

**IN THE COURT OF APPEALS  
ELEVENTH APPELLATE DISTRICT  
TRUMBULL COUNTY, OHIO**

|                                          |   |                             |
|------------------------------------------|---|-----------------------------|
| RICHARD McCONNELL,                       | : | <b>OPINION</b>              |
|                                          | : |                             |
| Plaintiff-Appellant,                     | : |                             |
|                                          | : | <b>CASE NO. 2013-T-0050</b> |
| - vs -                                   | : |                             |
|                                          | : |                             |
| BARE LABEL PRODUCTIONS,<br>INC., et al., | : |                             |
|                                          | : |                             |
| Defendants,                              | : |                             |
|                                          | : |                             |
| TAMMY SCHMITT,                           | : |                             |
|                                          | : |                             |
| Intervening Defendant-<br>Appellee.      | : |                             |

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2008 CV 00278.

Judgment: Reversed and remanded.

*Robert N. Farinacci*, 7757 Auburn Road, Suite 09, Concord, OH 44077 (For Plaintiff-Appellant).

*Andrew W. Suhar*, Suhar & Macejko, LLC, 29 East Front Street, P.O. Box 1497, Youngstown, OH 44501 and *Bruce M. Broyles*, 5815 Market Street, Suite 2, Youngstown, OH 44512 (For Intervening Defendant-Appellee).

DIANE V. GRENDELL, J.

{¶1} Plaintiff-appellant, Richard McConnell, appeals the April 9, 2013 Judgment Entry of the Trumbull County Court of Common Pleas, entering judgment in favor of McConnell against defendant, Tammy Schmitt, in the amount of \$23,030, plus interest.

The issues before this court are whether a trial court errs by not imposing a forfeiture for failing to produce corporate records, under R.C. 1701.94, where it is denied that such records exist and the corporation itself has been dissolved following the appointment of a receiver; whether a trial court errs by not awarding damages for lost profits based on past performance and anecdotal testimony regarding the corporation's income; and whether a trial court errs by not awarding punitive damages and/or compensatory damages for the alleged removal of personalty prior to the sale of real property at auction where the personalty is not identified or appraised prior to sale. For the following reasons, we reverse the decision of the court below and remand for further proceedings consistent with this opinion.

{¶2} On January 24, 2008, McConnell filed a Complaint for Mandatory Injunction to Permit Inspection of Corporate Records against Bare Label Productions, Inc., an Ohio corporation, in the Trumbull County Court of Common Pleas.

{¶3} On April 2, 2008, the trial court entered an Order, allowing Tammy Schmitt to intervene as a party defendant.

{¶4} On the same date, Schmitt filed an Answer, Cross-Claim, and Third-Party Claim. In her cross-claim against Bare Label Productions, Schmitt alleged that she is 51% shareholder in Bare Label Productions and that McConnell is a 49% shareholder. Schmitt sought the judicial dissolution of Bare Label Productions, as she and McConnell had "come to an impasse" with regard to its corporate purpose. The third-party claim was filed against Masury Real Estate, Ltd., another corporation in which she and McConnell were co-owners. Schmitt likewise sought the judicial dissolution of Masury Real Estate.

{¶5} On May 22, 2008, the trial court appointed a receiver to wind up the affairs of Bare Label Productions and Masury Real Estate.

{¶6} On March 9, 2009, McConnell filed a Motion to Vacate Order of Appointment of Receiver. McConnell's Motion was denied on April 1, 2009.

{¶7} On April 6, 2009, Schmitt filed a Notice of Compliance, advising the trial court that she "has to plaintiff[']s counsel \* \* \* provided copies of all the corporate financial records to the best of her knowledge."

{¶8} On June 25, 2009, the trial court issued an Order, authorizing the sale of real estate held by the receiver, located at 1248 Standard Avenue, Masury, Ohio, and "valued at approximately \$36,600.00 per the tax value."

{¶9} On July 23, 2009, the property at 1248 Standard Avenue was sold at auction for \$17,500 to Tammy Schmitt.

