

No. 1-13-1657

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

ATHENIAN BODY SHOP AND SALES,)	Appeal from the Circuit Court
d/b/a Hellas Auto Sales,)	of Cook County.
)	
Plaintiff and)	
Counterdefendant-Appellant,)	
)	
v.)	No. 2011 L 2004
)	
MOHAMMED KHALED,)	
)	
Defendant and)	
Counterplaintiff-Appellee,)	Honorable
)	Clare Elizabeth McWilliams,
(Car Source USA, Inc., Defendant).)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Connors and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* The judgment of the trial court was affirmed where the circuit court did not abuse its discretion in admitting evidence and where the damages award was not against the manifest weight of the evidence.

¶ 2 The plaintiff, Athenian Body Shop and Sales, Inc., d/b/a Hellas Auto Sales (Hellas), filed a complaint against the defendant, Mohammed Khaled, stating claims for breach of contract, breach of fiduciary duty, fraud and conversion after he allegedly violated the terms of the parties' oral partnership agreement. Khaled filed a counterclaim against Hellas, alleging it violated the terms of the same oral partnership agreement. The jury returned a verdict finding in favor of Hellas on its breach of contract and breach of fiduciary duty claims against Khaled and in favor of Khaled on his counterclaim against Hellas. Hellas now appeals,¹ arguing that the evidence did not support the amount of damages awarded to Khaled and exceeded the damages he sought in the *ad damnum* clause of his counterclaim. Hellas further argues that the court erred in failing to order Khaled's judgment forfeited based upon his breach of fiduciary duty. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 On February 22, 2011, Hellas filed its eight-count complaint alleging the following facts. In 2005, Hellas and Khaled entered into an oral partnership agreement in which Khaled agreed to purchase used cars at auction with partnership funds drawn from Hellas bank accounts and Hellas agreed to repair, maintain, advertise and otherwise service the vehicles until they were sold to third parties. After the cars were sold, Hellas and Khaled were to share in any net profits on an equal basis. According to the complaint, some of the vehicles were sold to Car Source.

¶ 4 Count I of the complaint stated a breach of contract claim against Khaled, alleging that he defaulted on a promissory note dated September 30, 2010. Under the terms of the note, Khaled owed Hellas \$50,000 and agreed to pay monthly installments of \$10,000, beginning October 1,

¹ The jury found in favor of Car Source USA, Inc. (Car Source) on all counts directed against it, and it is not a party to this appeal.

2010. If Khaled defaulted, the note required him to pay Hellas 6% interest on the unpaid balance along with all costs, expenses and attorney fees associated with any collection proceedings on the note. According to count I, Khaled defaulted and owed Hellas \$50,000 plus 6% annual interest and costs, expenses and attorney fees. A copy of the note allegedly signed by Khaled was attached to the complaint.

¶ 5 Counts II (breach of contract), III (conversion), IV (fraud), and V (breach of fiduciary duty), all directed at Khaled, alleged that, in violation of the terms of the oral partnership agreement, Khaled wrongfully assumed control of and sold six vehicles to Car Source and retained all profits from those sales for himself.

¶ 6 Count VI alleged conversion against Car Source, and counts VII (conspiracy to defraud) and VIII (conspiracy to commit conversion) were directed at both Khaled and Car Source, alleging that they conspired to convert Hellas's property and defraud it of its share of profits.

¶ 7 On April 18, 2011, Khaled filed a counterclaim against Hellas, alleging that he and Hellas had an oral partnership agreement to purchase, repair, and resell vehicles to third parties and that the profits would be divided on an equal basis. The counterclaim alleged that 900 vehicles were bought and sold between 2005 and 2008 at a net profit. Khaled alleged that he received \$600 per week from Hellas and that, after setting off those payments from his one-half of the net profits, Hellas still owed him \$234,049.50. According to the counterclaim, Hellas's refusal to pay Khaled this sum violated the terms of the oral partnership agreement, and Khaled requested that sum plus "court costs, and any other relief [the] Court deems just and appropriate."

