

IN THE COURT OF APPEALS OF IOWA

No. 3-365 / 12-1223

Filed July 10, 2013

CLAUDE SPEARS,
Plaintiff-Appellant,

vs.

**COM LINK, INC.; NORM WILKERSON;
MARK CHAFFEE; HERMAN SLABACH;
LANCE SLABACH; THEESE PRICE-
VITENSE; KENNETH PAXON; DEAN
PRICE; SANDY WILKERSON; RSM
MCGLADREY, INC.; MIDWEST DATACOM,
INC.; MIDWEST DATAPATH, L.L.C.;
MIDWEST DATACOM, L.L.C.; IOWA
DATACOM, L.L.C.; COMLINK WIRELESS,
L.L.C.; PRAIRIE INVESTMENTS, L.L.C.;
PRAIRIE INTERNET INVESTMENTS, L.L.C.;
COM-WAVES, COM-WAVES, L.L.C.;
MINT COMMUNICATIONS, L.L.C.;
UNIWAVE COMMUNICATIONS, INC.;
and VITENSE INVESTMENTS, INC.,**
Defendants-Appellees.

Appeal from the Iowa District Court for Linn County, Ian K. Thornhill,
Judge.

Claude Spears appeals from the district court's grant of summary judgment on claims of breach of contract, misrepresentation, fraud, minority shareholder oppression, conversion, conspiracy, and breach of fiduciary duty.

AFFIRMED AND REMANDED.

Richard A. Pundt of Pundt Law Office, and Larry J. Thorson of Ackley, Kopecky & Kingery, L.L.P., Cedar Rapids, for appellant.

Mark Weinhardt of Weinhardt & Logan, Des Moines, for appellee RSM McGladrey, Inc.

Steven E. Ballard, Thomas E. Maxwell, and Michael J. Harris of Leff Law Firm, L.L.P., Iowa City, for appellees, Herman Slabach, Lance Slabach, Theresa Price-Vitense, Dean Price, Prairie Investments, Mint Communications, and Vitense Investments.

Norm Wilkerson and Sandy Wilkerson, Cedar Rapids, appellees pro se.

Heard by Doyle, P.J., and Danilson and Mullins, JJ.

MULLINS, J.

Claude Spears appeals from the district court's order granting summary judgment on claims of breach of contract, misrepresentation, fraud, minority shareholder oppression, conversion, conspiracy, and breach of fiduciary duty. We affirm and remand for further proceedings against any remaining defendants.

I. Background Facts and Proceedings

This case arises out of the purchase, operation, and eventual failure of Com-Link, Inc. After Com-Link's failure, Spears sued twenty-five individuals and business entities directly and indirectly related to Com-Link's operation. We are called upon to review the propriety of the district court's grant of summary in favor of Norm Wilkerson; Sandy Wilkerson; Herman Slabach; Lance Slabach; Dean Price; Theresa "Teesa" Price-Vitense;¹ Prairie Internet Investments, LLC; Mint Communications, LLC; Vitense Investments, Inc.; and RSM McGladrey, Inc. We set forth the facts in the light most favorable to Spears.

Claude Spears, Stephen Rusboldt, and Gary Schultz founded Com-Link as an internet service provider in the mid-1990s. In early 2004, Norm Wilkerson, Mark Chaffee, and Kenneth Paxton expressed an interest in purchasing Com-Link on behalf of Midwest DataCom, Inc. During the negotiations, Paxton and Wilkerson made certain representations to Spears about Midwest DataCom's plans to expand Com-Link's customer base. Ultimately, Midwest DataCom did not purchase Com-Link and Paxton dropped out of the negotiations.

¹ Theresa "Teesa" Price-Vitense was known as Theresa "Teesa" Price prior to marriage. The caption refers to her as Theesa. We will refer to her as Theresa "Teesa" Price or Teesa.

After Midwest DataCom decided not to purchase Com-Link, Wilkerson contacted several investors to help acquire Com-Link. The investors included Dean Price, an accountant and managing partner of RSM McGladrey; Herman Slabach, president of a construction company that builds underground telecommunications infrastructure; and Lance Slabach. The investors decided to pursue the acquisition of Com-Link.

