[Cite as *Franks v. Connectivity Systems, Inc.*, 2012-Ohio-1920.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Edward W. Franks,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-934 (C.P.C. No. 11CVH01-1252)
John A. Rankin,	:	(REGULAR CALENDAR)
Defendant-Appellee,	:	
(Connectivity Systems, Inc. et al.,	:	
Defendants-Appellants),	:	
Edward W. Franks,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-962 (C.P.C. No. 11CVH01-1252)
John A. Rankin,	:	(REGULAR CALENDAR)
Defendant-Appellant,	:	
(Connectivity Systems, Inc. et al.,	:	
Defendants-Appellees).	:	

D E C I S I O N

Rendered on May 1, 2012

Hrabcak & Company L.P.A., *Michael Hrabcak*, *Heidi A. Smith*; and *Dwight I. Hurd Co., LPA*, and *Dwight I. Hurd*, for appellee Edward W. Franks.

Allen Kuehnle Stovall & Neuman LLP, *Todd H. Neuman* and *Rick L. Ashton*, for appellant John A. Rankin.

Carlile, Patchen & Murphy LLP, Carl A. Aveni, II and *H. Ritchey Hollenbaugh*, for appellees Connectivity Systems, Inc. et al.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶ 1} Defendant-appellant, John A. Rankin, appeals a judgment of the Franklin County Court of Common Pleas that granted a preliminary injunction against Rankin and his fellow defendants, Connectivity Systems, Inc. ("CSI"); B.I. Moyle Associates, Inc.; CSI Acquisition, LLC; Tuscan Table, LLC; Rankin Enterprises, LLC; and A&C Networks, LLC ("A&C"). For the following reasons, we affirm in part and reverse in part.

{¶ 2} CSI, which is incorporated in Ohio, develops and sells software. Although CSI's main office is in Columbus, it also maintains offices in Circleville and Washington Court House. The company earns approximately $8.5 to $10 million a year in revenue.

{¶ 3} When Rankin and Marc Schare founded CSI in 1995, each was an equal shareholder in the corporation. In 2001, Rankin became the majority shareholder of CSI when he purchased all of Schare's shares. Upon assuming the status of majority shareholder, Rankin became the president of CSI and effectively took control of the company. Currently, Rankin owns approximately 73 percent of CSI's stock, plaintiff-appellee Edward W. Franks owns approximately 17 percent, and three other individuals each own shares that make up the remaining 10 percent.

{¶ 4} In 2003, Rankin formed Rankin Enterprises. Prior to January 1, 2011, Rankin was the sole member of Rankin Enterprises. From 2003 to 2008, Rankin Enterprises acquired four different hospitality businesses located in Circleville, Ohio: The Movie House, a two-screen movie theater; The Screening Room, a combined movie theater and bar; Tootles Pumpkin Inn ("Tootles"), a bar; and J.R. Hooks Cafe, a restaurant. In 2007, Rankin acquired a majority membership interest in Tuscan Table, which operates a restaurant in Circleville. (Hereinafter, we will refer to the businesses owned by Rankin Enterprises and Tuscan Table collectively as "the Circleville businesses.")

{¶ 5} Except for Tootles, the Circleville businesses operate at a loss. Tuscan Table alone loses approximately $20,000 to $40,000 per month. From 2007 to 2009, the Circleville businesses lost a combined total of $2,978,683.[1]

{¶ 6} Rankin covered the Circleville businesses' losses by transferring funds from CSI accounts to Rankin Enterprises and Tuscan Table accounts. CSI usually booked the transfers as compensation to Rankin that Rankin received in addition to his wages.[2] In 2010, CSI transferred $853,313 to the Circleville businesses. These transfers, combined with Rankin's 2010 wages, resulted in annual compensation that exceeded $1.2 million.

{¶ 7} Beginning in 2004, CSI also booked some of the transfers to Rankin Enterprises as research and development costs. In 2009, CSI paid Rankin Enterprises $655,516 so it could engage in research and development at Rankin Enterprises businesses. CSI claimed federal tax credits for the amounts spent on research and development.

{¶ 8} According to Rankin, his decision to conduct research and development at the Rankin Enterprises businesses arose from CSI's need to diversify. CSI's primary product is a TCP/IP stack, which is a suite of programs that allows IBM mainframe computers to connect to the internet. According to Rankin, roughly 60 to 70 percent of CSI's revenues come from the TCP/IP product. The revenues from the TCP/IP product peaked in 2005, and they are now declining at a rate of about 10 percent per year. Currently, IBM pays CSI approximately $600,000 per quarter for its use of the TCP/IP product.

{¶ 9} Rankin claims that CSI employees used what they learned from the Circleville businesses to develop a concept for a point-of-sale software system for the hospitality industry. Additionally, Rankin has invented, and now seeks to patent, a sous vide processor, which cooks vacuum-sealed food in a low-temperature water bath. Rankin intends to begin marketing the sous vide processor in May 2012.

{¶ 10} Although Franks acknowledges that a need to diversify CSI's product line exists, he contends that Rankin pushed CSI into the hospitality market so he could justify

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[1] This figure does not take into account any money CSI paid to the Circleville businesses.

[2] Rankin's wages included amounts transferred to Rankin and others on Rankin's behalf, as well as personal expenses CSI paid on behalf of Rankin (i.e., Rankin's mortgage and spousal support payments).

CSI's subsidization of the Circleville businesses. According to Franks, Rankin purchased the two movie theaters because he enjoyed the movie business. Rankin acquired majority ownership of the Tuscan Table to save a local business from failing.

{¶ 11} In early 2009, Rankin established A&C to provide administrative services for CSI, Rankin Enterprises, and Tuscan Table. Although Rankin Enterprises and Tuscan Table benefited from A&C's services, CSI paid A&C's expenses. In 2010, CSI transferred $1,172,772 to A&C. Prior to January 1, 2011, Rankin was the sole member of A&C.

