COURT OF APPEALS
DECISION
DATED AND FILED

February 14, 2017

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2016AP700 **Cir. Ct. No. 2008CV1654**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

SWIDERSKI EQUIPMENT, INC. AND ALEX K. SWIDERSKI,

PLAINTIFFS-RESPONDENTS,

V.

JAMES SWIDERSKI,

DEFENDANT-APPELLANT,

SANDRA L. SWIDERSKI AND APPLETON INVESTMENTS, LLC,

DEFENDANTS.

APPEAL from orders of the circuit court for Outagamie County: NANCY J. KRUEGER, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. This case is before us for a second time. In a previous appeal, James Swiderski argued the circuit court erred by issuing an order compelling him to accept Swiderski Equipment, Inc.'s tender to redeem his shares of the corporation at a fixed price. We agreed with James that the circuit court had misinterpreted the share-valuation provisions of the parties' corporate redemption agreement (CRA). We therefore reversed the circuit court's order and remanded "for the parties to obtain a price redetermination consistent with our interpretation of paragraph 8" of the CRA. ***Swiderski Equip., Inc. v. Swiderski***, No. 2013AP1545, unpublished slip op., ¶20 (WI App May 6, 2014).

¶2 On remand, an appraisal was performed, and the circuit court ultimately ordered Swiderski Equipment to pay James $105,000 for his shares—the difference between the appraiser's valuation of James' shares and $510,000 that Swiderski Equipment had previously paid him. James now appeals, arguing the circuit court erred by: (1) determining the appraisal would be performed by Swiderski Equipment's accounting firm, Schenck, S.C.; (2) giving preclusive effect to a jury verdict from a separate Marathon County case on the issue of whether compensation Swiderski Equipment paid to James' father, Alex Swiderski, was excessive; (3) accepting the appraisal performed by Schenck, even though it valued only James' interest, rather than the entire corporation, and included minority and marketability discounts; and (4) permitting James to recover prejudgment interest beginning on December 31, 2015, rather than December 30, 2012.

¶3 We conclude the circuit court properly ordered the appraisal to be performed by Schenck, S.C. We therefore affirm in part. The court erred, however, by giving preclusive effect to the Marathon County jury's verdict on the issue of whether Alex's compensation was excessive. We therefore reverse in part

and remand for a new appraisal, during which the appraiser must independently determine whether Alex's past compensation was reasonable and consider its impact on the appraised valuation.

¶4 We further hold that, when performing the new appraisal, the appraiser must value the entire corporation, rather than only James' minority interest. The appraiser may not apply a minority discount, but may independently determine whether to apply a marketability discount. Prejudgment interest on the amount Swiderski Equipment owes to James shall be calculated beginning on the date the new appraisal is completed.

BACKGROUND

¶5 Some of the relevant background facts were set forth in our previous opinion. Alex is the majority shareholder, president, and sole director of Swiderski Equipment. ***Id.***, ¶2. James worked for the corporation and became its only minority shareholder in December 1986. ***Id.*** At that time, Alex and James signed a CRA, which placed share restrictions and obligations on the corporation's shareholders and granted the corporation share-redemption rights. ***Id.***

¶6 James ceased employment with Swiderski Equipment in 2008. ***Id.*** Pursuant to the CRA, Swiderski Equipment therefore "ha[d] the option to purchase" James' shares "at the price indicated in paragraph 8 …." Paragraph 8, in turn, set forth the following method for determining the price of the shares:

> The price of each share of stock of the Corporation to be purchased and sold under this agreement shall be fixed by the Shareholders and the Corporation, as evidenced by a certificate setting forth such fixed price, which certificate shall be dated and executed by the Shareholders and the Corporation's officers and attached hereto. The fixed price set forth in the certificate attached hereto shall be binding on the parties for all purposes of this agreement, except that

> during the ninety (90) day periods following the last day of the Corporation's fiscal year ending within the calendar years 1988, 1990 and within each subsequent second year thereafter, any party may request that a study be undertaken to arrive at a new fixed price to be agreed upon by the parties. No such request shall alter the then effective fixed price prior to the execution of a new fixed price certificate. The new fixed price shall take effect as of the date of execution of the certificate, and shall be binding on the parties for all purposes, subject to the limitations of this paragraph. If, during the appropriate ninety (90) day period, no party makes a request for a study to be undertaken to arrive at a new fixed price to be agreed upon by the parties, the fixed price set forth in the latest executed certificate attached hereto shall remain in effect for the subsequent two (2) year period. If any party shall, within the appropriate ninety (90) day period, request that a study be undertaken to arrive at a new fixed price to be agreed upon by the parties, and if the parties shall be unable to agree upon such a fixed price within forty-five (45) days following the request, then Krause, Howard & Company shall appraise the Corporation and determine its value.

