STATE OF MICHIGAN

COURT OF APPEALS

MARK WOJCIK and MARJORIE WOJCIK, Plaintiffs/Counter-Defendants-Appellants,	UNPUBLISHED July 25, 2006
v	No. 267005 Oakland Circuit Court
WILLIAM J MCNISH and MCNISH'S SPORTING GOODS & TROPHIES INC, Defendants/ Counter-Plainitffs-Appellees.	LC No. 2003-052644

Before: Kelly, PJ, and Markey and Meter, JJ.

PER CURIAM.

In 1982, Mark Wojcik ("plaintiff" or "Wojcik")[1] and William J. McNish ("defendant" or "McNish") formed the defendant McNish Sporting Goods and Trophies, Inc. (the "company" or the "corporation"). The business relationship between plaintiff and defendant soured after defendant, the majority stockholder in the company, insisted that his son-in-law, Christian Beaudoin ("Beaudoin"), participate in the business. Plaintiff claims that elevating Beaudoin to company management forced him to resign as day-to-day manager of the company, and that subsequently, defendants refused to buy his stock contrary to the parties' agreement to form the corporation. The trial court granted defendants' motion for summary disposition. Plaintiffs appeal by right. We affirm in part, reverse in part, and remand for further proceedings.

I

Plaintiffs originally filed an eight-count complaint, which grew to nine counts in plaintiffs' first amended complaint. Plaintiffs alleged defendants breached fiduciary duties, engaged in actionable oppressive conduct under MCL 450.1489, breached employment contracts and a stock purchase agreement, wrongfully terminated or constructively discharged plaintiff,

[1] The singular "plaintiff" refers only to plaintiff Mark Wojcik unless otherwise specified. The factual and legal bases of plaintiff Marjorie Wojcik's claims are so inadequately briefed that they are deemed abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

discriminated because of age, and owed money damages in a corporate "derivative" claim. Plaintiffs also sought declaratory and injunctive. After discovery was completed, defendants moved for summary disposition. Plaintiffs filed a response brief and also moved for summary disposition. The trial court heard arguments of counsel at the conclusion of which the trial court took the matter under advisement. The trial court issued its opinion and order granting defendants' motion for summary disposition on January 31, 2005.

The court ruled that plaintiffs' minority oppression claim failed because it lacked evidentiary support that defendants engaged in "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of a shareholder as a shareholder." MCL 450.1489. The court granted defendants summary disposition on plaintiff's age discrimination claim because plaintiff had not established that he had suffered an adverse employment action. The court determined that at best plaintiff had established only nepotism, which was not actionable under either state or federal law.

Regarding plaintiff's contract claims, the court ruled without further explanation, "that no questions of fact exist and Defendants' motion as to claims relating to the written agreement is granted." The trial court opined with respect to the stock purchase agreement, "that there is no evidence that the parties ever reached an agreement on the essential terms and even if such an agreement existed, Wojcik repudiated it when he stated that he would not abide by the agreement without a guaranty from McNish." Thus, the court concluded that because plaintiff repudiated the agreement, defendants were entitled to treat the agreement as terminated.

After the trial court issued its ruling, plaintiffs believed that some counts remained viable. Subsequently, after further motions and briefing, the trial court issued a second opinion and order, clarifying that it had dismissed all of plaintiffs' claims, and that only defendants' counterclaims remained. Plaintiffs appeal by right.

II

We review de novo a trial court's decision to grant or deny summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A party's motion brought under MCR 2.116(C)(10) tests the factual sufficiency of a claim and must be supported by affidavits, depositions, admissions, or other documentary evidence. *Id*. at 120. The trial court must view the substantively admissible evidence submitted at the time of the motion in the light most favorable to the party opposing the motion to determine if a party is entitled to judgment as a matter of law. *Id*. at 118, 120. If the moving party fulfills its initial burden, the party opposing the motion then must demonstrate with evidentiary materials that a genuine and material issue of disputed fact exists, and may not rest upon mere allegations or denials in the pleadings. MCR 2.116(G)(4); *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996). A trial court properly grants summary disposition when no genuine issue regarding any material fact exists and the moving party is entitled to judgment as a matter of law. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Id*.

