2011 IL App (5th) 090614-U

NO. 5-09-0614

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

JAVIER MUNIZ, Plaintiff-Appellee and Cross-Appellant, v. HERRIN MEDICAL CLINIC, LTD., DR. SEAN BOZORGZADEH, and DR. KELLY EVANS, in Their Individual and Official Capacities; and HERRIN CLINIC, LTD., DR. SEAN BOZORGZADEH, and DR. KELLY EVANS, in Their Individual and Official Capacities, Defendants-Appellants and Cross-Appellees.	)	Appeal from the Circuit Court of Williamson County. No. 04-L-123 Honorable Ronald R. Eckiss, Judge, presiding.

JUSTICE GOLDENHERSH delivered the judgment of the court.
Justices Spomer and Stewart concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendants are liable under theory of alter ego for corporate entity along with associated claims, and the award of punitive damages was proper.

¶ 2 Plaintiff, Javier Muniz, filed suit against defendants, Herrin Medical Clinic, Ltd. (HMC), Dr. Sean Bozorgzadeh (Dr. Sean), Dr. Kelly Evans (Dr. Evans), and Herrin Clinic, Ltd. (HC), in the circuit court of Williamson County. After a jury entered a verdict awarding plaintiff actual and punitive damages, the trial court amended the award and entered judgment in favor of plaintiff. On appeal, defendants raise issues as to (1) whether plaintiff is entitled to relief as a predissolution creditor under the Illinois Business Corporation Act of 1983 (805 ILCS 5/1.01 *et seq.* (West 2004)), (2) whether plaintiff is entitled to relief under

the Uniform Fraudulent Transfer Act (740 ILCS 160/1 *et seq.* (West 2004)), (3) whether defendants are liable under the theory of alter ego, (4) whether plaintiff's claim for punitive damages is procedurally inadequate, (5) whether the award for punitive damages is supported by the evidence and not excessive, and (6) whether the award of attorney fees is proper.

¶ 3 FACTS

¶ 4 HMC was incorporated in 1999 with Dr. Sean and Dr. Evans, his wife and fellow practitioner, as the officers and shareholders. In 2000, plaintiff became an employee and shareholder of HMC. At that time, plaintiff signed an employment contract (Agreement). The Agreement provided that disputes would be submitted to an arbitrator.

¶ 5 In October 2002, plaintiff informed Dr. Sean and Dr. Evans that he was starting his own practice and would be leaving HMC. Dr. Sean testified that he told plaintiff that he could come to the office and take one-third of the furniture and equipment. Dr. Sean stated that HMC also waived the penalties for early departure contained in the Agreement. The parties were not able to decide on an amount due plaintiff for his shares and accounts receivable.

¶ 6 Plaintiff filed for arbitration. On November 25, 2003, an arbitrator entered an award in favor of plaintiff and against HMC. The award included amounts for current accounts receivable of $36,272.80, plus interest, and $15,030.02 for stock, and ordered HMC to reimburse plaintiff for attorney fees and expert fees. Dr. Sean testified that he received a copy of this award on December 11 or 12, 2003. He stated that when he became aware of the arbitration award, he spoke to HMC's legal counsel about obtaining financing to pay for it. Dr. Sean testified that he believed, based on advice of legal counsel, that the arbitration award did not contain a final and collectable amount. Dr. Sean testified:

> "Q. [Attorney for Plaintiff:] Now, you've sat in here through some of the proceedings, and you said that you did or didn't have a concern about the amount of

–that was owed to [plaintiff]?

A. At this–this was the law, the arbitrator decided that, and I was okay with that, I didn't have any problems with it.

Q. And the problem came because of what attorney's fees were–were–might or might be due under the award?

A. The problem was that our attorney was telling us that there is no final number on what we actually owe."

¶ 7 Patrick Hewson, an attorney who had represented HMC, testified that he believed that the arbitration award was not collectable or valid in January 2004 as it had improperly incorporated an amount for attorney fees and had not ripened into judgment. Hewson testified that judgment was not entered until June 2004 and that plaintiff's attempt to freeze the accounts of HMC at Old National Bank through a citation prior to judgment was improper.

¶ 8 Dr. Sean testified that in late December 2003, he contacted Greg Ingram, a loan officer at Old National Bank, seeking to borrow money. He stated that he informed Ingram a loan was needed to make sure payroll was met and HMC could continue operation. Dr. Sean testified that it was his understanding that he personally would sign as a guarantor for the debt. At the time, HMC had an existing relationship with Old National Bank, including several loans. Dr. Sean stated he told Ingram that there was a dispute with a departed physician, but did not go into details in part because Dr. Sean himself was unsure. Dr. Sean testified:

"I told Ingram that I needed to borrow money for the continuation of the work of the clinic, and this award was also taken into consideration as a liability that at that time was hanging around the clinic's head, so I wanted to be prepared for that award in case we had to pay it."