In April 2004, Spears, Rusboldt, and Schultz entered an agreement with Com-Link entitled the “Share Purchase Agreement.” Under the terms of the agreement, Rusboldt and Schultz agreed to sell all of their shares to Com-Link; Spears agreed to sell a portion of his shares. The agreement further provided that Com-Link agreed to sell shares to several investors at a price to be agreed upon at a later date. The prospective investors listed in the agreement were Norm Wilkerson, Mark Chaffee, Herman Slabach, Lance Slabach, Mitchell Price, and Theresa “Teesa” Price. Each party signed the agreement—with Dean Price apparently acting on behalf of his adult children Mitchell and Teesa when signing.

After the parties signed the share purchase agreement, Spears, Rusboldt, and Schultz held a board meeting and authorized Com-Link to issue stock to the individual investors in the number of shares set forth in the share purchase agreement. The founding members elected the following board of directors: Norm Wilkerson, Claude Spears, Mark Chaffee, Herman Slabach, and Lance Slabach. The board then elected Wilkerson as president, Chaffee as vice president, Spears as secretary, and Sandy Wilkerson (Norm Wilkerson’s wife) as treasurer.

Over the next several years, Com-Link failed to remain competitive as an internet service provider and accumulated more and more debt. In 2005, Com-Link obtained a loan for \$107,000, which Spears does not remember signing. In 2006, Com-Link incurred a loan in the amount of \$264,643.23, which Spears again does not remember signing.

In August 2006, Com-Link sold certain assets to Mint Communications, LLC. Mint Communications is a subsidiary of Vitense Investments, Inc. Vitense Investments's shareholders include Dean Price, Teesa Price, and Kurt Vitense with Dean acting as its registered agent.

In October 2006, a collections agency demanded payment from Spears for a Com-Link American Express bill in the amount of \$29,870.16. Spears paid the bill. Spears then met with Dean Price to demand Com-Link's financial statements that he claims Price never provided.

In January 2007, Prairie Internet Investments was formed with Teesa Price as the registered agent. Prairie Internet Investments' shareholders included Herman Slabach (27%), Norm Wilkerson (27%), Vitense Investments (27%), Mark Chaffee (14%), and Spears (5%). Spears believed he was owed a 20% share.

Com-Link's digital subscriber line users were allegedly transferred to ABC Solutions (not a party to this case) in 2007. Com-Link ceased doing business later that year. Com-Link was then administratively dissolved for failure to file a biennial report in 2008. By 2011, Mint Communications, assumed all of Com-

Link's debt and Dean Price, Norm Wilkerson, and March Chaffee each personally guaranteed payment.

In 2008, Spears sued twenty-five individuals and entities related to the operation of Com-Link. In 2012, Spears filed his third amended and substituted petition at law with twenty-two individuals and entities remaining named parties. His petition at law contained twelve counts with seven discernible claims including breach of contract, misrepresentation, fraud, minority shareholder oppression, conversion, conspiracy, and breach of fiduciary duty. Spears alleged the individual defendants improperly used his credit card, converted property in a manner inconsistent with a security agreement, forged his name on bank loans, wrongfully obligated him to pay certain tax liabilities, used deceptive accounting practices to deceive him, and failed to comply with the terms of a contract. Spears further argued that the defendants siphoned corporate assets into a number of other business entities—including Prairie Internet Investments, Mint Communications, and Vitense Investments. He also asserted that he was never paid for the shares he sold to Com-Link under the share purchase agreement.

In response, Dean Price, Mitchell Price, Theresa "Teesa" Price, Kurt Vitense, Herman Slabach, Lance Slabach, Prairie Internet Investments, Mint Communications, and Vitense Investments filed a motion for summary judgment with Norm Wilkerson and Sandy Wilkerson joining the motion. Sandy Wilkerson then filed a motion for partial summary judgment. RSM McGladrey filed its own motion for summary judgment.

In April 2012, the district court held a hearing on the motions for summary judgment.² The district court found Spears's damages, if any, result from claims that are derivative of Com-Link or that are properly asserted against Com-Link, not the individuals and entities moving for summary judgment. The district court then found, even if Spears was able to assert claims against the individuals and entities, his claims fail on the merits. Spears appeals.