We review questions of law de novo. *Bertrand v Mackinac Island,* 256 Mich App 13, 28; 662 NW2d 77 (2003). Accordingly, this Court reviews de novo the interpretation and

application of a statute. *Eggleston v Bio-Medical Applications of Detroit, Inc,* 468 Mich 29, 32; 658 NW2d 132 (2003). Further, both the questions of whether contract language is ambiguous and the proper interpretation of a contract are questions of law, which we review de novo. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003).

III

Plaintiff argues that the trial court erred by dismissing his claim that McNish, as majority stockowner, breached his fiduciary duty to both the corporation and plaintiff, a minority stockholder, because material questions of fact remain regarding this claim. We disagree.

In *Production Finishing Corp v Shields*, 158 Mich App 479, 486; 405 NW2d 171 (1987), this Court citing elemental rules of agency observed: "It is beyond dispute that in Michigan, directors and officers of corporations are fiduciaries who owe a strict duty of good faith to the corporation which they serve." Applying common-law agency principles, "'[a] fiduciary owes a duty of good faith to his principal and is not permitted to act for himself at his principal's expense during the course of his agency.'" *The Meyer and Anna Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute,* 266 Mich App 39, 49; 698 NW2d 900 (2005), quoting *Central Cartage v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998).

Here, all of the alleged breaches of fiduciary duty by defendant relate to the appointment of Beaudoin as an officer and manager of the company. In essence, plaintiff claims that Beaudoin's promotion would ultimately lead to the financial ruin of the company and consequent depreciation in the value of the company's stock. Plaintiff cites *Salvador v Connor*, 87 Mich App 664; 276 NW2d 458 (1978), in support of his position. But, in that case the plaintiff alleged the defendants hired relatives for managerial positions where they "performed few, if any, services of value for the corporation," and the defendants otherwise fraudulently diverted corporate money for the defendants own benefit. In contrast, plaintiff alleges that Beaudoin was simply not capable of managing the company, not that McNish was diverting corporate assets to his own use. When a party fails to cite any supporting legal authority for its position, the issue is deemed abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999).

Moreover, plaintiffs' claim of harm to the corporation is based on speculation about the company's performance in the future. After a change in management, company revenues may decrease for any number of reasons, including a general downturn in economic conditions, economic health of clients, loss of key personnel, change in accounting practices, or increased competition. Indeed, plaintiff acknowledged that after his departure from the company, the company would face a difficult transition. In addition, plaintiff testified that after leaving the company he started working for the company's competitors. In sum, plaintiff's claim regarding breach of fiduciary duty must fail because it is based on speculation regarding future profitability of the corporation. The causal relationship between the alleged breach of duty and the alleged harm is too speculative to be sustained. See, e.g., in another context, *Skinner v Square D Co,* 445 Mich 153, 164; 516 NW2d 475 (1994) ("To be adequate, a plaintiff's circumstantial proof must facilitate reasonable inferences of causation, not mere speculation.").

Moreover, McNish's decisions are shielded by the business judgment rule, under which courts are reluctant to interfere with the discretion vested in the directors and officers of the corporation to manage its affairs. *In re Estate of Butterfield*, 418 Mich 241, 255; 341 NW2d 453

(1983); See, also, *Dodge v Ford Motor Co*, 204 Mich 459, 500; 170 NW 668 (1919), quoting 2 Cook on Corporations (7th Ed.), § 545: "'The discretion of the directors will not be interfered with by the courts, unless there has been bad faith, wilful neglect, or abuse of discretion.'"

Plaintiffs have not alleged, nor did they present any evidence to the trial court that McNish engaged in bad faith, willful neglect, or abuse of discretion. Plaintiff conceded in his deposition that he could not believe McNish would ever do anything to intentionally harm the company. Further, the company had not adopted an anti-nepotism policy; relatives of both plaintiff and defendant had worked for the company in the past. Indeed, if a change in corporate management or nepotism in a close corporation could serve as a basis for a claim of bad faith, willful neglect, or abuse of discretion, the courts would be flooded with litigation. In sum, because plaintiff did not allege or present any evidence of bad faith, willful neglect, or abuse of discretion, the trial court properly dismissed plaintiff's claim for breach of fiduciary duties.

IV

Next, plaintiffs argue that the trial court erred by granting summary disposition on their claim under MCL 450.1489. We disagree. Plaintiffs failed to produce evidence to create a material question of fact that defendants engaged in "willfully unfair and oppressive conduct" through a "continuing course of conduct or a significant action or series of actions" that substantially interfered with plaintiff's interests as a shareholder. So, the trial court properly granted defendants' motion for summary disposition on this claim.

