

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

DANIEL P. MORGAN, et al.,	:	
	:	CASE NOS. CA2010-10-095
Plaintiff-Appellees/Cross-Appellants,	:	CA2010-10-101
	:	
- vs -	:	<u>OPINION</u>
	:	2/27/2012
	:	
JOHN M. RAMBY,	:	
	:	
Defendant-Appellant/Cross-Appellee.	:	

CIVIL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 2005-CV-65364

Richard L. Carr, 110 North Main Street, Suite 1000, Dayton, Ohio 45402-1738, for appellee/cross-appellant, Daniel P. Morgan

Christopher R. Conard, Sasha A.M. VanDeGrift, 33 West First Street, Suite 600, Dayton, Ohio 45402, for appellee/cross-appellant, United Custom Builders, Inc.

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RINGLAND, J.

{¶ 1} Defendant-appellant and cross-appellee, John M. Ramby, appeals from a Warren County Court of Common Pleas decision granting judgment in favor of plaintiffs-appellees and cross-appellants, Daniel P. Morgan and United Custom Builders, Inc. (United). Morgan and United cross-appeal from the same decision. For the reasons outlined below,

we affirm in part and reverse in part.

{¶ 2} On September 2, 1999, Morgan, who had previously worked in the computer software industry, and Ramby, who had previous experience working in the construction industry, executed a Close Corporation Agreement forming United, a closely held corporation involved in the design and construction of custom-built residential homes within the Southwest Ohio region. As part of the Close Corporation Agreement, both Morgan and Ramby, as the only officers, directors, and shareholders of United, received a 50 percent share in the corporation.¹ In exchange for their 50 percent interests, Morgan, the corporation's treasurer, secretary, and chief financial officer, agreed to provide financing, whereas Ramby, the corporation's president and chief executive officer, agreed to run the business' day-to-day office and field operations.

{¶ 3} On September 21, 1999, Morgan and Ramby executed separate employment agreements with United. As part of their respective employment agreements, Ramby agreed to devote "one-half of [his] working time and efforts to the business and affairs" of the corporation, whereas Morgan was not "required to devote any of [his] time and efforts." At the time their respective employment agreements were executed, Ramby was president and chief executive officer of Miami Valley Synthetics, Inc., an exterior insulated finish system subcontractor, whereas Morgan was the vice president of System Integration at Omnicare, Inc., a long-term pharmacy healthcare provider. Morgan and Ramby agree that United was created simply to provide both parties with supplemental income.

{¶ 4} On September 22, 1999, as evidenced by a Commercial Mortgage Note, Morgan loaned \$300,000 to United. Ramby, while he did not personally guarantee the note,

1. In lieu of establishing a board of directors, the Close Corporation Agreement provides each shareholder would be liable for managerial acts just as a director is liable for actions taken by the full board. The term shareholder, therefore, at least in relation to the facts of this case, is virtually synonymous with that of director.

signed it in his capacity as president of United. Both Morgan and Ramby treated the loan as a revolving line of credit.

{¶ 5} After establishing the business and upon the completion of several custom homes, the once close relationship between Morgan and Ramby began to erode. According to Morgan, as a result of their falling out, Ramby separated himself from United in June 2002, leaving Morgan to deal with several disgruntled homebuyers threatening litigation, numerous unpaid invoices, and several mechanics liens. The resulting lawsuits initiated against United were later settled after the mechanics liens were dropped.

{¶ 6} On December 19, 2005, Morgan, individually and as a shareholder and officer of United, filed suit against Ramby alleging claims of contribution, breach of employment agreement, breach of fiduciary duties, tortious interference with business relations, and unjust enrichment. Ramby answered Morgan's lawsuit by filing a counterclaim. Thereafter, following a two-day bench trial during which the trial court denied Ramby's motion to dismiss for lack of subject matter jurisdiction, the trial court issued a decision denying Ramby's counterclaim and granting judgment to Morgan on his claims of contribution, breach of employment agreement, and breach of fiduciary duties. Ramby appealed from the trial court's decision to this court.

{¶ 7} On December 1, 2008, this court issued a decision affirming the trial court's decisions denying Ramby's counterclaim and his motion to dismiss. *See Morgan v. Ramby*, 12th Dist. No. CA2007-12-147, 2008-Ohio-6194, ¶ 33 and ¶ 40 (*Morgan I*). However, finding the trial court failed to properly develop the record, this court reversed the trial court's decision awarding judgment to Morgan and remanded the matter for a new trial. *Id.* at ¶ 24-27 and ¶ 40.

