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2013 IL App (3d) 110734-U

Order filed February 8, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

TERESA McDEVITT-FOLLIS,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellant,)	Will County, Illinois,
)	
v.)	
)	
ANNE SCHENCK,)	
)	
Defendant-Appellee,)	
)	
ANNE E. SCHENCK, individually and as a)	
shareholder of TRI-COUNTY TAX AND)	
BUSINESS DEVELOPMENT, INC., an)	Appeal No. 3-11-0734
Illinois Corporation, derivatively on behalf of)	Circuit Nos. 06-L-154
TRI-COUNTY TAX AND BUSINESS)	06-LM-420
DEVELOPMENT, INC.; and TRI-COUNTY)	
TAX SERVICE, INC.)	
)	
Counter-Plaintiffs-Appellees.)	
)	
v.)	
)	
ROBERT FOLLIS and TERESA)	
McDEVITT-FOLLIS,)	Honorable
)	Raymond E. Rossi,
Counter-Defendants-Appellants.)	Judge, Presiding.

JUSTICE LYTTON delivered the judgment of the court.
Justices Carter and Holdridge concurred in the judgment.

ORDER

¶ 1 *Held:* When business partners sued each other and trial court found that one partner, along with her husband, committed wrongful acts against the other, trial court properly entered judgment against wrongdoer and her husband, ordered them to pay compensatory damages, dissolved a successor corporation created by them and enjoined them from doing business with current clients. Trial court erred in ordering wrongdoer and husband to pay punitive damages without determining their ability to pay.

¶ 2 Teresa McDevitt-Follis and Anne Schenck entered in an agreement to become partners in a tax preparation business. Thereafter, McDevitt-Follis filed a complaint against Schenck, alleging breach of contract and seeking dissolution of the business. Schenck filed a counterclaim against McDevitt-Follis and her husband, Robert Follis, alleging breach of fiduciary duty, misappropriation of corporate opportunities and unjust enrichment. The court entered judgment in favor of Schenck and ordered McDevitt-Follis and Follis to pay \$285,383 in compensatory damages and \$150,000 in punitive damages. The court also dissolved a successor corporation created by McDevitt-Follis and enjoined McDevitt-Follis and Follis from performing any work for clients of the original or successor corporation. On appeal, McDevitt-Follis and Follis argue that the trial court erred in (1) entering judgment in favor of Schenck, (2) calculating compensatory damages, (3) ordering them to pay punitive damages, (4) dissolving the successor corporation, and (5) enjoining them from performing work for clients of the original or successor corporation. We affirm all orders of the trial court except its order requiring McDevitt-Follis and Follis to pay punitive damages. We reverse that portion of the trial court's order and remand for the trial court to conduct a hearing with respect to the punitive damage award.

¶ 3

FACTS

¶ 4 In 2004, Schenk began running a tax preparation business known as Tri-County Tax Service,

Inc. In 2005, McDevitt-Follis entered into an agreement with Schenck to purchase one-half of Schenck's tax business. The parties agreed that McDevitt-Follis would pay Schenck \$75,000.

¶ 5 Schenck and McDevitt-Follis agreed that Tri-County Tax Service, Inc. would be dissolved, and a new corporation, Tri-County Tax and Business Development, Inc., would be created. In October 2005, Schenck and McDevitt-Follis filed the articles of incorporation for Tri-County Tax and Business Development, Inc. with the Secretary of State.

¶ 6 In October 2005, Schenck signed the lease for the corporation's office space. Soon thereafter, Schenck voiced concerns to McDevitt-Follis that the corporation's bank account was being used to pay employees of Follis and for other expenses not associated with the tax business.

¶ 7 In early December 2005, Schenck stopped coming to work. In mid-December 2005, Schenck's attorney sent McDevitt-Follis a letter, demanding that she resign because she breached her fiduciary duties to the corporation by (1) allowing the corporation's funds to be used to make payments to her husband's employees, (2) committing forgery and/or fraud by changing the terms of the corporation's lease, (3) using corporation funds for personal expenses, (4) notarizing documents that falsely stated that she reviewed client's business receipts, and (5) knowingly issuing corporate checks when there were insufficient funds to pay them.

¶ 8 McDevitt-Follis filed a complaint against Schenck, which sought an accounting from Schenck as to income she derived from a competing business enterprise, as well as dissolution of Tri-County Tax and Business Development, Inc. Schenck filed counterclaims, which requested an accounting and pled (1) a derivative action to account for and return all sums taken by McDevitt-Follis and Follis, (2) a request for punitive damages, (3) unjust enrichment against both McDevitt-Follis and Follis, and (4) a count for forcible entry and detainer. Schenck sought monetary damages,

as well as injunctive relief.