This Court has held that MCL 450.1489, § 489 of the Michigan Business Corporation Act (MBCA) creates a cause of action to which the residual six-year limitation period of MCL 600.5813 applies. *Estes v Idea Engineering & Fabricating, Inc*, 250 Mich App 270, 285-286; 649 NW2d 84 (2002). The *Estes* conflict panel did not address, however, what conduct could be actionable under § 489. But this Court considered that question in *Franchino v Franchino*, 263 Mich App 172; 687 NW2d 620 (2004), a case involving a close corporation similar to this case. In *Franchino,* the plaintiff was a 31% shareholder, director, and an employee of the corporation. The defendant was a 69% shareholder, director, and the plaintiff's father. The plaintiff sought relief under § 489 after the defendant fired him and orchestrated the plaintiff's removal as a director of the corporation. *Franchino, supra* at 176-178. The plaintiff alleged that the defendant engaged in "willfully unfair and oppressive conduct" under § 489 "by terminating [the] plaintiff's employment in violation of the employment contract, removing [the] plaintiff from the board of directors, and amending the bylaws of the corporation." *Franchino, supra* at 178. This Court affirmed the trial court's grant of summary disposition in favor of the defendant, opining that § 489

> neither explicitly protects minority shareholders' interests as employees or directors, nor is it silent on the issue. Rather, the Legislature amended the statute to explicitly state that minority shareholders could bring suit for oppression only for conduct that "substantially interferes with the interests of the shareholder *as a shareholder*." MCL 450.1489(3) (emphasis added). To construe the statute in a way that allows plaintiff to sue for oppression of his interests as an employee and director would ignore the Legislature's decision to insert the phrase "as a shareholder" and render the phrase nugatory, which is contrary to a fundamental rule of statutory construction. Accordingly, we hold that the trial court correctly

> concluded that MCL 450.1489(3) does not allow shareholders to recover for harm suffered in their capacity as employees or board members.[2] [*Franchino, supra* at 185-186 (citations omitted).]

Thus, the *Franchino* Court held that § 489 "only gives rise to a cause of action in cases where a minority shareholder suffered oppression in his capacity as a shareholder" *Franchino, supra* at 189. The trial court properly granted summary disposition to the defendant because "employment and board membership are not generally listed among rights that automatically accrue to shareholders." *Id*. at 184. The Court noted that shareholder's rights "are typically considered to include voting at shareholder's meetings, electing directors, adopting bylaws, amending charters, examining the corporate books, and receiving corporate dividends." *Id*., citing 12 Fletcher Cyclopedia Corporations, ch 58, § 5717, p 22. Under the MBCA, the principal rights of shareholders in an ordinary business corporation "are to have a certificate of stock in proper form, to attend and vote at corporate meetings, and to take part in the election of directors." 9 MLP Corporations, § 191 (citations omitted). In general, corporate actions requiring a shareholder vote are "authorized by a majority of the votes cast by the holders of shares entitled to vote on the action, unless a greater vote is required in the articles of incorporation." MCL 450.1441(2).

In this case, plaintiff has not offered evidentiary support for his claim that defendants engaged in "a continuing course of conduct or a significant action or series of actions that substantially interfere[d]" with him as a shareholder to participate at shareholder meetings, or to access corporate books and records. Plaintiff's claims regarding breach of an employment contract and breach of a stock purchase agreement are not interests of plaintiff as a shareholder, and therefore, are not protected by § 489. *Franchino, supra* at 185-186, 189. Absent fraud or other unlawful conduct, which interferes with plaintiff's right to vote at pertinent shareholders meetings, plaintiff has no cause of action under § 489 to contest selection of personnel to serve as officers to manage the company by the majority of the shareholders. Thus, plaintiff has no cause of action under § 489 to contest the appointment of Beaudoin as an officer and manager of the company simply because plaintiff believes Beaudoin is not qualified for the position.