{¶ 12} During the period that CSI was funneling hundreds of thousands of dollars each year to the Circleville businesses and A&C, CSI started experiencing problems paying its own bills. Beginning in 2007, CSI failed to pay its employees on multiple occasions, resulting in an accumulation of back-pay owed to its employees. CSI also did not make timely payments to its employees' 401(k) accounts and missed payments of the premiums for its employees' health insurance. Although CSI always ensured that its employees' health insurance was reinstated, coverage lapsed approximately six times in 2009 and once in 2010 due to nonpayment.

{¶ 13} Since 2008, CSI also has had difficulty meeting its obligations to its creditors. CSI has defaulted on its contractual obligation to pay for an office building purchased from the Greater Columbus Chamber of Commerce ("Chamber of Commerce"). Consequently, the Chamber of Commerce has filed a foreclosure action and seeks over $400,000 in damages.

{¶ 14} In September 2010, Rankin dissolved CSI's board of directors, which included Franks. Rankin then appointed new board members, each of whom worked for either CSI or A&C. Rankin also appointed himself to the board.

{¶ 15} In early 2011, Rankin assigned his ownership interests in Rankin Enterprises, Tuscan Table, and A&C to CSI subsidiaries.[3] The effective date of the assignments was January 1, 2011. At the time of the assignments, Rankin did not know the monetary worth of either Rankin Enterprises or Tuscan Table. According to Rankin, the value of the Circleville businesses lay not in their monetary worth, but in the real-world environment they offered for the development of software products.

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[3] Specifically, Rankin assigned Rankin Enterprises and Tuscan Table to Distributed Programming Systems, Inc. Rankin assigned A&C to CSI Acquisitions, LLC.

{¶ 16} Rankin did not seek approval from CSI's board of directors before executing the assignments. In August 2011, Rankin sought and received a retroactive approval and ratification of the assignments from CSI's board of directors. The board took this action without conducting a meeting. Rankin did not disclose anything about the financial condition of Rankin Enterprises or Tuscan Table to the board members before asking each to sign the document approving and ratifying the assignments.

{¶ 17} During the first eight months of 2011, CSI poured over $900,000 into the Circleville businesses to keep them afloat. CSI also transferred an additional $876,997 to A&C.

{¶ 18} On January 27, 2011, Franks initiated the instant suit against Rankin and the other defendants. In his complaint, Franks asserted multiple claims, including a direct claim against Rankin for breach of fiduciary duty.

{¶ 19} After filing the complaint, Franks sought a temporary restraining order and injunction that would require CSI to use the funds from an anticipated legal settlement to pay the compensation due and owing to CSI employees. Ultimately, the parties stipulated that CSI would remit approximately $1.5 million of the $1.8 million settlement to pay its outstanding payroll and commission obligations.

{¶ 20} On August 30, 2011, Franks filed a combined motion for injunctive relief and appointment of a receiver. In the motion, Franks asked the trial court to "freeze" an upcoming payment from IBM until a receiver could be installed. Franks contended that such action was necessary to prevent Rankin from using the IBM funds for himself or the Circleville businesses, and leaving little to no money for CSI to operate.

{¶ 21} In October 2011, the trial court held a three-day evidentiary hearing on Frank's motion. During the hearing, various witnesses testified to the above facts. Additionally, Rankin admitted during his testimony that CSI does not generate monthly, quarterly, or even annual financial statements. CSI's only financial records are its tax returns, which Rankin himself completes. Rankin also admitted that he had not yet finished or filed CSI's 2010 tax return.

{¶ 22} Rebecca Smith, a certified public accountant, testified as Frank's expert witness. Smith reviewed the banking records of CSI, Rankin Enterprises, Tuscan Table, and A&C, as well as CSI's tax returns and 2010 and 2011 general ledgers. According to

Smith, both of the general ledgers are incomplete. After comparing CSI's banking records to the general ledgers, Smith estimated that the 2010 general ledger is missing 15 percent of CSI's transactions. The 2011 general ledger fails to record approximately 50 percent of CSI's transactions. Given the unreliability of the general ledgers, Smith could not ascertain whether CSI is currently profitable.

{¶ 23} On October 28, 2011, the trial court issued an opinion finding that Franks demonstrated a substantial likelihood that he will prevail on his claim for breach of fiduciary duty against Rankin. The trial court based its finding on two alleged breaches of fiduciary duty by Rankin. First, Rankin failed to ensure that CSI kept correct and accurate books and records of account. The trial court stated that:

> [T]he absence of even the most basic financial materials is glaring. No financial data permits any logical assessment of CSI's business and economic activities for nearly two years, its actual or contingent liabilities, or the amounts, timing, and likelihood of prospective cash flow in the future. * * * [B]usiness acquisitions (like those challenged here involving Tuscan Table restaurant and related Rankin entities) were allowed to occur without any colorable examination of their financial implications.
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> * * *
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> [T]he financial recordkeeping is so rudimentary, as to be almost incomprehensible, depriving officers and directors access to any significant financial information, which would afford someone having a reasonable understanding of business and economic activities, an opportunity to learn the truth about CSI's activities through reasonable study and diligence.
>
> In respect to financial data and unfiled tax returns, Mr. Rankin is not rationally managing CSI's business. His mistakes in this regard are, at the least, reckless. He is in breach of his fiduciary duty. Mr. Rankin cannot manage CSI using only wholly self-serving, subjective opinions such as "the business is doing better than ever."

Opinion, at ¶ 8, 11-12.