¶ 9 While the litigation was ongoing, McDevitt-Follis dissolved Tri-County Tax and Business Development, Inc. Just days later, she formed a new business called Tri-County Business Development & Tax Service, Inc. at the same address as the former corporation. In December 2007, the parties entered into an agreed order stating that the newly formed corporation was a successor corporation to Tri-County Tax and Business Development, Inc.

¶ 10 At trial, McDevitt-Follis and Follis admitted using funds from Tri-County Tax and Business Development, Inc. to pay Follis' business expenses for his corporation and wages for the employees of that corporation. The financial records from Tri-County Tax and Business Development, Inc. show a number of checks used to pay those employees and to pay personal expenses not related to Tri-County Tax and Business Development, Inc. The records also showed that Tri-County wrote many checks on its account that were returned for insufficient funds.

¶ 11 Several witnesses testified that McDevitt-Follis made the following statements about Schenck in 2006 and 2007: (1) Schenck was no longer in the tax business; (2) Schenck was being investigated by authorities, including the IRS and FBI; (3) Schenck was going to be arrested; and (4) Schenck no longer owned Tri-County Tax and Business Development, Inc.

¶ 12 Robert Fillotto, the court appointed receiver, determined that from 2006 to 2008, Tri-County Tax and Business Development, Inc. made a profit and that there was a large discrepancy between the reported and actual income of the corporation. He testified that he did not have a great deal of documentation from the corporation because McDevitt-Follis did not keep expense records. Based on his examination of the corporate documents McDevitt-Follis gave him, Fillotto opined that (1) corporate funds were used to pay for personal items; (2) the tax returns showed little profitability in

comparison to the actual income of the corporation; and (3) there was a co-mingling of corporate funds with Follis' insurance company funds.

¶ 13 He estimated that the yearly income of Tri-County Tax and Business Development, Inc. and/or its successor, Tri-County Business Development & Tax Service, Inc., was \$29,860 in 2006, \$75,212 in 2007, and \$30,321 in 2008, for a total of \$135,393 for those three years. In 2009, Tri-County Business Development & Tax Service, Inc. had annual gross revenue of \$137,000. Fillotto was able to trace a total of \$68,042.83 in payments from McDevitt-Follis to Schenck.

¶ 14 McDevitt-Follis testified that prior to 2005, she had no experience in preparing taxes other than her own. She admitted that she prepared the income statements and tax returns for Tri-County Tax and Business Development, Inc., which list herself as a 100% shareholder. She admitted that the tax returns contain errors because she is not experienced in corporate tax returns. She said that she did not know why Schenck was not listed as a director on the Articles of Incorporation. She admitted that she prepared an Election by Small Business Owner Form on December 13, 2005, that shows a change in ownership, listing Follis and herself as 50% shareholders each and Anne Schenck as a 0% shareholder.

¶ 15 McDevitt-Follis admitted that she prepared a document for former clients, which stated: "Please be aware that your 2002, 2003 and 2004 tax returns filed by the previous tax preparer might be subject to audit due to a pending IRS investigation." She stated that the document does not relate to Schenck but only to IRS investigations and audits for batches of tax returns prepared by Schenck.

¶ 16 McDevitt-Follis testified that she paid a total of \$75,000 to Schenck for 50% of her business. She testified that she collected \$18,500 in rental income from sub-tenants in 2006, which exceeded the amount of rent Tri-County paid to its landlord. McDevitt-Follis testified that she and Follis lost

their home to foreclosure in 2009.

¶ 17 Schenck testified that McDevitt-Follis paid her approximately \$66,000, not \$75,000, for half of her tax business. In October or November 2005, Schenck attempted to sublet a portion of the premises leased by Tri-County Tax and Business Development, Inc. to Chris Roder, who gave her a copy of a lease he received from McDevitt-Follis. The lease given to Roder by McDevitt-Follis stated that the rent for Tri-County Tax and Business Development, Inc. was \$32,000 per year, and the signatories' names were cut and pasted onto the lease. At that time, the rent for Tri-County was actually \$15,000 per year.

¶ 18 Schenck testified that she did not engage in a competing business from 2005 to 2007, but worked on tax returns for free during that time. She admitted that from 2007 to 2009, she made approximately \$20,000 to \$25,000 working for Tax Matters, Inc, a corporation she owns. Tax Matters, Inc. made approximately \$60,000 in revenue in 2010.