¶ 8 On Khaled's motion to dismiss counts III, IV, V, VII and VIII, the circuit court dismissed counts III and VIII of the complaint. The matter proceeded with discovery and was set for trial on counts I, II, IV, V, VI and VII of the complaint and on Khaled's counterclaim.

¶ 9 In a motion *in limine*, Hellas sought, *inter alia*, to prohibit Khaled from eliciting any testimony or other evidence concerning any business agreement between the parties which was related to a real estate transaction or any evidence of any alleged profit or loss concerning that real estate transaction. The court reserved its ruling on the motion, and the case proceeded to a week-long jury trial in January 2013.

¶ 10 In lieu of trial transcripts, the parties stipulated to supplement the appellate record with a bystander's report, prepared and certified pursuant to Illinois Supreme Court Rule 323(c) (eff. Dec. 13, 2005), which contained the following facts adduced at trial.

¶ 11 Khaled testified that he first met Nick Karamagianis (Nick) in 2004. At the time, Khaled was a wholesale buyer and seller of vehicles, and Nick co-owned Hellas, an automotive body shop and used car dealership, with his father, Dimitrios "Jim" Karamagianis (Jim). Khaled stated that he was having difficulty selling the vehicles he purchased and that Nick agreed to allow him to bring his cars to Hellas's lot to see if they could be sold. In late 2005 or early 2006, Khaled and Nick, on behalf of Hellas, made an oral partnership agreement whereby Khaled would buy and sell vehicles using Hellas's funds and lines of credit, title the cars in Hellas's name, and bring the cars to Hellas's lot for cleaning, detailing, and any body shop repairs needed before the cars could be sold to third parties for a profit. Khaled testified that, if Hellas could not perform the necessary body work or repairs, Hellas was responsible for hiring and paying a third party to perform the work. Khaled further testified that, once a vehicle was sold, the agreement was that he and Hellas would share in all net profits or losses equally. He acknowledged that all costs of repairs performed by Hellas or a third-party would be deducted before any net profits were divided. In addition, the parties agreed to deduct from profits a "pack expense" for each vehicle. The pack expense covered Hellas's costs for utilities, payroll, maintenance, and

advertising. Khaled testified that the parties agreed the pack expense per vehicle was \$300, but later Hellas increased the pack expense to \$500. Khaled stated that Jim unilaterally decided to increase the pack expense about 1 ½ years after the original agreement was reached. Khaled identified Hellas's "Police Book," which is a record required by law to be maintained by all auto dealers and showed that the pack amount increase occurred in April 2007. Khaled testified that he did not agree to the increase.

¶ 12 Khaled testified that he did not make any initial investment into the partnership and that he did not withdraw his net profits, instead choosing to let Hellas retain his profits to grow the partnership. However, sometime in 2008, Khaled's wife stopped working and Hellas began to pay him \$600 every week, until the partnership ended in 2009. Khaled testified that the weekly payments were drawn against his share of the partnership's profits.

¶ 13 Also in 2008, Khaled noticed that certain luxury vehicles were not selling on the Hellas lot, so he contacted Maher Obeid, a dealership manager at Car Source, to inquire about placing cars on Car Source's lot for sale. According to Khaled, he, Hellas, and Obeid agreed that if any of their vehicles sold on Car Source's lot, the net profits would be split equally between Car Source and Hellas. Thus, Khaled understood that he was entitled to 25% of those particular profits. Khaled stated that approximately 30 vehicles were sold through Car Source.

¶ 14 Khaled further stated that, in April 2009, he and Nick were discussing an upcoming auto auction and discovered that the Hellas bank account, which was usually funded with hundreds of thousands of dollars, had a balance of only \$17,000. Khaled testified that only Nick and Jim had access to the Hellas bank account. Khaled testified that he did not know where the money had gone, but he knew that Nick did not take it. Fearing that his partnership profits were in jeopardy, Khaled requested that Hellas pay out all the profits owed to him. Khaled testified that Nick was

aware that Hellas owed him several hundred thousand dollars in profits, and so, Nick gave him the titles to five vehicles that Hellas owned. Khaled stated that Nick told him that he "could do whatever he wanted" with the five vehicles, meaning he could keep all of the money from the sale of these vehicles. Khaled testified that he sold the five cars to Car Source and that Obeid paid him for the cars through checks payable to "Car Collection," another company related to Khaled.

