[Cite as *Brown v. Conway*, 2015-Ohio-2007.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

ARLON R. BROWN,	:	APPEAL NO. C-140086 TRIAL NO. A-1100301
Plaintiff-Appellant,	:	*O P I N I O N.*
vs.	:	
F. THOMAS CONWAY, Individually and as Trustee of the Conway Family Trust dated October 18, 2010,	:	
Defendant-Appellee,	:	
and	:	
COLLINS RIVERSIDE DEVELOPMENT LLC,	:	
Defendant.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: May 27, 2015

Dinsmore & Shohl, LLP, Bryan E. Pacheco and *Sarah B. Cameron, Heekin & Heekin* and *Christopher R. Heekin*, for Plaintiff-Appellant,

O'Hara, Ruberg, Taylor, Sloan & Sergent, David B. Sloan and *Gary J. Sergent* for Defendant-Appellee.

SYLVIA SIEVE HENDON, Presiding Judge.

{¶1} Arlon R. Brown sued F. Thomas Conway for dissolution of Collins Riverside Development LLC ("Collins"), for an accounting, and for breach of ethical obligations. Conway counterclaimed for dissolution of Collins, for an accounting, for breach of the parties' operating agreement, and for breach of fiduciary duty. Following a bench trial, the trial court found that there had been no operating agreement between the parties. The court dismissed Brown's complaint and ordered him to pay Conway $2,367,614, plus $500,000 for punitive damages, plus attorney fees and expenses. The court ordered that Collins be dissolved, and authorized Conway to sell its assets. Brown appeals the trial court's judgment.

{¶2} In its findings of fact, the trial court noted that the parties had formed Collins to purchase land for development. The court found that Conway had contributed more than $2.8 million to Collins, and that Brown had contributed just over half a million dollars. The court determined that Brown had commingled Conway's contribution with Brown's other business and family interests, and that, by doing so, Brown had dissipated the assets of Collins and had violated his fiduciary duty to Conway. In addition, the court specifically found that "[t]here was no operating agreement between Mr. Brown and Mr. Conway. Nevertheless, there was an agreement that the funds contributed were to be used to buy land and not for any personal expenses. The funds were also not to be mingled with other business interests of Mr. Brown."

{¶3} Brown now appeals, raising seven assignments of error for our review. In his first assignment of error, Brown argues that the trial court's finding that no

operating agreement existed was clearly erroneous and tainted the entire trial. Brown contends that the court's finding was contrary to Conway's judicial admissions and to the overwhelming evidence at trial. Conway counters that the court's finding regarding the absence of an operating agreement was supported by the weight of the evidence.

{¶4} In a challenge to the manifest weight of the evidence, this court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether in resolving conflicts in the evidence, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17.

{¶5} In a pleading captioned, "Verified Answer and Counterclaim of F. Thomas Conway to Plaintiff's Second Amended Complaint," Conway alleged that he and Brown had organized Collins in 2007 to purchase and develop real estate. At paragraph seven, Conway alleged that

> [t]he October 14, 2010 First Amendment to and Full Restatement of Manager-Managed Operating Agreement of Collins Riverside Development, LLC, ("Agreement"), attached hereto as Exhibit 'A,' § 9.9, states * * * that jurisdiction and venue is appropriate '...in the courts of * * * such other county where the Company may relocate its principal place of business.' * * * Collins' principal place of business is located in Hamilton County, Ohio.

{¶6} At paragraphs 19 and 20, Conway further alleged that he and Brown had entered into the agreement, which had reorganized Collins into a manager-managed company, and that he and Brown were the initial and current managers. At paragraph 21, Collins alleged that he had provided written notice to Brown of his intent to withdraw as a member of Collins in accordance with § 6.1.4 of the agreement.

{¶7} In the third count of Conway's pleading, entitled "Breach of Operating Agreement," Conway alleged that Brown had failed to comply with his obligations under § 8.2 of the agreement by failing to maintain full and accurate accounts in proper books and records or to permit a requested inspection of the records. Conway further alleged that § 9.3 of the agreement expressly granted him the right to specific performance upon Brown's breach.

