

## MEMORANDUM DECISION

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## IN THE COURT OF APPEALS OF INDIANA

Glenn S. Vician, Individually  
and on behalf of Bowman,  
Heintz, Boscia & Vician, P.C.,  
*Appellant-Plaintiff,*

v.

Bingham Greenebaum & Doll,  
LLP n/k/a Dentons Bingham  
Greenebaum LLP, and Jeremy  
Hill,  
*Appellees-Defendants*

August 31, 2023

Court of Appeals Case No.  
22A-PL-1935

Appeal from the Marion Superior  
Court

The Honorable James A. Joven,  
Judge

Trial Court Cause No.  
49D13-1807-PL-28322

**Memorandum Decision by Chief Judge Altice**  
Judges Riley and Pyle concur.

**Altice, Chief Judge.**

## Case Summary

[1] Glenn S. Vician was one of four shareholders in Bowman, Heintz, Boscia & Vician, P.C. (BHBV), a consumer collection law firm. BHBV was interested in merging with another, larger consumer collection firm, and, in 2014, it engaged the legal services of Bingham Greenbaum Doll, LLP n/k/a Dentons Bingham Greenbaum LLP (BGD) and attorney Jeremy Hill of that firm, to provide legal services associated with the transaction. Ultimately, BHBV and Blatt Hasenmiller Leibster & Moore (Blatt) entered into an asset purchase agreement, but Vician was opposed to the terms and did not participate in the sale to Blatt, electing to demand payment for his BHBV shares through the process provided in Indiana's Dissenters' Rights Statute.<sup>1</sup> Subsequently, Vician filed a lawsuit against BGD and Hill (sometimes collectively, Defendant Attorneys), asserting a derivative claim for legal malpractice as well as individual claims for breach of fiduciary duty, tortious interference with contract, and tortious interference with a business relationship. Defendant Attorneys filed a motion for summary judgment, which the trial court summarily granted.

[2] Vician appeals, asserting the following restated issues:

I. Were Vician's claims barred by the applicable two-year statutes of limitation?

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<sup>1</sup> See Ind. Code Chap. 23-1-44.

II. Did Vician satisfy the requirements for making one or more shareholder derivatives claims?

III. Did Defendant Attorneys, who were hired to provide legal services to BHBV, owe a duty to Vician, a minority shareholder who sought and obtained separate relief through Indiana's Dissenters' Rights Statute?

IV. Were Defendant Attorneys entitled to summary judgment on Vician's tortious interference claims?

V. Did the trial court abuse its discretion when it denied Vician's motion to compel discovery responses and granted a protective order to Defendant Attorneys?

[3] We affirm.

## **Facts & Procedural History**

[4] At times relevant to this appeal, BHBV had four shareholders, Vician (236 shares), Phillip LaMere (236 shares), Gerald Bowman (236 shares), and Thomas Burris (112 shares).<sup>2</sup> Due to changes in the consumer collection practice and government regulation, the shareholders discussed in 2013 the need for BHBV to merge with a larger, multi-state firm. Defendant Attorneys' involvement in that process spawned this lawsuit. The communications and negotiations between the various parties – and according to Vician, his

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<sup>2</sup> Another BHBV shareholder, James Boscia, retired in September 2014, at which time he redeemed his 236 shares for \$150 per share.

intentional exclusion therefrom – is relevant to Vician’s claims and is set forth below.

- [5] In March 2014, BHBV was involved in negotiations with a multi-state firm and signed a letter of intent. On July 14, 2014, BHBV engaged the legal services of BGD “to provide assistance to [BHBV] with respect to a corporate transaction.” *Confid. Appendix Vol. 5* at 175. Hill, on behalf of BGD, sent Burris an engagement letter and a Terms of Engagement document that set forth the terms of BGD’s representation, including:

You [BHBV] *will make such business or technical decisions and determinations as are appropriate.* You [BHBV] *will not rely on us [BGD] for business, investment or accounting decisions,* or expect us [BGD] to investigate the character or credit of persons or entities with whom you [BHBV] may be dealing.

*Id.* at 176 (emphases added). Ultimately, the shareholders approved Hill’s July 2014 draft to terminate the letter of intent with the other firm, and the BHBV board of directors voted not to pursue that potential merger.

- [6] In February 2015, Ken Wake, attorney and executive director of Blatt, an out-of-state firm, initiated discussions with Burris about a possible merger. Later that month, BHBV and Blatt entered into a nondisclosure agreement to allow exchange of confidential information to further investigate a possible venture to combine the two firms. On April 29, 2015, Wake sent Burris a proposed structure of the transaction: Burris would have an ownership interest in the profits of Blatt with the percentage to be determined; Bowman would retire;

and Vician and LaMere would each have employment contracts<sup>3</sup> with Blatt, for amounts and time to be determined, and would participate in BHBV legacy account profits at an amount and for a term to be determined.