¶ 15 Shortly thereafter, Nick and Khaled decided to reconcile the partnership profits. Khaled explained that they created a handwritten inventory of all 700-800 vehicles involved, using information from the "vehicle dealer jackets," which included the vehicle purchase price and repair costs. Khaled testified that he did not have access to the dealer jackets, that the repair costs had been overstated, and that the pack expense amount had been increased to \$500 from the \$300 agreed-upon amount. When Khaled objected to the accounting, Nick told him not to worry and that he would talk to Jim. After compiling the information for several months, Nick's accounting revealed that Khaled's share of the profits from car sales was \$263,000. However, Khaled stated that Jim maintained that Khaled owed Hellas money and threatened legal action. Khaled testified that Nick did not agree with Jim and that he and Nick remained friends despite Jim's position.

¶ 16 Regarding the promissory note, Khaled testified that he never signed it, because he did not owe money to Hellas. He testified that the signature on the note attached to Hellas's complaint was not his signature and that he never saw the note until it was attached to the complaint. He further testified that, during a September 2010 meeting about partnership profits, Jim refused to acknowledge that Hellas owed Khaled money, but he never produced any

documentation supporting his position. Finally, Khaled denied ever giving Nick a bag containing \$45,000 cash as payment to Hellas for the five vehicles.

¶ 17 Maher Obeid testified that he recalled Khaled selling him five vehicles in 2009, but he did not recall any details regarding the vehicles. Obeid stated that Car Source issued five checks to Car Collection for the cars, totaling \$158,500. Later, in August 2010, he received a list of vehicles from Jim with a request for information about them. Obeid told Jim that he would investigate the matter, but he never provided any documents to him. He also denied delivering a bag containing cash to Nick or Jim for any reason.

¶ 18 Jim testified that the parties agreed to an initial pack expense of \$300 per vehicle, but that, after two to three months into the agreement, they agreed to increase that value. He also testified that, in 2007 or 2008, the parties agreed, at Khaled's request, to change the terms of the partnership agreement. Jim stated that, because Khaled's wife had stopped working, he needed an income, and "so [Khaled] was paid a weekly salary of \$600 as a draw against his profits." According to Jim, the total amount paid to Khaled was approximately \$48,000.

¶ 19 Jim testified that the partnership sold approximately 700-800 vehicles, which Nick documented in the handwritten inventory he worked on with Khaled. (The inventory documents 784 cars.) However, Jim stated that the inventory was never completed, that there were still undocumented expenses, and that Khaled never expressed concerns about the numbers or costs.

¶ 20 Regarding the five vehicles in dispute, Jim testified that, in February or March 2009, Khaled requested titles for the vehicles sold at Car Source and that Nick provided him with the titles. However, according to Jim, Khaled eventually confessed to taking the sales proceeds from Car Source for those vehicles and promised to pay Hellas back by September 2009. Jim testified that, when Khaled failed to pay Hellas, he approached Obeid at Car Source about the vehicles.

¶ 21 On cross-examination, Jim was asked if he and Khaled had purchased land with the intent of using the property as a used car dealership. Counsel for Hellas objected to the question based on the court's reserved ruling on Hellas's motion *in limine*. The circuit court overruled Hellas's objection, stating that the testimony was relevant. Jim answered that he and Khaled purchased the land, but later sold the land for a profit. Jim admitted that Khaled's share of the profits from the land sale was \$92,459, but that Khaled directed him to deposit the proceeds into the Hellas account to "grow the business and buy more cars." Jim further admitted that he never returned the \$92,459 to Khaled despite his request. According to the bystander's report, Khaled's testimony regarding the land profits was consistent with Jim's admissions.