{¶8} Conway's pleading unequivocally asserted a material fact — he and Brown had executed an amended operating agreement in 2010 that governed Collins. As a result, his assertion constituted a judicial admission for purposes of trial. *See Haney v. Law*, 1st Dist. Hamilton No. C-070313, 2008-Ohio-1843, ¶ 7. Conway's assertion of the fact of the agreement in his pleading was admissible as evidence against him. *Id.* Brown was not required to offer any evidence to prove that the agreement existed because that fact had been judicially admitted in Conway's pleading. *Id*. at ¶ 8, citing *Gerrick v. Gorsuch*, 172 Ohio St. 417, 178 N.E.2d 40 (1961). Moreover, Conway affirmatively sought relief on the basis of the agreement, so he cannot seriously contend that the trial court's finding on the matter was supported by the evidence. Consequently, we hold that the trial court's determination that no operating agreement existed was contrary to the manifest

weight of the evidence, and we reverse the trial court's judgment and remand the cause for further proceedings consistent with law and this opinion. *See* App.R. 12(C); *Eastley*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, at ¶ 7.

{¶9} In Brown's remaining assignments of error, he argues that the trial court erred by ignoring the parties' stipulations, finding that he had committed fraud, awarding tort and punitive damages, and awarding damages to a party that had no standing. However, given our disposition of the first assignment of error, we do not reach the merits of these assignments of error because they are moot.

Judgment reversed and cause remanded.

FISCHER, J., concurs.
CUNNINGHAM, J., concurs in part and dissents in part.

CUNNINGHAM, J., concurring in part and dissenting in part.

{¶10} I agree with the majority's holding on Brown's first assignment of error. But I dissent from the majority's holding that our disposition of that assignment of error rendered moot Brown's assignments of error relating to the trial court's finding of fraud or its award of damages to a party who lacked standing.

{¶11} Generally, appellate courts do not address issues that are moot. *See In re Brown*, 10th Dist. Franklin No. 03AP-1205, 2005-Ohio-2425, ¶ 15; *see also* App.R. 12(A)(1)(c). Matters are moot "when they are or have become fictitious, colorable, hypothetical, academic or dead." *State ex rel. Cincinnati Enquirer v. Hunter*, 141 Ohio St.3d 419, 2014-Ohio-5457, 24 N.E.3d 1170, ¶ 4, quoting *In re L.W.*, 168 Ohio App.3d 613, 2006-Ohio-644, 861 N.E.2d 546, ¶ 11 (10th Dist.), quoting *Grove City v. Clark*, 10th Dist. Franklin No. 01AP-1369, 2002-Ohio-4549, ¶ 11, quoting *Culver v. Warren*, 84 Ohio App. 373, 393, 52 Ohio Law Abs. 385, 83 N.E.2d 82 (11th Dist.1948). In my view, the issues of fraud and standing are independent of and are

not implicated by our holding regarding the existence of an operating agreement, and the resolution of those assignments of error would necessarily impact the disposition of the case.

{¶12} In his third assignment of error, Brown argues that the trial court erred when it found that he had committed fraud by using Conway's money for personal obligations, because the claim was neither properly pleaded nor tried by consent, and it was not proven at trial. In my view, our determination that an operating agreement existed has no legal bearing on whether Conway had properly pleaded, much less proved, that Brown had engaged in fraud. Indeed, the existence of fraud could serve as the basis for voiding an operating agreement. Thus, the error raised by Brown is neither academic nor hypothetical to our determination that an operating agreement existed.

{¶13} In his seventh assignment of error, Brown argues that the trial court erred by awarding damages to a party without standing. He contends that Conway had no standing to pursue his counterclaims because he had assigned his entire interest in Collins to the Conway Family Trust. Essentially, Brown is challenging the trial court's factual determination that no such trust existed.

{¶14} The issue of Conway's standing to assert his counterclaims has a significance separate and apart from the issue of the existence of the operating agreement. It is axiomatic that before the merits of a legal claim can be considered, the person or entity seeking relief must establish standing to sue. *See ProgressOhio.org, Inc. v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E.3d 1101, ¶ 7, citing *Ohio Pyro, Inc. v. Ohio Dept. of Commerce, Div. of State Fire Marshal*, 115 Ohio St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27. Standing does

not depend on the merits of the claims asserted. Thus, the determination of standing is independent of the underlying claims and the eventual disposition of those claims.

{¶15} Because our determination that an operating agreement existed was not dispositive of the fraud and standing issues, those assignments of error were not rendered moot and should be addressed in these appeals.

Please note:

The court has recorded its own entry on the date of the release of this opinion.