¶ 19 Based on records that she was able to obtain and her knowledge of the corporation, Schenck calculated the income of Tri-County from 2006 to 2009. She determined that the actual income of the corporation was \$102,046 in 2006, \$64,859 in 2007, \$69,312 in 2008, and \$66,129 in 2009. Schenck testified that she was to be a director for Tri-County Tax and Business Development, Inc. and that her name was originally included in the articles of corporation but was later "whited out."

¶ 20 At the conclusion of the trial, the court found that McDevitt-Follis and Follis engaged in the following wrongful acts: (1) authorized and allowed Tri-County funds to be used to pay Follis' employees; (2) intentionally misappropriated Tri-County corporate account(s); (3) used Tri-County corporate account(s) for personal use; (4) intentionally dissolved Tri-County Tax and Business Development, Inc. during pending litigation; (5) intentionally formed a competing business; (6)

intentionally diverted Tri-County's clients to the newly formed competing business; (7) committed fraud and/or forgery on Tri-County records by changing the terms of the lease agreement and preparing and signing an unauthorized assignment; (8) misappropriated a corporate opportunity and subleased Schenck's leased premises to third parties without consent and received rent payments without accounting to Schenck; (9) failed to provide an accounting to Schenck; and (10) knowingly issued corporate checks when there was insufficient funds in the Tri-County account to cover such checks.

¶ 21 Relying on Schenck's computation of Tri-State's gross revenues from 2006 to 2009, the court held McDevitt-Follis and Follis jointly and severally liable to Schenck for \$285,383 in compensatory damages. The court also ordered McDevitt-Follis and Follis to pay \$150,000 in punitive damages, and \$1,125 in attorney fees and costs of suit. The court also enjoined McDevitt-Follis and Follis from using corporate funds of Tri-County or its successor companies and from engaging in any tax preparation business with any current or former clients of Tri-County or its successor. Finally, the court dissolved Tri-County Business Development & Tax Service, Inc.

¶ 22

ANALYSIS

¶ 23

I. Sufficiency of Appellants' Brief

¶ 24 Before addressing the substantive issues raised by McDevitt-Follis and Follis on appeal, we first address an argument raised by Schenck in her brief. Schenck argues that we should strike the brief filed by McDevitt-Follis and Follis and dismiss their appeal because their brief does not clearly set forth the standard of review for each issue.

¶ 25 Illinois Supreme Court Rule 341(h)(3) provides, in part: "The appellant must include a concise statement of the applicable standard of review for each issue, with citation to authority,

either in the discussion of the issue in the argument or under a separate heading placed before the discussion in the argument. Ill. S. Ct. R. 341(h)(3) (eff. July 1, 2008).

¶ 26 Here, the appellants, McDevitt-Follis and Follis, did not set forth the applicable standard of review in the discussion of the issues or under a separate heading before the discussion in the argument. Rather, they incorporated the standards of review into their statement of the issues presented and never discussed them again nor cited any authority with respect to them. For this reason, the appellants did not comply with Rule 341(h)(3).

¶ 27 Nevertheless, we will not dismiss the appeal nor strike their brief. Striking an appellate brief is a harsh sanction and is appropriate only when the violations of procedural rules hinder our review. *Hall v. Naper Gold Hospitality, LLC*, 2012 IL App (2d) 111151, ¶ 15. When an appellant's failure to comply with supreme court rules does not hinder the appellate court's ability to understand the issues raised on appeal, the appellate court should not dismiss the appeal. *See Coleman v. Akpakpan*, 402 Ill. App. 3d 822, 825 (2010).

¶ 28 When a party violates Rule 341(h)(3) by failing to set forth the standard of review, the appellate court may determine the proper standard of review. *See People v. Griffith*, 404 Ill. App. 3d 1072, 1079 (2010). Because we can determine the appropriate standards of review, we will not dismiss the appeal or strike the appellants' brief.

¶ 29 II. Judgment for Schenck

¶ 30 McDevitt-Follis first argues on appeal that the trial court erred in granting judgment in favor of Schenck. She contends that the trial court should have found that Schenck fraudulently manipulated her by accepting the agreed-upon purchase price for half of the corporation and then "abandoning the business."

¶ 31 McDevitt-Follis' one-count amended complaint against Schenck generally alleges that Schenck breached her contract with McDevitt-Follis. Whether a breach of contract has occurred is generally a question of fact which will not be disturbed unless the finding is against the manifest weight of the evidence. *Covinsky v. Hannah Marine Corp.*, 388 Ill. App. 3d 478, 483 (2009). The elements of a breach of contract claim are: (1) the existence of a valid and enforceable contract; (2) performance by the plaintiff; (3) breach of contract by the defendant; and (4) resultant injury to the plaintiff. *Timan v. Ourada*, 2012 IL App (2d) 100834, ¶ 24.