{¶ 24} Second, the trial court found that Rankin engaged in self-dealing when he unilaterally caused CSI to assume ownership of multiple businesses that he owned

personally; and thereafter, both voted himself and solicited other directors to ratify that conduct retroactively. According to the trial court, the Circleville businesses appeared to be Rankin's hobby, and offered no true benefit to the future of CSI. The trial court also found Rankin's subsidization of the Circleville businesses, despite their enormous losses, counterintuitive. Summarizing its findings, the trial court stated:

> Prior to the time [Rankin assigned his interest to CSI's subsidiaries], no board member, much less the entire board, was given formal or informal background information on the businesses being acquired. Absent sensible financial records it would have been impossible to evaluate the proposed transfers. Mr. Rankin signed all three assignments for both parties. * * * In context, this was quintessentially self-dealing. Even after his transfer, Mr. Rankin kept no financial records during 2011 on the three entitles that could reliably show how much they drained cash from CSI, although the evidence shows that occurred. Pro forma projections or a business plan for the future were never prepared much less circulated to CSI's Board before or after these transfers.
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> * * *
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> Mr. Rankin acted in reckless disregard of his heightened fiduciary obligations to CSI and its shareholders. He acted not for the betterment of CSI but because he deemed it convenient to fulfill his own subjective, long-held plans using some of the myriad of entities he controlled.

Opinion, at ¶ 32, 34.

{¶ 25} After detailing Rankin's misconduct, the trial court addressed the appropriate remedy. The trial court first recognized that CSI was in a precarious financial condition, and it urgently needed sensible financial regulation. Although a receiver could correct both situations, Rankin had asserted that a receivership might trigger a provision in CSI's contract with IBM that would require CSI to disclose to IBM source codes for the TCP/IP product. The trial court, recognizing this danger, instead entered a preliminary injunction mandating the following:

> 1. The dissolution of CSI's existing board of directors and appointment of an interim board of directors. Each party could nominate two interim directors, as well as one or more joint nominees, to create a slate from which the trial court would choose interim board members. Rankin has no

> authority to dissolve the interim board. Preliminary Injunction Order, at section 6.
>
> 2. Rankin must remain president of CSI. Preliminary Injunction Order, at section 6.
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> 3. The assignments of Tuscan Table, Rankin Enterprises, and A&C to the CSI subsidiaries are null and void. All funds or property advanced by CSI during 2011 to Tuscan Table, Rankin Enterprises, and A&C are deemed improperly made. A constructive trust is imposed on all assets of Rankin, individually; Tuscan Table; Rankin Enterprises; A&C; and Distributed Programming Systems, Inc. to assure repayment to CSI. Preliminary Injunction Order, at section 8.
>
> 4. CSI cannot be burdened with any additional financial cost for assisting in Rankin's individual defense in this case (beyond $40,000 in payment for legal work already performed). Preliminary Injunction Order, at section 5, 11.
>
> 5. No bond is required before the preliminary injunction becomes effective. Preliminary Injunction Order, at section 9.

{¶ 26} Both Rankin and CSI (along with the other corporate defendants) appealed the preliminary injunction order. CSI never filed a brief. Accordingly, we dismiss the appeal brought by CSI, i.e., appeal no. 11AP-934. App.R. 18(C); Loc.R. 9(D) of the Tenth District Court of Appeals.

{¶ 27} Rankin, the only appellant to file a brief, assigns the following error:

> The Trial Court Prejudicially Erred By Entering The Preliminary Injunction Order As Well As Its Opinion.

Although Rankin asserts a single assignment of error, he raises a multitude of arguments. Initially, Rankin contends that the trial court erred in entering a preliminary injunction because Franks failed to demonstrate that: (1) he is likely to prevail on the merits of his claim for breach of fiduciary duty or (2) he would suffer an irreparable injury if the trial court had not issued the injunction.

{¶ 28} In deciding whether to enter a preliminary injunction, a court must consider: (1) whether there is substantial likelihood that the plaintiff will prevail on the merits, (2) whether the plaintiff will suffer irreparable injury if the injunction is not granted, (3) whether third parties will be unjustifiably harmed if the injunction is granted,

and (4) whether the public interest will be served by the injunction. *Hydrofarm, Inc. v. Orendorff*, 180 Ohio App.3d 339, 2008-Ohio-6819, ¶ 18 (10th Dist.). Whether a court grants an injunction depends largely on the character of the case and the particular facts involved. *Perkins v. Quaker City*, 165 Ohio St. 120, 125 (1956). In granting injunctive relief, a court must focus primarily on weighing and balancing the equities between the parties. *Franklin Cty. Dist. Bd. of Health v. Paxson*, 152 Ohio App.3d 193, 2003-Ohio-1331, ¶ 25 (10th Dist.).

{¶ 29} The grant or denial of an injunction is solely within the trial court's discretion. *Garono v. State*, 37 Ohio St.3d 171, 172 (1988). Consequently, "unless there is a plain abuse of discretion on the part of [the] trial court[ ]," a reviewing court will not disturb a judgment granting or denying an injunction. *Perkins* at 125. In other words, absent a showing that the judgment is unreasonable, arbitrary, or unconscionable, a reviewing court will not reverse. *Schaller v. Rogers*, 10th Dist. No. 08AP-591, 2008-Ohio-4464, ¶ 31.

{¶ 30} Here, Franks, a minority shareholder, has asserted a direct claim for breach of fiduciary duty against Rankin, the majority shareholder. Rankin now argues that such a claim cannot succeed because Franks has not shown that he suffered an injury separate and distinct from that suffered by other shareholders. Rankin contends that such a showing is necessary for Franks to pursue a direct action as opposed to a derivative action. We disagree.

{¶ 31} CSI is a close corporation. "Typically, a close corporation is a corporation with a few shareholders and whose corporate shares are not generally traded on a securities market." *Crosby v. Beam*, 47 Ohio St.3d 105 (1989), paragraph one of the syllabus. In close corporations, there is often an identity of management and ownership, rendering a close corporation peculiarly susceptible to misuse or abuse by the majority shareholders. *Kademian v. Marger*, 2d Dist. No. 24256, 2012-Ohio-962, ¶ 58; *Biggins v. Garvey*, 90 Ohio App.3d 584, 599-660 (11th Dist.1993). Thus, majority shareholders of close corporations owe the minority shareholders a heightened fiduciary duty of good faith and loyalty. *Crosby* at 108.

