

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2079**

Jeffery D. Gordon,
Respondent,

vs.

Consulting Radiologists, Ltd., et al.,
Appellants.

**Filed June 17, 2019
Affirmed
Klaphake, Judge***

Hennepin County District Court
File No. 27-CV-16-15092

Randy G. Gullickson, Daniel R. Hall, Anthony Ostlund Baer & Louwagie P.A.,
Minneapolis, Minnesota (for respondent)

Marko J. Mrkonich, Benjamin D. Sandahl, Littler Mendelson, P.C., Minneapolis,
Minnesota (for appellants)

Considered and decided by Johnson, Presiding Judge; Reilly, Judge; and Klaphake,
Judge.

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

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellants challenge the district court's award of damages and attorney fees based upon findings that they breached fiduciary duties they owed respondent and violated provisions of the Minnesota Business Corporation Act. We affirm.

FACTS

This case arises out of respondent Dr. Jeffery D. Gordon's expulsion from appellant Consulting Radiologists, Ltd. (CRL), a closely held Minnesota corporation of which he was a shareholder and a member of the board of directors. Following his termination from CRL in the fall of 2016, Dr. Gordon brought a lawsuit against CRL and two of its shareholders, appellants Dr. Norman Arslanlar and Dr. Christopher Tillotson (appellant-doctors). At the time, Dr. Arslanlar was the chairman of CRL's board of directors, and Dr. Tillotson was CRL's president. Dr. Gordon alleged, inter alia, that appellant-doctors had breached the fiduciary duties they owed him and violated provisions of the Minnesota Business Corporation Act (MBCA). Following a combined jury and bench trial, the district court found appellant-doctors liable for breaches of fiduciary duty and violations of the MBCA, concluding that they had wrongfully "engaged in a course of conduct that culminated in [Dr. Gordon's] suspension from CRL and its Board of Directors, and ultimately resulted in his termination from CRL." The district court awarded Dr. Gordon \$642,857 in damages and \$175,000 in attorney fees. This appeal follows.

DECISION

Appellants' numerous arguments can be broadly described as, the district court: (1) erred in finding that they breached fiduciary duties owed to Dr. Gordon; (2) erred in finding that they violated the MBCA; (3) erred in awarding attorney fees to Dr. Gordon; and (4) abused its discretion by not granting appellants a new trial. We address each in turn.

I. Fiduciary Duties

Appellants make several arguments with respect to Dr. Gordon's fiduciary-duty claim. But, as an initial matter, it is important for us to properly frame the fiduciary-duty question. Dr. Gordon alleged in his complaint that appellants owed him fiduciary duties as co-shareholders and co-directors in a Minnesota closely held corporation. And the district court found that, as shareholders, appellants owed duties to Dr. Gordon in his capacity as a fellow shareholder. Unlike the appellant-doctors' characterization of Dr. Gordon's claim, the claim has never been that Dr. Gordon was owed fiduciary duties as an employee of CRL. Thus, Dr. Gordon's fiduciary-duty claim is a shareholder claim.

Appellants make four relevant arguments. First, they contend that the district court erred in finding that they breached their fiduciary duties owed to Dr. Gordon. Second, they assert that they did not cause the damages Dr. Gordon suffered. Third, they insist that the damages awarded on the fiduciary-duty claim were not supported by any evidence. And fourth, they claim that the district court erred by not applying the business judgment rule.

A. Breaches of fiduciary duties

Appellants begin by asserting that the district court erred in finding that they breached the fiduciary duties they owed to Dr. Gordon. Shareholders in a closely held corporation owe each other fiduciary duties. *Berreman v. West Publ'g Co.*, 615 N.W.2d 362, 367 (Minn. App. 2000), *review denied* (Minn. Sept. 26, 2000). Fiduciary-duty law imposes upon shareholders the “highest standards of integrity and good faith in their dealings with each other,” and requires that shareholders deal with each other openly, honestly, and fairly. *Pedro v. Pedro*, 489 N.W.2d 798, 801 (Minn. App. 1992), *review denied* (Minn. Oct. 20, 1992) (quotation omitted). “The common law fiduciary duty, sometimes called the duty of good faith and fair dealing, embraces both substantive obligations that focus on the outcomes of shareholder conduct and procedural obligations that focus on process.” *Gunderson v. All. of Comput. Prof'ls, Inc.*, 628 N.W.2d 173, 185 (Minn. App. 2001) (quotation omitted), *review granted* (Minn. Jul. 24, 2001), *appeal dismissed* (Minn. Aug. 17, 2001). Fiduciary duties also include the duty to disclose material facts. *Berreman*, 615 N.W.2d at 371. Whether appellants breached fiduciary duties is a question of fact that we review for clear error. *See id.* at 367.