{¶10} On August 21, 2009, McConnell filed an Objection to Sale of Real Estate, on the grounds that the property sold "was supposed to include real and personal property," and that Schmitt had removed the personal property, thereby "depress[ing] the value of the real estate property sold at auction."

{¶11} On September 17, 2009, the trial court entered an Order of Confirmation of Sale of Real Estate, Business and Personal Property.

{¶12} On September 29, 2009, McConnell filed a Motion to Amend Complaint, which the trial court granted on the same day.

{¶13} On February 18, 2010, the trial court entered a Judgment Entry of Dissolution of Bare Label and Masury Real Estate, Ltd., Discharging Receiver, and Approving Compensation. The court ordered the sum of \$4,747.77, representing the balance of funds held by the receiver, to be deposited with the court.

{¶14} On February 10, 2011, McConnell filed an Amended Complaint against Schmitt and Bare Label Productions. Count I of the Amended Complaint alleged that Schmitt had violated her duty, under R.C. 1701.37, to produce corporate records at the request of a shareholder. Count II stated a claim against Bare Label Productions for breach of contract. Count III stated a claim against Schmitt for tortious interference with a business relationship. Count IV stated a claim against Schmitt for breach of fiduciary duty.

{¶15} On May 26, 2011, Schmitt filed her Answer to Amended Complaint and Counterclaim. Schmitt asserted a claim to the \$4,747.77 deposited with the trial court, based on capital contributions she made to Bare Label Productions and Masury Real Estate.

{¶16} On April 19, April 20, and October 29, 2012, trial was held. McConnell testified on his own behalf and Joe Susak, a former employee of Club Pink, was called as a witness. Schmitt did not testify at trial, although her discovery deposition was admitted into evidence.

{¶17} On December 26, 2012, the trial court issued a Judgment Entry on the merits, without findings of fact. The court found in McConnell's favor on Count I, and ruled that "Bare Label Productions, Inc. and Masury Real Estate, Inc. shall be liable to Plaintiff in the amount of \$23,890.00 each, for a total of \$47,580.00." On Count III, the court found in McConnell's favor and ruled that "Terry [sic] Schmitt shall be liable to Plaintiff for interference of business relationship in the amount of \$6,450.00." The court further ordered, without reference to a particular count, that "the Defendant shall pay to Plaintiff the sum of \$54,000.00 as his share of rental payments," with "Defendant Schmitt \* \* \* given credit for \$40,000 she paid in purchase of real estate involved in

business.” The funds on deposit with the court were divided evenly between the parties.

{¶18} On December 28, 2012, Schmitt filed a Motion for New Trial.

{¶19} On December 31, 2012, the trial judge who issued the December 26, 2012 Judgment Entry retired from the bench.

{¶20} On January 22, 2013, McConnell filed a Motion for Clarification and Reconsideration of Judgment Entry.

{¶21} On March 8, 2013, McConnell filed a Motion for Judgment on the Record, with respect to Count IV (breach of fiduciary duty), and a Motion for Nunc pro Tunc Judgment Entry, seeking to have the judgment with respect to Count I entered against Schmitt, rather than Bare Label Productions and Masury Real Estate.

{¶22} On April 9, 2013, the trial court issued a Judgment Entry, vacating the court’s prior December 26, 2012 Judgment. The court denied Schmitt’s Motion for New Trial and McConnell’s Motion for Nunc pro Tunc Judgment Entry. The court granted McConnell’s Motion for Reconsideration and his Motion for Judgment on the Record, “to the extent that the Court hereby vacates the December 26, 2012 Judgment Entry.” The court determined that it would issue a new judgment on the merits based on the trial transcript and exhibits.