{¶ 32} A derivative action is an action brought by a shareholder in the name of the corporation to enforce a corporate claim. *Id.* at 107. As a general matter, a complaining

shareholder is limited to asserting a derivative action unless the shareholder is injured in a way that is separate and distinct from an injury to the corporation. *Id.*; *Weston v. Weston Paper & Mfg. Co.*, 74 Ohio St.3d 377, 379 (1996). However, "[c]laims of breach of fiduciary duty alleged by minority shareholders against shareholders who control a majority of shares in a close corporation, and use their control to deprive minority shareholders of the benefits of their investment, may be brought as individual or direct actions," rather than as derivative actions. *Crosby* at paragraph three of the syllabus. This exception to the general rule exists because recovery in a derivative action accrues to the corporation, and thus, remains under the control of the very parties who are defendants in the action. *Id.* at 109. By allowing a minority shareholder to pursue a direct action, the law ensures that a majority shareholder who has breached his fiduciary duty will not benefit from his own wrongdoing. *Id.*

{¶ 33} In the case at bar, Franks asserted a breach of fiduciary duty claim against the majority shareholder in a close corporation who allegedly used his control to the disadvantage of the minority shareholders. Consequently, he need not establish individualized injury to bring a direct action. *See Perry v. Perry Farms, Inc.*, 638 F.Supp.2d 840, 843-44 (N.D.Ohio 2009) (holding that a minority shareholder in a close corporation could directly sue the majority shareholder where the majority shareholder allegedly breached his fiduciary duty through unlawful diversion and transfer of assets to other companies that the majority shareholder controlled).

{¶ 34} Rankin next argues that Franks cannot succeed on his claim for breach of fiduciary duty because the failure to keep accurate and complete books and records of account, as well as failure to timely file tax returns, do not constitute breaches of fiduciary duty owed to a minority shareholder. Even if we found this argument meritorious, it would not qualify as a basis to reverse the trial court's judgment. As we explained above, the trial court determined that Franks has a substantial likelihood of success on his claim for breach of fiduciary duty for *two* reasons. The trial court found that the evidence strongly indicated, first, that Rankin failed to maintain accurate and complete books and records of account, and second, that Rankin engaged in self-dealing. Rankin is not challenging the inclusion of self-dealing in the ambit of conduct that violates a majority shareholder's fiduciary duty. Indeed, he cannot take such a position because " '[a]

majority shareholder has a fiduciary duty not to misuse his power by promoting his personal interests at the expense of corporate interests.' " *Crosby* at 108-09, quoting *United States v. Byrum*, 408 U.S. 125, 137 (1972). *See also Mulchin v. ZZZ Anesthesia, Inc.*, 6th Dist. No. E-05-045, 2006-Ohio-5773, ¶ 27 ("Majority shareholders owe minority shareholders a fiduciary duty, whereby the majority shareholders owe minority shareholders good faith, loyalty, disclosure, and an obligation to refrain from self-dealing."); *Carrier v. Weisheimer Cos., Inc.*, 10th Dist. No. 95AP-488 (Feb. 22, 1996) ("Under their fiduciary duty, [the majority shareholders] owed [the minority shareholders] good faith, loyalty, refraining from self-dealing, and disclosure."); *McLaughlin v. Beeghly*, 84 Ohio App.3d 502, 507-08 (10th Dist.1992) (holding that the controlling shareholder breached his fiduciary duty by using corporate funds to support his other enterprises to the detriment of the corporation). Rankin also fails to challenge the factual predicate underlying the trial court's conclusion that Rankin engaged in self-dealing. Consequently, a finding in favor of Rankin on his argument could not negate one of the reasons for the trial court's holding that Franks' claim for breach of fiduciary duty is likely to succeed. We thus conclude that the trial court did not abuse its discretion in finding that Franks satisfied that element for injunctive relief.

{¶ 35} By Rankin's third argument, he maintains that Franks did not prove that he would suffer irreparable harm if the trial court did not grant an injunction. We disagree.

{¶ 36} A plaintiff must show actual irreparable harm or the threat of such harm when seeking an injunction. *e ² Solutions v. Hoelzer*, 6th Dist. No. L-08-1295, 2009-Ohio-772, ¶ 32; *Convergys Corp. v. Tackman*, 169 Ohio App.3d 665, 2006-Ohio-6616, ¶ 9 (1st Dist.). Irreparable harm is "an injury for which there is no plain, adequate, and complete remedy at law, and for which money damages would be impossible, difficult, or incomplete." *1st Natl. Bank v. Mountain Agency, LLC*, 12th Dist. No. CA2008-05-056, 2009-Ohio-2202, ¶ 47. A risk of loss or damage to a business entity qualifies as irreparable harm. *Oyster Technologies, Ltd. v. Environmental Developers Group, LLC*, D.Mass. No. 1:11-cv-11795-JLT (Dec. 13, 2011); *see also S&S Sales Corp. v. Marvin Lumber & Cedar Co.*, 435 F.Supp.2d 879, 883 (E.D.Wis.2006) (holding that a plaintiff will suffer irreparable harm "if the defendant becomes insolvent or loses its business"); *Serio v. Black, Davis & Shue Agency, Inc.*, S.D.N.Y. No. 05 Civ. 15(MHD) (Dec. 30, 2005)

("A serious threat of insolvency by a defendant can constitute such a 'substantial chance' of irreparable harm.").

{¶ 37} Here, the trial court found that CSI was in a precarious financial situation. The evidence supports this finding—CSI was delinquent in paying its employees (despite the $1.5 million payment made in March 2011 to bring payroll current) and CSI had defaulted on its obligation to pay for its office building and owed over $400,00 to the Chamber of Commerce. Meanwhile, Rankin had sunk almost $1 million of CSI's funds into the Circleville businesses just in the first eight months of 2011.