¶ 9 On January 6, 2004, Dr. Sean received a citation to discover assets. Dr. Sean testified that on that same date, Ingram informed him that HMC's application had been reviewed and that HMC was qualified for a loan of $125,000 with an additional line of credit of $25,000. Dr. Sean stated that on January 7, 2004, Ingram called him to inquire if HMC was going to file for bankruptcy. Dr. Sean testified that he definitively answered that HMC would not be filing for bankruptcy.

¶ 10 Ingram testified that after his discussion with Dr. Sean in December 2003, HMC promptly submitted a loan application. Ingram submitted the application to a credit analyst. Based on the report of the credit analyst, there was sufficient stability to grant a loan of $125,000 and an additional line of credit for $25,000. Ingram testified that on January 6, 2004, he "was getting ready to proceed with having the documents prepared." On January 7, 2004, Ingram received a phone call from plaintiff's attorney, Martine Jackson, and "in the course of [their] discussion" Jackson stated that there was a possibility that HMC would be filing for bankruptcy. Ingram denied that Jackson advised him that she represented plaintiff or that plaintiff had an arbitration award against HMC.

¶ 11 Ingram testified that he then called Dr. Sean. He testified that Dr. Sean stated that HMC was considering filing bankruptcy because of an ongoing lawsuit by plaintiff. Ingram continued:

> "Q. [Attorney for Defendants:] Was it your understanding that because [plaintiff] had this judgment that HMC might consider filing bankruptcy? I mean, I'm trying to understand why you thought [plaintiff's] judgment would make HMC file bankruptcy? Why did you believe that?
>
> A. Because Dr. Sean told me that–
>
> Q. Okay.
>
> A. –that he was going to file bankruptcy if [plaintiff]–

Q. Okay.

A. –didn't accept the settlement."

Ingram testified that he wanted to eliminate the possibility of HMC filing for bankruptcy, and he stated, "I told Dr. Sean that until the dispute was settled, I was not going to proceed with the loan."

¶ 12 Dr. Sean testified that on January 9, 2004, he received a call from Old National Bank letting him know that a notice was going to be served on the bank which would have the effect of freezing the accounts of HMC. Dr. Sean testified that as a result of accounts being frozen, some checks to employees and vendors bounced. Dr. Sean testified that legal counsel informed him that the citation which caused the freezing of accounts was illegal because the arbitration had not been converted into a judgment.

¶ 13 Defendants contend that after a hearing was held on January 27, 2004, the citation was quashed and HMC's accounts released. Plaintiff concedes the award was not reduced to judgment until June 21, 2004.

¶ 14 Dr. Sean testified that medical billing software revealed that from January 2004 through July 2004 HMC had gross receipts showing accounts receivable of $146,644.27. Nonetheless, the disapproval of the loan request "completely destroyed the confidence of [him] to be able to continue the operations of HMC." Dr. Sean testified that he followed counsel's advice in dissolving HMC. Dr. Sean testified:

"Q. [Attorney for Defendants:] What were some of the things that the clinic did to properly dissolve the clinic?

A. We–we continued to do the work of collection on behalf of the old corporation, trying to bring as much money into the corporation to pay its debt. I negotiated on behalf of the corporation for a reduced rate on the lease, I–we called vendors and told them that if they had a claim–a claim they have to contact Mr.

> Hewson. We continued to issue checks to the employees who are doing the work of the corporation, pay payroll taxes, continued to maintain the Medical Manager Program that the old corporation was leasing to keep that–the books all clear. Plus in addition to that, to keep up with the frequent records–request for records from [plaintiff's] attorneys, which at times were boxes full that we have to–to spend a lot of time constantly trying to–to copy records to give to them, and so on, things like that."

HMC ceased providing medical services on January 22, 2004.

¶ 15 Dr. Sean testified that when HMC was incorporated in 1999, he and Dr. Evans were the sole shareholders and that plaintiff was added as a shareholder in 2000. He testified that HMC held regular meetings. Dr. Sean stated that he and the other shareholder of HMC, Dr. Evans, voted to sell assets of HMC to HC, but not the accounts receivable. HMC retained an appraiser who valued office furniture and equipment at $25,720. This was sold to HC in installments pursuant to an agreement signed by Dr. Sean and Dr. Evans on behalf of HMC on February 4, 2004.