{¶23} On the same date, the trial court issued a new Judgment Entry on the merits, pursuant to Civil Rule 63(B) (“[i]f for any reason the judge before whom an action has been tried is unable to perform the duties to be performed by the court after a verdict is returned or findings of fact and conclusions of law are filed, another judge designated by the administrative judge \* \* \* may perform those duties”). The court made the following relevant findings of fact:

Schmitt and McConnell entered into business together to open an adult entertainment venture known as Club Pink located at 1248 Standard Ave. in Masury, Ohio. Schmitt purchased the real estate at 1248 Standard Avenue prior to the establishment of the business relationship between Schmitt and McConnell. Schmitt did not recall the purchase price of the Standard Avenue real estate. She believed it was “upwards of \$15,000.”

The parties established two companies to operate their venture. According to its operating agreement, Masury Real Estate, Ltd. was created on April 1, 2005. McConnell was both the operating manager and [a] member of Masury Real Estate. Schmitt was a member as well. Pursuant to the minutes of the first meeting of Masury Real Estate, Schmitt was a fifty-one percent owner. McConnell was forty-nine percent owner.

Bare Label was also created on April 1, 2005. According to a shareholders agreement dated March 31, 2005, Schmitt held fifty-one shares of stock in Bare Label and McConnell held forty-nine shares of stock in Bare Label. Schmitt was listed as president and treasurer. McConnell was identified as the vice-president and secretary of Bare Label.

Schmitt transferred the 1248 Standard Ave. real estate into Masury Real Estate, LLC. Then, Masury Real Estate leased the club premises to Bare Label for an initial annual rate of \$24,000 per year, or \$2,000 per month.

According to McConnell's testimony at trial, Schmitt would contribute collateral to the parties' companies and he could contribute sweat equity. " \* \* \* I took care of running the club and managing the club, and she would put up the money," said McConnell. In exchange for this distribution of contributions, McConnell would " \* \* \* get fifty percent, she would get fifty percent, of the profits." In addition the parties had an understanding that Schmitt's contribution of the real estate would be paid off first as an obligation.

In addition, McConnell testified he was to receive \$350 per week in addition to his fifty-percent share of the profits. McConnell's management contribution was governed by an Employment Agreement executed on March 31, 2005 between Bare Label and McConnell. \* \* \* The term of this Employment Agreement was one year, from April 1, 2005 to April 1, 2006. The Agreement could only be terminated by "just cause." \* \* \* McConnell testified Schmitt terminated McConnell's employment on November 1, 2005 by changing the locks on Club Pink. Shortly thereafter, Schmitt performed other actions consistent with the intent of removing McConnell from Club Pink permanently.

\* \* \*

McConnell never received any portion of the profits from Bare Label. However, according to McConnell's own testimony,

Schmitt was to be paid first for her contribution of the real estate before the parties would divide any profits.

According to McConnell, he would have made \$50,000 a year in profits which represents his fifty percent (actually he only owned forty-nine percent) of Bare Label and Masury Real Estate. McConnell seeks reimbursement “\* \* \* for the money that’s lost, for my time, for half of the building, and half of a business that I would have made \$50,000 on.” McConnell stated the average monthly expenses of Bare Label were \$5,500, including the \$2,000 per month rental to Masury Real Estate.

McConnell testified he renovated and remodeled certain portions of the building. However, McConnell also stated Schmitt invested \$20,000 of her own money into the renovations. He estimated the equipment installed in the building at \$34,000. According to McConnell, this equipment was removed prior to the auction conducted by the Receiver.

{¶24} The trial court found in Schmitt’s favor on McConnell’s claim (Count I) under R.C. 1701.94 for failing to produce corporation financial documents. The court dismissed the breach of contract claim (Count II) as “no longer viable since Bare Label has been dissolved as a corporation.” On the interference with a business relationship claim (Count III), the court found in McConnell’s favor and awarded him \$7,350 for “lost wages due McConnell under the Employment Agreement” (\$350 per week for a period of twenty-one weeks/five months).



