth assignment of error that the trial court erred in granting summary judgment in favor Bill and the Estate on Chris's second and fourth causes of action.

{¶31} Chris's second claim alleged that Bill and Michael, as majority shareholders, breached their heightened fiduciary duties by amending the Shareholders' Agreement so that Bill

could acquire all of Michael's shares without providing Chris an opportunity to acquire an equal portion of them contrary to the purpose of the Shareholders' Agreement that all shareholders continue to have an equal interest. In his fourth cause of action, Chris asserted that Bill and Michael breached their fiduciary duties by tortiously and maliciously engaging in a conspiracy for Michael to sell all his shares to Bill without a bona fide offer first being made from Michael to Kenmore or equally to Bill and Chris.

{¶32} Chris's fourth claim is premised on the notion that Michael failed to follow the terms of the Shareholders' Agreement in offering his shares to Kenmore. However, as discussed above, the trial court issued declarations in favor of Bill and the Estate stating that Michael's "November 4, 2016 offer of his shares to Kenmore complied with the Shareholders' Agreement requirement that a divesting shareholder first present their shares to the company." Given that the trial court's rulings as to the amended counterclaims are not challenged on appeal, we cannot say that Chris has demonstrated that the trial court erred in granting summary judgment to Bill and the Estate as to Chris's fourth cause of action irrespective of its basis for doing so.

{¶33} The trial court's ruling on Chris's second claim, however, warrants further discussion. "[A] close corporation is a corporation with a few shareholders and whose corporate shares are not generally traded on a securities market." (Internal quotations and citations omitted.) *Palmer v. Bowers*, 9th Dist. Lorain No. 17CA011137, 2019-Ohio-1274, ¶ 17. "In a close corporation, the majority shareholders owe a heightened fiduciary duty to deal in the utmost good faith and loyalty with the minority shareholders. The fiduciary duty between majority shareholders and minority shareholders is breached when the majority shareholders, absent a legitimate business purpose, control the corporation in such a way as to prevent the minority shareholders from having an equal opportunity in the corporation." (Internal quotations and citations omitted.) *Id.* at ¶ 18,

quoting *Crosby v. Beam*, 47 Ohio St.3d 105, 108-109 (1989). There is no dispute that Kenmore is a close corporation.

{¶34} The trial court in its judgment entry concluded that because the Shareholders' Agreement was amended consistent with the express terms of the Shareholders' Agreement controlling amendments, the "conduct [could not] as a matter of law form the basis for a claim for Breach of Majority Shareholder Fiduciary Duty." In so doing, it relied in part upon two appellate cases involving shareholders who signed employment agreements which authorized their terminations without specification of cause. *See Cruz v. S. Dayton Urological Assocs., Inc.*, 121 Ohio App.3d 655, 663 (2d. Dist.1997); *Mulchin v. ZZZ Anesthesia, Inc.*, 6th Dist. Erie No. E-05-045, 2006-Ohio-5773, ¶ 27. In light of the employment agreements, the appellate courts concluded that the shareholders waived the right to argue that the defendants breached a fiduciary duty because they lacked a legitimate business reason for the terminations. *Cruz* at 663; *Mulchin* at ¶ 27. We cannot say that the situations are comparable. In addition, the trial court pointed to a trial court decision that arguably does present similar facts. Nonetheless, as a trial court decision, this Court is not bound to follow it.

{¶35} Here, the provision that Chris agreed to be bound by was a provision explaining the procedure to amend the Shareholders' Agreement, it did not deal with the substance of amendments. Essentially, under the trial court's reasoning, irrespective of the substance of the amendment, Chris could not succeed on a claim of a breach of fiduciary duty as long as the procedure was followed. If this were the law, majority shareholders could easily circumvent their fiduciary duties by enacting amendments to accomplish what would otherwise be impermissible. We cannot say that Chris's contractual agreement to the procedure upon which the Shareholders' Agreement could be amended also meant that Chris was agreeing to the substance of any

amendment so long as it was adopted according to the proper procedure. A provision can be adopted pursuant to the terms of an agreement and nonetheless violate a fiduciary duty.