Furthermore, we reject plaintiff's claim that the appointment of Beaudoin indirectly affected his interests as a shareholder because the company will be less profitable than it otherwise could become. Undoubtedly, a shareholder has an interest in having his investment become as profitable as possible. See *Thompson v Walker*, 253 Mich 126, 134-135; 234 NW 144 (1931) (the officers and directors of a corporation have a fiduciary duty to manage the corporation so "as to produce to each stockholder the best possible return for his investment"), and *Dodge, supra* at 507 ("A business corporation is organized and carried on primarily for the profit of the stockholders."). For the reasons discussed already, plaintiff's claim is inherently speculative. To be actionable under § 489, defendants' conduct must be "illegal, fraudulent, or

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[2] We note that the Legislature has amended this subsection to add: "Willfully unfair and oppressive conduct may include the termination of employment or limitations on employment benefits to the extent that the actions interfere with distributions or other shareholder interests disproportionately as to the affected shareholder." 2006 PA 68, effective March 20, 2006.

willfully unfair and oppressive." MCL 450.1489(1)(emphasis added). This is defined by the statute to be "a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder." MCL 450.1489(3). The statute places the focus on the actions of the majority, not the reasonable expectation of the shareholders to profits. See *Franchino, supra* at 188. Thus, to be actionable under § 489, the conduct of the majority must have been intended to cause the purported oppressive result. Here, plaintiff only testified that McNish would not listen to his warnings regarding Beaudoin's capabilities. Plaintiff, produced no evidence that McNish acted intentionally to harm the company, testifying "it would be hard for me to believe that because he has a large regard for money and damaging the corporation would damage his worth . . . ."

In sum, plaintiffs failed to create a material question of fact that defendants engaged in "illegal, fraudulent, or willfully unfair and oppressive" conduct, or a "continuing course of conduct or a significant action or series of actions" that substantially interfered with plaintiff's interests as a shareholder. MCL 450.1489. Therefore, the trial court properly granted defendants' motion for summary disposition on this claim. *Franchino, supra* at 181.

V

A. Plaintiff Mark Wojcik's Employment Contract Claims

We find that plaintiff's claim for breach of a written contract for lifetime employment as manager of the company is without merit. We also find without merit plaintiff's claim that because of oral promises, his position as manager was subject to termination only on just cause.

This issue presents a question of contract interpretation. The main goal of a court when interpreting a contract is to ascertain and enforce the parties' intent. *Quality Products & Concepts Co v Nagel Precision, Inc,* 469 Mich 362, 375; 666 NW2d 251 (2003). A court must first look to the contract's language and accord that language its plain meaning. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 61; 664 NW2d 776 (2003). Also, courts "read contracts as a whole, giving harmonious effect, if possible, to each word and phrase." *Id*. at 50 n 11. When the words used in a contract are clear, the contract must be enforced as written unless a provision is unlawful or violates public policy. *Id.* at 51.

Additional rules of construction apply when a party claims a contractual right to lifetime employment, or claims that an employment relationship is subject to termination only for just cause. In general, a contract of employment for an indefinite term is terminable at will by either party. *Toussaint v Blue Cross & Blue Shield of Michigan*, 408 Mich 579, 596; 292 NW2d 880 (1980). "[T]he presumption of at will employment may be overcome by proof of an express contract for a definite term or by a provision forbidding discharge without just cause." *Bracco v Michigan Technological University*, 231 Mich App 578, 598; 588 NW2d 467 (1998). When a party asserts that oral statements form the basis for employment security, "the oral statements of job security must be clear and unequivocal to overcome the presumption of employment at will." *Rowe v Montgomery Ward & Co*, 437 Mich 627, 636; 473 NW2d 268 (1991). Moreover, "'lifetime' employment contracts are extraordinary and, being so, 'must be expressed in clear and unequivocal terms before a court will conclude that an employer intended to enter into such a weighty obligation.'" *Bracco, supra* at 595, n 11, quoting *Bullock v Automobile Club of*

Michigan, 432 Mich 472, 517; 444 NW2d 114 (1989) (Griffin, J., concurring in part and dissenting in part). See, also, *Rowe, supra* at 640-641.

In this case, plaintiff relies on the parties' 1982 agreement to form the corporation. The agreement names plaintiff Mark Wojcik as the company's first vice-president and first secretary, "until their respective successors are duly elected and qualified . . . ." Further, the agreement states that plaintiff Mark Wojcik "shall also be General Manager for the Corporation," and also provides for compensation and perquisites for that service. The agreement does not provide for the term of office for vice-president, secretary, or general manager. Accordingly, the agreement, to the extent it is an employment contract, is presumed to be for an indefinite term subject to termination at will by either party. *Bracco, supra* at 598.