{¶25} With respect to McConnell's claim of breach of fiduciary duty (Count IV), the trial court found that "Schmitt's decision to terminate McConnell's employment without just cause was a violation of her heightened duty as a majority shareholder because there was no legitimate business purpose advanced in doing so." In addition to the lost wages awarded under Count III, the court awarded damages under Count IV for lost shareholder profits. The court found, based on McConnell's testimony, that "the monthly net profit was \$3,500" for the period from April 2005 to October 2005. The court subtracted \$20,000 from this figure as reimbursement for Schmitt's initial investment. McConnell was awarded \$2,205 for this seven-month period, based on his 49% interest in Bare Label Productions ( $[\$3,500 \times 7] - \$20,000 \times 0.49$ ).

{¶26} For the five-month period from November 2005 through March 2006 (the end of the Employment Agreement), the trial court determined that "the profit of Club Pink would have increased to \$5,500 net profit per month." The increase in net profit was explained in the context of rent payments to Masury Real Estate. Bare Label Productions paid Masury Real Estate \$2,000 a month in rent. For the first seven months of operation, from April to October 2005, the rent payment reimbursed Schmitt for her purchase of the real estate for an estimated \$14,000. Thereafter (beginning in November 2005), the rent paid to Masury Real Estate was subject to the same 51%-49% division as was Bare Label Productions' net profits. Thus, the \$5,500 profit for November 2005 through March 2006 represented Bare Label Productions' net profit of \$3,500 plus Masury Real Estate's rental income of \$2,000. For this period, McConnell was awarded \$13,475 ( $[\$5,500 \times 5] \times 0.49$ ).

{¶27} For the period after March 2006, the trial court did not award McConnell damages, holding that further damages were "too remote to speculate," as "there was

no testimony presented as to the profitability of Club Pink after McConnell's departure other than McConnell's own testimony that the business began to deteriorate quickly."

{¶28} On May 8, 2013, McConnell filed his Notice of Appeal. On appeal, McConnell raises the following assignments of error:

{¶29} "[1.] The court erred to the prejudice of the appellant by finding that no corporate records likely existed, contrary to the evidence, and excusing the appellee from the requirements of R.C. 1701.37 thereby depriving the appellant of his statutory right of recovery pursuant to R.C. 1701.94 and rendering the statutory scheme of the Ohio legislature meaningless."

{¶30} "[2.] The court erred to the prejudice of the appellant by finding that he is not entitled to damages for his share of the corporate profits beyond the contract term of his management agreement because these damages are 'too remote to speculate' and in calculating the lost profits of the appellant and in improperly calculat[ing] those damages he was awarded."

{¶31} "[3.] The court erred to the detriment of the plaintiff in failing to find that defendant's actions were malicious and reckless and that plaintiff was therefore entitled to an award of punitive damages and attorney's fees and the court further failed to rule on plaintiff's demand for one-half of the equipment and personal property removed by the defendant from the club prior to the auction of those items."

{¶32} In his first assignment of error, McConnell argues the trial court erred by not awarding him damages for Schmitt's failure to produce corporate records.

{¶33} Under Ohio law, "[e]ach corporation shall keep correct and complete books and records of account, together with minutes of the proceedings of its incorporators, shareholders, directors, and committees of the directors, and records of

its shareholders showing their names and addresses and the number and class of shares issued or transferred of record to or by them from time to time.” R.C. 1701.37(A). “Any shareholder of the corporation, upon written demand stating the specific purpose thereof, shall have the right to examine in person or by agent or attorney at any reasonable time and for any reasonable and proper purpose, the articles of the corporation, its regulations, its books and records of account, minutes, and records of shareholders aforesaid, and voting trust agreements, if any, on file with the corporation, and to make copies or extracts thereof.” R.C. 1701.37(C).

{¶34} The failure to comply with R.C. 1701.37(C) subjects the corporate officer to whom a demand is made “to a forfeiture of one hundred dollars, and to the further forfeiture of ten dollars for every day that such default continues.” R.C. 1701.94(B). “The court in which an action is brought to enforce any forfeiture under this section may reduce, remit, or suspend such forfeiture on such terms as it deems reasonable when it appears that the failure was excusable or that the imposition of the full forfeiture would be unreasonable or unjust.” R.C. 1701.04(C). The decision to reduce, remit, or suspend the forfeiture described by R.C. 1701.94(B) is within the discretion of the trial court. *Cousins v. Brownfield*, 83 Ohio App.3d 782, 790, 615 N.E.2d 1064 (10th Dist.1992).