{¶ 38} Given CSI's bleak financial circumstances, the trial court concluded that a preliminary injunction was necessary "to keep a bad situation from becoming fatal to the business." Opinion, at ¶ 2. The trial court worried that "the corporation won't be around if we don't grant some type of relief here." (Oct. 26, 2011 Tr. 126.) In explaining the preliminary injunction to the parties, the trial court indicated that an interim board of directors would hopefully "capture the business before it crashes and burns any further." (Oct. 28, 2011 Tr. 4.) More recently, in a journal entry addressing pending motions, the trial court explicitly stated that it "granted a preliminary injunction in an attempt to preserve CSI's continued solvency, if not its existence, pending trial." Mar. 20, 2012 journal entry, at 2. We conclude that the serious risk that CSI would become insolvent under Rankin's continued management constituted an actual threat of irreparable harm. Accordingly, we find that the trial court did not abuse its discretion in determining that Franks satisfied that element for injunctive relief.

{¶ 39} Rankin next argues that the trial court entered the preliminary injunction without first giving notice to him that it was considering granting such relief, thus violating his right to procedural due process. We find this argument unavailing.

{¶ 40} "Both the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution guarantee due process of law, and thus guarantee 'a reasonable opportunity to be heard after a reasonable notice of such hearing.' " *Ohio Valley Radiology Assocs., Inc. v. Ohio Valley Hosp. Assn.*, 28 Ohio St.3d 118, 125 (1986), quoting *State ex rel. Allstate Ins. Co. v. Bowen*, 130 Ohio St. 347 (1936), paragraph five of the syllabus. Due process of law, in its most comprehensive sense, includes the right "to be present before the tribunal which pronounces judgment upon a

question of life, liberty or property, to be heard, by testimony or otherwise, and to have the right of controverting, by proof, every material fact which bears on the question of right in the matter involved." *Williams v. Dollison*, 62 Ohio St.2d 297, 299 (1980).

{¶ 41} Rankin's argument focuses on the limited scope of the injunctive relief that Franks requested in his August 30, 2011 motion. With regard to injunctive relief, Franks only asked the trial court to "freeze" an expected payment from IBM to CSI so Rankin could not transfer the monies to himself and the Circleville businesses. Rankin asserts that he could not expect, given this specific request, that the trial court would issue such a broad preliminary injunction. Therefore, Rankin argues, he never had the opportunity to present evidence to convince the trial court that such injunctive relief was unnecessary.

{¶ 42} This argument ignores Franks' concomitant request that the trial court appoint a receiver. Franks sought a receiver under: (1) R.C. 2735.01(E), which allows a court to appoint a receiver "[w]hen a corporation * * * is insolvent, or in imminent danger of insolvency," and (2) R.C. 2735.01(F), which allows a court to appoint a receiver "[i]n all other cases in which receivers have been appointed by the usages of equity." To support his request under R.C. 2735.01(F), Franks pointed out that Ohio courts have appointed equitable receivers "upon a demonstration of gross mismanagement or mismanagement of the assets of a corporation to the detriment of the shareholders, as well as to preserve the assets of a corporation pending litigation." *Granada Invests., Inc. v. DWG Corp.*, 823 F.Supp. 448, 460 (N.D.Ohio 1993). *See also State ex rel. Petro v. Gold*, 166 Ohio App.3d 371, 2006-Ohio-943, ¶ 67-68 (10th Dist.) (affirming the appointment of a receiver based on fiscal mismanagement).

{¶ 43} Rankin asserts that the trial court denied Franks' request for the appointment of a receiver prior to the evidentiary hearing. Although Rankin is correct, the appropriateness of a receivership was an issue tried during the hearing. Moreover, from the beginning of the hearing, all parties understood that that issue was before the trial court. In opening his statement, CSI's counsel stated, "[w]hat's in front of this court today, as we discussed yesterday, Your Honor, is the emergency proceedings of a preliminary injunction hearing and the extraordinary relief of a receiver." (Oct. 21, 2011 Tr. 8.) Rankin's counsel concurred, stating, "[m]y understanding, Your Honor, is based

on your prior comments what this hearing is about there's two main things we're supposed to deal with today. The first is the receivership request." (Oct. 21, 2011 Tr. 10.)

{¶ 44} The trial court chose not to appoint a receiver because Rankin argued that such action would jeopardize the secrecy of the source codes for CSI's TC/PIP product. To preserve that secrecy, the trial court instead entered a preliminary injunction that, in effect, operated much like a receiver would have acted. Although the trial court did not appoint a receiver, the trial court's judgment resulted from consideration of the issues that the request for a receiver raised. Rankin, thus, had notice of the issues in play and opportunity to present evidence on those issues at the hearing. Accordingly, we find no violation of Rankin's right to procedural due process.

{¶ 45} Before moving on to Rankin's next argument, we note that Rankin also claims that the trial court violated the due process rights of CSI and the individual directors who were removed. Generally, a litigant may assert only his own rights, not the rights of third parties. *Util. Serv. Partners, Inc. v. Pub. Util. Comm. of Ohio*, 124 Ohio St.3d 284, 2009-Ohio-6764, ¶ 49. Rankin does not argue that the instant situation constitutes an exception to this general rule. Accordingly, we conclude that Rankin has no standing to seek reversal based on an alleged violation of the constitutional rights of CSI or the former directors.

{¶ 46} By his fifth argument, Rankin asserts that the trial court abused its discretion in entering injunctive relief that altered, rather than maintained, the status quo. The primary purpose of preliminary injunctive relief is to preserve the status quo pending final determination of the matter. *Thomson v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 09AP-782, 2010-Ohio-416, ¶ 24; *Davis v. Widman*, 184 Ohio App.3d 705, 2009-Ohio-5430, ¶ 29 (3d Dist.). Here, the preliminary injunction preserves the status quo by keeping CSI in existence and solvent. We conclude that the trial court did not abuse its discretion in taking affirmative steps to ensure that status quo.

