NOT DESIGNATED FOR PUBLICATION

No. 123,719

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

WILLIAM F. HEFNER,
Appellee,

v.

CHRIS A. DEUTSCHER, ET AL.,
Appellants.

MEMORANDUM OPINION

Appeal from Shawnee District Court; TERESA L. WATSON, judge. Opinion filed March 24, 2023. Affirmed.

Charles T. Engel and *Derek D. Ulrich*, of Engel Law, P.A., of Topeka, for appellants.

Roger N. Walter and *Trevor C. Wohlford*, of Morris, Laing, Evans, Brock & Kennedy, Chartered, of Topeka, for appellee.

Before HURST, P.J., HILL and ATCHESON, JJ.

HURST, J.: This case illustrates the perils of personal financial motivations on independent business judgment. William F. Hefner, an optometrist, was terminated from his employment in a closely held corporation of optometrists (Corporation) for allegedly "threatening to breach" the noncompete clause of his employment agreement which—coincidentally—permitted the Corporation to avoid giving him a large payout upon his exit. But the district court found that the Corporation and its president, Chris A. Deutscher, wrongly terminated Hefner's employment in breach of his employment agreement and Deutscher's fiduciary duties, and awarded Hefner $1,097,479.52 in damages.

Deutscher and the Corporation appeal, arguing that the district court erred in:

(1) finding that Hefner did not breach his employment agreement permitting his termination without receiving a payout;

(2) finding that Deutscher breached his fiduciary duty towards Hefner; and

(3) its damages calculation.

Contrary to Deutscher's and the Corporation's arguments, this court finds the district court's well-reasoned decision both legally and factually sound, and none of their arguments availing. The district court's decision is therefore affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

In 1997, after completing a teaching fellowship at Pacific University, Hefner began working at the Corporation in Topeka. The following year, Hefner officially joined the Corporation as an employee, signing an Employment Agreement and a Redemption Agreement, the terms of which are both at issue. Deutscher had joined the Corporation about a year before Hefner and, over the next two decades, Hefner and Deutscher oversaw the Corporation's operations. Unfortunately, and not uncommon to closely held corporations, management disagreements between the two developed, which eventually led to the present litigation.

The Employment Agreement and Redemption Agreement governed the terms of Hefner's employment including the terms of his exit—whether voluntary or involuntary—from the Corporation. Under the Redemption Agreement, the Corporation was required to pay Hefner a buyout amount upon his departure from the Corporation, but the timing and cause of his departure greatly impacted the amount of that payment.

Specifically, the Corporation had to purchase "Hefner's stock and other interests in Corporation and its business" upon the termination of Hefner's employment with the Corporation, "whether voluntary or involuntary and for whatever reason or cause." If Hefner left the Corporation "for any reason" before December 31, 2007, the Corporation had to pay him $2,500 per share for the purchase price of his stock. But if Hefner left his employment after December 31, 2007, as is the case here, "the purchase price [was to] be negotiated based on the then existing practice value." However, if Hefner breached any of his duties enumerated in the Employment Agreement—including the provisions of the noncompete clause—the Corporation could terminate his employment without repurchasing his stock and other interests in the Corporation. The Redemption Agreement provides that, in that event, Hefner would have to "transfer all [of] his stock and other interests in [the] Corporation and its business to [the] Corporation for no further consideration."

Paragraph 12 of the Employment Agreement contained the conditions under which the Corporation could terminate Hefner's employment and provided that the Corporation could terminate Hefner's employment "without prior notice, *for cause*" (emphasis added) and described "Cause" to include:

> "(h) Hefner's breach of any of his duties, responsibilities or obligations under the terms of this Agreement; . . . (j) Hefner's competition with the Corporation or personal utilization of opportunities which could be for the benefit of the Corporation; . . . or (l) Hefner's willful acts or omissions that are materially inconsistent with his duties as an employee of the Corporation."

The Employment Agreement also included a noncompete clause in subparagraph 14(a) which prohibited Hefner from competing with the Corporation within Shawnee County, Kansas, or its contiguous counties at any time during his employment and for 36 months after his departure for any reason from the Corporation. Subparagraph 14(d) granted the Corporation authority to seek injunctive relief or any other relief "granted to [the]

Corporation by law or under [the Employment Agreement] or other agreements" for "any breach *or threatened breach* by Hefner of the provisions of [ ] paragraph 14." (Emphasis added.)

Throughout their years of employment, Hefner and Deutscher both bought shares in the Corporation until they owned equal percentages. But around 2005 or 2006, Dr. Cecil Kohake, the president of the Corporation at the time, decided to retire and approached Deutscher about replacing him as president of the Corporation. In 2009, Kohake negotiated his exit from the Corporation in which he agreed to train Deutscher to assume the leadership role and Kohake would receive a structured settlement of approximately $1 million over the next 10 years. Deutscher later testified that Kohake received "over and above" compensation upon his retirement because of the training he offered to provide during his exit. Deutscher officially became the president of the Corporation in 2008 or 2009.

The Corporation's revenues remained stable after Kohake's departure in 2010, and the Corporation hired a new optometrist, Dr. Charles Rottinghaus. Rottinghaus joined the Corporation largely because of his relationship with Hefner, whom Rottinghaus had studied under and seen patients with when he was a student. Although the patient list officially belonged to the Corporation, each of the three doctors maintained their own "patient base" within the Corporation, with Rottinghaus inheriting his patient base from Kohake's departure.

The Breakdown of Deutscher's and Hefner's Management Relationship

Over the following years, Deutscher served as President, Hefner served as Secretary Treasurer, and the Corporation remained profitable. Hefner testified that they were "very different people" with "very different perspectives," who—perhaps inevitably—began to disagree about the best way to run the Corporation. Unfortunately, their disputes became overwhelming in mid-2016 when Deutscher and Hefner became "diametrically opposed" over whether to use co-office managers, rather than just one office manager, at the Corporation.

By 2016, Hefner and Deutscher each owned 40 percent of all of the Corporation's shares, and Rottinghaus owned 20 percent. All three doctors conducted monthly board meetings and generally shared the responsibilities of running the Corporation and made decisions by consensus. At a special board meeting in September 2016, shortly after the resignation of the Corporation's office manager, Deutscher and Hefner had a heated exchange about whether to simply find a replacement, or to hire two employees to co-manage—an idea first proposed by Rottinghaus. Deutscher became angry when he discovered that Hefner had talked to a current employee about taking on the co-managerial role before obtaining Deutscher's agreement. Deutscher then accused Hefner of causing all of the Corporation's employees to leave. Hefner replied, "'[T]his is your shit show, you can fly it into the ground, I'm done.'" During that dispute, Hefner offered to leave the practice in exchange for a payout of $750,000, plus the price of his shares. Deutscher tentatively accepted Hefner's offer to leave, responding: "'I'll put some numbers together and I'll get back to you, but until that point in time, you better have your ass at work every day.'" Although Rottinghaus was present at the meeting, he did not participate in the dispute and said he was in disbelief and "speechless."

At the next office meeting in October, Hefner sought to reconcile with Deutscher, apologizing for the antagonistic meeting and offering to make certain concessions in order to amicably move forward. But Deutscher explained that he had no interest in continuing to manage the Corporation together, telling Hefner that he was no longer welcome at board meetings because it would "make doing business awkward" as Hefner was now on the way out. Deutscher told Hefner that they "would let the lawyers work out the details of moving forward." Deutscher said he did not want to manage the

Corporation with Hefner but offered to let Hefner continue as an employee so long as he resigned as a Director and Officer.

The Negotiations for Hefner's Exit from the Corporation

Hefner was told the Corporation's attorney was representing the Corporation and Deutscher in the matter, so Hefner hired his own attorney and began negotiating his exit. Rottinghaus, who was not on the Corporation's board at the time, did not participate in the exit negotiations. The negotiations involved two alternative exit agreements, which Hefner's attorney first offered on October 14, 2016. Under the first option, the Corporation would buy Hefner's shares in the Corporation for $100,000, the Corporation would buy Hefner's remaining interests in the Corporation for $750,000, and Hefner would abide by the three-year noncompete clause in his Employment Agreement. Under the second option, the Corporation would buy Hefner's shares in the Corporation for $100,000, but it would also release him from the noncompete clause, thereby allowing him to immediately establish his own competing practice in Shawnee County or any contiguous county to it. Deutscher preferred the second option, which cost a lot less up front and permitted Hefner to establish a competing practice, stating that he would approve it "subject to a successful negotiation for a written agreement."