[7] On May 1, 2015, Burris contacted Hill with Wake's proposed structure, and on May 5, Burris and Hill corresponded with BHBV's outside accountant, Tammy Lynch, discussing the tax implications associated with a merger and asset sale. On May 11, Vician, Burris, LaMere, and BHBV's CFO, Chris Romo, met with Wake in Chicago to discuss base pay for Vician and LaMere and the bonus structure for BHBV legacy files that would be transferred to Blatt.

[8] On June 1, 2015, Hill sent Burris a draft of a non-binding Term Sheet, which summarized, for discussion purposes, the principal terms of a proposed combination of the two firms. Thereafter, Wake met with Vician, LaMere, Burris, and Romo to discuss aspects of the proposed deal. Burris thereafter corresponded with Hill about revisions, and on July 7, Burris sent the revised draft Term Sheet to Vician, LaMere, and Wake. That day, Vician contacted attorney Robert Milford about engaging Milford to represent him and LaMere in the transaction between BHBV and Blatt, and he informed Burris and Wake that he would be forwarding the Term Sheet to Milford to review. Vician at some point also forwarded to Milford his and LaMere's employment

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<sup>3</sup> Vician had an existing employment agreement with BHBV, executed on November 30, 2000, which allowed either party to terminate the relationship without cause with sixty days' notice.

agreements with BHBV and the BHBV Amended Restrictive Stock Agreement (the Stock Agreement).

[9] On July 21, 2015, Vician submitted his draft of a merger agreement to Milford and thereafter forwarded it to LaMere, with Vician privately telling LaMere that he did not want to work for an entity where Burris was an owner, as he considered Burris to be incompetent. On August 3, Milford sent a revised draft to Vician and LaMere, and Vician responded that he wanted a provision added that Burris would agree to subordinate his Blatt salary and bonus to sums owed to Vician and LaMere under their contractual rights with Blatt. In August 2015, Vician again told LaMere that he was concerned about being a non-owner at the will of Burris and Blatt.

[10] On August 24, 2015, Vician sent to Wake drafts of the proposed merger agreement and his employment agreement, as revised by Milford. Wake then forwarded the documents to Burris, who forwarded them to Hill. Burris explained to Hill that things “ha[d] taken a rather strange turn” because Vician, rather than providing comments on the Term Sheet, had “hired another attorney to represent his and [LaMere’s] interest in the process” and “we now have an agreement which was not based on the terms sheet.” *Confid. Appendix Vol. 6* at 71. Burris told Hill that neither he nor Wake had any input in the proposed merger agreement and that it included provisions that he (Burris) did not agree to, such as subordinating his salary to Vician and LaMere’s interests. On September 2, Hill responded to Burris with a marked-up draft of the

proposed merger agreement to align more closely with the Term Sheet that had been submitted on July 7, 2015.

- [11] On September 4, Wake emailed BHBV shareholders, expressing his goal of closing the deal by September 30 to ensure the new entity would be in a position to move forward on January 1, 2016. A few days later, Vician responded to Wake and the shareholders, identifying three issues that he felt needed to be resolved: (1) final approval of LaMere and Vician employment agreements; (2) final approval of the terms of the merger agreement; and (3) BHBV directors/shareholders had to resolve issues of buying out junior shareholders, timing of such repurchases, and distribution of remaining BHBV capital reserves.
- [12] Wake thereafter sent Vician's proposed merger agreement and employment agreement to Blatt's outside counsel for review. Blatt's response to the proposed merger agreement was an asset purchase agreement (APA), which Wake sent to the directors of BHBV on October 2, 2015. On October 8, LaMere responded that the APA and his employment agreement were acceptable to him. Vician, however, had a number of concerns, such as tail insurance and indemnity cap issues. On October 11, Burris wrote Hill about including certain language to protect Vician and LaMere in the event Blatt went out of business. On October 12, Wake emailed Vician to set up a call to discuss modifications to the proposed agreements.

[13] At some point around this time, Vician told Burris that he believed that Hill was representing Burris's interests but not Vician's. On October 17, Burris replied by email to Vician stating that Hill represented BHBV's interests; Hill was not copied on that email. Vician responded that neither he nor LaMere had communicated with Hill in a year and accused Hill of having a conflict of interest; Hill was not copied on that email.