The district court found that appellants breached their fiduciary duties because: (1) Dr. Arslanlar secretly communicated with Dr. Gordon’s wife for months about issues related to CRL business and requested that she conceal these communications from Dr. Gordon; (2) appellant-doctors refused to have a discussion with Dr. Gordon about ongoing issues without Dr. Arslanlar being present; (3) Dr. Arslanlar called a meeting of the board of directors on short notice in violation of CRL’s bylaws; (4) appellant-doctors suspended

Dr. Gordon from the board of directors in violation of CRL's bylaws; (5) appellant-doctors failed to disclose the suspension and subsequent reinstatement to Dr. Gordon; (6) appellant-doctors concealed board communications and actions from Dr. Gordon; (7) Dr. Tillotson sent a false letter to Abbott Northwestern for the purpose of causing Dr. Gordon's hospital privileges to be revoked; and (8) appellant-doctors caused Dr. Gordon's termination and eliminated his shareholder compensation.

Appellants first argue that there was no breach of fiduciary duty based on a board meeting being called with short notice and that even if there were, they should not be held personally liable. Dr. Arslanlar called this emergency meeting in order to discuss Dr. Gordon, and it led to his suspension from the board. As stated above, fiduciary duties include procedural obligations. *See Gunderson*, 628 N.W.2d at 185. CRL's bylaws required that emergency board meetings be called with at least 24 hours' notice. But Dr. Arslanlar did not comply with this requirement when he called the meeting. Accordingly, we conclude that the district court did not err in finding that the short notice constituted a breach of fiduciary duty.

Appellants also argue that their refusal to allow Dr. Gordon to meet with CRL without Dr. Arslanlar present was not a breach of fiduciary duty because their conduct was less severe than the conduct in an unpublished case from this court. "Unpublished opinions of the court of appeals are not precedential." Minn. Stat. § 480A.08, subd. 3(b) (2018). Moreover, Dr. Gordon had accused Dr. Arslanlar of inappropriately communicating with his wife in secret, and appellants do not dispute the district court's finding that their insistence that Dr. Arslanlar be present at any meeting with Dr. Gordon violated CRL's

policies. Accordingly, appellants' conduct violated the procedural obligations that appellants owed Dr. Gordon. *See Gunderson*, 628 N.W.2d at 185. We conclude that the district court did not err in finding a breach of fiduciary duty.

Appellants dispute the district court's finding that Dr. Tillotson's letter to Abbott Northwestern constituted a breach of fiduciary duty. They contend that the letter was true and in no way improper. But they fail to explain why any of the district court's findings related to the letter—including findings that Dr. Tillotson inaccurately informed the hospital that CRL was not aware of why Dr. Gordon was taking a leave of absence and that Dr. Tillotson sent the letter for the purpose of causing Dr. Gordon to lose his hospital privileges—are clearly erroneous.¹ We conclude that the district court did not err.

Appellants argue as well that Dr. Gordon's suspension from the board of directors was not a breach of fiduciary duty on their part because they do not vote on board actions. But there was testimony that the decision to suspend Dr. Gordon was not made by a formal vote but rather "[e]ach person was polled . . . and nobody objected" to the suspension. Both Dr. Arslanlar and Dr. Tillotson attended the meeting. Moreover, Dr. Arslanlar was the one who called the meeting, and he presented information about Dr. Gordon at the meeting, including text messages he had exchanged with Dr. Gordon's wife. We conclude that the

¹ Appellants also seem to argue that the district court was not allowed to find that sending the letter was a breach of fiduciary duty because of a prior summary-judgment ruling it had made which was, according to them, the "law of the case." But their argument rests on a misreading of *Zurich Am. Ins. Co. v. Bjelland*, 690 N.W.2d 352, 355 (Minn. App. 2004), *rev'd on other grounds*, 710 N.W.2d 64 (Minn. 2006). And the district court would be free to revisit its summary-judgment determination under Minn. R. Civ. P. 54.02.

district court did not err because the record is sufficient to support a finding that even if appellants did not formally vote for the suspension, they worked to effectuate it.