¶ 16 HMC retained counsel to draft documents for its dissolution. The articles of dissolution were signed on February 2, 2004. The plan of liquidation stated that its assets were primarily accounts receivable and various items of personal property and equipment. Defendants presented testimony from employees who worked for both corporations during the winding up of HMC that they kept separate time sheets for each corporation and that the corporations entered into separate contracts. Dr. Sean testified that HC obtained a new lender with new lines of credit, new health insurance contracts for employees, new medical provider numbers, new legal counsel, a new lease for less space, and new contracts with vendors.

¶ 17 Dr. Sean testified that during the first quarter of 2004, HMC collected over $126,000

in accounts receivable and deposited the collections in an HMC account at Old National Bank. He testified that $59,000 was deposited in an HMC account between March and October 2004. Dr. Sean testified that between January 1, 2004, and July 30, 2004, HMC issued payroll of $51,327.02, paid vendors $71,385.15, and paid $7,145.35 in taxes. Dr. Sean testified that by June 2004, collection on HMC's accounts receivable were no longer productive and collection efforts ceased.

¶ 18 Dr. Evans testified that she was a shareholder, held a title as an officer, and attended meetings for HMC but that she was not an officer or shareholder for HC. Dr. Evans described her role in the transfer of assets from HMC:

> "Q. [Attorney for Plaintiff:] You didn't make a decision or play a role in the agreement to sell and transfer the assets of [HMC,] did you?
>
> A. Could you repeat that?
>
> Q. I'm sorry. You didn't make a decision or play a role in the agreement to sell and transfer the assets of [HMC]?
>
> A. Well, I suppose I was, because I was an officer. I had to, you know, okay that we would sell the assets. The assets being just furniture, you know. We basically just had some furniture, and we got the appraisal and we okayed to sell that."

¶ 19 The articles of incorporation for HC were signed on January 8, 2004, with Dr. Sean as the sole officer and shareholder.

¶ 20 On July 2, 2004, plaintiff filed the original complaint for the present action. Plaintiff's second amended complaint, filed after the jury trial, lists three counts entitled "Breach of the Illinois Business Corporations Act," "Breach of the Uniform Fraudulent Transfer Act," and "[HC], Dr. Sean, and Dr. Evans as the Alter Ego of Herrin Medical Clinic." After the trial, a jury returned a verdict in favor of plaintiff for each count and awarded actual and punitive damages. The trial court amended the award and entered judgment in favor of plaintiff.

¶ 21 Defendants appeal.

¶ 22 ANALYSIS

¶ 23 I. LIABILITY

¶ 24 Plaintiff's allegation of an alter ego is where this court begins its discussion. In count III, plaintiff alleged that HC, Dr. Sean, and Dr. Evans were liable under the theory of alter ego for the debts of HMC. Decades ago the Illinois Supreme Court described the premises underlying the doctrine of corporate entity and the theory of liability for an alter ego:

> " 'The doctrine of corporate entity is one of substance and validity; it should be ignored with caution, and only when the circumstances clearly justify it. The theory of the *alter ego* has been adopted by the courts to prevent injustice, in those cases where the fiction of a corporate entity has been used as a subterfuge to defeat public convenience or to perpetrate a wrong; it should never be invoked to work an injustice, or to give an unfair advantage.' " *Superior Coal Co. v. Department of Finance*, 377 Ill. 282, 294, 36 N.E.2d 354, 360 (1941) (quoting *Pickwick Corp. v. Welch*, 21 F. Supp. 664, 669 (S.D. Cal. 1937)).

¶ 25 A basic motivation for assuming the identity of a corporation is to insulate stockholders from unlimited liability for corporate activity. *Apollo Real Estate Investment Fund, IV, L.P. v. Gelber*, 398 Ill. App. 3d 773, 787, 935 N.E.2d 949, 961 (2009). A corporation is its own legal entity, separate and distinct from shareholders, officers, and directors, which is responsible for its own debts. *Peetoom v. Swanson*, 334 Ill. App. 3d 523, 527, 778 N.E.2d 291, 294 (2002). The closeness of corporate holdings, even when held by a single shareholder, will not undermine the protection of limited liability. *Peetoom*, 334 Ill. App. 3d at 527, 778 N.E.2d at 294. The question is whether the corporate entity is merely an instrumentality to conduct the business of another person or entity. *Peetoom*, 334 Ill. App. 3d at 527, 778 N.E.2d at 294.

¶ 26 On appeal, defendants frame the issue in terms of piercing the corporate veil. If a corporate entity is merely the alter ego or business conduit for another entity, then the veil may be pierced. *Fontana v. TLD Builders, Inc.*, 362 Ill. App. 3d 491, 500, 840 N.E.2d 767, 775 (2005). The test is twofold. First, the entities must have such unity of interest and ownership that separate personalities do not exist; and second, the circumstances must establish that adherence to the fiction of a separate and independent corporate existence would sanction a fraud, promote injustice, or promote inequity. *Gass v. Anna Hospital Corp.*, 392 Ill. App. 3d 179, 186, 911 N.E.2d 1084, 1091 (2009). Courts are reluctant to pierce the veil. *Fontana*, 362 Ill. App. 3d at 500, 840 N.E.2d at 776. A party seeking to pierce the corporate veil has the burden of making "a substantial showing that one corporation is really a dummy or sham for another." *Sumner Realty Co. v. Willcott*, 148 Ill. App. 3d 497, 502, 499 N.E.2d 554, 557 (1986).