[14] The negotiations pertaining to the BHBV/Blatt transaction continued, with Wake emailing the four BHBV shareholders on November 6 with the APA and employment agreements as revised per recent conversations. Vician responded to Wake that day stating, "your updates to the agreements look accurate, based upon our previous discussions. I will be on vacation through 11/16. Let's plan a closing later in that week assuming, the BHBV principals receive a manageable tail policy from Rittman & Assoc. by then." *Appendix Vol. 2* at 176 (Burris's affidavit); *Confid. Appendix Vol. 7* at 208 (email correspondence). On November 10, Burris forwarded to Hill the versions of the APA and employment agreements approved by Vician and Wake.

[15] On November 20, Wake emailed the BHBV shareholders with the APA, stating that the scheduled closing date of December 31, 2015 was not feasible and proposing that it be moved to March 31, 2016. Burris, LaMere, and Bowman agreed to the change, but Vician did not, as he believed that the extension would negatively affect him monetarily and that it was orchestrated by Burris. As LaMere was no longer aligned with Vician, Vician was in a minority position. Later in November, Vician told Burris about his concerns that Hill



did not share work product with all the BHBV shareholders and that Burris failed to include all shareholders in his communications with Hill and accountant Lynch, suggesting to Burris that the BHBV/Blatt transaction be terminated.

[16] On December 18, 2015, a BHBV Board of Directors meeting was held to vote on the proposed transaction with Blatt. Vician was present and delivered a notice to BHBV shareholders and directors, pursuant to Indiana's Dissenters' Rights statute of his objection and dissent to the APA. A majority of the Board voted to approve the APA sale and recommended that the shareholders also do so. A special meeting of the BHBV shareholders occurred on December 30, 2015, and Vician participated by telephone. The day prior, Vician again provided a notice of his dissent to the proposed transaction with Blatt. A majority of the shareholders voted to approve the sale to BHBV. Vician's employment agreement was no longer part of the APA at that point since Vician opposed the transaction.

[17] On January 6, 2016, BHBV provided a Dissenters' Rights Notice to Vician as required by statute, directing Vician to make a demand for payment of his shares by February 29, 2016. On January 30, 2016, BHBV provided notice to Vician, pursuant his employment agreement, that it was terminating his employment with BHBV effective March 31, 2016.<sup>4</sup> On February 26, 2016,

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<sup>4</sup> At the same time, BHBV noticed and terminated the employment agreements of all other shareholders as well.

Vician presented his demand to BHBV for payment of his 236 shares of BHBV, seeking \$1,218,728.82, or over \$5,100 per share.

[18] The closing of the APA occurred on April 16, 2016. After the asset sale to Blatt, BHBV delivered a check to Vician in the amount of \$328,100 (\$1,389/share) representing BHBV's proposed estimated fair value of Vician's shares, pursuant to Ind. Code § 23-1-44-15, as valued by an accountant. Vician rejected the check. On May 17, 2016, BHBV filed a Dissenters' Rights Complaint, pursuant to I.C. § 23-1-44-19, in Lake Superior Court (the Dissenters' Rights Action) to obtain a judicial valuation of Vician's BHBV shares.<sup>5</sup>

[19] On April 12, 2018, Vician, pro se, filed a complaint against Defendant Attorneys for "derivative shareholder relief and also for direct individual relief," alleging, among other things, that they failed and refused to keep him directly informed and also drafted an APA that transferred BHBV non-cash assets to Blatt, purportedly for no consideration, which in turn harmed Vician, a minority shareholder. *Appendix Vol. 2* at 99. He alleged that Defendant Attorneys owed a fiduciary duty to him as third-party beneficiary/minority shareholder and that they breached that duty by conspiring and engaging in "behind-the-scenes communication with Burris to ultimately minimize

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<sup>5</sup> According to Defendant Attorneys, Vician filed a counterclaim against BHBV and third-party claims against Bowman, LaMere, and Burris for alleged tortious conduct; in turn, Bowman, LaMere, and Burris filed claims against Vician for tortious conduct.

consideration paid to BHBV.” *Id.* at 105. Vician asserted claims of (1) breach of fiduciary duty that caused him to suffer damages; (2) a derivative claim of legal malpractice that caused BHBV to suffer damages; (3) tortious interference with contract that caused damages to both Vician and BHBV, referring to both his employment contract with BHBV and the Stock Agreement; and (4) intentional interference with the business relationship between Vician and BHBV that caused damages to both him and BHBV. *Id.* at 106. Vician attached the Stock Agreement to his complaint.