Before the parties reached an agreement on his exit from the Corporation, Hefner began having reservations about setting up his own practice and started to think about returning to teaching:

> "[M]y state of mind was such that I—not knowing exactly which direction I was going to be able to go, I didn't know if this negotiation was going to result in a successful consummation or not. I didn't know if I would be offered an actual teaching job. I didn't know if I even wanted to even continue practicing going forward. So my state of mind was such that I wasn't sure exactly what I was going to be doing, but I was very certain that I wasn't going to be in the practice that I had for over 20 years."

By mid-November 2016, Hefner was more interested in pursuing the first option—the complete buyout of his stock and interests in the Corporation—and told his attorney to reach out about potentially selling his shares and interests at a discount to facilitate a return to teaching. But Deutscher wanted to reach an agreement on the second option. Hefner's lawyer recalled that Deutscher was not interested in buying out Hefner's shares and interests because it was "not an attractive offer." Hefner worried about Deutscher's unwillingness to cooperate with his preferred exit method and thought that Deutscher would prevent him from receiving compensation under the Redemption Agreement if he refused option two:

> "My fear, quite honestly, was that unless I was willing to take my patients and go elsewhere, that, in essence, he didn't want to buy me out. So as an agent of the corporation, he didn't want to buy my shares and interest in the corporation back. My concern was that if I didn't go with the option they preferred, that perhaps when I resigned, . . . I wouldn't get renumeration."

Hefner based this feeling on his fractured relationship with Deutscher, the fact that he stopped receiving his usual shareholder distributions in September, and that he was barred from attending board meetings.

Around this time, Hefner received a tentative offer to teach at an optometry school in Oklahoma but never told Deutscher or anyone at the Corporation that he was considering teaching because he feared it would hinder the exit negotiations. Deutscher testified that, throughout the years, he knew that Hefner had contemplated going back to teaching and that at some time Kohake had written Hefner a letter of recommendation for a teaching job. Hefner kept seeing patients as the parties negotiated the second exit option which would have permitted Hefner to open a competing practice. Eventually, Hefner's lawyer contacted the Corporation and accused Deutscher of attempting to freeze out a minority shareholder in breach of his fiduciary obligations and demanded that Deutscher cease excluding Hefner from board meetings.

Hefner's November 29, 2016, Application for an Optometry Trade Name

On November 29, 2016, despite his desire to pursue teaching, Hefner submitted an application to the Kansas Board of Examiners in Optometry for approval of the use of a trade name, Hefner Family Vision LLC, for an optometry practice. The Board of Examiners approved Hefner's application for the trade name one day later. Hefner explained that he filed the application because he felt like he needed to "adhere to the ongoing negotiations" and limit any potential delay if the parties reached an agreement on option two and he ultimately opened his own practice in Shawnee County or any contiguous county. Hefner testified that he felt the application for the trade name "was part of [the] ongoing negotiation[s]" for his exit. In the application, Hefner used his home address as the potential optometry office location and intentionally did not check a box certifying that he intended "'to actively engage in the practice of optometry under the tradename if approved within 365 days'" because he was not sure if he was actually going to practice under that trade name. Hefner later testified that he never intended to operate an optometry practice from his home and thought he would need to file another application to open a practice. Although the trade name approval was never displayed on the Board of Examiners' website, Deutscher and Rottinghaus both claimed they found out about the application on the day it was filed. The Corporation's attorney quickly called Hefner's lawyer to ask if he was still going to accept the second exit option, the option under which he would take a lower payout in exchange for the ability to open a competing practice.

Hefner's December 7, 2016, Notice of Resignation from the Corporation

On November 30, 2016, Hefner requested that the Corporation have a board meeting at their regularly scheduled office meeting the next day, as had been the custom, but Deutscher declined and reiterated in a text dated December 1, that "[w]e are done managing together." Three days later, Hefner definitively decided to return to teaching rather than opening his own practice and instructed his attorney to draft a resignation letter giving the Corporation six months' notice of his departure, as required by the Employment Agreement. The resignation letter, dated December 7, 2016, also stated that Hefner would tender his stock and other interests pursuant to the Redemption Agreement, requested further communication about the existing practice value to establish the price for his stock and other interests in the Corporation, and demanded repayment of a $50,000 loan he had made to the Corporation. The resignation letter did not state that Hefner planned to return to teaching or provide any other information on what Hefner was planning to do after leaving the Corporation. Deutscher said nothing to Hefner about the resignation letter at work that day, and the parties never discussed the potential price for Hefner's shares and interests. However, Deutscher testified that he understood Hefner's resignation letter meant that he was not agreeing to leave under option two—the lower payout amount in exchange for allowing Hefner to open a competing practice.

Hefner offered to continue working at the Corporation for the six months following his notice of resignation, but the Corporation terminated his employment on January 10, 2017, as explained below. However, Hefner did continue working during the month between his resignation notice and the termination of his employment, and he testified that during that time he never talked to his patients about leaving, threatened to leave, or asked any other employees to leave with him.

Deutscher's and the Corporation's Decision to Terminate Hefner's Employment

Three days after Hefner submitted his resignation letter, on December 10, 2016, Deutscher and Rottinghaus met with the Corporation's attorney to discuss Hefner's trade name application. Although Deutscher initially asserted that the meeting had occurred on December 3, Rottinghaus clarified that his calendar showed the meeting took place on December 10—after Hefner had tendered his resignation letter. According to Rottinghaus, the Corporation's attorney believed that Hefner's trade name application violated his Employment Agreement as it constituted a "threatened breach" of the noncompete clause. Deutscher agreed, noting that Hefner "threatened the [C]orporation by getting a tradename, Hefner Family Vision. We felt that he was going to open a practice." Deutscher believed Hefner needed to wait to file for a trade name after they had a signed exit agreement and felt that he "had a duty to enforce the current contract [Hefner] was under."

According to Deutscher, he assumed Hefner's trade name application meant he intended to start his own practice even though Deutscher knew that Hefner had been considering not starting his own practice because he offered to sell his shares and interests at a discount in mid-November, and his December 7 resignation letter demanded a full buyout. Deutscher maintained that he simply "didn't know what [Hefner] was doing" and that Hefner's "silence was the threat." Thus, Deutscher, acting on behalf of the Corporation as its president, decided to terminate Hefner's employment. Although Rottinghaus recalled that Deutscher decided to terminate Hefner at that December 10 meeting with the Corporation's counsel, Deutscher later testified that he did not actually decide to terminate Hefner until January 7, 2017. Yet Deutscher also testified that he decided to fire Hefner on November 30 based on the trade name application, even before talking to the Corporation's attorney and Rottinghaus about the trade name application.

Regardless of the date, according to Rottinghaus' testimony, Deutscher said the reason he terminated Hefner's employment was because of his alleged breach of the Employment Agreement, his "erratic behavior," and the lack of transparency and communication. Deutscher testified that he had "no thought of potential financial enrichment" in deciding to terminate Hefner's employment, whether for himself or the Corporation. Deutscher clarified that although Rottinghaus signed Hefner's termination letter, Deutscher had unilaterally decided to terminate Hefner's employment, and Rottinghaus played no role in the decision. The termination letter stated that Hefner's application for a trade name violated paragraphs 12 and 14 of his Employment Agreement.

The termination letter stated that the Corporation withdrew all prior exit offers and further informed Hefner that his alleged violation of the Employment Agreement meant that he had "forfeited [his] right to be paid for [his] stock and other interests in the Corporation," and he was required "to transfer all of [his] stock and other interests in the Corporation and its business to the Corporation for no further consideration all as provided in paragraph 3 of your Redemption Agreement." Interestingly, Hefner had withdrawn the trade name application a week before Deutscher terminated his employment.

The Trials

One month after Deutscher terminated his employment, Hefner filed suit against the Corporation for breach of contract and wrongful termination. Hefner also filed suit against Deutscher and Rottinghaus individually for breach of fiduciary duty. Hefner alleged that the Corporation violated his Employment Agreement and the Redemption Agreement when it wrongly terminated his employment "without valid justification" and without payment for his stock and other interests in the Corporation. Hefner also asserted that Deutscher and Rottinghaus had violated their fiduciary duty to him as "majority stockholders and directors" by terminating his employment without cause.

Hefner moved for partial summary judgment on his claims of breach of contract and wrongful termination. Deutscher, Rottinghaus, and the Corporation moved for summary judgment on all of Hefner's claims. The district court granted Hefner summary judgment on his breach of contract claim, granted Deutscher, Rottinghaus, and the Corporation summary judgment on Hefner's wrongful termination claim, and denied summary judgment as to the breach of fiduciary duty claims. The parties proceeded to trial on the remaining claims—the amount of Hefner's breach of contract damages, and whether Deutscher and Rottinghaus breached their fiduciary duties in terminating Hefner's employment. After a three-day trial, the district court entered judgment for Hefner in the amount of $1,175,551.87.