In addition, the 1982 agreement to form the corporation contains no express provision forbidding discharge without just cause. To establish a contractual right to employment terminable only on just cause requires proving with objective evidence that the employer and the employee mutually assented to such a term of the contract. *Rowe, supra* at 640. "The test for whether there was mutual assent to a just-cause provision is an objective one, looking at the express words of the parties and their visible acts." *Bracco, supra* at 598, citing *Rowe, supra.* Here, the parties' written contract contains no express words indicating mutual assent to a provision forbidding discharge without just cause. Further, plaintiff failed to identify any specific promises of just cause employment by McNish. Thus, there is no express written, or clear and unequivocal oral promise, to overcome the presumption that plaintiff's indefinite contract of employment as general manager was terminable at the will of either party.

Moreover, plaintiff cannot base his claim to lifetime employment on his "reasonable expectation" of lifetime employment as the company's general manager. "The practice of interpreting contracts on the basis of reasonable expectations rather that the plain language of the contract was repudiated by [our Supreme] Court in *Wilkie, supra* at 63." *Rory v Continental Ins Co*, 473 Mich 457, 461, 481 n 48; 703 NW2d 23 (2005).

Similarly, plaintiff has no claim to employment subject only to just-cause termination under the "legitimate expectations" leg of *Toussaint* and its progeny. As explained by our Supreme Court in *Rood v General Dynamics Corp*, 444 Mich 107, 137-138; 507 NW2d 591 (1993), quoting *Toussaint* at 613, the rationale for enforcing an employers policies and procedures relating to employee discharge is grounded on "the intuitive recognition that such policies and procedures tend to enhance the employment relationship and encourage an 'orderly, cooperative and loyal work force' for the ultimate benefit of the employer." But this extra-contractual enforcement policy applies only to "employer policy statements that are disseminated either 'to the work force in general or to specific classifications of the work force, rather than to an individual employee.'" *Rood, supra* at 138, quoting *In re Certified question (Bankey v Storer Broadcasting Co)*, 432 Mich 438, 443, n 3; 443 NW2d 112 (1989). So, the *Toussaint* "legitimate expectations" theory for enforcing an employer's policies and procedures relating to employee discharge is "inappropriate where [the] policies and procedures are applicable only to an individual employee." *Rood, supra* at 138 n 31.

Plaintiff's categorization of his resignation as a "constructive discharge" is unavailing. A constructive discharge occurs when an employer deliberately makes an employee's working conditions so intolerable that the that a reasonable person in the employee's position would feel

compelled to resign. *Vagts v Perry Drug Stores, Inc*, 204 Mich App 481, 487; 516 NW2d 102 (1994). We find it unnecessary to address Wojcik's claim that his promotion to president was actually inferior to Beaudoin's position as vice-president, and therefore, a "demotion" that supports his constructive discharge claim. Likewise, it is not necessary to consider whether a demotion or change in job assignments without any reduction in pay, benefits, or perquisites, may support a constructive discharge claim. Such issues are irrelevant here because "constructive discharge is not in itself a cause of action," but rather, "is a defense against the argument that no suit should lie in a specific case because the plaintiff left the job voluntarily." *Id*. at 487. Because plaintiff has no underlying cause of action for wrongful discharge based on contract or his legitimate expectations, his claim fails.

B. Stock Purchase Agreement

The parties' 1982 agreement to form the corporation states in ¶ 12: "The Subscribers agree to sign, and cause the corporation to sign, the Stock Purchase Agreement attached as Exhibit E." Paragraph 3 of the attached stock purchase agreement provides: "If MARK H. WOJCIK terminates his employment, he must offer his stock for sale to the Corporation and the Corporation must purchase." The parties do not dispute that plaintiff Mark Wojcik was a "subscriber" of the 1982 agreement, that plaintiff owned 30% of the issued common stock of the company, and that plaintiff terminated his employment with the company. Defendants claim that the parties never reached an agreement, or that if they did, plaintiff repudiated his right to have the company buy his shares in the company. We find defendants' argument without merit.

First, the contract was complete in 1982 when the corporation was formed. Second, the doctrine of anticipatory breach, or repudiation, applies when a party to a contract prior to the time of performance unequivocally indicates through words or actions the intent not to perform; the other party may either sue immediately for breach of contract or wait until after the repudiating party fails to perform. *Paul v Bogle*, 193 Mich App 479, 493-494; 484 NW2d 728 (1992). Here, plaintiff had fully performed his part of the contract. Plaintiff had subscribed to the 1982 agreement to form the corporation, contributed cash to acquire his shares in the company, worked in excess of twenty years as the company's manager, terminated his employment with the company, and offered his shares of stock for sale to the company. The parties' failure to reach agreement on the details of defendants' required performance; "the Corporation must purchase" language cannot negate that plaintiff fully performed his part of the bargain.