Appellants assert that Dr. Arslanlar's communications with Dr. Gordon's wife were not breaches of fiduciary duty. First, they argue that the communications were not secret. But there was testimony from Dr. Gordon's wife that Dr. Arslanlar asked her to keep their conversations confidential. And second, they argue that the communications were not material. *Berreman* states that shareholders in closely held corporations have a "duty to disclose material information about the corporation." 615 N.W.2d at 371. Materiality "depends on the specific facts of each case." *Id.* And in this case, the communications dealt with issues relating to CRL business, including how to manage Dr. Gordon and how to handle a physician in his practice group. We agree with the district court's conclusion that the content of the communications was material. Thus, we conclude that the district court did not err in finding a breach of fiduciary duty based on the secret communications.

Finally, appellants claim that Dr. Gordon's termination was not a breach of the fiduciary duties owed to him. But the district court's finding that appellants "engaged in a course of conduct that culminated in [Dr. Gordon's] suspension from CRL and its Board of Directors, and ultimately resulted in his termination from CRL" is supported by the record and the district court's other findings of fact. The district court's findings and the other breaches of fiduciary duty seem to indicate a coordinated effort on appellants' part

to discredit Dr. Gordon and cover up Dr. Arslanlar's unprofessional conduct with Dr. Gordon's wife. Therefore, this finding was also not clearly erroneous.²

B. Causation

Appellants argue that even if they breached their fiduciary duties to Dr. Gordon, those breaches did not cause Dr. Gordon's damages. Dr. Gordon was awarded damages for the wages he lost as a result of being forced out of CRL. Appellants claim those losses were self-inflicted by Dr. Gordon's behavior. But this reasoning completely ignores the district court's finding that appellants "engaged in a course of conduct that culminated in [Dr. Gordon's] suspension from CRL and its Board of Directors, and ultimately resulted in his termination from CRL." Appellants have not demonstrated that this finding was clearly erroneous, so we conclude that the district court did not err in finding causation.

C. Lack of support for damages

Appellants argue that the district court's award of damages should be rejected because it was not supported by any evidence. We review an award of damages for a clear abuse of discretion. *Dallum v. Farmers Union Ctr. Exch., Inc.*, 462 N.W.2d 608, 614 (Minn. App. 1990), *review denied* (Minn. Jan. 14, 1991). And generally an award will not be disturbed "unless the failure to do so would be shocking or would result in plain injustice." *Dunn v. Nat'l Beverage Corp.*, 745 N.W.2d 549, 555 (Minn. 2008) (quotation

² Appellants also argue that the district court "erred in the process it used to reach" the conclusion that they breached fiduciary duties because it did not sufficiently compare their case to two specific cases. Appellants cite to no relevant law to support their argument, so it is forfeited. *See State v. Bursch*, 905 N.W.2d 884, 889 (Minn. App. 2017) ("Arguments are forfeited if they are presented in a summary and conclusory form, do not cite to applicable law, and fail to analyze the law when claiming that errors of law occurred.").

omitted). The district court found that Dr. Gordon “earns \$192,895 less per year than he was making at CRL” and his “losses will continue for at least five years.” This equals nearly a million dollars over the course of five years. The advisory jury found that Dr. Gordon’s damages amounted to \$642,857, and the district court found this to be reasonable and supported by the evidence. Because the ultimate award for damages was about \$300,000 less than it could have been, we do not see how the district court abused its discretion in awarding it, nor do we see how the failure to overturn this award “would be shocking or would result in plain injustice.” *See id.* We conclude that the district court did not abuse its discretion.

D. Business judgment rule

Appellants also argue that the district court erred by not applying the business judgment rule to their conduct. “The business judgment rule is a presumption . . . to protect boards of directors against shareholder claims that the board made unprofitable business decisions.” *In re UnitedHealth Grp. Inc. S’holder Derivative Litig.*, 754 N.W.2d 544, 551 (Minn. 2008) (quotation omitted). Under this rule, “so long as a disinterested director makes an informed business decision, in good faith, without an abuse of discretion, he or she will not be liable for corporate losses resulting from his or her decision.” *Id.* (quotation omitted). But this is not a case of a shareholder suing a director derivatively for corporate losses; nor is it a case of a shareholder claiming that a director made an unprofitable business decision. The business judgment rule is therefore irrelevant to Dr. Gordon’s fiduciary-duty claim.