¶ 27 The question of unity of interest is determined by numerous factors. This court has stated:

> " 'In determining whether the 'unity of interest and ownership' prong of the piercing-the-corporate-veil test is met, a court generally will not rest its decision on a single factor, but will examine many factors, including: (1) inadequate capitalization; (2) failure to issue stock; (3) failure to observe corporate formalities; (4) nonpayment of dividends; (5) insolvency of the debtor corporation; (6) nonfunctioning of the other officers or directors; (7) absence of corporate records; (8) commingling of funds; (9) diversion of assets from the corporation by or to a stockholder or other person or entity to the detriment of creditors; (10) failure to maintain arm's-length relationships among related entities; and (11) whether, in fact, the corporation is a mere facade for the operation of the dominant stockholders.' " *Gass*, 392 Ill. App. 3d at 186, 911 N.E.2d at 1091 (quoting *Fontana*, 362 Ill. App. 3d

at 503, 840 N.E.2d at 778).

¶ 28 Defendants contend that corporate formalities were followed. They point out that both HMC and HC filed separate articles of incorporation and cite to the testimony from employees who worked for both corporations during the winding up of HMC that they kept separate time sheets for each corporation and that the corporations entered into separate contracts. Dr. Sean testified that HC entered into new contracts with vendors and obtained a new lender with new lines of credit, new health insurance contracts for employees, new medical provider numbers, new legal counsel, and a new smaller lease for HC. Defendants contrast this to instances where there was a complete disregard for corporate formalities. See *Ted Harrison Oil Co. v. Dokka,* 247 Ill. App. 3d 791, 796, 617 N.E.2d 898, 902 (1993).

¶ 29 Plaintiff contends that corporate formalities were not followed with exactitude and points to the lack of corporate minutes and paucity of other corporate documents in the record. See *Berlinger's, Inc. v. Beef's Finest, Inc.*, 57 Ill. App. 3d 319, 325, 372 N.E.2d 1043, 1048 (1978). Other factors strongly support a finding of unity of interest between both corporations and Dr. Sean. HC has no other functioning officers or directors besides Dr. Sean, and the jury could have easily found that Dr. Evans' role in HMC was minimal. Plaintiff's version of events was that the entire creation of HC was a diversion to the detriment of the rights of plaintiff as a creditor. Nor was the relationship between the entities beyond an arm's length. On this record, the jury could easily find that the creation of HC was a mere facade for the operation of the dominant stockholder, Dr. Sean.

¶ 30 The second prong for piercing the veil is whether the circumstances establish that adherence to the fiction of a separate and independent corporate existence would sanction a fraud, promote injustice, or promote inequity. *Fontana,* 362 Ill. App. 3d at 500, 840 N.E.2d at 775. Indeed, this is the basis of plaintiff's case. If the jury accepted the interpretation of events presented by plaintiff, then the logical conclusion would be that separate corporate

identities were created in order to promote the injustice of avoiding any payment to plaintiff.

¶ 31 Defendants contend that judgment for plaintiff is not warranted even if the record supports a piercing of the veil. In making this assertion, defendants correctly state a legal principle, but misapply it. Piercing the corporate veil is an equitable remedy, and not a cause of action in itself. *Peetoom,* 334 Ill. App. 3d at 527, 778 N.E.2d at 294. Piercing is a mechanism for imposing liability for an underlying cause of action such as a tort or breach of contract. *Peetoom*, 334 Ill. App. 3d at 527, 778 N.E.2d at 294.

¶ 32 The flaw in defendants' reliance on the limitation of the theory of piercing the veil is twofold. First, plaintiff's allegations in count III of the complaint contain an underlying cause of action. Plaintiff asserts that he is entitled to relief for the unsatisfied judgment deriving from the arbitrator award. Piercing the veil is the mechanism which prevents defendants, Dr. Sean and Dr. Evans, from using HMC as a shield for plaintiff's claims as a creditor.

¶ 33 Moreover, defendants' framing of the issue ignores the full extent of plaintiff's allegations and the findings of the jury. On appeal, defendants frame their arguments in terms of the theory of piercing the corporate veil. Of course, this case is not representative of most instances in which parties request a piercing of the corporate veil. The standard case involves whether the veil should remain in place for one corporate entity. This case also involves a successor corporation that obtained the assets of its predecessor.