The Corporation, Deutscher, and Rottinghaus appealed, specifically arguing that the district court wrongly granted Hefner summary judgment on his breach of contract claim. A panel of this court agreed and, because it found that the district court erred by preemptively ruling in Hefner's favor on the breach of contract claim, it reversed the district court's award of damages to Hefner and remanded for a new trial because the remaining issues—the alleged breach of fiduciary duty and damages—both turned on that singular issue. *Hefner v. Deutscher*, 58 Kan. App. 2d 58, 464 P.3d 367 (2020) (*Hefner I*).

At the second trial, two experts provided conflicting opinions regarding Hefner's contract damages, which required a determination of the value of the Corporation's stock price and Hefner's other interests in the Corporation. Hefner's expert, Brad Rourke, used four different methodologies based on the Corporation's financial records as of December 31, 2016, to determine the value of the Corporation with a good picture of "the different angles of a business." The "asset value method" produced a total practice value of $1,650,706; the "capitalization of earnings" method resulted in a value of $2,479,612; the "discounted future cash flow" method provided a terminal value of $2,507,395; and the "debt services model" produced a borrowing capacity of $2,423,225. Rourke explained that he conducted his valuations pursuant to the Internal Revenue Service (IRS) Revenue Ruling 59-60, and he believed that the discounted future cash flow method was the "gold standard" and most accurate valuation.

The Corporation's expert, Steven Clinkinbeard, used a single method based on the historic stock transactions between the optometrists over the history of the Corporation to determine fair market value. Clinkinbeard's method produced a $462,000 valuation of the

Corporation based on an assumed share price of $22,930.60. Clinkinbeard disagreed with the IRS Revenue Ruling 59-60's warning that the purchase price of closely held stocks are not necessarily reflective of a fair market value in closely held corporations because stock sales occur at irregular intervals and there is no established market for the shares. Clinkinbeard further asserted that Hefner's shares needed to be reduced by 35 percent because of his status as a minority shareholder, and he did not consider any of Hefner's other potential interests in the Corporation in making his valuation. Rourke disputed this methodology, calling Clinkinbeard's valuation of the Corporation "absurd" and "nonsensical." Rourke explained that he believed Clinkinbeard's valuation was inappropriate because it ignored factors from IRS Revenue Ruling 59-60 and merely derived an extrapolated value for the shared stock based on two transactions of the Corporation's shares that had occurred since 1970.

After four days of trial, the district court ruled in Hefner's favor. It first concluded that the Corporation had breached the employment agreement when it terminated Hefner's employment without cause. The court noted that Hefner's application for a trade name could not have reasonably been viewed as a "threatened breach" of the noncompete provisions of the Employment Agreement because it was consistent with the existing terms of the proposed exit agreement: "The evidence suggests that Defendants never perceived any imminent threat of Hefner opening a competing practice within the restricted area." The court also found that Rottinghaus was not liable for breach of fiduciary duty, but that Deutscher was liable, explaining it was not persuaded by Deutscher's testimony "that he did not discuss or even contemplate the financial benefits of terminating Hefner." Finally, the district court determined that Hefner's expert, Rourke, had provided a more accurate estimation of the value of the Corporation and entered judgment against the Corporation on the breach of contract claim, and entered judgment against Deutscher on the breach of fiduciary duty claim in the amount of $1,097,479.52. This damages award included $924,885.65 for Hefner's 40 percent share of the value of the Corporation, $170,847.87 in compensation (salary bonus and dividends), and $1,746 in benefits.

Deutscher and the Corporation—but not Rottinghaus—appeal.

DISCUSSION

Deutscher and the Corporation argue the district court erred in:

(1) determining Hefner did not breach the Employment Agreement by committing a threatened breach of the noncompete clause;

(2) finding Deutscher personally liable for breach of fiduciary duty for terminating Hefner's employment; and

(3) calculating Hefner's damages.

I. *The district court did not err in concluding that Deutscher and the Corporation terminated Hefner's employment in breach of his employment agreement.*

Deutscher and the Corporation contend the district court misapplied the legal standard when it determined that Hefner did not commit a "threatened breach" of the noncompete clause of the Employment Agreement when he filed his trade name application, and the court's decision was not supported by substantial competent evidence. Whether the district court accurately interpreted Hefner's Employment Agreement and Redemption Agreement is a question of law over which this court exercises unlimited review. See *Russell v. Treanor Investments L.L.C.*, 311 Kan. 675, 680, 466 P.3d 481 (2020); *Prairie Land Elec. Co-op. v. Kansas Elec. Power Co-op.*, 299 Kan. 360, 366, 323 P.3d 1270 (2014). But whether a contract has been breached is a question of fact. *Waste Connections of Kansas, Inc. v. Ritchie Corp.*, 296 Kan. 943, 964, 298 P.3d 250 (2013). This court reviews the district court's factual findings to ensure they are supported by substantial competent evidence and "will not reweigh the evidence but will accept the district court's findings so long as there is evidence in the record that reasonably supports the ultimate finding." *Peterson v. Ferrell*, 302 Kan. 99, 104, 349 P.3d 1269 (2015). Ultimately, after determining whether the district court's factual findings are supported by substantial competent evidence, this court determines whether the district court accurately applied the legal principles to those factual findings.

The *Hefner I* panel looked to the plain language of Hefner's Employment Agreement, summarizing its applicable provisions as follows:

> "Here, the noncompete clause—subparagraph 14(a) of Hefner's Employment Agreement—required Hefner to agree not to compete with the Corporation '[d]uring employment and during a period of thirty-six (36) months after termination or ceasing of employment for whatever reason or cause.' Competition under subparagraph 14(a) included 'engag[ing] directly or indirectly, either personally or as an employee, associate, partner, manager, agent, officer, director, stockholder, or otherwise be connected in any manner with the ownership, management, operation or control of any [optometry] business' located in Shawnee County, Kansas, or its contiguous counties.
>
> "On the other hand, subparagraph 14(d) of Hefner's Employment Agreement outlined the Corporation's remedies against Hefner should he violate the noncompete clause under subparagraph 14(a). Subparagraph 14(d) provided that '*any breach or threatened breach* . . . of the provisions of this paragraph 14' allowed the Corporation 'in addition to other rights or remedies granted to [the] Corporation by law or under this or other agreements, be specifically entitled to an injunction restraining Hefner from' competing against the Corporation. (Emphasis added.) Then, subparagraph 14(d) modified what actions constituted a violation of Hefner's noncompete clause. Thus, a breach or a threatened breach of the noncompete clause would constitute a violation." 58 Kan. App. 2d at 71-72.

After concluding that the district court erred in finding that the term "threatened breach" was equivalent to an anticipatory breach, the *Hefner I* panel held:

> "[T]he fact-finder must use the commonly understood meaning of the phrase 'threatened breach' to decide whether the Corporation legitimately terminated Hefner for cause because he committed a threatened breach of the noncompete clause of his employment agreement. If the fact-finder decides the Corporation legitimately terminated Hefner for cause, then Hefner's breach of contract claim fails." *Hefner I*, 58 Kan. App. 2d at 80-81.

The *Hefner I* panel then interpreted the language of the Employment Agreement and found the term "threatened breach" generally means "an act or set of circumstances that would lead a party to reasonably believe that a breach of contract, although not having yet occurred, is imminent and is likely to occur or happen. This act or set of circumstances can be proved by verbal, oral, or physical action." 58 Kan. App. 2d at 74-75. The panel explained that to commit a "threatened breach" under the Employment Agreement, "a person must simply engage in some act that communicates or expresses an intent to violate the employment agreement." 58 Kan. App. 2d at 77.

On remand of the breach of contract issue, the district court was charged with applying the definition set forth by the *Hefner I* panel to determine whether Hefner's actions constituted a "threatened breach." 58 Kan. App. 2d at 80-81. Although Deutscher and the Corporation's primary argument is that the district court's decision is not supported by substantial competent evidence, they also contend that the district court misapplied the law by considering Deutscher's understanding of the circumstances when determining whether Hefner committed a threatened breach. Deutscher and the Corporation contend the standard for a threatened breach "does not include the actions, thoughts, or intentions of the non-threatening party as an element or factor to determine whether a threatened breach has occurred."