II. Error Preservation

1. Shareholder Derivative Action

Spears argues the district court erred in finding his claims belonged, if at all, to Com-Link and were compensable only through a shareholder derivative suit. Alternatively, Spears contends he commenced a shareholder derivative suit. Generally, "shareholders have no claim for injuries to their corporation by third parties unless within the context of a derivative action." *Cunningham v. Kartridg Pak Co.*, 332 N.W.2d 881, 883 (Iowa 1983). To establish "an individual cause of action for direct injuries a shareholder must show that the third-party owed him a special duty *or* that he suffered an injury separate and distinct from that suffered by the other shareholders." *Id.*

To initiate a shareholder derivative action, a shareholder must petition to enforce the corporation's rights. See Iowa R. Civ. P. 1.279. The shareholder must support the petition with an affidavit setting forth "their efforts to have the directors . . . or other shareholders bring the action or enforce the right, or a

² As Spears voluntarily dismissed all claims against Mitchell Price and Kurt Vitense prior to the summary judgment hearing, we need not address whether summary judgment was appropriate as to these parties.

sufficient reason for not making such effort.” *Id.* Ordinarily, a shareholder cannot initiate a derivative action unless the shareholder has first made a written demand upon the corporation and ninety days have expired from the date the demand was made. See Iowa Code § 490.742 (2011).

It is clear Spears did not initiate a shareholder derivative suit to enforce Com-Link’s rights. See Iowa R. Civ. P. 1.279. Nor did Spear support the petition with an affidavit setting forth his efforts to enforce the corporation’s rights, or reasons for not making such efforts. See *id.* Spears cannot now claim relief under a theory of liability he neither pleaded nor presented to the district court. See *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (“It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.”). To the extent Spears seeks relief under a shareholder derivative action, error was not preserved for appellate review and that issue is not properly before this court. See *id.* We will address whether Spears has an individual cause of action for direct injuries as a shareholder later in this opinion to the extent necessary.

2. Piercing the Corporate Veil

Spears contends the district court erred in granting summary judgment because he is entitled to relief under a piercing-the-corporate-veil theory. See *In re Marriage of Ballstaedt*, 606 N.W.2d 345, 349 (Iowa 2000) (discussing the factors that must be proven in order to “pierc[e] the corporate veil”). It is unclear which claims Spears seeks to impose liability under a piercing-the-corporate-veil analysis.

It is well settled that “[w]hen a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal.” *Meier*, 641 N.W.2d at 537; see also Iowa R. Civ. P. 1.904(2). The district court recognized that Spears raised the issue of piercing the corporate veil. The court did not, however, rule on whether the doctrine applied to any of Spears’s claims. Spears did not subsequently request the district court to rule on whether, under the doctrine of piercing the corporate veil, he was entitled to a trial on any claim. See Iowa R. Civ. P. 1.904(2). Thus, Spear did not preserve this issue for our review. See *id.*; *Teamsters Local Union No. 421 v. City of Dubuque*, 706 N.W.2d 709, 713 (Iowa 2006) (finding error not preserved when appellant failed to file a post-trial motion asking the district court to rule on an issue and rejecting appellant’s decision-by-implication argument); *Meier*, 641 N.W.2d at 537.

3. Conspiracy

Spears’s conspiracy claim is unclear. Spears pleaded conspiracy as a separate count in his petition. On appeal, Spears seems to use his conspiracy claim as a bridge tenuously connecting a broad array of defendants to each of his claims. To establish a conspiracy, “an agreement must exist between the two persons to commit a wrong against another.” *Ezzone v. Riccardi*, 525 N.W.2d 388, 398 (Iowa 1994). Conspiracy requires an underlying tortious act or wrong; it does not give rise to a stand-alone cause of action. See *Basic Chems., Inc. v. Benson*, 251 N.W.2d 220, 233 (Iowa 1977) (“Civil conspiracy is not itself actionable; rather it is the acts causing injury undertaken in furtherance of the

conspiracy which give rise to the action.”). A plaintiff may, however, use civil conspiracy as “an avenue for imposing vicarious liability on a party for the wrongful conduct of another with whom the party has acted in concert.” *Wright v. Brooke Group Ltd.*, 652 N.W.2d 159, 172 (Iowa 2002).

Although Spears’s conspiracy argument is unclear, it is clear that the district court addressed Spears’s conspiracy claim only as it related to conspiracy to commit conversion. Spears did not subsequently request that the district court enlarge its ruling to determine whether conspiracy to commit other torts could withstand a motion for summary judgment. See Iowa R. Civ. P. 1.904(2). Thus, to the extent Spears wishes us to address whether any defendant conspired against him to commit a tort other than conversion, he has not preserved this issue for our review. See *id.*; *Teamsters Local Union No. 421*, 706 N.W.2d at 713; *Meier*, 641 N.W.2d at 537. We will, however, address Spears’s conspiracy to commit conversion claim later in this opinion.