¶ 34 In this case, plaintiff alleged that HC, and not just the individual doctors, was also an alter ego of HMC. Plaintiff alleged that HC, a successor corporation, assumed the assets of the previous corporation, HMC, and served as its alter ego. The general rule is that a corporation that purchases the assets of another is not liable for the debts of the transferor. *Vernon v. Schuster*, 179 Ill. 2d 338, 344, 688 N.E.2d 1172, 1175 (1997). This protection is intended to protect *bona fide* purchasers from unassumed liability, but the rule has developed

exceptions to protect creditors. *Vernon*, 179 Ill. 2d at 344, 688 N.E.2d at 1175. As was stated in *Pielet*:

> "There are four exceptions to the general rule of successor corporate nonliability: (1) where there is an express or implied agreement of assumption; (2) where the transaction amounts to a consolidation or merger of the purchaser or seller corporation; (3) where the purchaser is merely the continuation of the seller; or (4) where the transaction is for the fraudulent purpose of escaping liability for the seller's obligations." *Pielet v. Pielet*, 407 Ill. App. 3d 474, 508, 942 N.E.2d 606, 637 (2010), *appeal allowed*, ___ Ill. 2d ___, 949 N.E. 2d 1103 (2011).

¶ 35 The test for the continuity exception is not a question of operation, but of corporate identity. *Vernon*, 179 Ill. 2d at 344, 688 N.E.2d at 1175; see *Nilsson v. Continental Machine Manufacturing Co.*, 251 Ill. App. 3d 415, 418, 621 N.E.2d 1032, 1034 (1993). In the case at hand, the corporate identity of HC could be seen as an alter ego of HMC. As explained in *Vernon*:

> "The continuation exception to the rule of successor corporate nonliability applies when the purchasing corporation is merely a continuation or reincarnation of the selling corporation. [Citation.] In other words, the purchasing corporation maintains the same or similar management and ownership, but merely 'wears different clothes.' [Citations.] The rationale of this exception is as follows:
>
> > 'The exception is designed to prevent a situation whereby the specific purpose of acquiring assets is to place those assets out of the reach of the predecessor's creditors. *** To allow the predecessor to escape liability by merely changing hats would amount to fraud. Thus, the underlying theory of the exception is that, if a corporation goes through a mere change in form without a significant change in substance, it should not be allowed to escape liability.

[Citation.]' " *Vernon*, 179 Ill. 2d at 346, 688 N.E.2d at 1176.

The jury was instructed as to these exceptions, and the record supports a finding that HC was "a mere change in form without a significant change in substance." Similarly, under the version of events presented by plaintiff, HC could be seen as a fraudulent shield created for the purposes of evading liability. See *Brandon v. Anesthesia & Pain Management Associates, Ltd.*, 419 F.3d 594, 598 (7th Cir. 2005).

¶ 36 Viewing HC as the mere continuation of HMC highlights another difference in focus between the parties on appeal. Throughout each of the issues on appeal, defendants argue that the prominent transaction was the selling of office furniture and equipment. This ignores the fact that the greatest value for a professional practice is generally not its furniture or equipment, but its goodwill. See *In re Marriage of Courtright*, 155 Ill. App. 3d 55, 58, 507 N.E.2d 891, 894 (1987) (discussing professional goodwill in terms of marital distributions). The record supports the conclusion that HC, as a succeeding corporation, was a reincarnation of the preceding corporation, HMC, and received the intangible assets of the professional practice.

¶ 37 Defendants contest the amount of actual damages awarded to plaintiff. The jury awarded different amounts for different counts. Later, the trial court entered judgment in the amount of $190,363.54. Both sides agree that the calculation of the trial court was based on the arbitration award along with interest accrued. Defendants assert that no one testified that HC had received assets or distributions from HMC in the amounts determined by either the jury or the court. The value, however, was intangible. On appeal, plaintiff concedes that no expert testimony gave a specific figure for the intangible value of HMC on January 22, 2004, but points out that HMC had a total income of $1,227,752 in 2002 and $932,258 in 2003. Given the value of intangible assets to professional practices, the trial court correctly awarded the full amount of the debt that defendants attempted to evade. See *Brandon*, 419

F.3d at 599.

¶ 38 Count II of plaintiff's complaint is for breach of the Uniform Fraudulent Transfer Act (740 ILCS 160/5 (West 2004)). Under the Uniform Fraudulent Transfer Act, a debtor is liable for transfer "with actual intent to hinder, delay, or defraud" a creditor. 740 ILCS 160/5(a)(1) (West 2004). The Uniform Fraudulent Transfer Act lists numerous factors suggesting that defendants possessed the requisite intent. 740 ILCS 160/5(b) (West 2004). In essence, plaintiff presented sufficient evidence for the jury to find that the creation of HC was actually a transfer of substantially all of the assets of HMC, including professional goodwill, conducted from the inside and made in response to the arbitrator's award. 740 ILCS 160/5(b)(1), (b)(2), (b)(4), (b)(5), (b)(10) (West 2004).