¶ 22 Regarding the September 2010 meeting, Jim testified that, during the meeting, Khaled confessed to selling the cars to Car Source and agreed to pay \$50,000 for them. He stated that Khaled agreed that he owed at least \$75,000, that he offered \$25,000, and that he later signed the \$50,000 promissory note. Jim further denied that Hellas owed Khaled any money.

¶ 23 Jim also testified that Nick told him that Khaled delivered a bag containing \$45,000 cash for payment on the cars he sold to Car Source. Jim stated that he saw the cash in the safe after talking to Nick, but that he returned the cash to Khaled.

¶ 24 Nick testified that the parties agreed to increase the pack expense to \$500 approximately two months after the partnership agreement commenced in 2005. He further stated that he and Khaled had resolved all issues regarding the repair costs of the vehicles, but that the handwritten inventory was never completed as some fees and costs had not yet been included. Nick explained that there were five or six vehicles in dispute, but he never "pressed [Khaled about them] because they were friends." Nick testified that Khaled "took the money but promised to pay back the money to Hellas." Nick stated that, one day, Khaled brought him a paper bag

containing \$45,000 cash, which he explained was payment for the cars sold to Car Source. On cross-examination, Nick was impeached "as his deposition testimony revealed that the brown paper bag of cash came from [Obeid] as a down payment from Car Source to pay for the 5 cars." On further cross-examination, Nick agreed that the money was not from Khaled as a payment on the note and that he gave the money back to Obeid.

¶ 25 The parties entered into a stipulation at trial, which provided that, during the September 2010 meeting, neither Hellas nor Khaled made a demand upon each other for a specific amount to settle their respective claims. The stipulation also provided that neither Hellas nor Khaled produced any documents to support their respective claims.

¶ 26 The parties submitted their proposed jury instructions, none of which contained any special interrogatories.

¶ 27 On January 22, 2013, the jury returned its verdict, finding in favor of Hellas on its breach of the oral partnership agreement and breach of fiduciary duty claims and assessing \$158,500 in damages against Khaled for the former and no damages for the latter. The jury also found in favor of Khaled as to his counterclaim and assessed \$321,700 in damages against Hellas.

¶ 28 On February 4, 2013, Hellas filed a posttrial motion requesting a new trial, or in the alternative, a remittitur, arguing that the evidence did not support the damages awarded to Khaled and that the award exceeded the amount prayed for in his counterclaim. Further, Hellas moved the court to order the forfeiture of Khaled's judgment based upon the jury's finding that he breached his fiduciary duty.

¶ 29 On April 17, 2013, the circuit court heard the parties' arguments on Hellas's motion. Hellas argued that the court erred in admitting the evidence related to the land sale, because that agreement dated back to 2000 and was unrelated to the 2005 used car partnership agreement.

Hellas contended that the jury's award improperly included the \$92,000 profit from that real estate transaction. Hellas further argued that a remittitur was warranted in the amount of \$87,650.50, the difference between the jury's award of \$321,700 and the \$234,049.50 contained in the counterclaim's prayer for relief.

¶ 30 In response, Khaled argued that the evidence established that he invested the \$92,000 profit into his partnership with Hellas and that the testimony surrounding the land sale was relevant to show the source of those funds and to show the usual and customary business practices of the parties. Counsel for Khaled further explained that the *ad damnum* amount was computed before discovery and that, after reviewing discovery documents and the evidence at trial, he argued to the jury that, by his calculations, Khaled was owed \$283,027.50 in profits. Khaled further pointed out that he argued at trial that Hellas had unilaterally and improperly increased the pack expense to \$500 from the agreed-upon \$300 per each of the 784 cars, which amounts to over \$70,000 in additional expenses charged to him. Counsel concluded that, had the jury agreed with his estimate of \$283,027.50 on the profits and his contention that Hellas overcharged the pack expenses, the jury could have awarded more than the \$321,700 that it did.

¶ 31 The circuit court denied Hellas's motion, finding it did not meet the burden necessary for a remittitur or a new trial. This appeal followed.