[20] On December 20, 2019, Defendant Attorneys filed a motion for summary judgment. They argued that all of Vician’s claims were barred by the applicable two-year statute of limitations because his claims accrued in December 2015, when he opposed the sale of BHBV at the board and shareholder meetings or, when Vician’s employment agreement was terminated on January 30, 2016, or, at the latest, on February 26, 2016, when he made a formal demand for payment of his shares under the Dissenters’ Rights Statute.

[21] Defendant Attorneys also asserted that Vician’s legal malpractice and breach of fiduciary duty claims were barred as a matter of law because: (1) Defendant Attorneys were hired by and represented BHBV, a corporation, and Defendant Attorneys’ fiduciary duty was to BHBV, not Vician, a minority shareholder; (2) Vician chose not to proceed with the APA and instead chose to be compensated through the dissenters’ rights process, which was his exclusive remedy; and (3)

Vician lacked standing to bring a derivative claim on behalf of BHBV as, at that point, he was a former shareholder.<sup>6</sup>

[22] On June 1, 2021, while the motion for summary judgment was pending, Vician filed a motion to compel discovery responses to a request for production of documents (RFP) previously served on Defendant Attorneys that sought, among other things, (1) Hill’s communications with and work product for BHBV after December 14, 2015, and (2) communications between BHBV and Somerset, an accounting firm involved in an appraisal of BHBV. In late 2018, Defendant Attorneys objected to the RFP, refusing to produce the requested documents on the basis that the sought materials were protected by the attorney-client privilege and/or constituted work product and that Vician, as a former shareholder, lacked standing. Thereafter, Defendant Attorneys agreed to make available to Vician the requested documents up through the point in time when Vician dissented from the sale in December 2015 – documents they had already made available to him through a database created in the Dissenters’ Rights Action (in which Defendant Attorneys were not a party) – but excluding communications and documents created after Vician dissented and his interests were, they claimed, adverse to BHBV.

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<sup>6</sup> When Vician filed his complaint, the Dissenters’ Rights Action had not been settled or decided and, thus, he was still a shareholder. Vician admitted during discovery that as of September 28, 2018, he did not own any shares.

[23] In his motion to compel, Vician recognized that Indiana has not determined “whether attorney-client privilege can be asserted against a former officer or director when the materials attempting to be discovered were created during the tenure of the former officer or director,” but argued, for various reasons, that it should. *Confid. Appendix Vol. 3* at 29. Defendant Attorneys filed an opposition to Vician’s motion to compel as well as a motion for a protective order.

[24] Following a July hearing, the trial court denied Vician’s motion to compel on September 15, 2021 (2021 Discovery Order), finding that Vician “as a former shareholder/director of [BHBV] is not entitled to attorney-client or attorney work product documents requested by Plaintiff.” *Confid. Appendix Vol. 3* at 162; *see also Appendix Vol. 2* at 20 (CCS stating “Plaintiff requested information protected by attorney-client privilege for a time period after Plaintiff became a dissenting shareholder [and] is not entitled to discovery of such information”). The court granted Defendant Attorneys’ motion for a protective order, prohibiting Vician “from questioning Hill at deposition regarding attorney-client and work product matters not previously produced” from the database in the Dissenters’ Rights Action. *Confid. Appendix Vol. 3* at 162.

[25] Following substantial summary judgment briefing, designation and submission of “thousands of pages” of evidence, filing of motions, and a June 2022 hearing,<sup>7</sup> the trial court summarily granted Defendant Attorneys’ motion for

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<sup>7</sup> Counsel for BGD stated at this hearing that Vician’s Dissenters’ Rights Action with BHBV had been settled.

summary judgment on July 13, 2022. *Appellant's Brief* at 14. Vician now appeals.<sup>8</sup> Additional facts will be provided below as needed.

## Discussion & Decision

[26] The Court of Appeals reviews the grant of summary judgment de novo. *Warren v. Board of Sch. Trustees of Springs Valley Comm. Sch. Corp.*, 49 N.E.3d 559, 564 (Ind. Ct. App. 2015). The Court's review is limited to those facts designated to the trial court. *Id.* Summary judgment is properly affirmed where the designated evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.* The party appealing the grant of summary judgment has the burden of persuading the Court that the trial court's ruling was improper. *Munster Steel Co., Inc. v. CPV Partners, LLC*, 186 N.E.3d 143, 148 (Ind. Ct. App. 2022). The trial court's decision on summary judgment "is clothed with a presumption of correctness," and this court will affirm on any basis found in the record. *Commercial Credit Counseling Servs. v. W.W. Grainger, Inc.*, 840 N.E.2d 843, 847 (Ind. Ct. App. 2006).