{¶ 47} Rankin also claims that the trial court violated his right to trial by jury when it found that he violated his fiduciary duty, instead of merely determining that Franks had a substantial likelihood of success on his claim for breach of fiduciary duty. Although the trial court stated its findings in stronger language than necessary, the trial court did not

foreclose Rankin's opportunity for a jury trial. This case is currently set for a jury trial on July 23, 2012. Therefore, we find no merit in Rankin's argument.

{¶ 48} Next, Rankin argues that the trial court abused its discretion in allowing either Rankin's attorney or CSI's attorney, but not both, to cross-examine Franks' witnesses. We disagree.

{¶ 49} A trial court "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth [and] (2) avoid needless consumption of time." Evid.R. 611(A)(1) and (2). *See also State v. Treesh*, 90 Ohio St.3d 460, 480 (2001) (holding that a trial court may impose reasonable limits on cross-examination to avoid repetitive testimony); *In re Kister*, 194 Ohio App.3d 270, 2011-Ohio-2678, ¶ 48 (4th Dist.) (recognizing that a trial court may limit cross-examination to prevent repetitive testimony and shorten the length of the examination). The limitation of cross-examination lies within the sound discretion of the trial court, viewed in relation to the particular facts of each case. *Treesh* at 480. An appellate court will not disturb such an exercise of discretion absent a clear showing of an abuse of discretion. *Id.*

{¶ 50} Here, the trial court determined that, at the time of the evidentiary hearing, Rankin's and CSI's interests were aligned. To avoid needless repetitive testimony and shorten the length of the hearing, the trial court ordered that only Rankin's *or* CSI's counsel could cross-examine Franks' witnesses.[4] On appeal, Rankin does not explain how his interests diverged from CSI's, nor does he specify what lines of inquiry the trial court's ruling prevented him from pursuing. Thus, we conclude that Rankin establishes neither an abuse of discretion nor prejudice resulting from the restriction on the mode of cross-examination.

{¶ 51} Having exhausted Rankin's arguments that the trial court erred in granting any injunctive relief, we now turn to Rankin's attacks on specific provisions of the preliminary injunction order. First, Rankin contends that the trial court exceeded its authority in removing CSI's board of directors.

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[4] The trial court made its ruling after Rankin, the first witness that Franks called to the stand, fully testified. Thus, both attorneys "cross-examined" Rankin.

{¶ 52} Ohio courts have not addressed whether courts possess the inherent power to remove corporate directors. However, outside of Ohio, "[m]odern court decisions are fairly consistent in holding that, absent statutory authorization, there is no judicial power to remove legally elected directors, even on a showing of directors' dishonesty or inability to perform their duties." 2 Cox & Hazen, *Treatise on the Law of Corporations,* Section 9.16 (3d Ed.2011). *See also Easter v. Berglund*, Nev. No. 52159 (Apr. 9, 2010) ("[A]bsent express legislative authority * * *, the district court lacks the authority to simply remove directors from non-profit corporations."); *Webber v. Webber Oil Co.*, 495 A.2d 1215, 1221 (Me.1985) (recognizing that it is "well settled that equity has no jurisdiction to remove directors on grounds of mismanagement or neglect"); *Shocking Technologies, Inc. v. Michael*, Del.Ch. C.A. No. 7164-VCN (Apr. 10, 2012), fn. 5 ("There is, of course, significant authority for the proposition that the Court does not have the power, other than as granted by statute, to remove a duly selected director who has breached the duty of loyalty."); *Ross Sys. Corp. v. Ross*, Del.Ch. C.A. No. 10378 (Feb. 22, 1993) (holding that the trial court lacked the power to remove a member of a board of directors); 2 Fletcher, *Cyclopedia of the Law of Corporations*, Section 358.

{¶ 53} In rejecting the contention that courts have the power to remove members of a board of directors, the District Court of Delaware held:

> Directors are elected by the stockholders and must be removed by the source or power that elected them. To hold otherwise would permit a court, on petition of a minority shareholder, to substitute its discretion for that of the majority of the stockholders.

Feldman v. Pennroad Corp., 60 F.Supp. 716, 719 (D.Del.1945), *aff'd*, 155 F.2d 773 (3d Cir.1946). *See also In re Application of Burkin*, 1 N.Y.2d 570, 573 (1956) ("[T]he court lacks power at the instance of a stockholder to compel the stockholders to do what they would have had power to do, but have not done, in the exercise of this traditional common-law right to remove a director by 'amotion.' Only the stockholders could do that; the court cannot do it for them."). Courts make an exception to this rule only in instances where fraud is demonstrated. *Feldman* at 719; *Easter*; *Nahikian v. Mattingly*, 265 Mich. 128, 135 (1933); *Harkey v. Mobley*, 552 S.W.2d 79, 81 (Mo.App.1977); 2 Fletcher, Section 358.

{¶ 54} Unlike the majority of other states, Ohio has not adopted a statute permitting courts to remove directors elected by the shareholders. Thus, the trial court was relying solely on its inherent authority to justify its dismissal of CSI's board of directors. Given the precedent developed in other courts, we conclude that Ohio courts do not have the authority to remove corporate directors unless evidence establishes that the directors engaged in fraud. Here, the trial court made no finding that Rankin or the other board members engaged in fraud. Accordingly, we find that the trial court erred in removing CSI's board of directors.

{¶ 55} Rankin next argues that the record does not contain sufficient evidence to support the institution of a constructive trust over the assets of the Circleville businesses, A&C, or Rankin, individually. We agree with regard to the Circleville businesses and Rankin, but not as to A&C.