Moreover, defendants' claim that plaintiff repudiated the contract by insisting on a personal guarantee by McNish of the company's installment payments to purchase plaintiff's stock, is factually inaccurate. Paragraphs 6 of the stock purchase agreement provides: "The purchase price will be paid by downpayment of twenty-five (25%) at closing and the balance payable over twenty-four (24) equal monthly installments at nine percent (9%) interest, with right of prepayment and provision for acceleration in the event of default, *and provision for personal guarantee by the remaining shareholder*." (Emphasis added).

Thus, the trial court erred by dismissing plaintiff's claim that defendants breached the agreement to form the corporation and its incorporated stock purchase agreement. Plaintiff had performed all of the clearly stated prerequisites to trigger his contractual right to have the company purchase his stock, with a personal guarantee of payment by defendant McNish. The

parties' contract regarding plaintiff's right to have the company purchase his stock is clear and equivocal. "An unambiguous contract must be enforced according to its terms." *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004).

VI

Plaintiff also argues that he is a member of a protected class and established a prima facie case of age discrimination by showing that he suffered an adverse employment action and that Beaudoin, a younger man, was treated dissimilarly. We disagree. Plaintiff's age discrimination claim fails because plaintiff failed to produce sufficient evidence that he suffered a materially adverse employment action. Plaintiff's claim also fails because the facts and circumstances of this case do not create an inference of unlawful animus.

Section 202 of Michigan's Civil Rights Act, MCL 37.2202, provides in relevant part:

> (1) An employer shall not do any of the following:
>
> (a) Fail or refuse to hire or recruit, *discharge, or otherwise discriminate* against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, *because of* religion, race, color, national origin, *age*, sex, height, weight, or marital status. [Emphasis added.]

The essence of an age discrimination claim requires proving that age was a determining factor in an adverse employment action. *Matras v Amoco Oil Co,* 424 Mich 675, 682-683; 385 NW2d 586 (1986). A person may prove unlawful age discrimination under § 202(1)(a) with either direct or indirect evidence. *Matras, supra* at 683. When a plaintiff presents direct evidence of discrimination, the case is one of "intentional discrimination," sometimes referred to as a "mixed-motive" case. See *Wilcoxon v Minnesota Mining & Manufacturing Co*, 235 Mich App 347, 360; 597 NW2d 250 (1999). In a "mixed motive" case, "where the adverse employment decision could have been based on both legitimate and legally impermissible reasons, a plaintiff must prove that the defendant's discriminatory animus was more likely than not a 'substantial' or 'motivating' factor in the decision." *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 133; 666 NW2d 186 (2003).

A person may alternatively prove unlawful age discrimination by circumstantial evidence, employing the burden-shifting framework adopted in *McDonnell Douglas v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Matras, supra* at 683. Under the *McDonnell Douglas* approach, a prima facie case consists of evidence that the plaintiff (1) belongs to a protected class, (2) suffered an adverse employment action, (3) was qualified for the position, and (4) the adverse employment action was taken under circumstances giving rise to an inference of unlawful discrimination. *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001). If a plaintiff establishes a prima-facie case, the burden shifts to the employer to come forward with a legitimate nondiscriminatory reason for the adverse employment action. If the employer does so, the burden returns to the plaintiff to establish that the employer's stated legitimate reason is merely a pretext for discrimination. *Sniecinski, supra* at 134; *Wilcoxon, supra* at 359.

Whether a plaintiff attempts to prove unlawful discrimination by using direct evidence or under the *McDonnell Douglas* approach, an element of the plaintiff's discrimination claim is an

adverse employment action. *Wilcoxon, supra* at 362. An "adverse employment action" for the purposes of proving unlawful discrimination "(1) must be materially adverse in that it is more than 'mere inconvenience or an alteration of job responsibilities,' and (2) must have an objective basis for demonstrating that the change is adverse, rather than the mere subjective impressions of the plaintiff." *Meyer v City of Centerline*, 242 Mich App 560, 569; 619 NW2d 182 (2000). There is no exhaustive list of adverse employment actions, but "typically it takes the form of an ultimate employment decision, such as 'a termination in employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.'" *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 312; 660 NW2d 351 (2003), quoting *White v Burlington Northern & Santa Fe Co,* 310 F3d 443, 450 (CA 6, 2002).