II. MBCA

Appellants claim that they fulfilled their obligations under the MBCA, and they make two principal arguments. First, they assert that Minn. Stat. § 302A.467 (2018) cannot be the basis for a cause of action. And second, they argue that the district court erred in finding for Dr. Gordon on his claim under Minn. Stat. § 302A.751 (2018) because they acted in accordance with his reasonable expectations.

A. Section 302A.467

Appellants challenge the district court's conclusion that Dr. Gordon succeeded on count three of his complaint. In count three, Dr. Gordon invoked Minn. Stat. § 302A.467 and alleged that appellants had "violated provisions of Minn. Stat. Chapter 302A, specifically including . . . provisions relating to the duties and standard of care of directors, officers, and shareholders of CRL." Section 302A.467 states:

If a corporation or an officer or director of the corporation violates a provision of this chapter, a court in this state may, in an action brought by a shareholder of the corporation, grant any equitable relief it deems just and reasonable in the circumstances and award expenses, including attorneys' fees and disbursements, to the shareholder.

The district court awarded attorney fees to Dr. Gordon under this section.

Appellants argue that the district court erred in granting relief on this claim because Minn. Stat. § 302A.467 does not provide an independent cause of action and Dr. Gordon did not specifically enumerate what sections of chapter 302A they had violated. We have previously explained "that section 302A.467 is directed more at a remedy than at providing a ground for a claim." *Isaacs v. Am. Iron & Steel Co.*, 690 N.W.2d 373, 378-79 (Minn.

App. 2004), *review denied* (Minn. Apr. 4, 2005). And the language of the statute makes it clear that its applicability depends on a plaintiff showing that a corporation, officer, or director “violate[d] a provision of this chapter.” Minn. Stat. § 302A.467. The district court found that appellants had violated Minn. Stat. §§ 302A.251 and .361 (2018), which establish standards of conduct for directors and officers respectively. We are satisfied that the district court did not use section 302A.467 as an independent cause of action.

We are similarly unconvinced by appellants’ contention that Dr. Gordon inadequately pleaded what sections of chapter 302A they violated. “A major purpose of pleadings is to give fair notice to the adverse party of the incident giving rise to the suit with sufficient clarity to disclose the pleader’s theory upon which his claim for relief is based.” *Basich v. Bd. of Pensions*, 493 N.W.2d 293, 295 (Minn. App. 1992) (quotation omitted). And “pleadings shall be so construed as to do substantial justice.” Minn. R. Civ. P. 8.06. Dr. Gordon’s complaint made it clear he was alleging that appellants violated “provisions relating to the duties and standard of care of directors, officers, and shareholders of CRL,” which is precisely what sections 302A.251 and .361 cover. This was sufficient to put appellants on notice, and their argument fails.³

B. Section 302A.751 and reasonable expectations

Appellants next argue that the district court erred in finding that they violated Minn. Stat. § 302A.751. That section provides, in relevant part, that a district court may grant

³ Appellants rely on *Isaacs* to argue that Dr. Gordon was required to specifically enumerate which sections of chapter 302A they violated. In *Isaacs* we affirmed the dismissal of a claim under section 302A.467 as “impermissibly vague,” but we did not purport to create a specific-enumeration requirement. 690 N.W.2d at 378-79.

equitable relief in a shareholder action when it is established that “the directors or those in control of the corporation have acted in a manner unfairly prejudicial toward one or more shareholders in their capacities as shareholders or directors of a corporation that is not a publicly held corporation, or as officers or employees of a closely held corporation.” Minn. Stat. § 302A.751, subd. 1(b)(3). “The term ‘unfairly prejudicial’ should be liberally construed.” *Berreman*, 615 N.W.2d at 373. And unfairly prejudicial conduct “is conduct that frustrates the reasonable expectations of shareholders.” *Id.* at 374. The district court found that appellants acted in an unfairly prejudicial manner by: (1) refusing to investigate Dr. Gordon’s complaints; (2) suspending Dr. Gordon from the board of directors; and (3) terminating Dr. Gordon’s employment.