As explained by the *Hefner I* panel, the definition of threatened breach requires the court to review the broad range of actions and circumstances of the alleged breaching party and whether those actions or circumstances would lead a person to reasonably believe that a breach is imminent and likely to occur. In other words, the test is whether a reasonable person would believe that the actions of the other party conveyed an intent to breach the noncompete provisions of the employment agreement. 58 Kan. App. 2d at 74-75. This review requires the court to look at both sides of the applicable employment agreement. While Hefner's actions constitute the primary evaluation, the then-existing circumstances also frame the reasonable person's interpretation and understanding of those actions. This is important because the determination of whether Hefner committed a threatened breach of the noncompete clause relies not only on his objective actions but whether his actions would cause the other party "to reasonably believe" that a breach "is imminent and is likely to occur." 58 Kan. App. 2d at 74. Finding that a party has committed a threatened breach necessarily requires a finding that the actions and circumstances created a reasonable belief of imminent breach. Thus, whether a reasonable person in Deutscher's position, given the status of the exit negotiations between the parties, would believe Hefner's actions demonstrated a threatened breach was central in the district court's analysis.

The Corporation and Deutscher allege only that Hefner's submission of the trade name application was a threatened breach of the noncompete provision of his Employment Agreement. In analyzing this alleged threatened breach, the district court appropriately looked to the then-existing circumstances. First, the court explained that the parties were planning and negotiating Hefner's exit from the Corporation and were considering two basic options, one in which Hefner could compete and one in which he could not:

> "1) the Corporation or other doctors would purchase Hefner's shares in the Corporation for $100,000.00 buy his share of the practice for $750,000.00 over time, and Hefner would abide by the three-year non-compete clause in his Employment Agreement; or 2) the Corporation would redeem Hefner's shares for $100,000.00, Hefner would take his patients elsewhere and open his own practice and the Corporation would waive the non-compete clause in Hefner's Employment agreement."

The record shows that Deutscher had tentatively accepted the second option—which permitted Hefner to open a competing practice "subject to successful negotiation of a written agreement"—and proposed December 1, 2016, as Hefner's last day as a Director and Officer of the Corporation.

The parties were not engaged in any negotiations that involved Hefner maintaining his employment with the Corporation. Deutscher assumed that Hefner would open a competing optometry practice in Topeka and, therefore, the Corporation would only have to pay Hefner a nominal buyout amount and would not have to pay for Hefner's full interests in the Corporation upon his exit. But when Hefner became apprehensive about starting his own practice, he offered to sell back his stock and interests in the Corporation at a discount, a slight adjustment to the original offer under the first exit option—which Deutscher was unwilling to consider—even under those more financially beneficial terms. The parties never engaged in negotiations of Hefner's revised offer to take a discounted full buyout under the first option, and he kept working as the parties negotiated his exit under the second option. When Hefner filed his trade name application on November 29, the parties were *only* negotiating his exit from the Corporation under the second option—which contemplated Hefner opening a competing practice in exchange for a nominal buyout payment from the Corporation. Nothing about Hefner's trade name application conflicted with these ongoing negotiations.

During the trial, the district court made credibility determinations and generally weighed Hefner's credibility as greater than Deutscher's. The district court believed Hefner's testimony that he did not file the trade name application to imminently compete with the Corporation but to ensure that he was prepared to open a practice if that was the outcome of the ongoing exit negotiations. Hefner testified that he felt compelled to apply for the trade name "to adhere to the ongoing negotiations." Additionally, Hefner listed his home address on the application—so he had not identified or obtained any space for an optometry practice—and testified that he never intended to operate an optometry practice from his house. Hefner believed that he would need to file another application if he were to open a practice. He also intentionally left a box blank on the application certifying that he intended "to actively engage in the practice of optometry under the tradename if approved within 365 days." Nor is there any evidence that Hefner threatened to leave the Corporation before the expiration of his six-month notice period or that he recruited employees or patients. The evidence, including the trade name application, did not demonstrate an imminent threat that Hefner was likely to compete with the Corporation.

Although Deutscher's testimony includes some evidence to suggest that a reasonable person could believe Hefner's actions constituted a threatened breach, the district court found his testimony less credible than the other evidence. Deutscher testified that he did not know why Hefner had filed the trade name application, and he thought Hefner was likely going to open a competing practice. He also thought it was possible for Hefner to operate a practice out of his home—because it was "a big enough house." After receiving Hefner's resignation letter in which he demanded a full buyout of his shares and interests in the Corporation, Deutscher recognized that Hefner was not going to move forward with the second exit option which permitted him to open a competing practice. But he also claimed that it was not clear if Hefner was going to open his own competing practice, even though Hefner's resignation demand meant that his noncompete agreement would remain in place. Under cross-examination, Deutscher agreed that it would not have made sense for Hefner to turn down the exit option that included a waiver of the noncompete clause and then open a competing practice anyway.

Deutscher also testified that he believed Hefner's trade name application alone was reason enough to terminate his employment for breach of the Employment Agreement. Deutscher agreed that—other than the trade name application—he had no perception of threat or imminent danger of Hefner opening a competing practice. He acknowledged that he believed Hefner's application would be a useful tool in the exit negotiations. Although Deutscher testified that his decision to fire Hefner was based *solely* on the trade name application, he told Rottinghaus that he fired Hefner because of his "erratic behavior" and lack of transparency and communication during the exit negotiations.

Deutscher and the Corporation argue that the district court failed to recognize that Hefner's silence about the trade name application and actions during the exit negotiations were a calculated threat—but this argument simply seeks for this court to reweigh the evidence. The district court addressed these allegations and simply did not find them credible, explaining that "[a]ny reasonable person in Deutscher's position would have considered Hefner's trade name application to be consistent with the ongoing negotiations, not an act that expressed an intent to violate the Employment Agreement." That Hefner continued working for the Corporation for a full month after Deutscher found out about the trade name application supports the district court's conclusion that Deutscher apparently did not become threatened by the application until after Hefner submitted his resignation letter requesting a full buyout of his shares and interests in the Corporation. Although Deutscher provided conflicting testimony about when he met with the Corporation's attorney about Hefner's trade name application—and thus when he decided to terminate Hefner's employment——the termination letter to Hefner was dated over a month after Deutscher learned about the trade name application and four days after Hefner withdrew the application. Deutscher and the Corporation do not assert that some other intervening factor occurred during that month which made them, or any reasonable person, reasonably believe Hefner was likely to imminently breach the noncompete clause.

The district court's view of the evidence was that "[b]y all accounts, Hefner's trade name application was an opportunity the Corporation was hoping to exploit, not a threat it was trying to avoid." This court will not reweigh the evidence and will accept the district court's findings so long as there is evidence in the record that reasonably supports the court's ultimate finding. See *Peterson*, 302 Kan. at 104. "When there is substantial evidence to support the findings of the district court, it is immaterial if there was contrary evidence presented which, if believed, would support a different outcome." 302 Kan. at 106. The undisputed dates of the exit negotiations, Hefner's trade name application, Hefner's resignation letter, and the termination letter support the district court's credibility determination about Deutscher's testimony.

This court finds no error in the district court's assessment of the available evidence, and there is substantial competent evidence to show that Deutscher—under the circumstances—could not have reasonably believed that Hefner's trade name application alone demonstrated that Hefner was likely to commit an imminent breach of the noncompete agreement.

Deutscher and the Corporation also argue that the district court made an error of law by not finding that Hefner's trade name application constituted a threatened breach of the Employment Agreement because the administrative regulations required Hefner to certify that he intended to "actively engage in the practice of optometry under the trade or assumed name." K.A.R. 65-9-2(b)(2). Therefore, they contend, as a matter of law any trade name application is premised on the applicant's intent to operate under the requested name. But Hefner did not make that certification in his application. This court agrees with the *Hefner I* panel that it is possible to interpret Hefner's failure to check the box as demonstrating that he never intended to open a competing practice or that he "simply forgot." *Hefner I*, 58 Kan. App. 2d at 79-80. As the fact-finder at the bench trial, the district court was charged with making that determination. The court found Hefner's explanations for his actions to be credible under the circumstances of the exit negotiations, and this court finds the district court's factual conclusion is supported by substantial evidence.

The district court did not err in finding that Hefner's trade name application did not constitute a threatened breach of the noncompete clause of his Employment Agreement and thus, that Deutscher and the Corporation terminated his employment without cause.

While Deutscher and the Corporation disagree with the court's weighing of the evidence and assessment of witness credibility, it is not this court's role to reweigh those determinations. Nor does this court find this case to be a close call. The district court's factual findings are supported by substantial competent evidence in the record, and the district court properly applied the applicable law.