Here, defendants did not terminate plaintiff's employment. Although plaintiff asserts his resignation was a constructive discharge, he must still prove an adverse employment action created conditions so intolerable that it would cause a reasonable person to feel compelled to resign. *Vagts, supra* at 487. In other words, plaintiff cannot use his resignation as evidence he suffered an adverse employment action. *Id*. at 486 (The plaintiff's claim that she was constructively discharged for refusing to violate the law failed "because she use[d] her resignation as proof of both a constructive discharge and a refusal to violate the law.").

Plaintiff claims that he was demoted in favor of Beaudoin and that company minutes of a shareholders' meeting on January 9, 2003 evidence his claim. On our review of the minutes in the light most favorable to plaintiff, we conclude that the minutes do not support the claim that plaintiff's position was inferior to Beaudoin's position. Quite to the contrary, the minutes evidence that Beaudoin held an inferior position, but changes might occur in the future.

Plaintiff also asserts that a January 23, 2003 memorandum shows that his position as president was inferior to Beaudoin's as vice-president of company. But plaintiff in his brief on appeal concedes that this memorandum is dated the same day that plaintiff met for breakfast with McNish to resign his position and demanded that the company buy his stock.

Plaintiff owned 30% of the outstanding common stock of the company and was promoted to president of the company when Beaudoin was named vice-president. Plaintiff admits that his pay, benefits, and other perquisites were not reduced. Although McNish asked plaintiff to work with Beaudoin and to train him, plaintiff fails to highlight any objective evidence of statements or actions by defendants that evidence plaintiff's position with the company was inferior to that of Beaudoin. Rather, plaintiff testified about his subjective belief that he "knew" that he was being replaced by Beaudoin. For example, plaintiff testified, "I became painfully aware at one point in time that Chris [Beaudoin] was going to run the company and I was out, you know, those are all things that [McNish] and Chris decided somewhere between them . . . ."

In sum, plaintiff failed to produce objective evidence that he suffered a materially adverse employment action that was more than a mere inconvenience or an alteration of job responsibilities. Plaintiff's testimony established only that he was concerned that Beaudoin would replace him in the future. Plaintiff's age discrimination claim fails because the alleged adverse employment action is based only plaintiff's own subjective impression regarding what might happen in the future. *Meyer, supra* at 569; *Wilcoxon, supra* at 364.

Moreover, regardless of the evidentiary approach a plaintiff takes to prove unlawful discrimination, a causal link between the adverse employment action and the unlawful animus must be established. *Sniecinski, supra* at 134-135; *Matras, supra* at 682-683. If a plaintiff establishes a prima facie case of discrimination under the *McDonnell Douglas* burden-shifting framework, a presumption of unlawful discrimination is created and a causal link is presumed, requiring the employer to rebut the presumption. *Sniecinski, supra* at 135; *Hazle, supra* at 464-465. But, a claimant must first establish a prima facie case under the *McDonnell Douglas* framework before the causal presumption arises. To establish a prima facie case of discrimination under the *McDonnell Douglas* approach, the adverse employment action must occur in circumstances that give rise to an inference of unlawful discrimination. *Hazle, supra* at 463; *Wilcoxon, supra* at 359. Although the *McDonnell Douglas* framework is flexible and "should be tailored to the facts and circumstances of each case," *Sniecinski, supra* at 134 n 7, the circumstances must at a minimum give rise to an inference of unlawful discrimination.

In the present case, an experienced fifty-year-old manager was asked to train a less-experienced forty-year-old manager. This commonplace occurrence hardly gives rise to an inference of discrimination on the basis of age. Further, the circumstances of this case suggest that any favorable treatment accorded the younger person was based on nepotism, not age. Indeed, plaintiff's own testimony establishes that the company did not discriminate against older workers. Plaintiff testified that a "bunch of bald headed old guys" worked for the company. Further, after plaintiff resigned from the company, a sixty-year-old person replaced him. Simply put, the facts and circumstances of this case do not give rise to an inference that age was a motivating factor in any of defendants' actions that plaintiff claims to be adverse employment action. Consequently, plaintiff failed to establish a prima-facie case of age discrimination. The trial court properly granted defendants summary disposition on this claim.