On the same date they executed the CRA, James and Alex executed a certificate of agreed value indicating that each share of the corporation was worth $1000.

¶7 In August 2008, Swiderski Equipment notified James and his then-wife, Sandra Swiderski, that it was exercising its option to redeem their 510 shares. ***Id.***, ¶3. James and Sandra were involved in a contentious divorce, and Sandra objected to the redemption. ***Id.*** Swiderski Equipment and Alex[1] therefore filed the instant lawsuit in September 2008 seeking to enforce the CRA. ***Id.*** However, the parties' positions later reversed. In July 2009, Sandra moved to compel Swiderski Equipment to purchase the shares she and James owned for $1000 each. ***Id.***, ¶4. In response, Swiderski Equipment moved for partial

[1] For the remainder of this opinion, when referring to actions taken or arguments made by both Swiderski Equipment and Alex, either in the circuit court proceedings or on appeal, we refer to them collectively as "Swiderski Equipment."

summary judgment declaring it had the right, but not the obligation, to redeem James' shares pursuant to the CRA. ***Id.*** Swiderski Equipment asserted it no longer wished to redeem the stock "given the drastic downturn in the economy." ***Id.*** In February 2010, the circuit court, Judge Mark J. McGinnis presiding, granted Swiderski Equipment's motion, declaring the corporation had "the right, but not the obligation" to redeem James' and Sandra's shares. ***Id.*** A final judgment to that effect was entered in July 2010. ***Id.***, ¶5.

¶8 In November 2010, James requested a share revaluation pursuant to paragraph 8 of the CRA. ***Id.***, ¶6. Swiderski Equipment refused, asserting the July 2010 judgment had locked the share price at $1000. ***Id.*** James again requested a share revaluation in December 2012, but Swiderski Equipment did not respond. ***Id.*** In January 2013, Swiderski Equipment notified James it was exercising its option to redeem his 510 shares, and it tendered a check for $510,000. ***Id.***, ¶7. James acknowledged the corporation's right to purchase the shares, but he disputed their value. ***Id.***

¶9 The circuit court determined that, pursuant to paragraph 8 of the CRA, James' stock should be priced at $1000 per share because the parties had not agreed to a new price and executed a new certificate of agreed value. ***Id.***, ¶¶8, 16. James appealed, and we reversed the circuit court's decision, concluding the "only reasonable interpretation of paragraph 8 is that the parties are bound by an appraisal obtained pursuant to the terms of the paragraph." ***Id.***, ¶20. We remanded "for the parties to obtain a price redetermination consistent with our interpretation of paragraph 8." ***Id.***

¶10 On remand, the parties raised several issues regarding the appraisal of the corporation's stock. As relevant to this appeal, the parties disputed who

should perform the appraisal; whether the appraiser should value the entire corporation or merely James' interest; whether discounts for minority interest and lack of marketability should be applied; and whether the circuit court should direct the appraiser to treat certain bonuses paid to Alex as reasonable compensation, rather than retained earnings.

¶11 The circuit court, Judge Nancy J. Krueger presiding, issued a written order regarding these issues on June 26, 2015. The court held that the revaluation of Swiderski Equipment's stock would be performed by Mark Hanson, who was employed by Swiderski Equipment's accounting firm, Schenck, S.C. The court directed Hanson to "use his professional judgment and discretion in determining the fair market value of the stock of the company … and whether any discounts such as a discount for the lack of marketability of [Swiderski Equipment] stock and/or a discount for the minority status of James Swiderski's stock should be applied." Applying the doctrine of claim preclusion, the court gave preclusive effect to a jury verdict in a prior Marathon County lawsuit between the parties and directed Hanson to "conclusively presume that all executive compensation paid to Alex Swiderski for the period of 2005 through 2012, including all bonuses, was not excessive compensation, but rather, was reasonable compensation and therefore, the compensation including all bonuses shall not be treated as retained earnings for purposes of the appraisal." James moved for reconsideration of the court's decision regarding claim preclusion, and that motion was denied.

¶12 Hanson subsequently submitted a valuation report, in which he opined that James' 510 shares of Swiderski Equipment stock were worth $615,000 as of December 31, 2012. Consistent with Hanson's appraisal, the circuit court entered a final order on March 14, 2016, requiring Swiderski Equipment to pay James $105,000—the difference between Hanson's valuation and the $510,000

Swiderski Equipment had already paid James. The court ordered that interest would accrue on the additional $105,000 "at the rate of 9 percent per annum from December 31, 2015, until the total amount is tendered."

¶13 James now appeals. Additional facts are included in the discussion section as necessary.