III. Standard of Review

We review the district court’s grant of summary judgment for correction of errors at law. *Bierman v. Weier*, 826 N.W.2d 436, 443 (Iowa 2013). The district court may grant summary judgment only when the record demonstrates “that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Iowa R. Civ. P. 1.981(3). To determine whether summary judgment was appropriate, we view the record “in the light most favorable to the nonmoving party.” *Bierman*, 826 N.W.2d at 443.

IV. Analysis

1. Breach of Contract

To establish a breach-of-contract claim, the plaintiff must prove: “(1) the existence of a contract; (2) the terms and conditions of the contract; (3) that it has performed all the terms and conditions required under the contract; (4) the defendant’s breach of the contract in some particular way; and (5) the plaintiff has suffered damages as a result.” *Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 224 (Iowa 1998).

It seems elementary that only a party to a contract can breach a contract. *Harbit v. Voss Petroleum, Inc.*, 553 N.W.2d 329, 331 (Iowa 1996) (“Authority seems unnecessary for the proposition that only a party to a contract can be guilty of breaching it.”). Unfortunately, Spears overlooks this rather rudimentary principle. An examination of the share purchase agreement identifies the parties in no uncertain terms. The parties to the contract were Com-Link on the one hand, and Spears, Rusboldt, and Schultz on the other. Under the terms of the share purchase agreement, Com-Link agreed to purchase shares from the three founding members and those members authorized Com-Link to sell shares to certain individuals at a price to be agreed upon at a later date.

The agreement provided that Com-Link agreed to sell a specified number of shares to each of the prospective investors at a price to be agreed at a later date. The prospective investors were identified in the agreement as Norm Wilkerson, Mark Chaffee, Herman Slabach, Lance Slabach, Teesa Price, and Mitchell Price. The agreement contains no obligations of the prospective investors to purchase the shares or to assume any other duty or obligation. Each

prospective investor signed the share purchase agreement, with Dean Price signing for his children, Teesa and Mitchell. Although the prospective investors signed the agreement, they did not agree to and were not bound by any of its terms. Even when viewing the contract in the light most favorable to Spears, Wilkerson, Chaffee, Herman Slabach, Lance Slabach, Teesa Price, Mitchell Price, and Dean Price were not parties to the contract. It seems most likely that their signatures were mere acknowledgements by those prospective investors of Com-Link's agreement with Spears, Rusboldt, and Schultz to later offer to sell shares to them. Spears's assertion that one of the defendants drafted the share purchase agreement does not make that individual a party to the contract. As these individuals were not parties to the share purchase agreement, Spears's breach-of-contract claim against them must fail. *See id.*

With regard to the defendants not listed in the share purchase agreement—Sandy Wilkerson, Prairie Internet Investments, Mint Communications, Vitense Investments, and RSM McGladrey—Spears purposed a more measured approach in his amended pleadings than the one he now asserts on appeal. In his pleadings, Spears alleged only that Wilkerson, Chaffee, Herman Slabach, Lance Slabach, Dean Price, Teesa Price, and Mitchell Price breached a contract—ostensibly the share purchase agreement. On appeal, Spears seems to allege the defendants not listed in the share purchase agreement breached the agreement by virtue of their relationship with those listed in the agreement. Some of the entities Spears alleges breached the share purchase agreement were not yet in existence at the time Spears executed the

agreement. We find Sandy Wilkerson, Prairie Internet Investments, Mint Communications, Vitense Investments, and RSM McGladrey were not parties to the contract. Accordingly, Spears's breach-of-contract claim against them must fail. *See id.*

To the extent Spears alleges individuals and entities breached contracts other than the share purchase agreement, we find Spears failed to establish a factual dispute as to the existence and terms of any other express or implied contracts, and cannot withstand summary judgment. *See Molo Oil Co.*, 578 N.W.2d at 224 (setting forth the elements of a contract). As a result, we find no error in the district court's grant of summary judgment on the breach-of-contract claim against Norm Wilkerson, Sandy Wilkerson, Herman Slabach, Lance Slabach, Dean Price, Teesa Price, Prairie Internet Investments, Mint Communications, Vitense Investments, and RSM McGladrey. *See id.*