{¶36} The trial court additionally relied upon the business-judgment rule in finding in favor of Bill and the Estate. However, Chris asserted that Bill and Michael violated their fiduciary duties as majority shareholders, not as directors. The business judgment rule applies to disinterested directors. *See Maas v. Maas*, 1st Dist. Hamilton No. C-190536, 2020-Ohio-5160, ¶ 20-21.

{¶37} Accordingly, as the trial court's basis for awarding summary judgment to Bill and the Estate is unsupported in the law, we agree that the trial court erred in awarding summary judgment to Bill and the Estate on count two of Chris's complaint.

{¶38} Chris's fourth assignment of error is sustained in part and overruled in part.

ASSIGNMENT OF ERROR V

> THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GRANTING SUMMARY JUDGMENT DISMISSING PLAINTIFF'S FIFTH CAUSE OF ACTION FOR BILL SCALA'S BREACH OF FIDUCIARY DUTIES WITH RESPECT TO HIS ADOPTION OF THE FOURTH AMENDMENT TO THE STOCK RESTRICTION AGREEMENT.

{¶39} Chris argues in his fifth assignment of error that the trial court erred in granting summary judgment to Bill and the Estate on Chris's fifth cause of action which alleged Bill breached his fiduciary duty in adopting the Fourth Amendment to the Shareholders' Agreement.

{¶40} The trial court concluded that

> the Fourth Amendment does not disproportionately affect minority shareholders over majority shareholders, but impacts all shareholders equally. The Fourth Amendment does not grant any benefit to the majority shareholder while depriving a minority shareholder of some equal opportunity. As such, the Fourth Amendment cannot serve as the basis for a claim of breach of majority shareholder fiduciary duty.

> Further, Plaintiff's claims stemming from the Fourth Amendment are not ripe for review. Plaintiff has argued that should he predecease Bill, and should Bill remain majority shareholder, then Bill could by majority vote refuse to have Kenmore purchase Plaintiff's shares from his estate and thereafter Bill could refuse to declare dividends, thus potentially marooning Plaintiff's estate with allegedly restricted shares of Kenmore. This claim is purely hypothetical, and reliant on multiple future uncertainties.

{¶41} Chris has developed no argument in his brief explaining why the trial court erred in determining that this controversy was not ripe for review. Accordingly, Chris has not met his burden on appeal to demonstrate that the trial court erred in granting summary judgment on this claim to Bill and the Estate. *See Simon v. Simon*, 9th Dist. Summit No. 29615, 2021-Ohio-1387, ¶ 9 ("It is the Appellant's burden on appeal to affirmatively demonstrate error."); *Covel v. PNC Bank, NA*, 9th Dist. Summit No. 30068, 2022-Ohio-1477, ¶ 7 ("When a trial court grants judgment on multiple, alternative bases and an appellant does not challenge one of those bases on appeal, this Court will uphold the judgment on the unchallenged basis.") (Internal quotations and citations omitted.). While Chris has attempted to create such an argument in his reply brief, reply briefs are not the appropriate place to make new arguments. *See McAllister v. Myers Industries, Inc.*, 9th Dist. Summit No. 29040, 2019-Ohio-773, ¶ 22.

{¶42} Chris's fifth assignment of error is overruled.

ASSIGNMENT OF ERROR VI

> THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GRANTING SUMMARY JUDGMENT MOTION FOR DISMISSAL OF PLAINTIFF'S EIGHTH, NINTH, TENTH AND ELEVENTH CAUSES OF ACTION FOR BILL'S BREACH OF FIDUCIARY DUTY, MISAPPROPRIATION OF COMPANY ASSETS, USURPATION OF BUSINESS OPPORTUNITIES, BREACH OF FIDUCIARY DUTY AND UNJUST ENRICHMENT IN SIPHONING OFF CORPORATE ASSETS AND OPPORTUNITIES FOR HIS OWN PERSONAL BENEFIT.