{¶ 8} On May 4, 2009, Morgan filed a motion with the trial court for leave to file an amended complaint. The trial court granted Morgan's motion, and an amended complaint

was filed on July 1, 2009. As part of his amended complaint, United was added as an additional plaintiff on all claims.

{¶ 9} On December 10, 2009, and January 12, 2010, the trial court conducted a two-day bench trial in accordance with this court's mandate on remand. Over the course of the two-day trial, both Morgan and Ramby provided extensive testimony regarding United's affairs.

{¶ 10} On April 22, 2010, the trial court issued a decision granting judgment against Ramby in the amount of \$42,972.70. The trial court's decision was subsequently incorporated into a judgment entry filed on September 14, 2010. As part of its judgment entry, the trial court found Ramby could not be held liable for breaching the Close Corporation Agreement because Morgan and United had "failed to show that Ramby spent less than 50 percent of his working time working for United." The trial court also determined that Ramby could not be held liable for breaching his employment agreement with United as Morgan and United "failed to demonstrate any damages." The trial court, however, did find Ramby could be held liable for breaching fiduciary duties owed to both Morgan and United by failing to "formally resign from United" and by "refusing to cooperate in defense of the litigation" initiated by its former clients. Nevertheless, because Morgan and United failed to demonstrate any damages proximately caused by Ramby's breach other than legal fees incurred defending the various lawsuits brought against United, Ramby was only found liable for the "legal fees incurred as a result of Ramby's failure to help defend United's lawsuits." The trial court then denied Morgan and United's request for punitive damages.

{¶ 11} Ramby now appeals from the trial court's decision, raising four assignments of error for review. Morgan and United cross-appeal from the same decision raising an additional four assignments of error. Ramby's four assignments of error are as follows:

{¶ 12} Assignment of Error No. 1:

{¶ 13} THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT/CROSS APPELLEE RAMBY BY FINDING HE BREACHED HIS FIDUCIARY DUTIES TO UNITED WITHOUT SUFFICIENT, COMPETENT AND CREDIBLE EVIDENCE.

{¶ 14} Assignment of Error No. 2:

{¶ 15} THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT/CROSS APPELLEE RAMBY BECAUSE THE FINDING THAT HE BREACHED HIS FIDUCIARY DUTY TO MORGAN WAS CONTRARY TO LAW.

{¶ 16} Assignment of Error No. 3:

{¶ 17} THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT/CROSS APPELLEE RAMBY BECAUSE THE AMOUNT OF \$42,972.70 IN ATTORNEYS' FEES FOR WHICH HE WAS FOUND LIABLE WERE NOT PROVEN TO BE THE DIRECT AND PROXIMATE CAUSE OF THE BREACH OF HIS FIDUCIARY DUTIES TO MORGAN OR UNITED.

{¶ 18} Assignment of Error No. 4:

{¶ 19} THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT/CROSS APPELLEE RAMBY, A 50% SHAREHOLDER, BY ENTERING A JUDGMENT AGAINST HIM IN THE AMOUNT OF \$42,972.70, BEING THE FULL AMOUNT OF A LOAN FROM MORGAN, A 50% SHAREHOLDER, TO UNITED FOR THE PAYMENT OF UNITED'S ATTORNEYS' FEES.

{¶ 20} In his first assignment of error, Ramby argues that the trial court erred by finding he breached his fiduciary duty owed to United. In support of this claim, Ramby argues that there was "not sufficient credible and competent evidence" to support United's breach of fiduciary duty claim. In his second assignment of error, Ramby argues that the trial court erred by finding he breached his fiduciary duty owed directly to Morgan. The third and fourth assignments of error claim the trial court erred by finding Ramby's "inattention to

United's litigation" proximately caused United to incur \$42,972.70 in attorney fees and that Ramby should be "wholly responsible" for the same.

{¶ 21} In civil cases, "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *Fairbanks Mobile Wash, Inc. v. Hubbell*, 12th Dist. Nos. CA2007-05-062 and CA2007-05-068, 2009-Ohio-558, ¶ 13, quoting *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978), syllabus. In turn, this court "will not disturb a trial court's findings of fact where the record contains competent, credible evidence to support such findings." *Pinnacle Management v. Smith*, 12th Dist. No. CA2003-12-237, 2004-Ohio-6928, ¶ 12, quoting *Wiltberger v. Davis*, 110 Ohio App.3d 46, 52 (10th Dist.1996). Therefore, "if there is competent, credible evidence to support the factual findings of the trial court, we review only whether, after weighing the evidence and resolving evidentiary conflicts and issues of credibility, the trial court properly applied the governing law to those factual findings." *Owens v. Haunert*, 137 Ohio App.3d 507, 514 (12th Dist.2000).