¶ 39 Defendants contend that the award under count II was based on an erroneous interpretation of what was transferred. Plaintiff alleged that substantially all of the assets of HMC were transferred to HC for less than fair value with the intent to defraud plaintiff as creditor. Defendants attempt to limit the discussion to the transfer of personal property. Defendants contend that the relevant transfer was that of the furniture and office equipment and point to the liquidation appraisal. As with the issue of alter ego, however, the record supports the finding that the creation of HC was a transfer of all the intangible assets from HMC. See *Brandon*, 419 F.3d at 600.

¶ 40 In count I, plaintiff alleged that defendants violated the Business Corporation Act of 1983 (Business Corporation Act) (805 ILCS 5/8.65 (West 2004)). Section 8.65 of the Business Corporation Act imposes liability on any director who assents to a distribution to shareholders prohibited by section 9.10. 805 ILCS 5/8.65, 9.10 (West 2004). Section 9.10 provides as follows:

> "(c) No distribution may be made if, after giving it effect:
>
> (1) the corporation would be insolvent; or

(2) the net assets of the corporation would be less than zero or less than the maximum amount payable at the time of distribution to shareholders having preferential rights in liquidation if the corporation were then to be liquidated." 805 ILCS 5/9.10(c)(1), (c)(2) (West 2004).

Whether defendants violated this section was a question of fact for the jury. Distribution of property under the Business Corporation Act is a broad umbrella. "Distribution" was defined in the instructions as "a direct or indirect transfer of money or other property by a corporation for the benefit of its shareholders." The Business Corporation Act defines "property" broadly: "(v) 'Property' means gross assets including, without limitation, all real, personal, tangible, and intangible property." 805 ILCS 5/1.80(v) (West 2004). The record supports the conclusion that upon, and due to, the creation of HC in early 2004, HMC became unable to pay its debts as they became due. See 805 ILCS 5/1.80(m) (West 2004). Likewise, the jury could easily find that had the individual defendant physicians not transferred their income stream to HC, HMC would have remained viable and solvent.

¶ 41 II. PUNITIVE DAMAGES

¶ 42 Defendants contest the award of punitive damages. An initial set of arguments relate to procedure. For persuasive support, each party turns to different parts of the record. Defendants point to the timeline of pleadings in the trial court file. Plaintiff points to the transcript of the trial.

¶ 43 The first amended complaint, which was the operative pleading at the commencement of trial, was filed on September 30, 2005. The jury returned a verdict on March 27, 2008. On September 25, 2008, plaintiff submitted to the court a second amended complaint, which contained a prayer for punitive damages.

¶ 44 On appeal, defendants contend that the amendment was untimely and prejudicial. They argue that the trial court erred by allowing plaintiff to recover punitive damages

without a corresponding pleading while on trial. Defendants assert that this violated the principle that proof without pleadings is as defective as pleadings without proof. *Colonial Inn Motor Lodge, Inc. v. Gay*, 288 Ill. App. 3d 32, 40, 680 N.E.2d 407, 412 (1997). Defendants further argue that the trial court abused its discretion in allowing plaintiff to amend his complaint after the close of proofs.

¶ 45 Under the Code of Civil Procedure (Code) (735 ILCS 5/1-101 *et seq.* (West 2004)), a trial court has discretion to allow amendments both prior to and after trial. The Code provides as follows:

> "§ 2-616. Amendments. (a) At any time before final judgment amendments may be allowed on just and reasonable terms, introducing any party who ought to have been joined as plaintiff or defendant, dismissing any party, changing the cause of action or defense or adding new causes of action or defenses, and in any matter, either of form or substance, in any process, pleading, bill of particulars or proceedings, which may enable the plaintiff to sustain the claim for which it was intended to be brought or the defendant to make a defense or assert a cross claim.
>
> ***
>
> (c) A pleading may be amended at any time, before or after judgment, to conform the pleadings to the proofs, upon terms as to costs and continuance that may be just." 735 ILCS 5/2-616(a), (c) (West 2004).