II. *The district court did not err in finding Deutscher breached his fiduciary duty.*

Deutscher argues the district court erred in finding he breached his fiduciary duty to Hefner because he did not engage in self-dealing, but made a business judgment in determining that Hefner had violated the noncompete clause of his Employment Agreement. Hefner, as a shareholder, had a right to bring a direct claim against Deutscher, as an officer or director of the Corporation, "for injuries affecting the individual legal rights of that shareholder," which includes "a contractual right of the shareholder which exists independently of any right of the corporation." *Lightner v. Lightner*, 46 Kan. App. 2d 540, 547, 549, 266 P.3d 539 (2011); *Richards v. Bryan*, 19 Kan. App. 2d 950, 961, 879 P.2d 638 (1994). "'Kansas imposes a very strict fiduciary duty on officers and directors of a corporation to act in the best interests of the corporation and its stockholders.'" *Burcham v. Unison Bancorp, Inc.*, 276 Kan. 393, 416, 77 P.3d 130 (2003) (quoting *Miller v. Foulston, Siefkin, Powers & Eberhardt*, 246 Kan. 450, 467, 790 P.2d 404 [1990]). This burden is set higher in Kansas than in some other jurisdictions. *Becker v. Knoll*, 291 Kan. 204, Syl. ¶ 3, 239 P.3d 830 (2010). Directors also owe this same fiduciary duty between themselves. *Sampson v. Hunt*, 233 Kan. 572, 584, 665 P.2d 743 (1983). This right of direct action is intended to protect shareholder and corporate interests—no matter how big or small—from self-dealing corporate officers and directors. Because Rottinghaus was merely a shareholder—not a fiduciary—at the time, the district court appropriately denied that portion of his claim. Neither Deutscher nor Hefner challenges this ruling.

The shareholder's ability to bring a direct claim against the directors and officers is balanced by the rebuttable presumption that "in making business decisions not involving direct self-interest or self-dealing, corporate directors act on an informed basis, in good faith, and in the honest belief that their actions are in the corporation's best interest." *Becker*, 291 Kan at 208-09. This rebuttable presumption is known as the business judgment rule, protecting corporate officers from liability for their legitimate business decisions. A panel of this court has found that "directors do not breach a fiduciary duty if they fire an employee, who is also a shareholder, for a legitimate business reason." *Richards*, 19 Kan. App. 2d at 962. This protects directors from liability arising from their actions to manage personnel when acting within their responsibilities and for legitimate business purposes.

In a direct action, the shareholder plaintiff bears the initial burden to establish a prima facie case of the corporate officer's or director's breach of their fiduciary duties. The business judgment rule is a rebuttable presumption which puts the initial burden on the person bringing the suit —i.e., the shareholder—to show that the corporate officer or director engaged in "self-dealing" or another "disabling factor" in making the challenged decision. *Becker*, 291 Kan. at 209. If such a showing is made, "then the presumption of the rule is rebutted, and the burden of proof shifts to the defendants to show that the transaction was, in fact, fair to the company." 291 Kan. at 209. The corporate officer defendant must then "show by clear evidence that the defendant acted in fairness and good faith to the corporation." 291 Kan. 204, Syl. ¶ 2.

Hefner was therefore first required to show that Deutscher's decision to terminate his employment without cause resulted from self-dealing or some other breach of his fiduciary duty. This basically required Hefner to overcome the presumption that Deutscher acted in accordance with the business judgment rule, in that his decision was made in good faith, with due care, and within his authority. See *Becker*, 291 Kan. at 208-10. Once Hefner successfully overcame the presumption that Deutscher's actions were protected by the business-judgment rule—which he did—then the burden shifted to Deutscher to prove that his decision to terminate Hefner's employment for committing a threatened breach of the noncompete provision of his Employment Agreement "was entirely fair to the corporation and its shareholders." 291 Kan. at 210.

Hefner made a prima facie showing that Deutscher breached his fiduciary duty because his decision to terminate Hefner's employment was motivated by self-dealing or self-interest.

This court reviews the district court's decision by determining whether it is supported by substantial competent evidence and then reviews de novo whether the district court properly applied the law to determine that Hefner made a prima facie showing of Deutscher's breach. See *Becker*, 291 Kan. at 206. "'Prima facie evidence is evidence sufficient to sustain a verdict in favor of the issue it supports, even though it may be contradicted by other evidence.'" 291 Kan. at 206.

A corporation's officers and directors owe a fiduciary duty to the corporation and its shareholders, and that includes the duty of loyalty. "'The duty of loyalty requires that the best interests of the corporation and its shareholders take precedence over any self-interest of a director, officer, or controlling shareholder that is not shared by the stockholders generally.'" *Becker*, 291 Kan. at 208. "A director is interested 'where the director has a financial or pecuniary interest in a transaction other than that which devolves to the corporation or to all of the shareholders generally.'" *Kansas Heart Hospital, L.L.C. v. Idbeis*, 286 Kan. 183, 211, 184 P.3d 866 (2008). Thus, directors breach their fiduciary duty when they act in expectation of a personal financial benefit at the expense of the corporation or in which not all stockholders share generally. Here, the benefit to Deutscher is not the typical example—such as when a director causes the corporation to engage the services of a vendor with which the director also has a financial interest—yet, it is nonetheless a benefit to Deutscher.

Hefner argued that Deutscher and Rottinghaus acted together as majority shareholder and breached their fiduciary duty by wrongly terminating his employment to avoid the Corporation's obligation to pay him under the Redemption Agreement, which increased their own individual compensation and financial stake in the Corporation. But the district court did not find for Hefner under that theory; it found that Deutscher alone breached his fiduciary duty in terminating Hefner's employment. Regardless of the theory, Hefner presented evidence that Deutscher—motivated by his own self-interests—wrongly terminated Hefner's employment in violation of the Employment Agreement. The district court found that Hefner presented sufficient evidence to establish a prima facie case of Deutscher's self-dealing because terminating Hefner's employment without cause and without due compensation clearly personally benefited Deutscher financially. The district court explained that it was

> "not persuaded by Deutscher's testimony that he did not discuss or even contemplate the financial benefits of terminating Hefner based on breach of the non-compete. Deutscher understood the financial ramifications of his decision—there would be no payment due to Hefner upon his exit. The benefits to Deutscher, one of two remaining shareholders, were obvious."

As a closely held corporation, the departure of even a single shareholder can have tremendous personal benefit to the remaining shareholders. And here, because Deutscher was one of only two remaining shareholders after Hefner's departure, his ownership in the Corporation increased substantially from 40 percent to 62.5 percent—making Deutscher the majority shareholder. Although Deutscher's percentage ownership would have increased even if Hefner resigned as planned, the Corporation retained considerable cash and assets that benefited Deutscher by terminating Hefner under the guise of a breach of his Employment Agreement. Unlike a traditional example of self-dealing, Deutscher did not personally receive all of Hefner's stock because Rottinghaus also received some, but he became the majority shareholder and Rottinghaus remained a minority shareholder. So the decision had a disproportionate benefit to Deutscher.

Moreover, Deutscher's overall compensation from the Corporation increased the year following Hefner's departure, from $460,000 to $629,000. However, Deutscher testified that this compensation increase was due to cutting expenses and firing other employees and was not specifically derived from terminating Hefner's employment without paying him for his stock and corporate interests. But it logically flows that, had the Corporation paid Hefner for his stock and other interests, there naturally would have been less cash available for compensating Deutscher.

While acting as the president of the Corporation, Deutscher decided to wrongly terminate Hefner's employment—which benefited Deutscher in the form of greater equity in the Corporation, becoming the majority shareholder in the Corporation, and increased compensation—at the expense of Hefner and the Corporation. Hefner demonstrated a prima facie case of self-dealing and thereby shifted the burden to Deutscher to show his decision was motivated by legitimate business judgment and the transaction terminating Hefner's employment without paying him in accordance with the Redemption Agreement "was, in fact, fair to the company." See *Becker*, 291 Kan. at 209.

Deutscher failed to demonstrate that terminating Hefner's employment without paying him as provided in the Redemption Agreement was an entirely fair transaction to the Corporation and its shareholders.

Because Hefner presented a prima facie case of Deutscher's breach, this court must consider whether the district court erred in finding that Deutscher failed to rebut that presumption by presenting clear evidence that he acted in fairness and good faith when he terminated Hefner's employment. However, rather than present evidence demonstrating that he prevails on the second step of the burden-shifting framework, Deutscher essentially challenges the district court's conclusion that Hefner met his prima facie burden to show that Deutscher engaged in self-dealing. Having already found that Hefner met his burden to rebut the business judgment rule, this court will address Deutscher's arguments and presume he intends to relate them to the second step of the analysis by showing his decision was fair to the Corporation.

Deutscher argues that the district court incorrectly determined that he enriched himself because

(1) he did not directly receive Hefner's shares upon termination of his employment; and

(2) regardless of how Hefner left the Corporation, his stock shares would have returned to the Corporation and thus increased Deutscher's ownership percentage.