Appellants first claim that because Dr. Gordon did not have a reasonable expectation of continued employment, his termination was not unfairly prejudicial. They hinge their argument on language in section 302A.751, subdivision 3a, saying that “employment agreements . . . are presumed to reflect the parties’ reasonable expectations” and Dr. Gordon’s employment agreement indicating he was an at-will employee. The district court found that this presumption was overcome, explaining that “Dr. Arslanlar, the Chairman of the CRL Board, testified that a shareholder-doctor can only be terminated at CRL when there is a good reason” and that “[r]egardless of what any employment agreement says, the expectation is that a termination must be for a good reason.”

Appellants claim that the district court was wrong to rely on Dr. Arslanlar’s testimony in order to determine that the presumption had been overcome because, under *Gunderson*, “General statements about job security, company policy, or an employer’s

desire to retain an employee indefinitely are insufficient to overcome the presumption that employment is at will.” 628 N.W.2d at 182. But appellants misread *Gunderson*. The *Gunderson* court was referring to general statements made to an employee about his or her employment status. *See id.* Dr. Arslanlar was testifying about termination, not making a general statement to Dr. Gordon as an employee. Thus, the comment on general statements is inapplicable to this case. We see no reason to disturb the district court’s finding that the presumption was overcome and that Dr. Gordon had a reasonable expectation of continued employment.

Appellants also argue that Dr. Gordon had no reasonable expectation that they would handle his suspension from the board of directors or its investigation into his claims of harassment against Dr. Arslanlar any differently. But, as previously mentioned, the suspension from the board of directors and the failure to investigate the claims of harassment were in contravention of CRL’s bylaws and established policies respectively. And appellants provide no reason why Dr. Gordon would not have a reasonable expectation that CRL would follow its bylaws and established policies. This argument fails.

III. Attorney Fees

Appellants next assert that the district court erred by not properly limiting the attorney fees that Dr. Gordon received. We review an award of attorney fees for an abuse of discretion. *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 608, 620 (Minn. 2008). The “award must reflect the *degree* of success obtained.” *Id.* at 623 (quotation omitted)

Appellants argue that the district court erred because it awarded Dr. Gordon half the attorney fees that he sought. They assert that he should only have been awarded 30% or

34% of the fees that he requested because he only succeeded on three of his ten claims and recovered only a third of the damages that he sought. But appellants do not cite to any authority that requires a strict mathematical calculation to determine degree of success in a case. The district court spent six and a half pages carefully analyzing the request for attorney fees and then awarded less than half of what was requested. This reflects the reality that Dr. Gordon was not entirely successful in his lawsuit. And we are satisfied that the district court properly exercised its discretion in awarding attorney fees.

IV. Motion for a New Trial

Appellants conclude by arguing that the district court erred in denying their motion for a new trial. We review such a denial for an abuse of discretion. *Christie v. Estate of Christie*, 911 N.W.2d 833, 838 (Minn. 2018). “A district court may grant a new trial for ‘[e]rrors of law occurring at the trial’ or when ‘[t]he verdict . . . is not justified by the evidence, or is contrary to the law.’” *Id.* (quoting Minn. R. Civ. P. 59.01).

Appellants argue that the jury instructions were deficient and they were therefore deprived of a fair trial on counts one, two, and three. A district court has broad discretion in determining jury instructions, and an appellate court will not reverse the district court if the jury instructions “overall fairly and correctly state the applicable law.” *Id.* (quotation omitted). If one of the district court’s jury instructions was erroneous and the error was prejudicial to appellants, or the effect of the erroneous jury instruction cannot be determined, a new trial is required. *Id.* And an erroneous jury instruction “is prejudicial if a more accurate instruction would have changed the outcome of the case.” *Id.* (quotation omitted). But the jury was only an advisory jury with respect to counts one through three,

and appellants prevailed on counts four through ten. It was the district court that ultimately found appellants liable. Accordingly, appellants have failed to demonstrate that they were prejudiced when the jury's verdict was non-binding with respect to the relevant counts.

Appellants also argue that the district court made errors of law at trial by allowing inadmissible hearsay and character testimony and by not allowing their expert to testify about the value of the CRL shares. But they neither allege nor demonstrate that they were prejudiced by these rulings. This argument also fails, and we conclude that the district court did not abuse its discretion in denying appellants' motion for a new trial.

Affirmed.