{¶ 22} A close corporation, such as United, is a corporation with relatively few shareholders whose corporate shares are generally not traded on a securities market. *Crosby v. Beam*, 47 Ohio St.3d 105, 107 (1989). Directors of a closely held corporation owe a fiduciary duty to both the corporation and to its shareholders. *Thompson v. Cent. Ohio Cellular, Inc.*, 93 Ohio App.3d 530, 540 (8th Dist.1984). As noted by this court in *Morgan I*, "[t]his entails a duty of good faith, a duty of loyalty, a duty to refrain from self-dealing, and a duty of disclosure." *Id.*, 2008-Ohio-6194 at ¶ 22, citing *Wing Leasing Inv. V. M & B Aviation, Inc.*, 44 Ohio App.3d 178, 181 (10th Dist.1988). "A breach of this duty exposes the director to liability for damages where clear and convincing evidence establishes that the director acted with deliberate intent to cause injury to the corporation or recklessly disregarded the corporation's best interests." *Morgan I*.

{¶ 23} It is well-settled that shareholders in a closely held corporation "owe one another a fiduciary duty to act in good faith and refrain from self-dealing." *Heaton v. Rohl*, 193 Ohio App.3d 770, 2011-Ohio-2090, ¶ 54 (11th Dist.); *Herbert v. Porter*, 165 Ohio App.3d 217, 2006-Ohio-355, ¶ 12 (3rd Dist.). In circumstances in which corporate owners are equal shareholders, a heightened fiduciary duty may arise when "one owner so dominated the corporation that he or she can be said to have been in control to the exclusion of the other." *Morrison v. Gugle*, 142 Ohio App.3d 244, 255, (10th Dist.2001). However, as noted by this court in *Morgan I*, Morgan and Ramby merely "owed one another an ordinary fiduciary duty as shareholders" of United. *Id.*, 2008-Ohio-6194 at ¶ 21.

{¶ 24} That said, in this case, Morgan, individually and as a shareholder of United, brought a direct action against Ramby alleging breach of fiduciary duty in his capacity as employee, director, and officer of United. As this court stated in *Morgan I*, "a director's breach of a fiduciary duty is generally said to harm the corporation and, accordingly, damages resulting from such a breach inure to the corporation." *Id.* at ¶ 23, citing *Grand Counsel of Ohio v. Owens*, 86 Ohio App.3d 215, 220-221 (10th Dist.1993). A shareholder, however, may bring a direct action against a director or officer of the corporation "(1) where there is a special duty, such as contractual duty, between the wrongdoer and the shareholder, and (2) the shareholder suffered an injury separate and distinct from that suffered by other shareholders."² (Emphasis added.) *Hershman's, Inc. v. Sach-Dolmar Div.*, 89 Ohio App.3d 74, 77 (9th Dist.1993), quoting 12(B) Fletcher, *Cyclopedia of Law of Private Corporations* (1993) 484, Section 5911. In other words, "[i]f the complaining shareholder is injured in a way that is separate and distinct from an injury to the corporation, then the complaining shareholder has a direct action,' allowing him to sue individually." *Viking v.*

2. It should be noted, in *Morgan I* we incorrectly paraphrased the rule of law provided by the Ninth District Court of Appeals in *Hershman's, Inc. v. Sach-Dolmar Div.* to include the word "or" instead of the proper word "and."

Worthington Steel Ents., L.L.C. v. James, 11th Dist. No. 2010-G-2971, 2011-Ohio-1714, ¶ 45, quoting *Crosby*, 47 Ohio St.3d at 107.