2. Misrepresentation and Fraud

The district court addressed Spears's overlapping misrepresentation and fraud claims as claims of negligent misrepresentation, fraudulent misrepresentation, and fraudulent concealment. After the district court's ruling, Spears did not request a decision on any other theory. *See Iowa R. App. P. 1.904(2)*. Thus, we will address Spears's misrepresentation and fraud claims as claims of negligent misrepresentation, fraudulent misrepresentation, and fraudulent concealment in turn. *See id.*

In Iowa, negligent misrepresentation has its roots in section 552 of the Second Restatement of Torts. *See Beeck v. Kapalis*, 302 N.W.2d 90, 96–97

(Iowa 1981). To establish a claim for negligent misrepresentation, a claimant must prove the following:

One who, in the course of his business, profession, or other employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

Freeman v. Ernst & Young, 516 N.W.2d 835, 837–38 (Iowa 1994) (quoting Restatement (Second) of Torts § 552 (1977)). In order to support a claim for misrepresentation, the defendant must owe a duty of care to the plaintiff. See *Sain v. Cedar Rapids Cmty. Sch. Dist.*, 626 N.W.2d 115, 124 (Iowa 2001). Only when persons providing the information are in the business or profession of supplying information to others does this duty arise. See *id.* In determining whether a person is in the business of supplying information to others, we consider the relationship between the parties and the context in which the information was provided. *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 111–12 (Iowa 2012); *Strum v. Peoples Trust & Sav. Bank*, 713 N.W.2d 1, 4–5 (Iowa 2006).

To establish a claim of fraudulent misrepresentation, on the other hand, the plaintiff must show “(1) representation; (2) falsity; (3) materiality; (4) scienter; (5) intent to deceive; (6) reliance; and (7) resulting injury and damage.” *Whalen v. Connelly*, 545 N.W.2d 284, 294 (Iowa 1996).

In order to establish a claim of misrepresentation or fraud for nondisclosure, the plaintiff must show the defendant failed to disclose a known

material fact when the defendant had a legal duty to communicate the information to the plaintiff. See *Irons v. Cmty. State Bank*, 461 N.W.2d 849, 854 (Iowa Ct. App. 1990). Liability for fraudulent concealment arises under section 550 Restatement (Second) Torts, which provides as follows: “One party to a transaction who by concealment or other action intentionally prevents the other from acquiring material information is subject to the same liability to the other, for pecuniary loss as though he had stated the nonexistence of the matter that the other was thus prevented from discovering.”

In his deposition Spears conceded he did not rely on any of the individuals or entities listed as defendants in his complaint in selling his shares to Com-Link and authorizing Com-Link to issue shares to the investors. Indeed, prior to retaining shares in Com-Link, Spears met with his attorney and discussed the matter with his father and business associates. In such arm’s length transactions, our supreme court has found that a claim of negligent misrepresentation is not actionable. See *Freeman*, 516 N.W.2d at 838 (refusing to allow a suit for misrepresentation where a seller made misrepresentation pursuant to the sale of a business). Other than this initial business transaction with Com-Link, Spears fails to identify any other business transaction in which he claims to have relied upon the guidance of others to the extent a duty to disclose information to him would arise. Thus, Spears has not generated a genuine issue of material fact sufficient to preclude summary judgment as to the issues of misrepresentation or fraud. See Iowa R. Civ. P. 1.981(3); *Bierman*, 826 N.W.2d at 443.

3. Minority Shareholder Oppression

Spears urges this court to fashion an equitable remedy for damages for minority shareholder oppression that allegedly occurred in a now administratively dissolved corporation. Minority shareholder oppression claims typically arise out of a statutory claim for judicial dissolution. See Iowa Code § 490.1430(2)(b); *Maschmeier v. Southside Press Ltd.*, 435 N.W.2d 377 (Iowa Ct. App. 1988). Iowa courts have been willing to provide equitable relief for minority shareholder oppression outside the statutory claim for judicial dissolution—at least where the corporation is still a going concern. See *Maschmeier*, 435 N.W.2d at 382 (ordering the majority to purchase the minority’s shares after finding “[i]t is clear in Iowa that once oppression, waste, or misapplication of the corporate assets has been found, the trial court, sitting in equity, can devise a remedy to meet the situation”); *Sauer v. Moffitt*, 363 N.W.2d 269, 275 (Iowa Ct. App. 1984) (ordering partial liquidation and redemption of a minority shareholder’s shares where defendants were unable to account for property and income because of their mismanagement or fraudulent acts); *Holden v. Constr. Mach. Co.*, 202 N.W.2d 348, 363—64 (Iowa 1972) (“Wherever a situation exists which is contrary to the principles of equity and which can be redressed within the scope of judicial action, a court of equity will devise a remedy to meet the situation, though no similar relief has been given before.”)). To determine whether a plaintiff has established a claim for minority shareholder oppression, we must consider whether the controlling directors and majority shareholders have frustrated the reasonable expectations of the minority shareholder under the circumstances.