{¶43} Chris argues in his sixth assignment of error that the trial court erred in granting Bill and the Estate summary judgment on Chris's eighth, ninth, tenth, and eleventh causes of action.

{¶44} We begin by noting that Chris has developed no argument with respect to the eleventh cause of action, pertaining to unjust enrichment. Accordingly, Chris has failed to meet his burden on appeal to demonstrate that the trial court erred in granting summary judgment on that count. *Simon* at ¶ 9.

{¶45} The eighth claim involved allegations that Bill tortiously misappropriated Kenmore assets for his own benefit through other business entities. Chris alleged that Bill "fraudulently and maliciously concealed his misappropriation * * * from Chris * * * until it was uncovered through pretrial discovery." The ninth cause of action contained allegations that Bill tortiously usurped business opportunities of Kenmore for his own disproportionate personal benefit through other business entities. The claim included assertions that Bill "fraudulently and maliciously concealed his usurpation * * * from Chris * * * until it was uncovered through pretrial discovery." Finally, in the tenth claim, Chris maintained that Bill breached fiduciary duties to Chris as a shareholder by using other business entities to misappropriate Kenmore assets and tortiously usurp business opportunities. While multiple entities are referenced in the complaint, on appeal, Chris limits his focus to two: Kenmore Aggregates, LLC/K-Nova, LLC and Nova Housing II, LLC. As to Kenmore Aggregates, LLC/K-Nova, LLC, Chris maintains on appeal that the evidence supports that Bill breached fiduciary duties and usurped corporate opportunities. With respect to Nova Housing II, LLC, Chris focuses his argument on the alleged misappropriation of Kenmore's assets and the usurpation of corporate opportunities. We will limit our discussion accordingly.

<u>Kenmore Aggregates, LLC/K-Nova</u>

{¶46} "A corporate officer has a fiduciary obligation to the corporation he serves. From this fiduciary obligation arises the doctrine of usurpation of a corporate opportunity." (Internal citations omitted.) *Miller Bros. Excavating, Inc. v. Stone Excavating, Inc.*, 2d Dist. Greene No. 97-CA-69, 1998 WL 12646, *5 (Jan. 16, 1998).

> It is a general rule in equity jurisprudence that officers and directors of a corporation, who acquire knowledge and information, in their fiduciary capacity, of investment or other business opportunity, in the line of their corporation's business, cannot appropriate the opportunity of financial or business gain for themselves as individuals, if the opportunity would be advantageous to their corporation and the corporation is financially able to accept the opportunity and make the advantageous acquisition.
>
> Where the corporation presents evidence of usurpation of a corporate opportunity, the fiduciary has the burden of establishing that the opportunity was unavailable to the corporation based on the wishes of the offeror.

(Internal citations omitted.) *Miller Bros. Excavating, Inc.* at *5.

{¶47} It is undisputed that Kenmore's lines of business included highway construction, asphalt plants, and aggregates/mining. Kenmore looked for properties for purposes of mining and/or asphalt plants that it could spin-off into side companies such as Kenmore Aggregates, LLC. Kenmore Aggregates, LLC was formed in 2014 for the purpose of holding a piece of property that contained aggregates, specifically a property referred to as the Peters property. However, ultimately no property was purchased at that time. In his deposition, in discussing when entities were formed, Bill explained, "[u]sually[,] * * * if we have an interest in something, we'll go ahead and register it with the state, State of Ohio. If the deals come through, then we formalize it and go through the rest of the process. If we don't, we don't, so I don't know when they were formed." Bill clarified that, typically, operating agreements setting forth ownership interest were not drawn up until something became of the LLC itself.