{¶ 56} A constructive trust arises by operation of law against one who " 'by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy.' " *Estate of Cowling v. Estate of Cowling*, 109 Ohio St.3d 276, 2006-Ohio-2418, ¶ 18, quoting *Ferguson v. Owens*, 9 Ohio St.3d 223, 225 (1984). In other words, when a person acquires legal title to property that he may not in good conscience retain, equity converts him into the trustee of the property for the true owner. *Id.*

{¶ 57} Rankin initially argues that the trial court erred in imposing a constructive trust because the evidence does not demonstrate unjust enrichment. We find this argument unavailing. Although a constructive trust is usually a remedy against unjust enrichment, a court may impose it in any situation in which it is against the principles of equity for the titleholder to retain property. *Id.* at ¶ 19. A constructive trust "may arise because [property] was acquired through fraud, duress, undue influence, or mistake, through a breach of fiduciary duty, or through the wrongful disposition of another's property." *Brate v. Hurt*, 174 Ohio App.3d 101, 2007-Ohio-6571, ¶ 26 (12th Dist.).

{¶ 58} Second, Rankin argues that the trial court could only impose a constructive trust over money improperly obtained from Franks, not CSI. Rankin cites no legal

authority for this position, and we decline to constrict the trial court's equitable authority based on an unsupported argument.

{¶ 59} Third, Rankin contends a constructive trust is inappropriate here because Franks failed to sufficiently trace the assets covered by the constructive trust. Before a court may impose a constructive trust, the particular property at issue must be traced from the time of the wrongful deprivation to the possession of the entity over whom the constructive trust should be placed. *Estate of Cowling* at ¶ 22. " 'Tracing is a process where the claimant basically must be able to point to the identifiable property or fund and say, "This is mine." If the funds or property are untraceable—meaning the claimant cannot determine where they were deposited or what the debtor has done with them—the equitable remedy is not available.' " *Id.* at ¶ 21, quoting Hohimer, *Constructive Trusts in Bankruptcy: Is an Equitable Interest in Property More Than Just a "Claim"?*, 19 Bankr.Dev.J. 499, 510-11 (2003). " 'Because identification is crucial to permit recovery of the wrongfully held property, tracing is fundamental to a constructive trust.' " *Weyand v. Barnes*, 191 Ohio App.3d 134, 2010-Ohio-4735, ¶ 10, quoting *Dixon v. Smith*, 119 Ohio App.3d 308, 320 (3d Dist.1997).

{¶ 60} Here, with regard to the Circleville businesses, the evidence demonstrates that Rankin wrongfully transferred funds from CSI banking accounts to the Circleville businesses' banking accounts. Barry Boyer, the manager of operations at Tuscan Table and J.R. Hooks Cafe, testified that when he did not have sufficient funds to pay expenses, he would contact Rankin, and Rankin would transfer funds into the restaurants' operating account. Operating accounts, by their nature, contain revenue from a business's operation and are used to pay a business's expenses. Thus, by transferring funds into the Circleville businesses' operating accounts, Rankin commingled CSI funds with funds legitimately earned by the businesses.

{¶ 61} In instances where trust funds are commingled with the "trustee's" own funds in a single account, a claimant does not need to trace the identical coins or dollars that constitute trust property. *Staley v. Kreinbihl*, 152 Ohio St. 315, 321-24 (1949). " 'The fact that the money wa[s] not marked, and, by a mingling with other funds of the [trustee], lost its identity, does not affect the right to recovery in full, if it can be traced to the vaults of the [trustee], and it appears that a sum equivalent to it remained

continuously therein until removed.' " *Id.* at 324, quoting *Massey v. Fisher*, 62 F. 958 (C.C.E.D.Pa 1894). Thus, if at all times after deposit of trust funds, the amount in the account at issue equals or exceeds the amount of the trust funds, the trust funds must be returned in their full amount. *In re MJK Clearing, Inc.*, 371 F.3d 397, 402 (8th Cir.2004); *In re Dameron*, 155 F.3d 718, 724 (4th Cir.1998); *First Fed. of Michigan v. Barrow*, 878 F.2d 912, 916 (6th Cir.1989); *Connecticut Gen. Life Ins. Co. v. Universal Ins. Co.*, 838 F.2d 612, 619 (1st Cir.1988).

{¶ 62} However, the tracing rules become more complicated if the trustee withdraws money from the commingled account and subsequently makes additions to that account. In such situations, the law presumes that the trustee expends its own funds first, leaving as much of the trust fund as possible in the account. *Barrs v. Barrs Rent-a-Car Co.*, 71 Ohio App. 465, 466-67 (1st Dist.1943); *In re MJK Clearing* at 402; *In re Dameron* at 724; *Connecticut Gen. Life Ins.* at 619; Restatement of the Law 3d, Restitution and Unjust Enrichment, Section 59(2)(a) and Comment d (2011). If the trustee withdraws all of its own funds from the account, then any further withdrawals deplete the amount of trust funds held in the account. Therefore, to the extent the account is depleted below the amount of trust funds deposited, the trust funds are lost. *Barrs* at 467; *In re MJK Clearing* at 402; *In re Dameron* at 724; *Barrow* at 916; *Connecticut Gen. Life Ins.* at 619; Restatement, Section 59(2)(c). A trustee's subsequent contributions of its own money to the account do not restore the trust funds. *Schuyler v. Littlefield*, 232 U.S. 707, 710 (1914); *In re Dameron* at 724; *Barrow* at 916; *Connecticut Gen. Life Ins.* at 619; Restatement, Section 59(2)(b) and Comment d (recognizing an exception to this rule if the trustee intends the contributions to restore trust funds).

{¶ 63} In the case at bar, no one disputes that Rankin used CSI funds to cover the Circleville businesses' losses and that, without regular infusions of CSI money, the businesses would have failed. The Circleville businesses, thus, did not retain CSI's money, but immediately spent it to pay their expenses. Banking records from the restaurants' operating account show that the restaurants' account was routinely overdrawn, demonstrating the speed with which the restaurants depleted *all* funds that they received. Because CSI's funds moved through the operating accounts of the Circleville businesses so quickly, Franks could not point to any money in those accounts and say "that money

belongs to CSI." Consequently, the constructive trust over the Circleville businesses' assets had no property on which to attach, and thus, it must fail. *See Weyand* at ¶ 17-18 (holding that the trial court could not impose a constructive trust on an individual's unspecified assets where the wrongfully appropriated money was traced beyond that individual).