{¶35} In the present case, the original Complaint, filed on January 24, 2008, asserted a claim for the inspection of the corporate documents specified in R.C.1701.37(A). There is evidence in the record that McConnell’s attempts at inspecting corporate records began as early as February 2006, when a written request was made to counsel for Bare Label Productions, referencing R.C. 1701.37. In the April 9, 2013 Judgment Entry, the court found no evidence that “Schmitt was intentionally

concealing or refusing to provide the requested documents,” and that “[i]t is more likely the documents simply did not exist.” The court concluded that “it would be unreasonable and unjust to award any forfeiture fees under R.C. 1701.94(C) for the officer of a corporation that is now dissolved.”

{¶36} We find the trial court’s complete absolution of Schmitt from all responsibility to comply with the requirements of R.C. 1701.37 to be an abuse of discretion. As noted above, Schmitt had a statutory obligation to “keep correct and complete books,” not merely to present them for inspection upon demand. The court’s conclusion that the records “likely \* \* \* did not exist” confirms the violation of the statute. The court excuses Schmitt’s failure on the grounds that the corporation has since been dissolved, although McConnell requested the records over two years before dissolution. To allow such a ruling to stand would only encourage corporate officers who have failed to maintain records to resist efforts to examine records, in the expectation that the issue would become moot upon the corporation’s dissolution. In other words, a corporation may not avoid its duty to produce records by neglecting its duty keep records. *Cousins* at 788 (“[d]efendant is not entitled to avoid the mandate of R.C. 1701.38 [to produce financial statements at shareholder meetings] by failing formally to schedule meetings”).

{¶37} Moreover, McConnell presented evidence that some corporate records did exist, through the production of a hand written check registry for Masury Real Estate for the years 2005 through 2008, a partial check registry for Bare Label Productions for 2008, and the 2008 tax returns for Bare Label Productions. If these records exist, it is not reasonable to conclude that no other records would exist.

{¶38} The trial court’s initial December 26, 2012 Judgment Entry found in McConnell’s favor on this issue and assessed statutory fines in the amount of \$47,580.

On remand, the lower court is instructed to either reinstate the December 26, 2012 Judgment with respect to the statutory fines, or, if it finds this amount to be in error, to recalculate the amount of statutory damages to which McConnell is entitled.

{¶39} The first assignment of error is with merit.

{¶40} In the second assignment of error, McConnell argues the trial court erred in its calculation of damages.

{¶41} A trial court's determination of damages will not be reversed absent an abuse of discretion. *Roberts v. United States Fid. & Guar. Co.*, 75 Ohio St.3d 630, 634, 665 N.E.2d 664 (1996).

{¶42} As an initial matter, McConnell raises no argument with respect to the \$7,350 for interference with a business relationship. Rather, McConnell's arguments focus on lost profits under the operating agreements for Bare Label Productions and Masury Real Estate.

{¶43} The trial court's calculations with respect to lost profits misinterpret the testimony at trial and must be rejected. The court determined, based on McConnell's testimony, that "the monthly net profit was \$3,500." In fact, McConnell testified that estimated monthly operating expenses were around \$3,500. Since the \$3,500 estimate of monthly operating expenses was the basis of the court's calculation of McConnell's lost profits as a shareholder, that portion of the judgment must be reversed.