{¶48} Despite this assertion, there is also deposition testimony which seems to contradict the foregoing. Pages earlier in his deposition, Bill testified that Chris was a 1/3 owner of Kenmore Aggregates, LLC, a statement which would not make sense if ownership interests were not determined until after property was acquired as Bill later testified. While it appears the attorneys may have disagreed with Bill's statement concerning Chris's ownership interest in Kenmore Aggregates, LLC, it does not appear that that particular statement was corrected during Bill's deposition.

{¶49} It was not until sometime later that the Lehmann property was located. It was over a thousand acres. In February 2017, Bill signed, as the managing member of Kenmore Aggregates, LLC, a purchase agreement to purchase the property for over $16,000,000. The purchase agreement stated that the note would be guaranteed by Kenmore. Kenmore provided Kenmore Aggregates, LLC with the $100,000 earnest money. The hope was to use the property for mining for Kenmore's needs. Prior to closing, the property was annexed to Commercial Point and was rezoned. In the rezoning, all mining was precluded. According to Bill, the property no longer fit within Kenmore's lines of business as now it would involve real estate development, as opposed to mining. Instead of getting the deposit back, in July 2018, Bill opted to pay Kenmore the $100,000 back with interest and develop the property outside of Kenmore. In September 2018, Kenmore Aggregates, LLC was renamed K-Nova, LLC. Ultimately, in November 2018, K-Nova, which included Bill, Paul, Bill's two sons, and Bob Konstand, purchased the property. Chris is not a member of K-Nova.

{¶50} In Bill's and the Estate's motion for summary judgment, they argued that Chris lacked standing to bring the claims and that his claims failed on the merits. They maintained that once mining was prohibited on the property, the property no longer represented a business

opportunity to Kenmore as it was outside Kenmore's lines of business. In addition, they asserted that a majority of the directors did not want Kenmore or Kenmore Aggregates, LLC to pursue the opportunity.

{¶51} In response, Chris only argued that Bill tortiously eliminated Chris's ownership interest in Kenmore Aggregates, LLC. He asserted that the record demonstrated that Chris had an interest in Kenmore Aggregates, LLC and that Bill eliminated his interest when Bill renamed Kenmore Aggregates, LLC K-Nova, LLC.

{¶52} The trial court determined that Kenmore Aggregates, LLC existed in name only as it did not have property, assets, corporate formation documents, shareholders, members, or directors. It further stated that Chris was not a member of either Kenmore Aggregates, LLC or K-Nova, LLC. It then concluded that Chris's claim failed both on the merits and because he lacked standing. In so doing, the trial court noted that Chris had not demonstrated that the property was a viable business opportunity to Kenmore Aggregates, LLC or Kenmore once mining was prohibited. The trial court also stated that Chris did not demonstrate that Kenmore purchased and developed real estate.

{¶53} On appeal, Chris argues that the trial court erred in concluding that Kenmore Aggregates, LLC was not a real business entity, that Chris did not have an ownership interest in Kenmore Aggregates, LLC, and that the development of the property was not a corporate opportunity of Kenmore's. In this section of the brief devoted to Kenmore Aggregates, LLC and K-Nova, LLC, Chris does not challenge the trial court's determination that Chris lacked standing. *See Covel*, 2022-Ohio-1477, at ¶ 7. However, even assuming that Chris's standing argument in the section pertaining to Nova Housing II, LLC was meant to apply to Kenmore Aggregates, LLC

and K-Nova, LLC, we conclude that Chris has failed to demonstrate that his claims should succeed on the merits.

{¶54} Even assuming that Chris had standing to raise his claims related to Kenmore Aggregates, LLC and K-Nova, LLC, Chris has not shown that the trial court erred in granting summary judgment to Bill and the Estate.

{¶55} Chris's only argument in opposition to summary judgment was that Bill eliminated Chris's interest in Kenmore Aggregates, LLC when Bill changed the name to K-Nova, LLC., an argument he seems to raise again on appeal wherein he maintains the trial court's findings are erroneous. However, Chris fails to explain why those findings are relevant with respect to the claims Chris asserted. Even assuming that Chris had an ownership interest in Kenmore Aggregates, LLC, Chris has not explained how the elimination of that interest in the name change to K-Nova, LLC amounted to a usurpation of a corporate opportunity of Kenmore or as related breach of fiduciary to Chris as a Kenmore shareholder.