DISCUSSION

I. Choice of appraiser

¶14 James' first argument on appeal is that the circuit court erred by determining the appraisal would be performed by Mark Hanson, an employee of Schenck, S.C. According to paragraph 8 of the CRA, the appraisal was to be performed by Krause, Howard & Company (hereinafter, Krause). However, following remand from this court, Swiderski Equipment submitted an affidavit of Thomas Gelhar, one of Krause's principals. Gelhar averred that, although Krause had served as the outside public accounting firm for Swiderski Equipment for over twenty years, and although the CRA specified Krause was to perform the appraisal described in paragraph 8, Krause no longer employed a professional who specialized in business valuations, and it was therefore unable to provide those services. Gelhar further averred that Swiderski Equipment was "having its accounting needs transferred to Schenck, SC, a Mid-West accounting firm, which will be better suited to serve its needs." Gelhar averred that Schenck is "a reputable and competent accounting firm, which not only will have staff sufficient to serve [Swiderski Equipment's] needs, but could also perform the business valuation services required by [Swiderski Equipment]." Gelhar therefore recommended that Swiderski Equipment "use Schenck, SC, for its business valuation needs."

¶15 Based on Gelhar's affidavit, Swiderski Equipment argued the appraisal should be performed by Schenck. James disagreed, arguing Schenck was biased because it had been retained by Swiderski Equipment in the prior Marathon County lawsuit between the parties "to perform forensic accounting work in an attempt to put together allegations for breach of fiduciary duty or employee duties against James." James asked the circuit court to instead "appoint a fair and impartial valuator who is qualified to perform the services and is not a biased and impartial advocate for one side or the other."

¶16 The circuit court rejected James' argument and ruled that Mark Hanson, an employee of Schenck, would perform the appraisal. Addressing James' assertion of bias, the court reasoned:

> But this initial agreement, the initial CRA, used the company's accountant and accounting firm to do the appraisal. So, nothing is really different there. And if there is bias, bias was built into the contract. And there certainly is an advantage to using the accounting firm that knows the corporation. Because of that knowledge it has an understanding of the business and some history with the business, although certainly here not as extensive [as] had the original accounting firm been used. I don't believe the business relationship between Schenck and [Swiderski Equipment] would disqualify Schenck, especially in light of the language in paragraph eight that specified that [Swiderski Equipment's] accountant at that time would perform the revaluation.

¶17 We conclude the circuit court properly interpreted paragraph 8 of the CRA when it appointed Hanson to conduct the appraisal. The goal of contract interpretation is to determine the intent of the parties. ***Kernz v. J.L. French Corp.***, 2003 WI App 140, ¶9, 266 Wis. 2d 124, 667 N.W.2d 751. "When the terms of a contract are plain and unambiguous, we will construe the contract as it stands." ***Id.*** (quoting ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶14, 257

Wis. 2d 421, 651 N.W.2d 345). However, when contractual language is ambiguous—that is, subject to more than one reasonable interpretation—we look to extrinsic evidence to determine the parties' intent. ***Id.***, ¶10.

¶18 The interpretation of an unambiguous contract is a question of law that we review independently. ***Town Bank v. City Real Estate Dev., LLC***, 2010 WI 134, ¶32, 330 Wis. 2d 340, 793 N.W.2d 476. Whether a contract is ambiguous is also a question of law for our independent review. ***Kernz***, 266 Wis. 2d 124, ¶8. However, if a contract is ambiguous, the parties' intent is a question of fact to be determined by the fact finder, here the circuit court. *See* ***Town Bank***, 330 Wis. 2d 340, ¶32. We accept the circuit court's factual findings unless they are clearly erroneous. ***Lellman v. Mott***, 204 Wis. 2d 166, 170-71, 554 N.W.2d 525 (Ct. App. 1996).[2]

¶19 The CRA's plain language provides that, if the parties cannot agree on a new fixed price for the corporation's stock, an appraisal is to be conducted by Krause. However, it is undisputed that Krause is no longer able to perform business valuations. Because the CRA does not address which firm the parties intended to perform the appraisal if Krause could not do so, it is ambiguous under

[2] Swiderski Equipment argues that, instead of applying a contract law analysis, we should review the circuit court's decision to appoint Hanson as the appraiser for an erroneous exercise of discretion because the court was resolving an issue not addressed by this court's mandate in the prior appeal. *See* ***State ex rel. J.H. Findorff & Son, Inc. v. Circuit Court for Milwaukee Cty.***, 2000 WI 30, ¶25, 233 Wis. 2d 428, 608 N.W.2d 679 (circuit court has some discretion on remand to resolve matters not addressed by mandate in a manner consistent with that mandate). However, the circuit court's oral ruling makes it clear the court's decision to appoint Hanson as the appraiser was based on its interpretation of the CRA. In any event, even if we applied the erroneous-exercise-of-discretion standard of review, we would similarly conclude the court properly appointed Hanson as the appraiser.

the circumstances. It is therefore appropriate to look to extrinsic evidence to determine the parties' intent.