In support of this argument, Deutscher heavily relies on *Kansas Heart Hospital*, a case in which a group of 14 physician shareholders brought a breach of fiduciary duty claim against multiple corporate directors who redeemed their stock based on their alleged breach of the bylaws which prohibited the 14 physician shareholders from owning shares in a "competing health care facility." 286 Kan. at 187. The Kansas Supreme Court held that the stock redemption created a personal financial benefit that was shared equally by all remaining shareholders: "If there is any benefit from the redemption, it is merely the result of the fact that fewer shares are outstanding. And this is a benefit that all remaining shareholders participate in equally in accordance with their respective ownership." 286 Kan. at 212.

Like the share redemption in *Kansas Heart Hospital*, Deutscher's decision to terminate Hefner's employment resulted in fewer outstanding shares of the Corporation and a corresponding increase in the percentage to all of the remaining shareholders—but here, there were just two—Deutscher and Rottinghaus. That is where the similarities between the two cases cease. Unlike here, the district court found that the directors in *Kansas Heart Hospital* properly invoked a provision in the corporate bylaws to redeem the physicians' stock. Whereas here—the district court came to the opposite conclusion—

finding that Deutscher's decision to terminate Hefner's employment was not supported by the Employment Agreement. Additionally, in *Kansas Heart Hospital*, the objecting shareholders received a payment for their redeemed stock in accordance with the bylaws, but here, Deutscher did not pay Hefner for his shares in accordance with the Redemption Agreement.

In *Kansas Heart Hospital*, all the shareholders, including the directors who voted to redeem the stock of the 14 physicians, benefited from the stock redemption "equally in accordance with their respective ownership." 286 Kan. at 212. Unlike the directors in *Kansas Heart Hospital*, here, Deutscher was the sole decision maker and stood to gain more (majority shareholder status and a larger percentage increase in compensation) than the only other remaining shareholder. Moreover, the directors in *Kansas Heart Hospital* compensated the complaining shareholders for their redeemed shares in accordance with the bylaws. Here, on the other hand, Deutscher wrongly terminated Hefner's employment to ensure the Corporation could avoid compensating Hefner for his shares under the Redemption Agreement and thus increase Deutscher's personal compensation. Unlike the case of a closely held corporation as here, the *Kansas Heart Hospital* board of directors' actions to redeem the stock of the 14 shareholders did not result in a windfall to the directors who made the decision. The wrongful manner in which Deutscher ensured that Hefner's shares returned to the Corporation also resulted in a financial windfall to the Corporation to which it was not entitled. The district court did not err in finding Deutscher acted with self-interest, and Deutscher has failed to rebut that showing by demonstrating that his actions were fair to the Corporation. Deutscher's actions have resulted in lengthy, costly litigation in which the Corporation has been found liable for damages—that is not fair. See e.g., *Becker*, 291 Kan. at 209 (requiring the director to rebut the presumption of self-dealing by showing the challenged transaction was overall fair to the corporation).

Deutscher also attacks the district court's credibility determinations—particularly the court's skepticism of his testimony that terminating Hefner's employment for filing a trade name application was a necessary business decision. The undisputed evidence shows

- a rocky business and management relationship between Deutscher and Hefner;
- Hefner intended to leave the Corporation;
- the parties were engaged in adversarial negotiations related to the terms of his exit; and
- Deutscher decided to terminate Hefner's employment only after Hefner requested a full buyout of his shares and other ownership interest.

Despite this evidence, Deutscher asserts that he acted consistent with his fiduciary duties as the president of the Corporation when he, relying on the assessment of the Corporation's counsel, decided that Hefner's trade name application constituted a violation of his Employment Agreement. Deutscher seeks to counter the district court's finding that Hefner presented a prima facie showing that Deutscher breached his fiduciary duty by pointing to contradicting evidence. "'Prima facie evidence is evidence sufficient to sustain a verdict in favor of the issue it supports, *even though it may be contradicted by other evidence*.'" (Emphasis added.) *Becker*, 291 Kan. at 206 (quoting *Frick Farm Properties v. Kansas Dept. of Agriculture*, 289 Kan. 690, Syl. ¶ 10, 216 P.3d 170 [2009]).

As the district court found, Hefner presented sufficient evidence to make a prima facie case of Deutscher's self-dealing. The burden therefore shifted to Deutscher to show his decision was overall fair to the Corporation, and he failed to carry that burden at the district court and on appeal. This court finds no evidence undermining the district court's credibility determination, nor any evidence demonstrating Deutscher's decision to terminate Hefner's employment without paying him in accordance with the Redemption Agreement was necessary to protect the Corporation from competition or otherwise.

Deutscher's final argument on appeal similarly fails to show that his decision was fair to the Corporation: he claims that the district court erred by "grant[ing] Hefner a victory on a legal theory he did not plead." Deutscher claims that because Hefner's breach of fiduciary duty claim was premised on Deutscher *and* Rottinghaus working in concert as majority shareholders against Hefner as a minority shareholder, the court was precluded from finding that Deutscher violated his fiduciary duty from his solo acts of wrongly terminating Hefner's employment. But Deutscher provides no legal authority to support his argument. Failure to support a point with pertinent authority is akin to failing to brief the issue. See *State v. Tague*, 296 Kan. 993, 1001, 298 P.3d 273 (2013).

While this court cannot create an argument for Deutscher to support his conclusory allegation, it appears that he alleges that because Count 3 of Hefner's Petition for Breach of Fiduciary Duty included factual allegations that Hefner "is a minority shareholder to whom the majority owes fiduciary duties" and "[a]s majority stockholders and directors Defendants Deutscher and Rottinghaus breached their fiduciary duty to Plaintiff," the district court was not permitted to find that Deutscher breached his fiduciary duty by and through his own conduct without showing that Rottinghaus also breached his fiduciary duty. Deutscher's allegations are misplaced. First, Hefner pled a claim of breach of fiduciary duty against Deutscher and Rottinghaus, and the district court's determination that Rottinghaus did not breach his fiduciary duty does not prevent Hefner from demonstrating, and the district court from finding, that Deutscher did breach his fiduciary duty. Second, to the extent Deutscher argues that Hefner's breach of fiduciary duty claim included an allegation of civil conspiracy, Hefner's failure to prove the conspiracy similarly does not negate the existence of an underlying breach by one or more of the parties alleged to have engaged in the conspiracy.

An actionable civil conspiracy occurs when the following elements are proved: "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds in the object or course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof." *State ex rel. Mays v. Ridenhour*, 248 Kan. 919, 927, 811 P.2d 1220 (1991). While the independent tort of civil conspiracy requires the prevailing aggrieved party to prove an underlying unlawful act occurred, Hefner's failure to prove the existence of a conspiracy—that is a failure to prove one or more of the first three elements—does not prevent him from showing that one or more of the alleged conspirators independently committed the overt underlying act of breach of fiduciary duty. See e.g., *NVLCC, LLC v. NV Lenexa Land Holdings*, LLC, 2022 WL 16843468, at *5 (Kan. App. 2022) (unpublished opinion) (upholding district court's dismissal of a civil conspiracy claim even when one of the conspirators stipulated to the unlawful overt act of breach of fiduciary duty but plaintiff failed to show a meeting of the minds between two or more persons as to that breach); *In re Motor Fuel Temperature Sales Practices Litigation*, No. 07-1840-KHV, 2012 WL 976039, at *8 (D. Kan. 2012) (unpublished opinion) (granting partial summary judgment on plaintiffs civil conspiracy claims for failure to show a meeting of the minds when underlying claims against defendants for violating the Kansas Consumer Protection Act remained). Moreover, Hefner did not seek a recovery based on civil conspiracy, but alleged breach of fiduciary duty by Deutscher and Rottinghaus. The pretrial order explained Hefner's theory as: "[b]y wrongfully squeezing Plaintiff out of the corporation as an officer, director and shareholder for their own financial gain, Defendants breached their fiduciary duty owed to Plaintiff as a minority shareholder." This court finds no error in the district court's finding that Deutscher breached his fiduciary duty independently of any act of Rottinghaus.