¶ 32 Here, McDevitt-Follis alleged that Schenck breached her contract to operate Tri-County with McDevitt-Follis by "abandoning the business" and serving her clients elsewhere. However, the evidence at trial established that Schenck did not abandon the business but, rather, left as a result of McDevitt-Follis' acts that amounted to a breach of fiduciary duty to the corporation, including (1) allowing the corporation's funds to be used to make payments to her husband's employees, (2) committing forgery and/or fraud by changing the terms of the corporation's lease, (3) using corporate funds for personal expenses, (4) notarizing documents indicating that she reviewed client's business receipts when she never viewed the receipts, and (5) knowingly issuing corporate checks when there are insufficient funds to pay them.

¶ 33 Because Schenck had valid reasons to part ways with McDevitt-Follis, the trial court's decision that McDevitt-Follis did not prove their breach of contract action was not against the manifest weight of the evidence.

¶ 34 III. Compensatory Damages

¶ 35 McDevitt-Follis and Follis argue that the trial court improperly calculated the amount of compensatory damages to which Schenck was entitled. They contend that the court should have

used Filletto's calculations of the corporation's income, instead of Schenck's, to determine the compensatory damages they owed.

¶ 36 The determination of the amount of damages is a function reserved for the trier of fact, and a reviewing court will not lightly substitute its opinion for the judgment rendered in the trial court. *Kindernay v. Hillsboro Area Hospital*, 366 Ill. App. 3d 559, 572 (2006). The amount fixed as damages by the trier of fact will only be disturbed on review if it is obviously the result of passion and prejudice. *Goldstein v. Hertz Corp.*, 16 Ill. App. 3d 89, 98 (1973).

¶ 37 Here, the trial court thoroughly explained its damage calculation and supported it by the record. The trial court chose to use Schenck's income calculations for Tri-County Tax and Business Development, Inc. and its successor because the court found Schenck's calculations to be the most accurate and credible. Since the trial court heard the testimony of the parties and assessed their credibility, we should not disturb the trial court's award of damages. We affirm the court's award of compensatory damages to Schenck.

¶ 38 IV. Punitive Damages

¶ 39 McDevitt-Follis and Follis argue that the trial court should not have ordered them to pay punitive damages because their actions were the result of their lack of business experience, not bad faith.

¶ 40 Punitive damages are not favored in the law. *Petty v. Chrysler Corp.*, 343 Ill. App. 3d 815, 828 (2003). A court may award punitive damages if the defendant's tortious acts are malicious or display reckless disregard for another's rights. *Id.* The purpose of punitive damages is to punish the defendant and deter others from the same conduct; however, they are awarded only in cases with aggravated circumstances, such as fraud, willfulness, wantonness, or malice. *Id.* Punitive damages

should not be awarded if the defendant's misconduct is not above and beyond the conduct needed for the basis of the underlying cause of action. *Id.*

¶ 41 To determine whether punitive damages are appropriate, the trier of fact can consider the character of the defendant's acts, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant. *Slovinski v. Elliot*, 237 Ill. 2d 51, 58 (2010). Evidence of the defendant's financial status is necessary for an appellate court to properly review a challenge to an award of punitive damages. *Powers v. Rosine*, 2011 IL App (3d) 100070, ¶ 14.

¶ 42 In reviewing a trial court's decision to award punitive damages, the appellate court must take a three-step approach, considering (1) whether punitive damages are available for the particular cause of action, using a *de novo* standard, (2) whether, under a manifest weight of the evidence standard, the defendants acted fraudulently, maliciously or in a manner that warrants such damages, and (3) whether the trial court abused its discretion in imposing punitive damages. *Linhart v. Bridgeview Creek Development, Inc.*, 391 Ill. App. 3d 630, 641 (2009).

¶ 43 Count II of Schenck's counterclaim stated a claim for breach of fiduciary duty against McDevitt-Follis. Punitive damages are available as a matter of law for breach of fiduciary duty. *Tully v. McLean*, 409 Ill. App. 3d 659, 670 (2011). Thus, the first step is satisfied.

¶ 44 Turning to the second step, we review the trial court's reasons for imposing punitive damages to determine if its judgment was against the manifest weight of the evidence. See *Linhart*, 391 Ill. App. 3d at 641. Here, the trial court found that McDevitt-Follis and Follis committed a total of 10 wrongful acts. Those acts defrauded subtenants, caused Schenck to lose money and injured Schenck's reputation. We find that the trial court's award of punitive damages is not against the

manifest weight of the evidence.