{¶ 25} To recover under a breach of fiduciary duty claim, a party must show the existence of a fiduciary relationship, failure to comply with a duty accorded that relationship, and damages proximately caused by that failure. *Keybank Natl. Assoc. v. Guarnieri & Secrest, P.L.L.*, 7th Dist. No. 07 CO 46, 2008-Ohio-6362, ¶ 33, citing *Strock v. Pressnell*, 38 Ohio St.3d 207, 216 (1988). Proximate cause "is often difficult of exact definition as applied to the facts of a particular case." *Young v. Hollins*, 12th Dist. No. CA89-11-099, 1991 WL 6361, * 4 (Jan. 22, 1991), quoting *Clinger v. Duncan*, 166 Ohio St. 216, 222 (1957). Nevertheless, while oftentimes difficult to define, the proximate cause of an event is generally thought of as "that which in a natural and continuous sequence, unbroken by any new, independent cause, produces that event and without which that event would not have occurred." *Wilson v. AC & S, Inc.*, 169 Ohio App.3d 720, 2006-Ohio-6704, ¶ 106 (12th Dist.), quoting *Aiken v. Indus. Comm.*, 143 Ohio St. 113, 117 (1944). Proximate cause "contemplates a 'probable' or 'likely' result, not merely a 'possible' one," and therefore, the issue of proximate cause is not subject to speculation or conjecture. *Wooley v. Meluch*, 9th Dist. No. 24196, 2009-Ohio-449, ¶6; *Mills v. Best Western Springdale*, 10th Dist. No. 08AP-1022, 2009-Ohio-2901, ¶ 20.

{¶ 26} The trial court found Ramby breached his fiduciary duty to United when he "decided to quit working for the company" after realizing the "partnership could not survive" leaving it in Morgan's inexperienced hands without first winding up "its affairs in an expeditious and orderly manner." In so holding, the trial court found United would not have incurred \$42,972.70 in legal fees had Ramby "performed his fiduciary duties" as the president of United by "vigorously defend[ing]" the corporation and its shareholders in "each and every suit." The court also found Ramby breached his fiduciary duty owed directly to

Morgan when he separated himself from the corporation and left Morgan "to defend the pending lawsuits brought against the corporation that [Ramby] had a fiduciary duty to help resolve." We agree that Ramby's decision to quit working for United and leave the company with Morgan was certainly unbecoming of an otherwise prudent businessman, and reflects a reckless disregard for United's corporate interests. To simply walk away from the situation, as Ramby did, demonstrates a lack of good faith and violates the fiduciary duty owed to United and Morgan.

{¶ 27} Turning to the question of whether Morgan and United have been damaged as a proximate result of Ramby's conduct, the record indicates the majority of the lawsuits initiated against United involved complaints about poor workmanship and the collection of unpaid invoices. United's alleged liability, therefore, was already well-established by the time Ramby separated himself from the corporation. Furthermore, while Morgan and United claim it was a natural and probable consequence for United to "end up in multiple lawsuits with substantial legal fees," this discounts the litany of other options available to United in order to address its disgruntled clients' concerns. In turn, while Ramby's assistance in defending against the lawsuits may have proved beneficial, it simply cannot be said that his departure proximately caused United to incur damages amounting to \$42,972.70 in attorney fees. Accordingly, because the trial court's decision finding United incurred damages amounting to \$42,972.70 in attorney fees proximately caused by Ramby's departure was not supported by competent and credible evidence, we find the trial court's decision finding United would not have incurred these legal fees had Ramby been present is against the manifest weight of the evidence and based on nothing more than pure speculation.

{¶ 28} Moreover, a review of the record makes it clear that Morgan failed to provide any evidence that he suffered any injuries, let alone an injury separate and distinct from that of the corporation, that would allow him to maintain a direct action.

{¶ 29} Accordingly, Ramby's first and second assignments of error are not well-taken and overruled. However, having concluded that Morgan and United failed to prove damages proximately resulting from Ramby's breach of a fiduciary duty, the third and fourth assignments of error are well-taken and hereby sustained.

{¶ 30} As indicated, Morgan and United raise four cross-assignments of error. For ease of discussion, they will be addressed out of order.

{¶ 31} Cross-Assignment of Error No. 1:

{¶ 32} THE TRIAL COURT ERRED BY FINDING THAT MORGAN WAS NOT ENTITLED TO CONTRIBUTION FROM RAMBY FOR [UNITED'S] DEBTS.

{¶ 33} In his first cross-assignment of error, Morgan argues that the trial court erred by finding Ramby was not obligated to contribute to the debt Morgan incurred on United's behalf. In support of this claim, Morgan essentially argues that he was entitled to bring a direct action against Ramby in order to recover a portion of the money he paid into the business venture. The money Morgan loaned to United was repaid from corporate assets and both Morgan and Ramby took out business credit cards with personal guarantees. Ramby, therefore, cannot be held responsible for the additional money Morgan continued to invest in this losing proposition. Accordingly, Morgan and United's first cross-assignment of error is overruled.