¶20 The circuit court determined the parties intended Swiderski Equipment's corporate accounting firm to perform the valuation discussed in paragraph 8 of the CRA. That finding is not clearly erroneous. In his affidavit, Gelhar averred the provision of the CRA stating the appraisal would be performed by Krause "was put in place because [Krause] served as the independent, outside accounting firm for the company." The record also contains an affidavit of William Hess, the attorney who drafted the CRA, which states:

> In drafting this agreement and specifically paragraph 8 of this agreement, [Krause] was selected as the entity to "appraise the Corporation and determine its value," because [Krause] was, at the time and was expected to be [Swiderski Equipment's] accounting firm ongoing into the future. This provision was made a part of the agreement because the company retained the right to select its accountant as the entity to "appraise the Corporation and determine its value."

This evidence supports the circuit court's finding that the parties intended Swiderski Equipment's corporate accounting firm to perform the appraisal contemplated by paragraph 8 of the CRA. Based on this finding, the court properly determined the appraisal should be performed by Schenck, Swiderski Equipment's current accounting firm.

¶21 James argues that, by determining Schenck should perform the appraisal, the circuit court "set aside clear evidence of bias and lack of neutrality" on Schenck's part. However, the court correctly concluded that bias was "built into" the CRA because the CRA designated Swiderski Equipment's corporate accounting firm as the entity to perform the valuation described in paragraph 8. James asserts "there was no bias or lack of neutrality built into the selection of

[Krause] as the valuator, even if that company was the corporate accountant," because he and Alex were both working for Swiderski Equipment at the time the CRA was signed and were not adverse to one another. Yet, as Swiderski Equipment correctly notes, under the terms of the CRA, there is no need for an outside appraisal unless a dispute arises between the parties regarding the value of the company's stock. We therefore agree with Swiderski Equipment that "[h]aving [Swiderski Equipment's] accountant perform the appraisal whenever such a dispute arises necessarily creates the potential for bias by the accountant in favor of [Swiderski Equipment], especially if, as was the case here, that accountant [had] a good working relationship with [Swiderski Equipment] for an extended period of time." In other words, the parties clearly contemplated that the valuation would be performed by a potentially biased entity at the inception of the contract; the circuit court simply gave effect to the parties' intent.

¶22 James further argues the circuit court erred by "not taking into account that representatives of Schenck had performed forensic [accounting] work and testified directly adverse to James … in the Marathon County matter." However, by selecting Hanson to appraise Swiderski Equipment, the circuit court implicitly rejected James' argument regarding bias and found that the work Schenck performed in the Marathon County matter would not cause Hanson to be biased against James. *See* ***State v. Pallone***, 2000 WI 77, ¶44 n.13, 236 Wis. 2d 162, 613 N.W.2d 568 ("Even if the circuit court does not make an explicit factual finding, we assume that the court made the finding in a manner that supports its final decision."), *overruled on other grounds by* ***State v. Dearborn***, 2010 WI 84, 327 Wis. 2d 252, 786 N.W.2d 97.

¶23 The circuit court's implied finding regarding bias is not clearly erroneous. Hanson was not involved in the Marathon County matter, and James

does not cite any evidence supporting his claim that work performed by other Schenck employees in that matter caused Hanson to be biased against James in the instant case. Moreover, Gelhar averred in a supplemental affidavit that, despite the forensic accounting work Schenck performed in the Marathon County case, Gelhar nevertheless believed Schenck was "fully capable of performing a fair and objective business valuation for [Swiderski Equipment]." On this record, the circuit court could reasonably find that Schenck's prior involvement in the Marathon County lawsuit would not cause Hanson to be biased against James when performing the valuation required under paragraph 8 of the CRA. We therefore affirm the circuit court's decision appointing Hanson to appraise Swiderski Equipment.

II. Claim preclusion

¶24 James also argues the circuit court erred when, pursuant to the doctrine of claim preclusion, it directed Hanson to "conclusively presume" the compensation paid to Alex between 2005 and 2012 was not excessive and, as such, should not be treated as retained earnings for purposes of the appraisal. As a threshold matter, Swiderski Equipment argues this issue is moot because, despite the circuit court's ruling, Hanson independently concluded the compensation was not excessive. We agree with Swiderski Equipment that, if the record conclusively showed Hanson undertook an independent analysis of the excessive compensation issue, rather than relying on the circuit court's directive, James' arguments regarding preclusion would be moot because their resolution would have no effect on the underlying controversy. *See* ***PRN Assocs. LLC v. DOA***, 2009 WI 53, ¶25, 317 Wis. 2d 656, 766 N.W.2d 559. However, the record is insufficient for us to determine whether Hanson actually performed an independent analysis.