¶ 32 Hellas first argues that the trial court erred in failing to order a remittitur or a new trial where the jury's verdict was tainted by the improper land sale evidence, exceeded the counterclaim's *ad damnum* amount, and was not supported by the evidence. We disagree.

¶ 33 Regarding the real estate transaction evidence, we cannot find that the circuit court abused its discretion in admitting the evidence of Khaled's investment of his land sale profits into the used car sales partnership. "Relevant evidence is evidence 'having any tendency to make the

existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence.' " *Smith v. Silver Cross Hospital*, 339 Ill. App. 3d 67, 73-74 (2003) (quoting *Wojcik v. City of Chicago*, 299 Ill.App.3d 964, 971 (1998)). The relevance and the admission of evidence at trial are within the sound discretion of the circuit court, and we will not disturb its ruling absent a clear abuse of that discretion. *Id.* An abuse of discretion may be found only where no reasonable man would take the view adopted by the circuit court. *Id.*

¶ 34 Here, the circuit court determined that the testimony regarding the land sale was relevant because it showed the parties' usual and customary conduct in transacting business, including the use of oral agreements. Further, the evidence was relevant to prove the amount which Khaled claimed Hellas owed him. Both parties testified that Khaled directed Jim to deposit his share of the land sale profits, \$92,000, into the Hellas account to help grow the partnership. Both also testified that the money was never returned to Khaled. Accordingly, we do not agree with Hellas's contention that the jury's award was tainted by this evidence.

¶ 35 Regarding Hellas's claim that a remittitur, or alternatively, a new trial, is warranted because the damages award exceeds the counterclaim's *ad damnum* clause, we also disagree. The amount of a verdict is generally at the discretion of the jury and is not subject to scientific computation. *Velarde v. Illinois Central Railroad. Co.*, 354 Ill. App. 3d 523, 540 (2004). A question of damages is to be determined by the trier of fact, and we will not substitute our opinion for the judgment rendered in the trial court. *Id.* "However, a court will order a remittitur, or, if the plaintiff does not consent, a new trial, if a verdict is excessive." *Id.* A damage award may be viewed as excessive if it (1) exceeds the range of fair and reasonable compensation, (2) is the result of passion or prejudice, or (3) is so large that it shocks the judicial

conscience. *Id.* (citing *Richardson v. Chapman*, 175 Ill.2d 98, 113 (1997)); see also *DiCosolo v. Janssen Pharm., Inc.*, 2011 IL App (1st) 093562, ¶ 69. "Whether remittitur should be allowed is 'considered on a case-by-case basis because the evidence and circumstances supporting verdicts must be carefully examined before a jury's assessment of damages is reduced.' " *Velarde*, 354 Ill. App. 3d at 540 (quoting *Best v. Taylor Machine Works*, 179 Ill.2d 367, 413 (1997)).

¶ 36 In this case, we cannot say a remittitur was appropriate as Khaled has not consented. See *Peter J. Hartmann Co. v. Capitol Bank and Trust Co.*, 353 Ill. App. 3d 700, 711 (2004) (the "court does not have the authority to reduce the damages by entry of a remittitur if plaintiff objects or does not consent"). Moreover, we do not find that a new trial is warranted where the damage award does not exceed the range of fair and reasonable compensation, does not appear to be the result of passion or prejudice, or is not so large it shocks judicial conscience. As Khaled argued, the jury was presented with evidence supporting his claim that he was owed at least \$283,027.50 in profits and that Hellas overcharged him \$200 for pack expenses on 784 cars. Even excluding the evidence that his \$92,000 investment was never returned, the jury award could have been well over the \$321,700 that it awarded if it accepted Khaled's claim that he was overcharged on all or most of the 784 pack expenses. Under these facts and circumstances, we find that neither a remittitur nor a new trial on damages is warranted.