{¶56} Bill and the Estate put forth evidence that, even assuming that the Lehmann property represented a corporate opportunity for Kenmore, it was no longer one once there was no longer the ability to mine on the property. Chris has pointed this Court to no evidence that would support the development of this particular parcel would fall within Kenmore's line of business. *See Miller Bros. Excavating, Inc.*, 1998 WL 12646, at *5. While Chris's affidavit states that Kenmore has been involved in many development projects which he then lists, he provides no other information about them or indicates how they would be comparable to developing the Lehmann property. Chris has failed to demonstrate that the trial court erred in granting summary judgment to Bill and the Estate with respect to the Kenmore Aggregates, LLC and K-Nova, LLC claims.

Nova Housing II, LLC

{¶57} The Nova Housing entities, including Nova Housing II, LLC, were set up as separate entities to shield Kenmore from potential liability. Bill testified that the construction management work that Nova Housing II, LLC was involved in was substantially more risky than Kenmore's highway work.

{¶58} According to Paul's affidavit, in the early 2000's, Bill developed opportunities through contacts at the University of Akron to serve as a construction manager for several dormitory and campus projects. "Bill approached the Shareholders and Directors to address the fact that construction management services were outside Kenmore's business lines and that he wanted to form a new company to perform this work, but he would own a majority interest in the same." Chris, Paul, and Margaret received a smaller interest in Nova Housing II, LLC, which was formed in 2005 and did not perform any work on a project after 2007. Due to divorce proceedings, Michael was excluded from ownership in Nova Housing II, LLC. Chris described the foregoing somewhat differently. He averred that sometime between 2003 and 2006, Bill told Chris that Bill had formed a "new company called Nova Housing to pursue a business opportunity he had learned about through his own personal contacts which had nothing whatsoever to do with Kenmore. [Bill] said he nevertheless was giving me and the other siblings a small ownership interest in Nova Housing out of his own sense of generosity despite corporate Attorney Steve Hammersmith and corporate accountant Richard Fedorovich purportedly telling Bill he didn't have to share ownership on this opportunity with anybody." Chris averred that he "question[ed] Bill's explanation at the time but did not learn until pretrial discovery in this case that Bill had fraudulently misrepresented and concealed the true facts about Nova Housing in his discussion with [Chris]." Chris also submitted pages of Kenmore's website demonstrating the Kenmore has

had a construction management group since 2001. Chris has acknowledged that the knew from the beginning of Nova Housing II, LLC that Bill owned a larger proportion of the shares than Chris and was aware of the ownership structure.

{¶59} Instead of setting up a separate payroll structure for Nova Housing II, LLC, the payroll was done through Kenmore. This meant that Kenmore hired construction management employees that were then used on the Nova Housing II, LLC project and Nova Housing II, LLC reimbursed Kenmore for those expenses. There is no evidence that Kenmore was not completely reimbursed for its expenses. There was also evidence that what the Kenmore employees were paid was less than the overall amount that Kenmore was paid indicating that Kenmore profited from its involvement. Paul averred that he was aware that Nova Housing II, LLC utilized Kenmore employees in the projects and that he did not have a problem with it.

{¶60} Bill and the Estate argued that Chris lacked standing, that the claims were barred by the statute of limitations, and that they failed on the merits. Chris maintained that the projects performed by Nova Housing II, LLC represented opportunities for Kenmore, that he had standing to bring the claims, and that they were not time barred because Bill fraudulently misrepresented and concealed his misappropriation of Kenmore assets and profits. Chris maintained that Bill lied by telling Chris that Nova Housing II, LLC had nothing to do with Kenmore.