¶25 In his report, Hanson noted that one of the factors requiring adjustment of a corporation's earnings is the payment of "excessive benefits to officers, including pension and profit sharing." Hanson declined to make any adjustment to Swiderski Equipment's earnings on that basis. In support of that decision, Hanson quoted the circuit court's ruling requiring him to conclusively presume the compensation paid to Alex was reasonable. However, immediately thereafter he stated, "Based on our own analysis, we have concluded that the historical officer's compensation is within industry ratios. We also note that an executive compensation expert, Scott M. Dettman[,] concluded that executive compensation was not excessive for the period 2005 through 2012."

¶26 Although this latter statement suggests Hanson may have performed an independent analysis regarding the reasonableness of Alex's compensation, his report does not contain any further information about that analysis—for instance, the "industry ratios" he considered in order to reach that conclusion. Moreover, the record does not contain any affidavit or testimony by Hanson demonstrating that he in fact conducted an independent analysis of the excessive compensation issue. The record is therefore insufficient to support a conclusion that Hanson actually made an independent determination that the compensation paid to Alex was not excessive. Accordingly, we reject Swiderski Equipment's claim that James' preclusion arguments are moot.

¶27 As noted above, the circuit court directed Hanson to "conclusively presume" the compensation paid to Alex between 2005 and 2012 was not excessive, based on the court's determination that a jury verdict in the previous Marathon County litigation should be given preclusive effect under the doctrine of claim preclusion. The Marathon County case involved multiple claims, counterclaims, and third-party claims between James, Alex, Swiderski Equipment,

and other related entities. As relevant to this appeal, James asserted a claim that Alex, acting as the majority shareholder and director of Swiderski Equipment, breached his fiduciary duties to James, the minority shareholder. The jury in the Marathon County case concluded Alex had breached his fiduciary duties to James, but James was not damaged by the breach.

¶28 Following our remand in the instant case, Swiderski Equipment argued James' breach-of-fiduciary-duty claim in the Marathon County case was premised on allegations that Alex paid himself excessive compensation in the form of bonuses and other perks. Swiderski Equipment further asserted that, because the jury in the Marathon County case "rejected" James' breach-of-fiduciary-duty claim, the doctrine of claim preclusion prevented James from arguing, in this case, that the compensation paid to Alex was excessive. The circuit court agreed, stating:

> As far as the treatment of bonuses paid to [Alex], I reviewed the information concerning the lengthy case in Marathon County. And my understanding is that James brought a claim for breach of fiduciary duty against Alex arguing that Alex paid himself excessive compensation through bonuses paid from 2008 through 2012. And essentially he was asking for damages from that jury, a certain percentage of those bonuses to be awarded to him as damages for that breach. While the jury found that there was a breach of fiduciary duty they did not award causal damages. And the question here is whether Alex's bonuses were fair compensation or retained earnings. And based upon the conclusions of the jury in that Marathon County case, I think [Swiderski Equipment's] argument that the jury's verdict stands for the proposition that the bonuses paid to Alex were reasonable compensation and should not be considered as retained earnings is a reasonable interpretation of that verdict.
>
> And I think [Swiderski Equipment's] argument of claim preclusion is legitimate. I think it can be concluded that the jury determined that although Alex may have breached his fiduciary duty in some way, it was not in paying himself excessive compensation.

¶29 Whether claim preclusion applies under a given fact scenario is a question of law that we review independently. ***Northern States Power Co. v. Bugher***, 189 Wis. 2d 541, 551, 525 N.W.2d 723 (1995). Under claim preclusion, "a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings." ***Lindas v. Cady***, 183 Wis. 2d 547, 558, 515 N.W.2d 458 (1994) (quoting ***DePratt v. West Bend Mut. Ins. Co.***, 113 Wis. 2d 306, 310, 334 N.W.2d 883 (1983)). Three elements must be present for claim preclusion to apply: "(1) an identity between the parties or their privies in the prior and present suits; (2) an identity between the causes of action in the two suits; and, (3) a final judgment on the merits in a court of competent jurisdiction." ***Northern States***, 189 Wis. 2d at 551.

¶30 The first two of these elements appear to be met in the instant case. As for the first element, James, Alex, and Swiderski Equipment—the parties in this case—were also parties in the Marathon County lawsuit. As for the second element, James claimed in the Marathon County lawsuit that Alex breached his fiduciary duties by paying himself excessive compensation. Similarly, the parties in this case dispute whether the compensation paid to Alex was excessive, such that it should be treated as retained earnings for purposes of appraising Swiderski Equipment. Under Wisconsin's transactional approach to the second element, this constitutes an identity between the causes of action in the two lawsuits. *See* ***Kruckenberg v. Harvey***, 2005 WI 43, ¶¶25-27, 279 Wis. 2d 250, 694 N.W.2d 879.