¶ 46 A grant of leave to amend a complaint is reviewed under the abuse-of-discretion standard. The four factors are (1) whether the proposed amendment would cure a pleading that is defective, (2) whether prejudice or surprise results, (3) whether the amendment was filed timely, and (4) whether prior opportunities to amend were identified. *Loyola Academy v. S&S Roof Maintenance, Inc.*, 146 Ill. 2d 263, 273, 586 N.E.2d 1211, 1215 (1992). Prejudice is the most important factor. *Paschen Contractors, Inc. v. City of Kankakee*, 353

Ill. App. 3d 628, 638, 819 N.E.2d 353, 362 (2004). Defendants argue that amendment should not normally be permitted for matters previously known when no excuse is offered. *State Farm Fire & Casualty Co. v. M. Walter Roofing Co.*, 271 Ill. App. 3d 42, 49, 648 N.E.2d 254, 259 (1995).

¶ 47 Defendants argue that they were prejudiced by the late amendment of pleadings. They assert they had no notice to present a defense against punitive damages. In particular, defendants assert that the jury was invited to speculate as to net worth. They also argue that plaintiff never offered an excuse for the late filing.

¶ 48 In response, plaintiff points out that defendants did not object to the placement of punitive damages before the jury. First, defendants did not object when plaintiff originally moved to amend the complaint to conform to the proof. In the early stages of the jury instruction conference, plaintiff moved to amend. Defendants apparently foresaw this motion. In discussing an instruction proposed by defendants, defense counsel stated, "I assume they are going to amend the complaint," and shortly later described defendants' proposed instruction as "an attempt, Your Honor, to capture all of the claims that I anticipate will be made in an amended complaint in line with the evidence that's put in to the case." On the next page, plaintiff moved to amend to conform to the proof.

¶ 49 Defendants contend that they objected when plaintiff moved to amend to conform to the proof. A docket entry made when plaintiff filed the second amended complaint indicates defendants objected at a hearing held that date. The court went off the record when plaintiff moved to conform to proof. Nonetheless, no objection to the amendment appears in the record before the jury rendered its verdict.

¶ 50 Notably, defendants did not object to the jury being instructed on punitive damages. Plaintiff submitted instructions on punitive damages, defendants objected to the form and

wording of plaintiff's instruction on punitive damages, and a modified instruction was submitted. When proffered, the trial court asked the pivotal question:

" Q. [THE COURT:] All right. Any objection to the punitive damages?"

The record is silent as to any response. The failure to object to the submission of punitive damages to the jury undermines defendants' claim on appeal. Generally, a party should not be heard to raise an issue on appeal that it failed to raise in a timely manner before the trial court. See *In re Estate of Rohrer*, 269 Ill. App. 3d 531, 535, 646 N.E.2d 17, 19 (1995). Defendants acquiesced in the submission of the issue of punitive damages to the jury. Not only were there no objections, defendants made no suggestion of additional evidence such as seeking leave to reopen the case.

¶ 51 The silence at the jury instruction conference also stands contrary to defendants' claims of prejudice on appeal. At the time plaintiff sought leave to conform to the proof, the evidence had supported the amendment. The one aspect of punitive damages that appears to not have been extensively litigated before the jury was the net worth of defendants. See *Manns v. Briell*, 349 Ill. App. 3d 358, 365, 811 N.E.2d 349, 355 (2004). Although the financial status of a defendant may be relevant and admissible to the question of deterrence, defendants give no reason to believe the failure to address this was fatal to plaintiff's claim.

¶ 52 Defendants' silence at the jury instruction conference is understandable. The issue of whether defendants had engaged in willful and wanton conduct had been fully litigated before the jury. Defendants were aware from the initial filing that plaintiff was claiming fraudulent conduct. By the time the court asked if there were any objections to the submission of punitive damages, the issue of whether defendants had engaged in willful and wanton conduct had been fully litigated in front of the jury.

¶ 53 Defendants contend that the amount awarded for punitive damages was excessive under the common law and the constitution. *Turner* outlined the test for whether an award is excessive under the common law:

> "With regard to the first argument, to determine whether an award is excessive in a given case, Illinois courts look to a fact-specific set of relevant circumstances, including the following: (1) the nature and enormity of the wrong, (2) the financial status of the defendant, and (3) the potential liability of the defendant. [Citation.] The highly factual nature of the assessment of punitive damages dictates that a great amount of deference should be afforded the determination made at the trial court level, and to reflect that deference and the highly factual nature of the determination, we review the assessment of punitive damages on a manifest-weight-of-the-evidence standard. [Citation.] A jury's assessment of punitive damages will not be reversed unless the manifest weight of the evidence shows that the assessment was so excessive that it demonstrated passion, partiality, or corruption on the part of the jury." *Turner v. Firstar Bank, N.A.*, 363 Ill. App. 3d 1150, 1161-62, 845 N.E.2d 816, 827 (2006).