¶ 45 Turning to the third step, we consider whether the trial court abused its discretion by awarding punitive damages. In determining whether punitive damages are appropriate, the trial court was required to consider not only the nature and extent of the harm to Schenck but also the assets of McDevitt-Follis and Follis. See *Slovinski*, 237 Ill. 2d at 58.

¶ 46 Here, the record reveals that McDevitt-Follis and Follis lost their home to foreclosure in 2009. Tri-County made \$66,129 in income that same year. There is no other evidence in the record regarding the wealth of McDevitt-Follis and Follis. Under such circumstances, we cannot determine if the \$150,000 punitive damage award is excessive. See *Powers*, 2011 IL App (3d) 100070 at ¶ 14. Thus, we remand the matter to the trial court to examine the financial situation of McDevitt-Follis and Follis before ordering them to pay punitive damages.

¶ 47 V. Dissolution of the Corporation

¶ 48 McDevitt-Follis and Follis argue that the trial court erred in dissolving Tri-County Business Development and Tax, Inc.

¶ 49 Equity will not permit a person to derive any benefit from a fraud perpetrated by her. *Callner v. Greenberg*, 376 Ill. 212, 215 (1941). Courts have the power to ensure that a wrongdoer does not enjoy an inequitable advantage by taking away any benefit obtained by fraud. *Id.* at 218; *Baldi v. Chicago Title & Trust Co.*, 113 Ill. App. 3d 29, 32 (1983).

¶ 50 In her complaint, McDevitt-Follis sought dissolution of Tri-County Tax and Business Development, Inc. The court not only dissolved that corporation but also its successor, Tri-County Business Development & Tax Service, Inc. In its ruling, the trial court found that McDevitt-Follis committed wrongful acts by forming a competing business, Tri-County Business Development and

Tax, Inc., and intentionally diverting clients from Tri-County Tax and Business Development, Inc. to Tri-County Business Development & Tax Service, Inc.

¶ 51 Because McDevitt-Follis committed wrongful acts in the creation and operation of Tri-County Business Development & Tax Service, Inc. the trial court did not err in dissolving the corporation. See *Callner*, 376 Ill. at 215. By dissolving the corporation, the trial court properly took away the inequitable advantage McDevitt-Follis obtained by her fraud and wrongdoing. *Id.* at 218; *Baldi*, 113 Ill. App. 3d at 32. We affirm the court's order dissolving Tri-County Business Development & Tax Service, Inc.

¶ 52 VI. Injunctive Relief

¶ 53 Finally, McDevitt-Follis and Follis argue that the trial court improperly enjoined them from performing tax services for any current or former clients of Tri-County Tax and Business Development, Inc. or its successor.

¶ 54 In order to be entitled to a permanent injunction, a plaintiff must establish that (1) she has no adequate remedy at law, (2) she possesses a certain and clearly ascertainable right, and (3) she will suffer irreparable harm if no relief is granted. *County of Kendall v. Rosenwinkel*, 353 Ill. App. 3d 529, 538 (2004). In addition, a court considering injunctive relief should balance the equities. *Id.* However, there should be no balancing of the equities where the violation is willful and/or tortious. *Barrett v. Lawrence*, 110 Ill. App. 3d 587, 593 (1982).

¶ 55 "An injunction should be granted to restrain a wilful, wanton or unprovoked wrong *** for no man can complain that he is injured by being prevented from doing, to the hurt of another, and which he has no right to do." *Barrett*, 110 Ill. App. 3d at 593-94, quoting Am Jr. 2d *Injunctions* sec. 60 (1969). A trial court's order granting injunctive relief will not be reversed absent an abuse of

discretion. *Rosenwinkel*, 353 Ill. App. 3d at 541.

¶ 56 Here, the trial court found that McDevitt-Follis intentionally and wrongfully diverted clients away from Schenck and to her newly formed corporation by making defamatory statements about Schenck. Because McDevitt-Follis pilfered clients by fraudulent and unlawful means, it was appropriate for the trial court to enjoin McDevitt-Follis and Follis from performing any work for those clients. See *Barrett*, 110 Ill. App. 3d at 593-94. We affirm the court's order granting Schenck injunctive relief.

¶ 57

CONCLUSION

¶ 58 For the foregoing reasons, the judgment of the trial court of Will County is affirmed in part, reversed in part and remanded.

¶ 59 Affirmed in part, reversed in part, and remanded.