{¶ 64} Unlike the Circleville businesses, A&C, which provided administrative services to the Rankin-controlled businesses, earned no revenue from outside patrons. Consequently, to the extent that A&C had funds in its banking accounts on the date the trial court imposed the constructive trust, A&C received those funds only from CSI. Moreover, CSI paid A&C's expenses, so any assets that A&C possessed ultimately came from CSI. Accordingly, we find the constructive trust imposed on A&C assets appropriate.

{¶ 65} We next turn to the validity of the constructive trust over Rankin's individual assets. As we stated above, a constructive trust allows a claimant to recover property wrongfully held by another. To support the institution of a constructive trust on assets of the Circleville businesses and A&C, the trial court found that all the 2011 transfers from CSI to those companies were improperly made. Preliminary Injunction Order, at section 8. The trial court made no such finding as to the transfers CSI made directly to Rankin or transfers CSI made on Rankin's behalf for personal reasons. Absent a finding that Rankin wrongfully received particular property or funds from CSI, the trial court had no basis on which to impose a constructive trust. *See State ex rel. Marietta v. Groves*, 4th Dist. No. 84 X 7 (Aug. 9, 1985) ("A cardinal feature of the constructive trust is that it is not a right to recover as on a debt owing, but the right to recover property wrongfully held."). Accordingly, we conclude that the trial court erred in the institution of a constructive trust over Rankin's individual assets.

{¶ 66} The final provision of the preliminary injunction that Rankin challenges is the provision that requires Rankin to remain as president of CSI. Rankin argues that this provision violates the Thirteenth Amendment of the United States Constitution, as well as 42 U.S.C. 1994.

{¶ 67} Pursuant to 42 U.S.C. 1994, known as the Anti-Peonage Act:

> The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws,

> resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void.

Peonage is the "status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness." *Clyatt v. United States*, 197 U.S. 207, 215 (1905). The Anti-Peonage Act, therefore, prohibits forced labor because of debt. *Pollock v. Williams*, 322 U.S. 4, 8 (1944).

{¶ 68} Here, the preliminary injunction order compels Rankin to continue performance of his duties as CSI president. However, Rankin is not peon—he owes no debt to CSI that the preliminary injunction order forces him to satisfy through his labor. Consequently, 42 U.S.C. 1994 does not apply to this case.

{¶ 69} According to Section One of the Thirteenth Amendment, "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." As used in the Thirteenth Amendment, the phrase "involuntary servitude" was intended "to cover those forms of compulsory labor akin to African slavery which, in practical operation, would tend to produce like undesirable results." *Butler v. Perry*, 240 U.S. 328, 332 (1916). Involuntary servitude exists if a person is forced to work "by the use or threatened use of physical or legal coercion." *United States v. Kozminski*, 487 U.S. 931, 944 (1988).

{¶ 70} In the case at bar, Rankin must continue as CSI president or face legal sanction for contempt of court. This threatened legal sanction renders unconstitutional the provision of the preliminary injunction order that requires Rankin to remain as president of CSI. Accordingly, we find that the trial court erred in incorporating such a provision into the preliminary injunction order.

{¶ 71} In the final section of his brief, Rankin explains how the preliminary injunction order prejudices him. In order for an appellate court to reverse a judgment of a trial court, the appellant must demonstrate error *and* prejudice as a result of the error. *Smith v. Flesher*, 12 Ohio St.2d 107, 110 (1967). Prejudice alone does not justify reversal.

Accordingly, we will only address the one argument in the final section that correlates prejudice with an alleged error not already addressed in this decision.

{¶ 72} In that argument, Rankin challenges the restriction on the amount of funds CSI can advance to pay Rankin's legal expenses in relation to this lawsuit. Rankin contends that this restriction violates Section 5.05 of the CSI Regulations.

{¶ 73} Appellate review is limited to the record as it existed at the time the trial court rendered its judgment. *Wiltz v. Clark Schaefer Hackett & Co.*, 10th Dist. No. 11AP-64, 2011-Ohio-5616, ¶ 13; *Wallace v. Mantych Metalworking*, 189 Ohio App.3d 25, 2010-Ohio-3765, ¶ 10 (2d Dist.). "A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." *State v. Ishmail*, 54 Ohio St.2d 402 (1978), paragraph one of the syllabus.

{¶ 74} At the time the trial court granted the preliminary injunction, the CSI regulations were not part of the record. Therefore, we cannot consider whether the preliminary injunction order contravenes any provision of the CSI regulations.

{¶ 75} As a final matter, we must convey our regret that we must reverse some of the core provisions of the preliminary injunction order. The trial court obviously invested significant time and thought in crafting an innovative interim solution after Franks demonstrated a substantial likelihood that Rankin breached his fiduciary duties. In light of our decision, the trial court may wish to revisit the issue of a receivership for CSI.

{¶ 76} For the foregoing reasons, we dismiss CSI's appeal, i.e., appeal No. 11AP-934. With regard to Rankin's appeal, we overrule in part and sustain in part the sole assignment of error. We reverse the portions of the preliminary injunction order that: (1) dissolved CSI's board of directors and appointed an interim board; (2) imposed a constructive trust on all assets of Rankin, individually; Tuscan Table, LLC; and Rankin Enterprises, LLC; and (3) required Rankin to remain president of CSI. In all other respects, we affirm the preliminary injunction order.

Case No. 11AP-934 dismissed;
Case No. 11AP-962 judgment affirmed in part; reversed in part;
and cause remanded with instructions.

SADLER and TYACK, JJ., concur.