{¶ 34} Cross-Assignment of Error No. 3:

{¶ 35} THE TRIAL COURT'S DAMAGES AWARD IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 36} In their third assignment of error, Morgan and United argue that the trial court's damages award is against the manifest weight of the evidence. According to Morgan and United, because they "provided a detailed account of the costs [United] incurred and the profits [United] should have earned on each project," they are entitled to recoup United's

\$700,000 in losses from Ramby. We disagree.

{¶ 37} A reviewing court may not reverse a damages award unless it is against the manifest weight of the evidence. *Hartkemeyer v. Ventling*, 12th Dist. No. CA2007-03-074, 2009-Ohio-93, ¶ 93. In turn, and as noted above, so long as there is competent, credible evidence, a judgment will not be reversed as being against the manifest weight of the evidence. *Henry v. Richardson*, 193 Ohio App.3d 375, 2011-Ohio-2098, ¶ 11 (12th Dist.).

{¶ 38} In this case, the trial court found United incurred damages amounting to \$42,972.70 in attorney fees defending lawsuits brought against it resulting from Ramby's departure. However, as previously noted, such an award was against the manifest weight of the evidence and based on nothing more than pure speculation. The trial court did not award any other damages resulting because Morgan and United "failed to demonstrate damages proximately resulting from Ramby's breaches of his fiduciary duties other than the legal fees incurred in defending United's various lawsuits."

{¶ 39} After a thorough review of the record, we find no error in the trial court's decision declining to award Morgan and United any additional damages. While Morgan and United may be correct in their claim that "Ramby presented no evidence regarding the damages his mismanagement and abandonment caused," evidence tending to prove a fact "does not necessarily become uncontroverted or uncontested simply because an opposing party does not present rebuttal evidence." *Wilhoite v. Kast*, 12th Dist. No. CA2001-01-001, 2001-Ohio-8621, 2002 WL 4524, *6 (Dec. 31, 2001).

{¶ 40} As the trial court found, Morgan and United are not entitled to damages simply because Ramby was an incompetent business partner who was unsuccessful at managing the company and generating profits. All business ventures carry inherent risks. Therefore, although we do not condone Ramby's decision to simply walk away from United, based on the facts and circumstances of this case, the record is devoid of any evidence indicating

Morgan and United suffered any resulting damages. Accordingly, because the trial court's decision refusing to award Morgan and United any additional damages was proper, Morgan and United's third cross-assignment of error is overruled.

{¶ 41} Cross-Assignment of Error No. 2:

{¶ 42} THE TRIAL COURT ERRED AS A MATTER OF LAW BY FINDING THAT RAMBY DID NOT BREACH THE [CLOSE CORPORATION AGREEMENT].

{¶ 43} In their second cross-assignment of error, Morgan and United argue that the trial court erred by finding Ramby did not breach the Close Corporation Agreement. The record supports the trial court's determination that Ramby did not breach the agreement. However, even if we were to find the trial court erred by failing to find Ramby breached the agreement, as noted in the discussion of their third cross-assignment of error, Morgan and United have failed to establish any resulting damages. See *Valley Paint v. Natl. Union Fire Ins. Co. of Pittsburgh*, 12th Dist. No. CA2010-08-060, 2011-Ohio-1308, ¶ 19 (breach of contract claim requires proof plaintiff incurred damages as a result). Therefore, because they failed to prove any resulting damages from Ramby's alleged breach, Morgan and United's second cross-assignment of error is overruled.

{¶ 44} Cross-Assignment of Error No. 4:

{¶ 45} THE TRIAL COURT'S [sic] ERRED BY NOT AWARDING PUNITIVE DAMAGES AND ATTORNEYS' FEES FROM THIS CASE BECAUSE RAMBY'S ACTIONS WERE REPREHENSIBLE.

{¶ 46} In their fourth assignment of error, Morgan and United argue that the trial court erred by not awarding them punitive damages. However, "[i]t is well established that a claim for punitive damages cannot exist independently of the underlying cause of action for which it is sought." *Kill v. CSX Transp.*, 185 Ohio App.3d 291, 2009-Ohio-6871, ¶ 44 (3rd Dist.); *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 649, 1994-Ohio-324. Therefore,

because Morgan and United failed to establish any resulting damages, they were not entitled to recover punitive damages. Accordingly, Morgan and United's fourth cross-assignment of error is overruled.

{¶ 47} The judgment awarding damages of \$42,972.70 to Morgan and United is reversed and vacated. In all other respects, the judgment of the trial court is affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.