¶ 37 Moreover, we do not find the fact that the award exceeds the amount prayed for in Khaled's counterclaim requires a new trial *per se*. Hellas cites to no authority establishing that a damage award may not exceed the *ad damnum* clause of a plaintiff's complaint or counterclaim where the damages had been proven by a preponderance of the evidence. Accordingly, Hellas has forfeited its argument by failing to cite legal authority in support. See Ill. S.Ct. R. 341(h)(7) (eff.Feb.6, 2013); *In re Estate of Burren*, 2013 IL App (1st) 120996, ¶ 44 (noting that the party

forfeited its argument that the award of damages exceeded the amount the plaintiff prayed for in the *ad damnum* clause of the complaint by failing to cite to legal authority for the proposition). Regardless, we do not find any authority in our own research prohibiting the entry of a damage award which exceeds the amount contained in the plaintiff's *ad damnum* clause where the damage amount was proven by a preponderance of the evidence at trial. See *Jager v. Libretti*, 273 Ill. App. 3d 960, 968 (1995) ("It is clear that judgment may be entered upon a verdict which exceeds the *ad damnum* clause in plaintiff's complaint," and noting a party may seek to amend the complaint after judgment is entered if opposing party is not prejudiced); *Hartmann*, 353 Ill. App. 3d at 711 (finding that the damage award must be corrected or a new trial granted "where the verdict exceeds the *proven* damages" (Emphasis added.)).

¶ 38 Hellas's argument that the damage award is not supported by the evidence is also without merit. Where an award of damages is made after a trial, the standard of review is whether the judgment is against the manifest weight of the evidence. *1472 N. Milwaukee, Ltd. v. Feinerman*, 2013 IL App (1st) 121191, ¶ 13. A judgment is against the manifest weight of the evidence only if the opposite conclusion is clear or where the trial court's findings appear to be unreasonable, arbitrary, or not based on evidence. *Id.* To warrant reversal of a damages award, we must find that the fact-finder either ignored the evidence or that its measure of damages was erroneous as a matter of law. *Id.* An award of damages is not against the manifest weight if there is an adequate basis in the record to support the trial court's assessment. *Id.*

¶ 39 As we stated earlier, the jury in this case was presented evidence that Khaled was owed at least \$283,027.50 in profits and that Hellas overcharged him \$200 for pack expenses on 784 vehicles. Had the jury accepted both propositions, the jury could have awarded an amount far surpassing the \$321,700 that it actually awarded. Thus, we cannot say that the jury ignored the

evidence, that its measure of damages was incorrect as a matter of law, or that the record does not adequately support the judgment of \$321,700. Accordingly, we do not find that the judgment is against the manifest weight of the evidence.

¶ 40 Finally, Hellas argues that the circuit court abused its discretion when it refused to order a complete or partial forfeiture of Khaled's damages where the jury found that he breached his fiduciary duties at the time he sold the five vehicles to Car Source. Hellas contends that a breach of fiduciary duty requires the complete forfeiture of all compensation paid to the fiduciary during the period of the breach. Again, we disagree.

¶ 41 While Hellas is correct in pointing out that Illinois law permits a complete forfeiture of any compensation received by a partner during a time when he was breaching his duty to the partnership (*Dowd & Dowd, Ltd. v. Gleason*, 352 Ill. App. 3d 365, 385 (2004)), we do not find that the circuit court abused its discretion in denying Hellas's posttrial motion seeking forfeiture (*Tully v. McLean*, 409 Ill. App. 3d 659, 683 (2011) (reviewing court's forfeiture order disgorging fiduciary's compensation during period of breach for an abuse of discretion)). First, Hellas did not prove at trial, identify in its posttrial motion, or assert in its appellate brief a specific amount of compensation that Khaled received during the period of his breach. Second, the jury found in favor of Hellas as to both the breach of an oral partnership agreement and the breach of fiduciary duty claims, and both claims were based upon identical conduct, namely that Khaled improperly kept the partnership proceeds from the sale of five vehicles to Car Source. The jury awarded Hellas \$158,500, the amount Obeid paid Khaled for the five cars, on the breach of the partnership agreement claim, and it awarded zero on the breach of fiduciary duty claim. Therefore, the damage award disgorged Khaled of all funds that Hellas proved he received

during the breach period; any additional amount would have been excessive based upon the evidence adduced at trial.

¶ 42 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 43 Affirmed.