¶ 54 The jury apparently found that defendants acted with evasive purpose and that the nature of such a wrong justified the award of punitive damages. Nor is there any indication that the jury was swayed by passion, partiality, or corruption. As plaintiff points out, the ratio of punitive damages in relation to actual damages is in line with other instances of evasive or fraudulent conduct. See *O'Neill v. Gallant Insurance Co.*, 329 Ill. App. 3d 1166, 1181, 769 N.E.2d 100, 113 (2002); *Gambino v. Boulevard Mortgage Corp.*, 398 Ill. App. 3d 21, 70, 922 N.E.2d 380, 425 (2009); *Gehrett v. Chrysler Corp.*, 379 Ill. App. 3d 162, 180, 882 N.E.2d 1102, 1118 (2008).

¶ 55 Defendants also contend that the award was excessive under the constitution. An award of punitive damages that is fundamentally unfair violates due process. *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 418 (2003). Again, *Turner* outlines the test:

> "We consider three guideposts as we review awards of punitive damages: (1) the degree of the reprehensibility of the defendant's misconduct, (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Campbell*, 538 U.S. at 418, 155 L. Ed. 2d at 601, 123 S. Ct. at 1520. The *Campbell* decision and previous decisions of the United States Supreme Court counsel that the most important of these guideposts is the reprehensibility of the defendant's misconduct. *Campbell*, 538 U.S. at 419, 155 L. Ed. 2d at 602, 123 S. Ct. at 1521. To determine reprehensibility, reviewing courts consider the following factors: (1) whether the harm caused was physical as opposed to economic, (2) whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others, (3) whether the target of the conduct had financial vulnerability, (4) whether the conduct involved repeated actions or was an isolated incident, and (5) whether the harm was the result of intentional malice, trickery, deceit, or mere accident. *Campbell*, 538 U.S. at 419, 155 L. Ed. 2d at 602, 123 S. Ct. at 1521." *Turner*, 363 Ill. App. 3d at 1162-63, 845 N.E.2d at 828.

As plaintiff repeatedly argues, the jury could easily find that defendants had a single purpose in dissolving HMC–to deprive plaintiff from collecting his award. This conduct is readily characterized as reprehensible. In other words, the action displayed intentional malice, trickery, and deceit. *Turner*, 363 Ill. App. 3d at 1163, 845 N.E.2d at 828.

¶ 56 The final issue on appeal is whether the award of attorney fees was proper. The trial court apparently awarded attorney fees on the ground that plaintiff was entitled to such relief under the Business Corporation Act. Plaintiff concedes that there is no statutory basis for awarding attorney fees, but he contends that he is entitled to attorney fees under the Agreement. The plain language of the Agreement calls for such relief.

¶ 57 The Agreement provides as follows:

> "21. Any controversy or claim arising out of, or relating to this Agreement, or any related agreements or transactions, or the breach thereof, shall be settled by arbitration, in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered and may be entered in any court having jurisdiction. The prevailing party in any such action shall be entitled to all expenses, reasonable attorney's fees (proof of payment by such party shall constitute presumptive evidence of reasonableness) and costs."

¶ 58 A contractual "fee-shifting" provision is an exception to the general rule that a party is responsible for its own attorney fees. *Bright Horizons Children's Centers, LLC v. Riverway Midwest II, LLC*, 403 Ill. App. 3d 234, 254, 931 N.E.2d 780, 798 (2010). *Bright Horizons Children's Centers, LLC* stated:

> "We are required to strictly construe a contractual provision for attorney fees. *Bjork*, 381 Ill. App. 3d at 544, citing *Grossinger Motorcorp., Inc. v. American National Bank & Trust Co.*, 240 Ill. App. 3d 737, 752 (1992). That is, we construe the fee-shifting provision 'to mean nothing more–but also nothing less–than the letter of the text.' *Erlenbush v. Largent*, 353 Ill. App. 3d 949, 952 (2004). The construction of a contract's fee-shifting provision presents a question of law, which we review *de novo*. *Fontana v. TLD Builders, Inc.*, 362 Ill. App. 3d 491, 510 (2005)." *Bright Horizons Children's Centers, LLC*, 403 Ill. App. 3d at 254-55, 931 N.E.2d at 798.

¶ 59 Strictly construed, the Agreement calls for an award of attorney fees in this case. This litigation and the proceeding arbitration arose out of plaintiff's attempts to enforce defendants' obligations under the Agreement. Furthermore, there is no doubt that plaintiff is the prevailing party. *Cf. Med+Neck & Pain Center, S.C. v. Noffsinger*, 311 Ill. App. 3d 853, 861, 726 N.E.2d 687, 694 (2000).

¶ 60 Accordingly, the judgment of the circuit court of Williamson County is hereby affirmed, and the matter is remanded for consideration of any attorney fees incurred on appeal.

¶ 61 Affirmed; cause remanded with directions.