{¶61} The trial court concluded that these claims were barred by the four-year statute of limitations in R.C. 2305.09, that Chris lacked standing to pursue them, and that the claims failed on the merits.

{¶62} On appeal, Chris argues that the trial court erred in concluding Kenmore never performed construction management services and would not have regarded them as a corporate opportunity. Additionally, he disputes that he lacks standing or that the claims are time barred.

{¶63} Even assuming that Chris possessed standing, we cannot say that the trial court erred in granting summary judgment to Bill and the Estate on these claims. To the extent Chris challenges the ownership structure of Nova Housing II, LLC, those arguments are time barred under R.C. 2305.09 as a matter of law. There is no dispute that Chris was aware of the ownership structure around the time the business was formed in 2005. While we agree that the trial court erred in failing to recognize there is a dispute of fact as to whether construction management services fall within Kenmore's line of business, we cannot say that it is determinative. While Chris averred that Bill said that Nova Housing II, LLC had nothing to do with Kenmore, Chris also averred that he questioned that. Further, Paul averred that Bill told the shareholders and directors that the opportunities were in construction management, which Bill maintained were outside Kenmore's line of business. Even if Bill misrepresented that the opportunities were outside of Kenmore's line of business, the evidence supports that Chris was aware of the nature of the opportunity, i.e. that it involved construction management. Further, as a long-term shareholder, director, and employee of Kenmore Chris should have also been aware of the nature of Kenmore's work. The fact that Kenmore openly displayed on its website that it has had a construction management group since 2001 supports that that information was not concealed. Thus, even if Chris's allegations are included within R.C. 2305.09's discovery exception as he alleges, the claim would still be time barred. *See Investors REIT One v. Jacobs*, 46 Ohio St.3d 176 (1989), paragraph 2b of the syllabus. ("[B]y the express terms of R.C. 2305.09(D), the four-year limitations period does not commence to run on claims presented in fraud or conversion until the complainants have discovered, or should have discovered, the claimed matters."). Moreover, even if not barred by the statute of limitations, we cannot conclude that there remains a genuine dispute of material fact as to whether there was an usurpation of a corporate opportunity when the fact of the opportunity

and the nature of the work was presented to the shareholders and the directors and there is no evidence an objection was made. Finally, to the extent that Chris argues on appeal that the record supports that there was a misappropriation of corporate assets via the use of Kenmore employees, there was evidence presented that Nova Housing II, LLC reimbursed Kenmore for these expenses and Kenmore even profited from its involvement. Accordingly, we cannot say that there is a genuine dispute of material fact as to this issue. Overall, Chris has not demonstrated that the trial court erred in granting summary judgment to Bill and the Estate on these claims.

{¶64} Chris's sixth assignment of error is overruled.

ASSIGNMENT OF ERROR VII

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GRANTING SUMMARY JUDGMENT DISMISSING PLAINTIFF'S TWELFTH AND THIRTEENTH CAUSES OF ACTION FOR BILL'S BREACH OF FIDUCIARY DUTY AND CONVERSION OF CHRIS'[S] LOAN RECEIVABLE AND CHRIS'S PROPORTIONATE SHARE OF A KENMORE DISTRIBUTION.

{¶65} Chris argues in his seventh assignment of error that the trial court erred in granting summary judgment on Chris's twelfth and thirteenth causes of action.

{¶66} These claims involve the management of proceeds from the sale of the assets of Kenmore Asphalt Products, Inc. ("KAP") in 2007. Money from the sale was transferred from KAP to Kenmore and appeared on Kenmore's books as an indebtedness to KAP. Ultimately, in order to remove the indebtedness from Kenmore's books, it was decided that as of April 30, 2012, KAP would make a distribution of a note receivable of $3,541,856.66 to Bill, Chris, and Michael who were KAP's shareholders, and, that same day, it was then contributed back to Kenmore by the three shareholders as a capital contribution. Bill testified in his deposition that he told the shareholders about the transaction.