Baur v. Baur Farms, Inc., ___ N.W.2d ___, ___, 2013 SW 2710449, at *10 (Iowa 2013).

Spears argues the district court erred in holding that he could not be oppressed because none of the defendants owned a majority interest in Com-Link. In support of his argument, Spears alleges “Dean Price, Norm Wilkerson, Mark Chaffee, Teesa Price, [and] Herman and Lance Slabach all conspired to dismantle [Com-Link] and its business operation” by forming new business entities “to siphon off business” and by forging Spears’s name on loan documents. Spears’s arguments under his minority shareholder oppression claim overlap with his arguments for conversion, conspiracy to commit conversion, and breach of fiduciary duty. For reasons articulated elsewhere in this opinion, Spears’s claims for conversion, conspiracy to commit conversion, and breach of fiduciary duty fail.³

In *Baur*, the Iowa Supreme Court held that “majority shareholders act oppressively when, having the corporate financial resources to do so, they fail to satisfy the reasonable expectations of a minority shareholder by paying no return on shareholder equity while declining the minority shareholder's repeated offers to sell shares for fair value.” ___ N.W.2d at ___ 2013 SW 2710559, at *10. The Court in *Baur* declined to elucidate all the circumstances that may constitute minority shareholder oppression. See *id.* Instead, the Court adopted a reasonableness standard to assess such claims. See *id.*

³ See Parts IV 4–5 at pages 19-22.

We must consider whether, under the circumstances, Spears generated a factual issue as to whether Com-Link's controlling directors or majority shareholders frustrated his reasonable expectations through oppressive conduct. See *id.* Unlike *Baur*, Com-Link's controlling directors or other shareholders did not force Spears to assume a lesser role in the corporation while refusing to pay a return on shareholder equity. See *id.* Com-Link's controlling directors and shareholders attempted to keep the corporation afloat, spreading its assets and its debt across several other entities. Consequently, Dean Price, Norm Wilkerson, and March Chaffee now shoulder approximately \$440,000 of Com-Link's debt.

It is unfortunate that Com-Link failed as a business venture; Spears may have hoped it would not. Spears's optimism about the future of Com-Link's business as an internet service provider and the corporation's ultimate failure does not alone give rise to a claim of minority shareholder oppression. It was incumbent on Spears to raise a factual issue about whether Com-Link's controlling directors or majority shareholders frustrated his reasonable expectations as a minority shareholder through oppressive conduct. See *id.* Here, we simply have a failed business venture. All of Com-Link's directors and shareholders suffered from its failure. Under the circumstances of this case, we find Spears has not generated a genuine issue of material fact sufficient to preclude summary judgment on the issue of minority shareholder oppression as to all parties. See *id.*; *Bierman*, 826 N.W.2d at 443.

4. Conversion & Conspiracy to Commit Conversion

Spears argues the district court erred in granting summary judgment on his conversion claim because the court overlooked his possessory interest in his personal credit card and in all of Com-Link's assets. "Conversion" is defined as "the wrongful control or dominion over another's property contrary to that person's possessory right to the property." *Condon Auto Sales & Service, Inc. v. Crick*, 604 N.W.2d 587, 593 (Iowa 1999). To support a claim for conversion, "the plaintiff must establish a possessory interest in the property." *Blackford v. Prairie Meadows Racetrack & Casino, Inc.*, 778 N.W.2d 184, 188 (Iowa 2010).

Spears's allegations regarding the conversion of his personal credit card are patently misleading. Spears alleges Sandy Wilkerson and Norm Wilkerson used his personal American Express credit card to make tens of thousands of dollars in unauthorized purchases. After Com-Link failed to pay the credit card bill, a collection agency contacted Spears about the charges and he paid for them using a credit card held in his name. It is undisputed that Sandy and Norm used an American Express credit card associated with a *Com-Link account*, not Spears's personal account. It is clear to this court that Spears is actually claiming that he felt pressured by American Express to pay the corporate credit card account by using his personal credit card account, and now seeks a theory upon which to recover from the Wilkersons for the voluntary use of his own credit card to pay a corporate debt. We find Spears failed to generate a factual issue regarding a possessory interest in Com-Link's corporate credit card sufficient to withstand a motion for summary judgment.