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<sup>8</sup> Vician's August 12, 2022 Notice of Appeal identified the court's summary judgment order as the order being appealed. Vician's Appellant's Brief raises an argument challenging the court's denial of his motion to compel, although his Notice of Appeal does not identify the 2021 Discovery Order as being appealed, nor do his Statement of Issues or Summary of Argument mention the denial of the motion as an issue on appeal.

## I. Statute of Limitation

[27] Defendant Attorneys assert, as they did on summary judgment, that all four of Vician’s claims were barred as a matter of law by the statute of limitations. Vician agrees that the statute of limitation applicable to each of the claims is two years. *See* Ind. Code § 34-11-2-4 (an action for injury to person or character or for injury to personal property must be commenced within two years after the cause of action accrues). His position is that his injury did not occur and he could not ascertain damages until the closing of the sale on April 16, 2016, making his April 12, 2018 complaint timely filed.

[28] Our courts have explained that for a cause of action to “accrue,”

it is not necessary that the full extent of damage be known or even ascertainable, but only that some ascertainable damage has occurred. Further, legal malpractice actions are subject to the “discovery rule,” which provides that the statute of limitations does not begin to run until such time as the plaintiff knows, or in the exercise of ordinary diligence could have discovered, that he had sustained an injury as the result of the tortious act of another. For purposes of the discovery rule, reasonable diligence “means simply that an injured party must act with some promptness where the acts and circumstances of an injury would put a person of common knowledge and experience on notice that some right of his has been invaded or that some claim against another party might exist.”

*Saylor v. Reid*, 132 N.E.3d 470, 473 (Ind. Ct. App. 2019), *trans. denied* (citations and most internal quotations omitted). Vician maintains that his claims, filed on April 12, 2018, were not time barred because the sale closed on April 16,

2016, and “if BHBV had not closed the sale then [he] would have had no damages.” *Appellant’s Brief* at 29.

[29] There is no dispute that, on December 18, 2015, a majority of the board of directors voted to approve the sale to Blatt via the APA, and, at that time, Vician provided a notice of his dissent to such sale. On December 30, the shareholders likewise voted to approve the sale, and Vician again provided notice of his dissent. Thus, the terms of the deal between BHBV and Blatt, which form the underpinnings of his malpractice and breach of duty claims, were known to Vician as of December 2015. Indeed, in his complaint, Vician alleges that Defendant Attorneys “knew . . . that . . . [Vician] . . . *as of December, 2015, . . . as a minority shareholder would be financially damaged by reason of the asset sale agreement drafted under the direction of [Attorney Defendants].*” *Appendix Vol. 2* at 103 (emphasis added). If Defendant Attorneys knew by that date that he would be financially damaged, then so did Vician.

[30] As to his tortious interference claims, Vician argues that “the value of the employment contract, lost wages, and the damages caused by BHBV’s actions regarding the valuation of his shares, did not occur until the asset sale occurred,” and therefore, “there were no ascertainable damages prior to the asset sale on April 16, 2016.” *Appellant’s Brief* at 29. While the amount may not have been specifically ascertained until then, BHBV gave notice to Vician on January 30, 2016, that it was terminating his employment contract (as it did with all BHBV shareholders/directors), with termination of employment effective March 31, 2016. As to Vician’s claim for tortious interference with a



business relationship, his allegations are general, claiming only that “a valid business relationship existed between [Vician] and BHBV” and that Defendant Attorneys intentionally interfered with it. *Appendix Vol. 2* at 112. Presumably, the “business relationship” also stems from the employment agreement and/or the Stock Agreement. Vician submitted a demand for payment of his shares in February 2016 and thus knew by that point that, in his view, he had suffered some ascertainable damage.

[31] That said, even if we agreed with Vician that his claims were not time barred, we find for separate reasons, as explained below, that Defendant Attorneys were nevertheless entitled to judgment as a matter of law. We first address the derivative legal malpractice claim then turn to his individual claims.

## **II. Derivative Legal Malpractice Claim**

[32] Vician’s derivative legal malpractice and individual breach of fiduciary duty claims are related, stemming from the same underlying facts. Summarized, the allegations are that Defendant Attorneys failed to keep Vician informed of the work they were performing in connection with the BHBV/Blatt transaction (although keeping Burris and Bowman informed), structured and drafted an APA “to sell off BHBV’s assets, business name, stream of income, goodwill and client base for no consideration,” which “was undertaken to provide substantial direct personal benefits to only certain minority [shareholders] of BHBV,” and failed to “fulfill their duties to maintain, preserve and enhance the value of BHBV” by “refusing to maximize the sale value of the company,” all of which

damaged BHBV and Vician, a minority shareholder. *Appendix Vol. 2* at 102, 107, 108.