After finding that Hefner presented a prima facie showing that Deutscher breached his fiduciary duty by acting in his own self-interest when he terminated Hefner's employment, the district court found that Deutscher failed to rebut that prima facie showing: "The question is whether Deutscher acted in fairness and good faith. The answer is no." On appeal, Deutscher does not challenge the district court's conclusion that he failed to rebut Hefner's prima facie showing that Deutscher violated his fiduciary duties. Instead, he argues that the district court committed various errors of fact and law in concluding that Hefner presented sufficient evidence to establish a prima facie showing that Deutscher's decision to terminate his employment for an alleged breach of the Employment Agreement flowed from his own self-interest and thus, was not an act protected from liability by the business judgment rule. Contrary to Deutscher's assertions, Hefner presented ample evidence establishing that Deutscher's actions were not saved by the business judgment rule as the challenged decision resulted from self-interest and not from an informed, good-faith, and honest belief that the actions were in the Corporation's best interests. As Deutscher presents no evidence to overcome or rebut Hefner's prima facie showing, the district court's determination that he violated his fiduciary duties is affirmed.

III. *The district court did not err in calculating Hefner's damages.*

Lastly, Deutscher and the Corporation dispute the district court's damages calculation and contend it provided Hefner a substantial windfall. They assert three errors:

(1) Hefner's expert failed to provide a reasonable basis to calculate damages under the Redemption Agreement;
(2) the district court's ultimate valuation of the Corporation was based on speculation; and
(3) the court erred in relying on Hefner's expert valuation that included potential shareholder distributions and bonuses as a component of lost compensation and benefits under the Employment Agreement.

The ultimate goal in calculating contract damages is "to put the nonbreaching party in the position he or she would have been in had the breach never occurred."

Peterson, 302 Kan. at 106. However, on appellate review, this court does not determine whether the district court's remedy is the "'best remedy that could have been devised'" but whether the district court's damages calculation "'is erroneous as a matter of law or constitutes a breach of trial court discretion.'" 302 Kan. at 106 (quoting *In re Conservatorship of Huerta*, 273 Kan. 97, 99–100, 41 P.3d 814 [2002]). The district court's damages calculation and award is discretionary, but it must have some "'reasonable basis for computation which will enable the trier of fact to arrive at an approximate estimate thereof.'" 302 Kan. at 106 (quoting *Stewart v. Cunningham*, 219 Kan. 374, 381, 548 P.2d 740 [1976]). Contract damages must be proved with some degree of specificity, and the district court cannot base the calculation on mere speculation. *State ex rel. Stovall v. Reliance Ins. Co.*, 278 Kan. 777, 789, 107 P.3d 1219 (2005).

This district court's damage calculation for a breach of contract claim is a question of law over which this court exercised unlimited review. *Peterson*, 302 Kan. at 106. But when Deutscher and the Corporation question the district court's factual findings supporting the damages award, this court must determine whether those factual findings are supported by substantial competent evidence. *Louisburg Building & Development Co. v. Albright*, 45 Kan. App. 2d 618, 638, 252 P.3d 597 (2011). In conducting this assessment the court will not reweigh evidence or make witness credibility determinations. *Peterson*, 302 Kan. at 106-07. This court reviews the record in the light most favorable to the prevailing party—here, Hefner—when determining whether the evidence was too speculative or conjectural to support the district court's damages calculation. 302 Kan. at 107.

The parties dispute the amount of the district court's damage calculation, which was based on two categories: (1) the value of Hefner's stock and other interests in the Corporation owed under the Redemption Agreement; and (2) the compensation and benefits that Hefner would have received between the date he was wrongfully terminated and the last day he would have worked for the Corporation had his employment not been wrongfully terminated. Deutscher and the Corporation challenge the court's calculation of both categories.

The value of Hefner's stock and other interest in the Corporation

Deutscher and the Corporation argue that, under the Redemption Agreement, Hefner was only entitled to receive the value of his shares—not any compensation for his "other interests" in the Corporation—and that Hefner provided no reasonable basis for the value of his shares and other interests. Therefore, according to Deutscher and the Corporation, the court's determination of the Corporation's value was based on mere speculation.

Because the district court found that Hefner did not violate the noncompete provisions of the Employment Agreement, and thus Deutscher terminated Hefner's employment without cause after December 31, 2007, the Employment Agreement and Redemption Agreement required the Corporation to "purchase . . . *all Hefner's stock and other interests in Corporation and its business*. . . . [with] the purchase price [to be] negotiated based on the then existing practice value." (Emphasis added.) Unfortunately, because of the acrimonious departure and litigation, the parties never negotiated the "then existing practice value" or the price of Hefner's shares and interests as required by the Redemption Agreement, and thus the task fell to the district court. At trial, the district court heard conflicting testimony from the parties' experts regarding the value of the Corporation.

Hefner's expert, Rourke—whose accounting firm performs about 200 valuations of optometry clinics every year—explained that he used four different methodologies in the appraisal: (1) the asset based method; (2) the capitalization of earnings method; (3) the discounted future cash flow method; and (4) the debt service method. Rourke testified that he relied on IRS Revenue Ruling 59-60, which sets forth necessary factors for appraising the fair market value of a closely held corporation. IRS Revenue Ruling 59-60 provides that:

> "In valuing the stock of closely held corporations, or the stock of corporations where market quotations are not available, all other available financial data, as well as all relevant factors affecting the fair market value must be considered for estate tax and gift tax purposes. No general formula may be given that is applicable to the many different valuation situations arising in the valuation of such stock. However, the general approach, methods, and factors which must be considered in valuing such securities are outlined.
>
> . . . .
>
> "The purpose of this Revenue Ruling is to outline and review in general the approach, methods and factors to be considered in valuing shares of the capital stock of closely held corporations for estate tax and gift tax purposes. The methods discussed herein will apply likewise to the valuation of corporate stocks on which market quotations are either unavailable or are of such scarcity that they do not reflect the fair market value.
>
> . . . .
>
> "Closely held corporations are those corporations the shares of which are owned by a relatively limited number of stockholders. Often the entire stock issue is held by one family. The result of this situation is that little, if any, trading in the shares takes place. There is, therefore, no established market for the stock and such sales as occur at irregular intervals seldom reflect all of the elements of a representative transaction as defined by the term 'fair market value.'" Rev. Rul. 59-60, 1959-1 C.B. 237.

Rourke used the Corporation's financial and support statements, which included the Corporation's tax returns, income and expense statements, comparable sales of other practices, and the tangible and intangible assets of the practice. Rourke's approach was consistent with IRS Revenue Ruling 59-60. Section 4.01 provides that, in calculating an appraised value, "all available financial data, as well as all relevant factors affecting the fair market value, should be considered" and specifically identifies these factors:

"(a) The nature of the business and the history of the enterprise from its inception.

"(b) The economic outlook in general and the condition and outlook of the specific industry in particular.

"(c) The book value of the stock and the financial condition of the business.

"(d) The earning capacity of the company.

"(e) The dividend-paying capacity.

"(f) Whether or not the enterprise has goodwill or other intangible value.

"(g) Sales of the stock and the size of the block of stock to be valued.

"(h) The market price of stocks of corporations engaged in the same or a similar line of business having their stocks actively traded in a free and open market, either on an exchange or over-the-counter." Rev. Rul. 59-60, 1959-1 C.B. 237.

Of the four valuation methods, Rourke testified that the "gold standard" was the discounted cash flow methodology. His appraisal explained that this method was "the economic value concept of a business viewed as a series of future cash flows, which the buyer values to arrive at a purchase price for the practice. This methodology takes into account the ongoing business relationship of the operating parts, rather than the sum of assets and liabilities."

Deutscher and the Corporation's expert, Clinkinbeard, who has performed about 20 valuations of medical practices over the last 25 years, took a much more limited approach to the appraisal, and focused solely on the historical sale prices of the closely held Corporation's stock. Although Clinkinbeard agreed with Rourke that IRS Revenue Ruling 59-60 suggests using more than just historic stock prices for valuing closely held corporations, he declined to follow that guidance and factored no other information or data into his appraisal. Clinkinbeard further disagreed with the Revenue Ruling's warning that stock sales of closely held practices are not necessarily reflective of fair market value. Rourke testified that Clinkinbeard's valuation was "inappropriate" because he only relied on historic share prices in his methodology.

Ultimately, the average of Rourke's four methodologies produced a practice value of the Corporation of $2,265,234.50, while Clinkinbeard's single methodology produced a value of $462,000.00. The district court considered the experts' testimony and reports and found that Rourke had provided the more reliable valuation of the Corporation. Specifically, the district court used his third method—discounted future cash flow—to conclude that the practice value of the Corporation was $2,507,395.00. The district court then made two adjustments: first, it subtracted the Corporation's liabilities and added its assets; and second, it subtracted the amount still owed to Dr. Kohake under his deferred-compensation agreement as debt. After making these adjustments, the court determined that the Corporation's value, including its stock and other interests as provided in the Redemption Agreement, was $2,312,214.12, and Hefner's resulting 40 percent share was $924,885.65.