¶31 The record, however, is insufficient for us to determine whether the third element has been satisfied. Although the Marathon County case indisputably produced a final judgment on the merits in a court of competent jurisdiction, on the record before us, we cannot discern whether the jury in that case actually

found in favor of Swiderski Equipment on the operative issue—the reasonableness of Alex's compensation. As noted above, the jury concluded Alex breached his fiduciary duties to James, but the breach did not result in damages. There are multiple reasonable ways to interpret this verdict. On one hand, consistent with the circuit court's ruling, the jury could have concluded that, "although Alex may have breached his fiduciary duty in some way, it was not in paying himself excessive compensation." On the other hand, however, the jury could have concluded the compensation paid to Alex was excessive, but, for other reasons, James did not sustain any damages as a result of the breach. For instance, the jury could have accepted Swiderski Equipment's argument that, at the time the allegedly excessive compensation was paid to Alex, there was no tax-effective way for James to receive a share of those funds.[3]

¶32 Neither the circuit court nor Swiderski Equipment has cited any evidence supporting the court's conclusion that the Marathon County jury must have determined Alex breached his fiduciary duties in some other way besides by paying himself excessive compensation. The record does contain a report prepared by Jeffrey Cordray, James' damages expert in the Marathon County case, who opined that James sustained damages as a result of bonuses and rent

[3] Swiderski Equipment notes the circuit court instructed the jury that, in determining the amount of damages awarded to James on the breach of fiduciary duty claim, it should not increase or decrease its award "based on tax implications to James Swiderski." Swiderski Equipment argues we must presume the jury followed this instruction. *See* ***Schwigel v. Kohlmann***, 2002 WI App 121, ¶13, 254 Wis. 2d 830, 647 N.W.2d 362. Be that as it may, we reject Swiderski Equipment's argument that this instruction prevented the jury from determining James was not damaged by Alex's receipt of excessive compensation because, at the time that compensation was paid to Alex, there was no tax-effective way for James to receive a portion of the money. The instruction instead conveyed to the jury that, if the jury determined James was entitled to damages, it should not adjust the amount of the award based on its assumptions regarding the award's tax implications to James.

Swiderski Equipment paid Alex during the years 2008 through 2012, as well as Swiderski Equipment's purchase of a motor home for Alex's personal use. Based on Cordray's report, the jury could theoretically have concluded Alex breached his fiduciary duties with respect to the rent or the motor home, but not with respect to the bonuses. However, there is no other evidence in the record confirming that is what the jury did. Moreover, Swiderski Equipment does not argue on appeal that the jury found a breach of Alex's fiduciary duties based on some conduct other than Alex's receipt of the bonuses.

¶33 On this record, there was insufficient evidence for the circuit court to conclude, as a matter of law, that the jury in the Marathon County case determined the bonuses paid to Alex were not excessive. Although that issue was indisputably litigated in the Marathon County proceedings, the jury's verdict is ambiguous as to whether the jury actually determined the compensation was excessive. Because there is no evidence in the record that definitively clarifies the basis for the jury's verdict, the circuit court erred by determining that verdict should be given preclusive effect under the doctrine of claim preclusion.[4]

[4] In his motion for reconsideration of the circuit court's decision on claim preclusion, James cited an affidavit of one of the jurors in the Marathon County case, who averred that the jurors "did not feel that the bonuses Alex took were reasonable compensation," but they "decided [they] could not award damages to James because [they] could not find a logical way for Swiderski Equipment, Inc. to have paid what James was owed without everyone having to pay excessive taxes." The circuit court concluded this affidavit was inadmissible under WIS. STAT. § 906.06(2) (2015-16). On appeal, James argues the circuit court misinterpreted that statute. We need not address this argument because, even without considering the juror's affidavit, we conclude the circuit court erred by giving preclusive effect to the Marathon County verdict. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (court of appeals need not address all issues raised by the parties if one is dispositive).

All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶34 Swiderski Equipment argues in the alternative that the circuit court's ruling can be affirmed based on the doctrine of issue preclusion. To determine whether issue preclusion applies in a given case, a court must apply a two-step analysis. *See* ***Estate of Rille v. Physicians Ins. Co.***, 2007 WI 36, ¶36, 300 Wis. 2d 1, 728 N.W.2d 693. First, the court must determine whether issue preclusion can, as a matter of law, be applied—that is, whether the operative issue or fact "was actually litigated and determined in the prior proceeding by a valid judgment in a previous action and whether the determination was essential to the judgment." ***Id.***, ¶¶36-37. This is a question of law that we review independently. ***Id.***, ¶37. If this first step is satisfied, the court must then determine whether applying issue preclusion comports with principles of fundamental fairness. ***Id.***, ¶38. A circuit court's decision regarding fundamental fairness is reviewed for an erroneous exercise of discretion. ***Id.***

¶35 Swiderski Equipment's issue preclusion argument fails at the first step of the analysis, for the same reason its claim preclusion argument failed. Namely, the record is insufficient to support a conclusion that the jury in the Marathon County case determined the compensation paid to Alex was not excessive. We therefore reject Swiderski Equipment's alternative argument regarding issue preclusion.