{¶44} The Ohio Supreme Court has held that "[a] new business may establish lost profits with reasonable certainty through the use of such evidence as expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and any other relevant facts." *AGF, Inc. v. Great Lakes Heat Treating Co.*, 51 Ohio St.3d 177, 555 N.E.2d 634 (1990), paragraph three of the

syllabus. This court has held that “[a] plaintiff seeking to establish future lost profits need only offer sufficient evidence, which may include expert testimony, to demonstrate the lost profits with reasonable certainty.” *Burlington Group, Inc. v. Great Lakes Restaurant Inn, Inc.*, 11th Dist. Geauga No. 94 -G-1839, 1995 Ohio App. LEXIS 1099, 9; *Advanced Travel Nurses LLC v. Watson*, 2nd Dist. Montgomery No. 24628, 2012-Ohio-3107, ¶¶ 18-19 (award of future lost profits was not speculative despite the “relative youth” of the company).

{¶45} In the present case, McConnell presented sufficient evidence of Club Pink’s profitability to merit an award of lost profits beyond his seventh-month period of employment. McConnell testified regarding cover charges, fees from lap dances, payments from dancers, and income from concession sales. McConnell also testified regarding the volume of business the club was transacting. McConnell estimated weekend attendance as between sixty and one hundred twenty people and weekday attendance as between ten and sixty people. This figures are notably similar to those given by Joe Susak, who worked as a doorman at Club Pink. Susak estimated that on a weekend night anywhere between eighty and one hundred thirty people might be at the club, while on a weekday night attendance might range between five and eighty people. Finally, Schmitt, in her discovery deposition, gave evidence regarding the club’s business following her dismissal of McConnell. Given the totality of the evidence, the trial court should have fashioned an appropriate remedy to compensate McConnell, not only for lost shareholder profits during his period of employment, but also for the period after his employment, during which he remained a 49% shareholder.

{¶46} McConnell’s losses as a 49% owner of Masury Real Estate, moreover, were demonstrated with reasonable certainty. Pursuant to a five-year lease agreement,

Bare Label Productions rented the property at 1248 Standard Avenue at the rate of \$2,000 per month, commencing May 1, 2005. From May 2005 until Club Pink closed in December 2008, Masury Real Estate would have received \$88,000 in rental payments from Bare Label Productions. Schmitt testified that she paid about \$15,000 to purchase the property. Crediting Schmitt with the purchase price, McConnell is entitled to \$35,770, representing his share of the rents ( $[\$88,000 - \$15,000] \times 0.49$ ).

{¶47} The second assignment of error is with merit.

{¶48} In the third assignment of error, McConnell argues that the trial court erred by not awarding him punitive damages, attorney fees, and one-half of the value of various equipment and personal property that he claims was removed from the property prior to auction.

{¶49} Punitive damages may awarded based on a claim of breach of fiduciary duty where there is a demonstration of “actual malice.” *Blair v. McDonagh*, 177 Ohio App.3d 262, 2008-Ohio-3698, 894 N.E.2d 377, ¶ 65 (1st Dist.). Actual malice is defined as: “(1) that state of mind under which a person’s conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm.” *Preston v. Murty*, 32 Ohio St.3d 334, 336, 512 N.E.2d 1174 (1987). The decision to award punitive damages and/or attorney fees lies within the discretion of the trial court. *Hastings v. J.E. Scott Corp.*, 2nd Dist. Miami No. 2003 CA 32, 2004-Ohio-1821, ¶ 39.

{¶50} In the present case, Schmitt willfully disregarded and violated McConnell’s rights as a minority shareholder and as an employee. *Preston* at 336 (“the court must determine that sufficient evidence is presented revealing that the party consciously disregarded the injured party’s rights or safety”). After seven months had elapsed on a

twelve-month employment contract, Schmitt terminated McConnell without explanation and physically barred him from the club. Schmitt also willfully disregarded McConnell's rights as a minority shareholder in both Bare Label Productions and Masury Real Estate. According to McConnell's uncontradicted testimony, he never received a single payment from either corporation. Schmitt refused McConnell's efforts to inspect corporate records and, when McConnell sought to compel production through a lawsuit, motioned the court to dissolve both corporations. The result of the dissolution was that Schmitt was able to reacquire the property for approximately the same price she had originally paid (and for which she had been reimbursed from club profits), which was considerably less than its tax value. Lastly, McConnell also testified that Schmitt removed various items of personal property, club furnishings, and two full kitchens, with an estimated value of \$34,000, from corporate property prior to auction.