Spears alleges he has a security interest in all of Com-Link's equipment and that Com-Link's sale of that equipment without his consent constitutes conversion. According to the terms of the share purchase agreement, Spears retained "a first lien on any and all equipment owned by Com-Link, Inc. to the extent that it would cover the balance of the bank note from Farmer's State Bank." Apart from the share purchase agreement, Spears asserts a security interest in all Com-Link's equipment under a separate security agreement executed at approximately the same time as the share purchase agreement. It is undisputed that the balance of that loan has been paid, with Spears paying nothing personally. There is no longer a debt to the bank. Thus, there is no obligation to secure. Spears appears to argue Com-Link owes him other obligations secured under the broad terms of the security agreement. But Spears does not set forth a legal argument to support his assertions of continued security interest, and we decline to articulate one for him on appeal. We deem this argument waived. See Iowa R. App. P. 6.903(2)(g)(3) ("Failure to cite authority in support of an issue may be deemed waiver of that issue."); *Kragnes v. City of Des Moines*, 810 N.W.2d 492, 507 n.12 (Iowa 2012).

As previously articulated, Spears failed to preserve error on all conspiracy claims except the conspiracy to commit conversion. To support his conspiracy to commit conversion claim, Spears argues all of the defendants conspired to usurp and sell corporate assets to new entities they had formed. Unless a shareholder was owed a special duty or suffered injuries separate and distinct from other shareholders, the shareholder's only route to recovery for injuries to a

corporation is through a shareholder derivative suit. See *Cunningham*, 332 N.W.2d at 883.

We find the cause of action for the sale of Com-Link's assets lies, if at all, with the corporation itself, not Spears individually. See *id.* We further find Spears has failed to generate a factual issue on whether any third party owed him a special duty or whether he suffered injuries separate and distinct from other shareholders. See *id.* As we have already held that Spears did not bring this action as a shareholder derivative suit, we find no error in the court's grant of summary judgment on Spears's conspiracy to commit conversion claim.

5. Breach of Fiduciary Duty

Spears argues he presented a genuine issue of material fact on his breach of fiduciary duty claims sufficient to preclude summary judgment. A fiduciary relationship is one that "exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." *Kurth v. Van Horn*, 380 N.W.2d 693, 695 (Iowa 1986) (internal quotation marks and citation omitted). Some relationships necessarily create fiduciary duties. See *id.* An officer and director in a corporation "owes a fiduciary duty to the company and its shareholders." *Cookies Food Products, Inc., by Rowedder v. Lakes Warehouse Distrib., Inc.*, 430 N.W.2d 447, 451 (Iowa 1988). Generally, a majority shareholder also owes a fiduciary duty to the corporation and shareholders. See *id.* Conversely, minority shareholders not in control of the corporation do not owe a fiduciary duty to the corporation or its shareholders. See *id.*

Breach of fiduciary duty is generally a derivative claim. See *Weltzin v. Nail*, 618 N.W.2d 293, 299 (Iowa 2000); *Cunningham*, 332 N.W.2d at 883. Spears is understandably upset about the failure of Com-Link as a business venture. By all accounts, its failure permeated the ranks of all shareholders culminating with Dean Price, Norm Wilkerson, and March Chaffee each personally guaranteeing payment of approximately \$440,000 of the now defunct Com-Link's debt. Spears has not, however, generated a factual issue on whether he suffered injuries separate and distinct from other shareholders or whether any third party owed him a special duty apart from that owed to all shareholders. See *Cunningham*, 332 N.W.2d at 883. Thus, we find no error in the district court's grant of summary judgment as to this claim.

V. Conclusion

To the extent Spears seeks relief under a shareholder derivative action, error was not preserved for appellate review and that issue is not properly before this court because Spears neither pleaded nor presented a shareholder derivative action to the district court. To the extent Spears preserved error on all other issues, we find no error in the district court's grant of summary judgment in favor of the individuals and entities at issue on the claims of breach of contract, misrepresentation, fraud, minority shareholder oppression, conversion, conspiracy, and breach of fiduciary duty. Accordingly, we affirm and remand for further proceedings against any remaining defendants.

AFFIRMED AND REMANDED.