{¶67} Chris alleged in his verified complaint that Bill did the foregoing without Chris's authorization, knowledge, or consent. Chris claimed in his Twelfth cause of action that Bill converted Chris's distribution and alleged in the thirteenth cause of action that Bill breached his fiduciary duty in converting the distribution. In the complaint, Chris maintained that the distribution was one of cash but the documentary evidence supports that it was a note receivable. However, in the brief in opposition to the motion for summary judgment, Chris did acknowledge that distribution from KAP was of a note receivable, not cash.

{¶68} In the motion for summary judgment, Bill and the Estate asserted that Chris's claims were time barred and failed on the merits. As to the statute of limitations, Bill and the Estate maintained that the four-year statute of limitations in R.C. 2305.09 had run and thus the claims were time barred. Bill and the Estate argued that even if Chris did not know about the distribution and capital contribution, he should have known by April 2013 as the same would have been reflected on his personal tax records. *See Investors REIT One*, 46 Ohio St.3d 176 at paragraph 2b of the syllabus. Bill and the Estate pointed to Chris's 2012 Schedule K-1 for KAP which includes in line 16 the amount of $3,541,864 and specifies that line represents items affecting shareholder basis. The record also contains the audited 2012 financial statements of Kenmore. As an S Corporation, the shareholders of Kenmore themselves are taxed on their proportionate share of Kenmore's taxable income. The April 30, 2012 balance sheet reflects under the heading of shareholders' equity and the line item of "Additional paid in capital" the amount of $10,678,669. Finally, the deposition of Richard Fedorovich is in the record. Mr. Fedorovich and the firm he worked for did the accounting for all of Kenmore's business entities and all of the shareholders at the times relevant to these claims. Mr. Fedorovich testified that, while he did not do the personal

returns for the shareholders, he did sign the personal returns and reviewed them with each shareholder.

{¶69} As to the merits, Bill and the Estate asserted that Bill never possessed or exercised dominion or control over the property upon which Chris's claim was based, that the money at issue was not identifiable, and that Chris was not damaged.

{¶70} While Chris responded to the arguments on the merits, Chris did not argue that the claims were not time barred. The trial court concluded in its judgment entry that the claims were time barred and failed on the merits.

{¶71} On appeal, Chris argues both that his claims do not fail on the merits and are not time barred. However, as he did not argue below that the claims were within the statute of limitations, he cannot do so now on appeal. *See Huntington Natl. Bank v. Anderson*, 9th Dist. Lorain No. 17CA011223, 2018-Ohio-3936, ¶ 20. Chris also has not specifically argued that Bill and the Estate failed to meet their initial summary judgment burden on that point. Moreover, based on the evidence and arguments properly before us, we conclude that the trial court did not err in determining that Bill and the Estate met their initial summary judgment burden to demonstrate that the claims at issue were time barred. The transactions occurred in 2012 and Chris did not raise these claims until 2020. Further, the evidence presented by Bill and the Estate, absent argument and evidence to the contrary, would support that Chris should have been aware of these claims well over four years before his complaint was filed.

{¶72} To the extent Chris argues on appeal that "the statute of limitations has no application to Chris's claim that Bill wrongfully converted the $7,083,731 he took out of Kenmore last February without having Kenmore make any proportionate distribution to Chris[,]" we note

that Chris did not make any claim alleging the same and he never amended his complaint to add such a claim. Thus, that assertion is also without merit.

{¶73} Chris's seventh assignment of error is overruled.

III.

{¶74} Chris's fourth assignment of error is sustained in part and overruled in part. His remaining assignments of error are overruled. The judgment of the Medina County Court of Common Pleas is affirmed in part and reversed in part. The matter is remanded for proceedings consistent with this decision.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

DONNA J. CARR
FOR THE COURT

HENSAL, P. J.
CONCURS.

SUTTON, J.
CONCURS IN JUDGMENT ONLY.

APPEARANCES:

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