¶36 In summary, we conclude the circuit court erred by instructing Hanson to "conclusively presume" the compensation paid to Alex between 2005 and 2012 was not excessive and therefore should not be treated as retained earnings for purposes of the appraisal. As a result, we reverse the order adopting Hanson's valuation and directing Swiderski Equipment to pay James $105,000, which is the difference between Hanson's valuation of James' interest and the $510,000 payment Swiderski Equipment had already made to James. We remand

for Hanson to conduct a new appraisal, in which he must independently determine whether the disputed compensation was excessive and, if so, how that fact should impact the valuation.

III. Other issues regarding the scope of the appraisal

¶37 James argues the circuit court erred by accepting Hanson's appraisal for three additional reasons. Because we have determined a new appraisal is required due to the circuit court's erroneous ruling regarding claim preclusion, it is not strictly necessary for us to address these additional arguments. *See* ***Turner v. Taylor***, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (court of appeals need not address all issues raised by the parties if one is dispositive). However, we choose to do so in the interest of judicial efficiency, because the issues James raises are likely to arise again on remand. *See* ***State v. Temby***, 108 Wis. 2d 521, 527, 322 N.W.2d 522 (Ct. App. 1982).

¶38 First, James argues the circuit court should have specifically directed Hanson to value the entire corporation, rather than James' interest alone.[5] We agree with James that the CRA required Hanson to value Swiderski Equipment as

[5] James argued in the circuit court that the CRA required a valuation of the entire corporation. The circuit court seemed to agree during its oral ruling, stating, "[Paragraph 8] just basically talks about value of the corporation. So, I am not going to put constraints upon the accountant or the appraiser who's doing this evaluation. It will be the appraiser's decision as to how to value the corporation considering the nature of the corporation." However, in its subsequent written decision, the court made reference to the appraiser determining the value of "James' 510 shares of [Swiderski Equipment] stock." The court also ordered the appraiser to "use his professional judgment and discretion in determining the fair market value of the stock of the company … and whether any discounts such as a discount for … the minority status of James Swiderski's stock should be applied." In his appraisal report, Hanson identified his task as preparing "a valuation engagement and conclusion of value and summary report ('report') to assist you in the determination of the fair market value of 510 shares of common stock of Swiderski Equipment, Inc."

a whole, rather than determining the value of James' interest. Paragraph 8 of the CRA, which is quoted in full at paragraph 6 of this opinion, sets forth the method that is to be used to determine the price of the corporation's stock. As relevant here, it provides that "[t]he price of each share of stock of the Corporation to be purchased and sold under this agreement shall be fixed by the Shareholders and the Corporation, as evidenced by a certificate setting forth such fixed price." During a ninety-day period occurring every two years, "any party may request that a study be undertaken to arrive at a new fixed price to be agreed upon by the parties." If such a study is requested and the parties are unable to agree on a new fixed price, paragraph 8 states that Krause "shall appraise *the Corporation* and determine *its value*." (Emphasis added.) This language unambiguously demonstrates that, in the event a reappraisal is required, the appraiser is to value the entire corporation, not just the interest owned by a single shareholder. We therefore hold that, on remand, Hanson must determine the value of Swiderski Equipment as a whole, rather than the value of James' minority interest.

¶39 James' second argument regarding the scope of the appraisal is that Hanson erred by applying a minority discount. Hanson explained in his report that a minority discount is applied when valuing a minority interest in a corporation in order to account for the minority shareholder's lack of control over corporate policy, inability to direct the payment of dividends, and inability to compel a liquidation of corporate assets. In other words, "The basis for a minority interest discount is in the concept that the perceived risk is less in an investment when the investor has the right to control the company's course of action."

¶40 We agree with James that, because the CRA requires an appraisal of the entire corporation, Hanson should not have applied a minority discount when performing his valuation.[6] As noted above, paragraph 8 of the CRA requires the appraiser to value the entire corporation, not an individual shareholder's interest. Once the corporation's value has been determined, paragraph 3 of the CRA sets forth various discounts that are to be applied, depending on the circumstances, in the event of a sale of a shareholder's stock. However, no provision of the CRA allows for the application of a separate minority discount when performing the valuation of the entire corporation required by paragraph 8. Consequently, on remand, Hanson may not employ a minority discount when valuing Swiderski Equipment.