[33] To prove a legal malpractice claim, the plaintiff must show: (1) employment of the attorney (the duty); (2) failure of the attorney to exercise ordinary skill and knowledge (the breach); (3) proximate cause (causation); and (4) loss to the plaintiff (damages). *CRIT Corp. v. Wilkinson*, 92 N.E.3d 662, 670 (Ind. Ct. App. 2018). “The primary and essential factual predicate for a legal malpractice claim is an attorney-client relationship.” *Spainhower v. Smart & Kessler, LLC*, 176 N.E.3d 258, 264 (Ind. Ct. App. 2021), *trans. denied*. Here, there is no dispute that Defendant Attorneys were hired by BHBV, that BHBV was Defendant Attorneys’ client, and that Vician did not have an individual attorney-client relationship with BHBV. Vician alleges that his claim for legal malpractice is made “on behalf of BHBV” and thus purports to assert a derivative claim.<sup>9</sup> *Appellant’s Brief* at 17; *see also Appendix Vol. 2* at 99 (complaint stating that Vician was asserting both individual and derivative claims), at 112 (complaint stating, in section asserting legal malpractice, that “Plaintiff BHBV” suffered damages).

[34] Derivative actions are brought in the name of the corporation and “must comply with” Ind. Trial Rule 23.1 and Ind. Code Chap. 23-1-32. *Edgeworth-*

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<sup>9</sup> Our Supreme Court has explained that “[d]erivative actions are suits asserted by a shareholder on the corporation’s behalf against a third party because of the corporation’s failure to take some action against the third party.” *In re ITT Derivative Litig.*, 932 N.E.2d 664, 666 n.1 (Ind. 2010). Derivative actions are brought in order to redress an injury sustained by the corporation or to enforce a duty owed to the corporation. *Id.* All relief obtained belongs to the corporation. *DRW Builders, Inc. v. Richardson*, 679 N.E.2d 902, 907 (Ind. Ct. App. 1997).

*Laskey Properties, L.L.C. v. New Boston Allison Ltd. P'ship*, 793 N.E.2d 298, 304 (Ind. Ct. App. 2003); *see also G & N Aircraft, Inc. v. Boehm*, 743 N.E.2d 227, 234 (Ind. 2001). T.R. 23.1 provides, in part:

In a derivative action brought by one or more shareholders . . . to enforce a right of a corporation, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint *shall be verified*[.] . . .

(Emphasis added). I.C. § 23-1-32-2 likewise states that a complaint in a derivative action “must be verified.” Vician acknowledges that failure to satisfy the verification requirement “can deprive the trial court of the jurisdiction to hear a particular case.” *Appellant’s Brief* at 22.

[35] Vician’s pro se complaint was not verified. His position is that he effectively complied with T.R. 23.1 because he is an attorney and filed his complaint pro se, and, as an attorney, is held to standards of veracity pursuant to Ind. Trial Rule 11(A), which prohibits an attorney from filing anything known to be false with a court. Thus, he maintains, he satisfied “the policy behind the requiring an affirmation.” *Reply Brief* at 7. We are unconvinced that effectively complying is sufficient to satisfy the requirement of filing a verified complaint.

[36] Furthermore, we have observed that to maintain a derivative action, a shareholder or member of an association must satisfy the following four requirements: (1) the complaint must be verified, (2) the plaintiff must have been a shareholder or member at the time of the transaction of which he or she

complains,<sup>10</sup> (3) the complaint must describe the efforts made by the plaintiff to obtain the requested action from the board of directors, and (4) the plaintiff must fairly and adequately represent the interests of the shareholders or members. *See Edgeworth-Laskey*, 793 N.E.2d at 305; *see also* T.R. 23.1. Vician has not explained or provided support for how he “represents the interests of the shareholders,” given that a majority of the shareholders voted to approve the APA, which is at the root of his malpractice claim against Defendant Attorneys.

[37] For these reasons, Defendant Attorneys were entitled to summary judgment on Vician’s derivative legal malpractice claim.<sup>11</sup>

### **III. Breach of Fiduciary Duty Claim**

[38] Based upon the same facts as his legal malpractice claim, Vician asserts an individual claim for breach of fiduciary duty against Defendant Attorneys. A claim for breach of fiduciary duty requires proof of three elements: (1) the existence of a fiduciary relationship; (2) a breach of the duty owed by the fiduciary to the beneficiary; and (3) harm to the beneficiary. *West v. J. Greg*

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<sup>10</sup> Defendant Attorneys argue, in part, that “Vician *as a former shareholder* has no standing to bring a derivative claim on behalf of BHBV.” *Appellee’s Brief* at 40 (emphasis added). As we resolve the derivative claim(s) on other grounds, we do not reach said argument, but note that Vician was still a shareholder at the time of the transaction in April 2016, and there is no evidence that he did not still own shares at the time he filed his complaint in April 2018.