VII

Plaintiff argues that trial court erred by dismissing his claim under MCL 450.1487 to inspect the books and records of the corporation. We disagree. Because plaintiffs did not allege in their complaint that defendants had denied them access to company records, and defendants affirmatively allege they have provided or offered to provide access to records, there is "no genuine issue as to any material fact, and [defendants are] entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10).

VIII

Plaintiffs next argue that the trial court erred by dismissing their "derivative" claim. We hold that the trial court properly dismissed this claim because plaintiffs do not seek damages on behalf of the company but rather sought damages from the company for themselves as individuals and a shareholder.

"'Derivative proceeding' means a civil suit in the right of a domestic corporation or a foreign corporation that is authorized to or does transact business in this state." MCL 450.1491a(a). It is a suit to enforce the right of the corporation. MCL 450.1492a(b). "'Any recovery runs in favor of the corporation, for the shareholders do not sue in their own right. They derive only an incidental benefit. If the defendants account, it must be to the corporation and not to the shareholders.'" *Futernick v Statler Builders, Inc*, 365 Mich 378, 386; 112 NW2d

458 (1961), quoting *Dean v Kellogg,* 294 Mich 200, 207; 292 NW 704 (1940) (citations omitted). Generally, an action to enforce corporate rights or to redress or prevent injury to the corporation must be brought in the name of the corporation and not that of a stockholder, officer or employee. *Michigan Nat'l Bank v Mudget*, 178 Mich App 677, 679; 444 NW2d 534 (1989). MCL 450.1492a provides an exception to this general rule, but the shareholder must "fairly and adequately represents the interests of the corporation in enforcing the right of the corporation." MCL 450.1492a(b). "The minimum requirements for such a suit are proof of fraud or abuse of trust in the board of directors of the corporation in failing or refusing to enforce a corporation right or claim, plus demand on said board by the stockholder for such action or proof that the demand would be useless." *Futernick, supra* at 387; MCL 450.1493a.

In their "derivative" claim, plaintiffs generally allege breach of fiduciary duty, fraud, breach of contracts, minority oppression, and wrongful termination, which have caused unspecified damages to plaintiffs and the company. Plaintiffs do not further allege in their complaint, or explain in their brief on appeal, the nature of the damages to the corporation, or proffer evidence to support such a claim. Plaintiffs pray for judgment against "defendants" for "hundreds of thousands of dollars," and for an order for the dissolution of the company, or "the purchase of Mark Wojcik's shares by Defendants." Thus, plaintiff Mark Wojcik, as a shareholder, does not seek damages from McNish for the benefit of the company. Rather, plaintiff seeks damages from McNish *and* the company for alleged injures to plaintiff in his capacity as a party to a contract, as a minority shareholder, and as an employee. Accordingly, plaintiff's claim is not a true derivative action on behalf of the company but only a restatement of plaintiff's other claims for his alleged personal injuries as a party to a contract, as an employee, and as an alleged oppressed minority shareholder. Although plaintiffs assert breach of fiduciary duty and fraud, the essence of their claim is that majority stockholder McNish exercised poor business judgment promoting less qualified Beaudoin over more qualified Mark Wojcik. Such purported poor judgment is not the type of fraud or abuse of trust that will support a derivative suit. The trial court properly dismissed this claim.

IX

Last, plaintiffs argue defendants were not entitled to summary disposition on plaintiffs' count I (breach of fiduciary duty), count IV (wrongful termination), count V (constructive discharge), count VII (accounting), and count VIII (derivative action), because defendants failed to identify the issues for which there was no genuine dispute of any material fact. MCR 2.116(G)(4); *Meyer, supra* at 575.

We find this argument without merit. As required by MCR 2.116(G)(4), defendants specifically identified the issues of material fact they believed were undisputed and argued they were entitlement to judgment as matter of law on all of the theories that plaintiffs advanced in their shotgun complaint. Further, MCR 2.116(I)(1) requires the trial court to render judgment without delay, "[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits of other proofs show that there is no genuine issue of material fact." Additionally, for the reasons discussed *supra*, the trial court reached the correct result regarding the issues that plaintiffs assert were decided on defective procedure. "'This Court will not reverse a trial court's order if it reached the right result for the wrong reason.'" *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 407 n 72; 651 NW2d 756 (2002), quoting *Detroit v Presti*, 240 Mich App 208, 214; 610 NW2d 261 (2000).

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Jane E. Markey
/s/ Patrick M. Meter