[6] Hanson's report is ambiguous as to whether he, in fact, applied a minority discount. After discussing generally the concept of a minority discount, Hanson stated, "The value derived from the income approach is considered a value based on a minor[i]ty cash-flow. Therefore, this method arrives at a fair market value calculated on a non-controlling basis and a separate discount for a non-controlling position is not necessary." This language suggests that Hanson did not apply a separate minority discount after determining the value of James' shares. However, it also suggests Hanson's initial valuation was affected by the fact that James owned a minority interest in the corporation.

We requested supplemental briefs from the parties on this issue, asking them if there was any evidence clarifying whether Hanson's valuation was, in fact, affected by the fact that James held a minority interest in Swiderski Equipment. After reviewing the parties' supplemental briefs, significant questions remain as to whether, and to what extent, a minority discount was applied. Ultimately, however, we need not resolve this issue because, regardless of whether Hanson applied a minority discount, we reverse the order adopting Hanson's valuation on other grounds. *See supra* ¶36.

James' supplemental brief included two citations to SHANNON P. PRATT ET AL., VALUING A BUSINESS: THE ANALYSIS AND APPRAISAL OF CLOSELY HELD COMPANIES (3d ed. 1996). Swiderski Equipment moved to strike those references, arguing the cited treatise "is not part of the record and was not properly authenticated by an expert in business valuations using the income approach." We agree and therefore grant the motion to strike. We have not considered or relied upon the cited treatise in reaching our conclusions in this appeal.

¶41 Third, James argues Hanson erred by applying a marketability discount. We disagree. Hanson explained the purpose of a marketability discount as follows:

> The ability to readily sell an ownership interest in a timely manner refers to the *marketability* of the interest. Closely held companies are unlike publicly traded companies in that an owner cannot simply call his stockbroker and issue a sell order for the interest. In order to reflect this lack of liquidity, a *discount for lack of marketability* is applied.

As this explanation makes clear, a marketability discount is applied due to factors that affect the value of a closely held corporation in its entirety. Here, the CRA required Hanson to determine the value of Swiderski Equipment. In so doing, he could reasonably conclude, for the reasons stated in his report, that Swiderski Equipment's status as a closely held corporation decreased the value of its shares. We therefore reject James' argument that Hanson erred by applying a marketability discount. On remand, Hanson may independently determine whether to apply a marketability discount when conducting the new appraisal of Swiderski Equipment.

IV. Prejudgment interest

¶42 The circuit court determined that, under the terms of the CRA, James was entitled to prejudgment interest at a rate of nine percent per year on the difference between the amount Swiderski Equipment paid him for his shares ($510,000) and the amount Hanson determined those shares were worth ($615,000). The court further determined the interest on that amount began to accrue on December 31, 2015, after Hanson's appraisal was completed. James argues the court should have instead concluded the interest began to accrue on

December 30, 2012, which, according to James, is the date the appraisal "should have been performed."

¶43 A party's entitlement to prejudgment interest presents a question of law that we review independently. ***Teff v. Unity Health Plans Ins. Corp.***, 2003 WI App 115, ¶42, 265 Wis. 2d 703, 666 N.W.2d 38. "The general rule is that prejudgment interest may be recovered only when damages are either liquidated or liquidable, that is, there is a reasonably certain standard of measurement by the correct application of which one can ascertain the amount he or she owes." ***Id.***, ¶43. The rationale for this rule is that "if the amount of damages is either liquidated or determinable by reference to some objective standard, the defendant can avoid the accrual of interest by simply tendering to the plaintiff a sum equal to the amount of damages." ***Id.***

¶44 James argues prejudgment interest in this case began to accrue on December 30, 2012, because, as of that date, James had requested a revaluation of the corporation's stock, and the only reason a revaluation was not conducted was because Swiderski Equipment improperly refused his request. Because the revaluation could have been performed as of December 30, 2012, James argues the amount Swiderski Equipment owed him for his shares was reasonably ascertainable on that date.

¶45 We disagree. Although James requested a revaluation in December 2012, many issues and uncertainties existed at that point regarding the revaluation, including whether James was legally entitled to a revaluation under the terms of the CRA. Some of those issues persist in this appeal—for instance, whether certain discounts should have been applied and how Alex's allegedly excessive compensation should have been treated. Due to these issues, James'

damages were not "liquidated or liquidable" as of December 30, 2012. *See* ***id.*** Consequently, the circuit court properly rejected James' assertion that prejudgment interest began to accrue on that date.

¶46 For the reasons explained above, we have determined it is necessary to reverse the circuit court's orders in part and remand for Hanson to conduct a new appraisal. Only when that appraisal is completed will James' damages be "liquidated or liquidable." As a result, prejudgment interest on any amount Swiderski Equipment owes to James will begin to accrue on the date the new appraisal is completed.

¶47 No WIS. STAT. RULE 809.25 costs allowed to the parties.

By the Court.—Orders affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.