<sup>11</sup> While he does not expressly argue that his tortious interference claims were derivative actions, we note that his complaint alleges that Defendant Attorneys caused financial damage to both BHBV and to Vician. To the extent that the two tortious interference claims are derivative in nature, Defendant Attorneys were entitled to summary judgment on them for the reasons discussed above.

*Allen Builder, Inc.*, 92 N.E.3d 634, 643 (Ind. Ct. App. 2017), *trans. denied*. With regard to duty, we have recognized:

The existence of a duty is generally a question of law for the court to decide. Where an alleged duty is well established, there is no need for a judicial redetermination of duty. Whether a particular act or omission amounts to a breach of an attorney's duty is generally a question of fact for the jury. However, breach can become a question of law where the facts are undisputed and only a single inference can be drawn therefrom.

*Devereux v. Love*, 30 N.E.3d 754, 763 (Ind. Ct. App. 2015) (quoting *In re Estate of Lee*, 954 N.E.2d 1042, 1046-47 (Ind. Ct. App. 2011), *trans. denied*), *trans. denied* (internal citations omitted).

[39] Vician claims that Defendant Attorneys were in a fiduciary relationship with him as a BHBV minority shareholder, and owed him a duty to, among other things, consult with and “fully inform [him] of any and all legal matters that [they] were undertaking on behalf of BHBV” and “ensure that BHBV assets were not sold and transferred for an unfair and inadequate price over objection of a minority BHBV shareholder. *Appendix Vol. 2* at 103. Vician alleged that Defendant Attorneys not only breached those duties but engaged in a “conspiracy . . . with Burris” with a “common design to defraud BHBV of value” and “maintained a major and irreconcilable conflict of interest . . . in aiding and abetting the transfer of BHBV assets for an unfair price . . . resulting in the fact that Burris . . . ended up owning 50% of all BHBV’s non-cash assets, at no cost to Burris and resulting in a major BHBV loss.” *Id.* at 105.

[40] Defendant Attorneys raised various arguments in seeking summary judgment, including that they were hired to provide legal services to BHBV, a corporation, that their duty was thus to BHBV, and that there is no support under Indiana law for them owing a duty to Vician, a minority shareholder. *See Cutshall v. Barker*, 733 N.E.2d 973, 981 (Ind. Ct. App. 2000) (recognizing that law firm retained by corporation represents the corporation and not individual board members or directors).

[41] Vician acknowledges that Indiana law currently does not recognize a duty in the circumstances of this case but argues that Indiana partnership law – where in certain cases a lawyer representing a partnership is in an attorney-client relationship with each of its partners and owes a duty of disclosure – provides a potential basis for imposing a duty on Defendant Attorneys in this situation, given the similarities between a partnership and a close corporation. And Vician suggests that “it makes good sense to hold that the attorney [for a close corporation] holds the same duty of disclosure to the shareholders.” *Appellant’s Brief* at 24. He also argues that he was a known third-party beneficiary to the transaction and, therefore, Defendant Attorneys’ duty to “zealously advocate for [] each of shareholders” and “keep[] them informed in a timely manner so that they could make fully informed decisions and know the terms being negotiated” extended to him. *Id.* at 26.

[42] As Defendant Attorneys note, Vician did not raise these arguments to the trial court. We thus find them waived. *See Munster Steel Co., Inc.*, 186 N.E.3d at 149 (“It is well settled that ‘arguments not presented to the trial court on summary

judgment are waived on appeal’”) (quoting *King v. Ebrems*, 804 N.E.2d 821, 826 (Ind. Ct. App. 2004)). Even if not waived, we decline Vician’s invitation to create a duty where one does not now exist. Accordingly, his breach of fiduciary duty claim fails.

#### **IV. Tortious Interference Claims**

[43] In his complaint, Vician asserted a claim for tortious interference with contract, identifying the contracts as his employment agreement and the Stock Agreement. He also asserted a claim for tortious interference with business relationship, generally asserting that there was “a valid business relationship” between Vician and BHBV with which Defendant Attorneys intentionally interfered. *Appendix Vol. 2* at 112.