In explaining its rationale, the district court noted Clinkinbeard's insistence on using a methodology that was discouraged by IRS Revenue Ruling 59-60 and that Clinkinbeard's valuation produced a price-per-share only marginally higher than the price-per-share Hefner had paid under his 1998 stock purchase agreement. The district court further noted that: (1) the Corporation consistently produced gross profits of around $2.8 million per year; and (2) the Corporation's shareholders had drawn more that $1 million per year from the business for the past several years. The court explained that even Clinkinbeard had called the Corporation's business a "gravy train" and that, given the profits and distributions over the years, Clinkinbeard's estimate that Hefner's 40 percent interest in the Corporation was only worth $115,510 was "egregiously low."

Deutscher and the Corporation assert that Rourke's valuation method is hypothetical, speculative, and arbitrary—but the record belies this argument. As explained above, Rourke's appraisal was based on a range of financial figures and data provided by the Corporation. Deutscher and the Corporation further argue that Rourke's valuation methodology was inherently flawed because it based the value on an assumption of the Corporation's sale to a third party. Because Kansas prohibits unlicensed individuals from owning an interest in an optometry practice, Deutscher and the Corporation argue that the analysis lacked "any identification of a market for selling the Corporation." See K.S.A. 65-1502(b) (prohibiting nonlicensed persons from owning an optometry practice). However, Deutscher and the Corporation provide no support for the allegation that this assumption undermined Rourke's valuation of the Corporation or that an appraisal of a closely held corporation must be based on the then-current existence of able buyers.

The Redemption Agreement presupposed that the parties would negotiate the value of the Corporation, but because the parties did not negotiate an agreed-upon value, the district court had to rely on the opinions of appraisal experts. The Corporation, as a closely held corporation, had no active market to determine the value of its stock and, therefore, Rourke's appraisal relied on reasonable data provided by the Corporation and well-accepted appraisal principles—including considerations established by the IRS in Revenue Ruling 59-60. Finally, Deutscher and the Corporation attempt to impugn Rourke's expert testimony by claiming his appraisal methodology was contradicted by an employee of his firm in an online article. But that employee was not called as a witness or retained as an expert in the case. The district court heard the testimony, reviewed the evidence, and was able to weigh the testimony and credibility of both Rourke and Clinkinbeard—and any evidence contradicting or undermining these opinions—and this court will not reweigh the evidence or reassess those credibility determinations on appeal. *Peterson*, 302 Kan. at 106-07. Deutscher and the Corporation have provided no basis for this court to conclude that the district court erred in relying on Rourke's valuation.

Rourke's Appraisal Properly Considered Hefner's "Other Interests in the Corporation"

The Redemption Agreement states that the Corporation must pay Hefner for his "stock and other interests in Corporation and its business" upon the termination of his employment, "whether voluntary or involuntary and for whatever reason or cause." Deutscher and the Corporation argue that Rourke included items as Hefner's "other interests in the Corporation" that should not have been included in the valuation. Because the term "other interests" is undefined, they contend that it could only mean Hefner's patient base and, because the Employment Agreement states that Hefner's patients were the sole property of the Corporation, then Hefner was only entitled to the value of his shares in the Corporation. Under this logic, the phrase "other interests in the Corporation and its business" in the Redemption Agreement would include compensation for something prohibited under the Employment Agreement and nothing of value, which would be an illogical result and therefore, is not a reasonable interpretation. See *Wichita Clinic, P.A. v. Louis*, 39 Kan. App. 2d 848, 853, 185 P.3d 946 (2008) ("The law favors reasonable interpretations, and results which vitiate the purpose of the terms of the agreement to an absurdity should be avoided.").

As the district court correctly noted, the Redemption Agreement "contemplates the purchase of 'other interests' beyond the shares of stock" as it repeatedly refers to "Hefner's stock and other interests in the Corporation and its business." Moreover, the Redemption Agreement provided for two different purchase prices in the event of Hefner's voluntary departure, one if he left before the end of 2007 and one if he left after, showing an intent to compensate longer term stockholders more highly. If Hefner departed voluntarily before the end of 2007, the Corporation was required to buy his shares at the stated price of $2,500 per share, but if he stayed longer, the purchase price was to be the "then existing practice value" as negotiated between the parties and include Hefner's "other interests" in the Corporation. Therefore, Clinkinbeard's appraisal, which would have only compensated Hefner for the price of his shares, does not follow the language of the Redemption Agreement. The district court's interpretation is supported by the Redemption Agreement's plain language, which provided for a different calculation methodology after 2007 and included Hefner's "other interests" in the compensation amount in addition to the share price.

The district court did not commit an error of law in concluding that the Corporation had to buy out Hefner's shares together with his "other interests," and it did not err in relying on Rourke's expert opinion and testimony in calculating Hefner's damage award. When viewed in a light most favorable to Hefner, the evidence was sufficient to support the district court's calculation of the value of his 40 percent stake in the Corporation and its business.

Hefner's Lost Compensation Calculation

Deutscher and the Corporation contend the district court's $170,847.87 award for lost compensation and benefits is erroneous and not supported by the evidence. The disputed amount only relates to the district court's inclusion of Hefner's potential shareholder distributions because Deutscher and the Corporation agree that, if the employment termination was wrongful, Hefner is entitled to his regular salary and benefits he would have received between January 7 and June 7, 2017.

The district court found that, under the terms of the Employment Agreement, Hefner's compensation included his salary, bonus, and dividends. At trial, Hefner demonstrated his average compensation, including both salary and distributions, between the years 2014 through 2016. The district court then took Hefner's average compensation and calculated a per diem figure—which included his average bonus and dividends—and multiplied it by the 149 days that Hefner would have continued working for the Corporation had he not been fired without cause. Deutscher and the Corporation argue that the district court wrongly included shareholder distributions in that calculation because they were not guaranteed under Hefner's Employment Agreement. They also argue that Hefner's bonuses were based on his production and thus no bonus amount should have been included because Hefner did not claim he would reach a particular production level to justify the bonus. Essentially, because the bonus and distributions were not guaranteed amounts, Deutscher and the Corporation claim the district court erred by including them in its per diem calculation.

Under the Employment Agreement, Hefner had to give six months' written notice prior to any voluntary resignation—which he did on December 7, 2016—and the Corporation was then required to provide him with "compensation" during that period if he worked or was available to work. Section 11 of the Employment Agreement provides that:

> "Either party may terminate Hefner's employment hereunder at any time without giving reason or cause therefore upon providing six (6) months prior written notice to the other party. . . . Corporation shall not be obligated to assign any duties or continue to permit Hefner to see any patients following notice of termination under this paragraph, but shall be *obligated only for payment of compensation and benefits required hereunder*." (Emphasis added.)

Although the Corporation was not "obligated to assign any duties or continue to permit Hefner to see any patients following notice of termination," it was still required to provide Hefner with "compensation and benefits" during the six-month notice period. As the district court noted, the Employment Agreement does not use the phrase "salary and benefits" but rather the broader phrase "compensation and benefits," which necessarily includes more than just salary.

While Deutscher and the Corporation are correct that Hefner did not see patients from January 1, 2017 to June 7, 2017—so there was no patient base upon which to calculate a bonus—they ignore the reason why this was wrongful termination. The evidence supports the assumption that Hefner would have continued working and seeing patients had his employment not been wrongly terminated. Hefner kept seeing patients after he gave his notice in early December until his wrongful termination. Moreover, even if Hefner did not see patients during the notice period, the Corporation would still have been obligated "for payment of compensation and benefits." The Employment Agreement did include a calculation methodology for those compensation and benefits, and the district court was therefore tasked with developing a remedy to place Hefner in the same position he would have been if Deutscher and the Corporation had not breached the terms of his Employment Agreement. See *Peterson*, 302 Kan. at 106. This court cannot say that the district court's chosen method of calculating Hefner's "compensation and benefits" for the six-month period had his employment not be wrongfully terminated—by calculating the average of Hefner's total compensation and benefits over the prior three years—was an error of law or an abuse of the district court's discretion.

CONCLUSION

Sometimes anger, frustration, and self-interest lead people to make decisions that are not ultimately in their own best interests—nor in the best interests of those to whom they owe a duty of care—and that is what happened in this case. The district court did not err in finding that substantial competent evidence demonstrated that Deutscher and the Corporation wrongfully terminated Hefner's employment in breach of his Employment Agreement and that Deutscher acted with self-interest in the same decision. Nor did the district court err in its application of the law to those well-established facts to find both the Corporation and Deutscher liable for breach of contract and Deutscher liable for breach of fiduciary duty. Moreover, the district court's comprehensive assessment of the damages is supported by the facts and law. This court affirms.

Affirmed.