{¶51} On remand, the trial court should fashion an award of punitive damages, taking into consideration McConnell's testimony regarding attorney fees and the removal of property and equipment from the club building.

{¶52} The third assignment of error is with merit.

{¶53} For the foregoing reasons, the Judgment of the Trumbull County Court of Common Pleas is reversed and this cause is remanded for further proceedings consistent with this opinion. Costs to be taxed against the appellee.

COLLEEN MARY O'TOOLE, J., concurs in judgment only,

THOMAS R. WRIGHT, J., concurs in part and dissents in part with a Concurring/Dissenting Opinion.



THOMAS R. WRIGHT, J., concurs in part and dissents in part with a Concurring/Dissenting Opinion.

{¶54} Regarding the first assignment of error, I agree that R.C. 1701.37(A),(C), and 1701.94(C) govern. A corporation has a duty to keep correct and complete financial records, R.C. 1701.37(A), and a shareholder has a right to the information upon request. R.C. 1701.37(C). Only an officer charged with the duty to keep and produce the books, however, is subject to statutory forfeiture.

{¶55} Whether an officer has the duty to keep the books is obviously, a function of fact. The lead opinion, however, improperly concludes that Schmidt had a “statutory” duty to keep the books.

{¶56} I agree with the majority that *if* Schmidt were charged with the duty to keep and produce the books, the failure to do so during the existence of the corporation cannot be entirely absolved by the later dissolution.

{¶57} Nevertheless, there has been no factual finding on whether Schmidt was charged with the duty to keep the books. I would remand to the trial court for a factual finding on whether Schmidt was charged with the duty to keep the books with instruction that if Schmidt were charged with such and did not keep or produce, to enforce the forfeiture provision exercising its discretion.

{¶58} As to the issue of lost profits for Bare Label Productions, Inc., I agree that the trial court’s calculation of lost profits is incorrect. Appellant recanted his testimony that \$3,500 referred to net operating revenue. Instead he testified that Bare Label Production, Inc.’s expenses were \$3,500. However, on remand the trial court should not be required to accept appellant’s testimony that \$3,500 represented the total

expenses for Bare Label Productions, Inc., nor should the trial court be required to accept the revenue figures provided by appellant. The trial court, as finder of fact, should be permitted to make whatever findings it deems appropriate.

{¶59} For Masury Real Estate however, I disagree with the lead opinion's calculation of damages. The trial court's judgment indicated that Masury Real Estate was profitable for seven months—from the opening of Club Pink until appellee changed the locks. According to the trial court, lost profits for Bare Label Productions and Masury Real Estate after seven months were speculative because Club Pink's business quickly deteriorated. The trial court's conclusion regarding the deterioration of Club Pink's business is supported by the record.

{¶60} Nevertheless, the majority finds that Masury Real Estate had damages of \$2,000 per month for 37 months. If anything, the record strongly cautions against making that conclusion. Appellant did not produce documentation proving rent payments. Furthermore, appellant admitted on cross-examination that he had no evidence that Bare Label Productions, Inc. ever made rent payments to Masury Real Estate. Given this, the evidence is tenable at best as to whether Masury Real Estate made a profit after seven months, rather than show it continued to make a profit until December 2008.

{¶61} Finally, I disagree with the lead opinion's conclusion that punitive damages must be awarded. Punitive damages involve determinations into the defendant's state of mind. Such is a question of fact for the fact-finder to determine rather than a question of law. *Spalding v. Coulson*, 8th Dist. Cuyahoga Nos. 70524, 70538 1998 Ohio App. LEXIS 4105, at \*63 (September 3, 1998) (holding that determination of malicious intent is a question of fact). The trial court failed to make a

finding one way or the other on whether punitive damages should be awarded. Instead of making a finding on appeal, I would deem the record insufficient for appellate review and remand to the trial court for a punitive damages decision.