[44] Tortious interference with contract requires one to prove: (1) the existence of a valid and enforceable contract; (2) the defendant’s knowledge of the existence of the contract; (3) the defendant’s intentional inducement of breach of the contract; (4) the absence of justification; and (5) damages resulting from the defendant’s wrongful inducement of the breach. *Coleman v. Vukovich*, 825 N.E.2d 397, 403 (Ind. Ct. App. 2005). Similarly, the elements of tortious interference with a business relationship are: (1) the existence of a valid relationship; (2) the defendant’s knowledge of the existence of the relationship; (3) the defendant’s intentional interference with that relationship; (4) the absence of justification; and (5) damages resulting from defendant’s wrongful

interference with the relationship. *Miller v. Cent. Ind. Cmty. Found., Inc.*, 11 N.E.3d 944, 961 (Ind. Ct. App. 2014), *trans. denied*.

[45] The record indicates that both tortious interference claims appear to flow from the same premise, discussed above in the context of duty, namely, that Defendant Attorneys failed to keep Vician directly apprised of all modifications and changes and structured an APA that negatively impacted Vician, all of which ultimately lead to termination of and interference with Vician's employment contract and Stock Agreement with BHBV.<sup>12</sup> However, the terms of Vician's employment agreement with BHBV allowed either party to terminate the relationship without cause with sixty days' notice, and the undisputed evidence is that the employment agreements of all shareholders were terminated at the same time as was Vician's in January 2016. As to the Stock Agreement, it does not prohibit the sale of the assets of BHBV upon approval of a majority of the directors and a majority of the shareholders. There is no evidence or even allegation that termination of his employment agreement was a breach of contract or that there was a breach of the Stock Agreement.

[46] In sum, Vician has not shown any genuine issue of material fact precluding summary judgment to Defendant Attorneys on these claims, and we find that, even if Vician's tortious interference claims were able to get past the statute of

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<sup>12</sup> There was no allegation concerning violation of any contract or relationship with Blatt.



limitations discussed above, Defendant Attorneys were entitled to judgment as a matter of law on the tortious interference claims.

## **V. Denial of Vician’s Motion to Compel**

[47] In September 2021, the trial court denied Vician’s motion to compel and determined that Vician requested “information protected by attorney-client privilege for a time period after Plaintiff became a dissenting shareholder [and] is not entitled to discovery of such information.” *Appendix Vol. 2* at 20; *see also Confid. Appendix Vol. 3* at 162 (finding that Vician, as a former shareholder/director “is not entitled to attorney-client or attorney work product documents requested”). Vician did not identify the denial of his motion to compel in his statement of issues or discuss it in his summary of argument section, as required by Ind. Appellate Rule 46(A). However, at the end of his Appellant’s Brief and thus seemingly as an afterthought, Vician raises the argument that the trial court abused its discretion when it denied his motion to compel.

[48] As Vician acknowledges, discovery matters are reviewed for an abuse of discretion. *Warren*, 49 N.E.3d at 569. An abuse of discretion occurs where the decision is against the logic and natural inferences to be drawn from the facts of the case. *Id.*

[49] Vician seeks discovery of communications between Defendant Attorneys and its client, BHBV, and communications between Defendant Attorneys and Somerset, the accountants hired by BHBV to value BHBV. Vician was granted

access to all requested communications occurring *prior to* the point in time when, in December 2015, he took a position adverse to BHBV and was provided the Somerset valuation. However, communications *after* December 13, 2015 were excluded, i.e., not produced by Defendant Attorneys, as they took the position that these were privileged attorney-client and/or work product materials. Vician acknowledges that he opposed the sale and exercised his dissenter’s rights in December 2015, but asserts he remained an officer, shareholder, and director “until after the closing [] on April 16, 2016 and, as such, was entitled to review the work product and other materials of [Defendant Attorneys].” *Appellant’s Brief* at 34.

[50] Vician argues that, even if the attorney-client privilege belonged to BHBV, as Defendant Attorneys claimed to the trial court, Defendant Attorneys never “provide[d] proof” that they were “instructed to assert the privilege on behalf of BHBV” and, therefore, his motion to compel should have been granted. *Id.* at 36. This argument was not presented to the trial court. We thus find it waived. *See Munster Steel Co., Inc.*, 186 N.E.3d at 149 (arguments not presented to the trial court are waived on appeal).

[51] In any event, we agree with Defendant Attorneys that the requested communications between Defendant Attorneys and BHBV and between them and Somerset after Vician dissented and his interests became adverse in December 2015 are not relevant and not likely to lead to the discovery of admissible evidence related to Vician’s malpractice/breach of duty/tortious interference claims, as there is no allegation that any breach or interference

occurred *after* Vician's decision to oppose the transaction. Vician has not established that the trial court abused its discretion when it denied his motion to compel and granted a protective order to Defendant Attorneys.

[52] Judgment affirmed.

Riley, J. and Pyle, J., concur.