[Cite as *Ahmed v. Wise*, 2013-Ohio-2211.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Yasmeen E. Ahmed et al.,	:	
Plaintiffs-Appellants,	:	
		No. 12AP-613
v.	:	(C.P.C. No. 09CVH-06-8337)
Henry A. Wise, M.D., et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on May 30, 2013

Law Offices of William M. Todd, Ltd., and *William M. Todd*, for appellants.

Jones Day, *J. Kevin Cogan*, *John M. Newman, Jr.*, *Matthew C. Corcoran*, *Adrienne Ferraro Mueller*, and *Heather R. Barber*, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Plaintiffs-appellants appeal from a judgment of the Franklin Count Court of Common Pleas granting a directed verdict in favor of defendants-appellees. For the following reasons, we affirm the judgment of the trial court.

I. FACTS AND PROCEDURAL BACKGROUND

{¶ 2} As a result of the merger of several entities, American Kidney Stone Management, Ltd. ("AKSM"), was formed in 1996. AKSM's principal business is providing urology-related facilities, equipment, and services. According to the complaint, AKSM operates facilities engaged in the use of Extracorporeal Shock Wave Lithotripsy to

treat genitourinary stones. AKSM also provides equipment for certain urinary conditions and prostate and kidney cancer care to patients across the United States.

{¶ 3} Ownership interests in AKSM are accounted for in "units," and appellants consist of 35 individuals, entities, and institutions that held such units and were members of AKSM. The essence of appellants' amended complaint filed against the managing members of AKSM on June 3, 2009, is that appellants have been forced out of and forced to sell their shares of AKSM because they are either not actively practicing urology or are not referring their patients to AKSM. According to appellants' amended complaint, this is so despite there being no "active practice" or "referral" conditions attached to their initial purchases of AKSM units.

{¶ 4} The pertinent events leading up to this litigation are as follows. In early 2007, AKSM engaged in a restructuring plan in which AKSM offered members a voluntary redemption of units for $70 per unit. Also, in 2007, members of AKSM that were actively practicing urologists were offered the opportunity to purchase units at $51 per unit. In 2008, AKSM's board recommended that the operating agreement governing AKSM be amended to include an active practice of medicine clause, which would require unitholders in AKSM to be practicing urologists. Additionally, the proposed 2008 amendment provided that members not actively practicing on the effective date of the amendment would have three years to redeem their shares. The 2008 amendment provided a mechanism to determine the fair market value of each unit for redemption. The proposed amendments were adopted effective September 30, 2008. For purposes of redemption of appellants' units, the managing members of AKSM obtained valuations from three independent valuation companies that provided respective valuations of $47, $53, and $61 per unit. From these valuations, the redemption price for appellants' units was determined to be $54 per unit.

{¶ 5} Appellants filed an amended ten-count complaint asserting causes of action for breach of fiduciary duty, fraudulent or negligent misrepresentation, breach of contract, and declaratory judgment. After the filing of appellants' 2009 amended complaint, this matter was consolidated with two other cases arising out of the events of 2007 and 2008 occurring at AKSM.

{¶ 6} Trial was scheduled for May 30, 2012. Shortly before trial, the parties in the two other cases settled their claims and dismissal entries were filed on May 14 and 23, 2012. On May 24, 2012, counsel for appellants moved for a continuance and asserted three reasons in support of the request. The first reason was that counsel for appellants had been working collaboratively with counsel in the other two cases and, because of their settlement, sharing of resources and responsibilities was no longer possible. Secondly, counsel asserted he had only recently retained co-counsel to assist him in the underlying matter, and third, counsel asserted he was currently in a jury trial that began on May 21, 2012. For these reasons, counsel requested that the court continue trial to a date "convenient to [the] Court." (Motion, 4.)

{¶ 7} Though no written decision appears in the record, the trial court denied appellants' request for a continuance and trial commenced on May 30, 2012. Testimony from ten witnesses was presented, and, at the close of appellants' case-in-chief, appellees moved for a directed verdict pursuant to Civ.R. 50. The trial court granted appellees' motion and entered final judgment in favor of appellees on all of appellants' claims.

II. ASSIGNMENTS OF ERROR

{¶ 8} This appeal followed, and appellants assert the following two assignments of error for our review:

> I. The common pleas court plainly erred in arbitrarily exercising its "case management" authority in a manner that precluded Appellants from having an adequate amount of time to fully, and effectively, present their case-in-chief in this complicated business litigation, in violation of the "Open Court" and "Due Course of Law" provisions of Article I, Section 16 of the Ohio Constitution.
>
> II. The common pleas court erred in granting Appellees' motion for a directed verdict at the close of Appellants' case-in-chief, by improperly weighing the evidence and failing to follow the clear legal standard applicable to Appellees' motion under Rule 50 of the Ohio Rules of Civil Procedure.

III. DISCUSSION

A. Standard for Directed Verdict and Standard of Review

{¶ 9} "A motion for directed verdict tests whether the evidence is sufficient to warrant a jury's consideration, so in deciding whether to grant a directed verdict, a trial court considers neither the weight of the evidence nor the credibility of the witnesses." *Jarupan v. Hanna*, 173 Ohio App.3d 284, 2007-Ohio-5081, ¶ 8 (10th Dist.), citing *Estate of Cowling v. Estate of Cowling*, 109 Ohio St.3d 276, 2006-Ohio-2418, ¶ 31; *Wagner v. Roche Laboratories*, 77 Ohio St.3d 116, 119 (1996).

{¶ 10} "According to Civ.R. 50(A)(4), a motion for directed verdict should be granted when, after construing the evidence most strongly in favor of the party against whom the motion is directed, 'reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party.' " *Groob v. Keybank*, 108 Ohio St.3d 348, 2006-Ohio-1189, ¶ 14, reconsideration denied, 109 Ohio St.3d 1483, 2006-Ohio-2466. " 'In deciding [a motion for a directed verdict], the court must assume that the evidence presented by the non-movant is true and must give the non-movant the benefit of all reasonable inferences to be drawn from that evidence.' " *Koss v. Kroger*, 10th Dist. No. 07AP-450, 2008-Ohio-2696, ¶ 15, quoting *Halk v. Cedarville College*, 2d Dist. No. 97-CA-75 (June 26, 1998), citing *Ruta v. Breckenridge-Remy Co.*, 69 Ohio St.2d 66, 68 (1982). "The court's function is 'to determine whether there exists any evidence of substantial probative value in support of [the non-movant's] claim.' " *Id.*, quoting *Halk*, quoting *Ruta* at 69.

{¶ 11} "Because a directed verdict only tests the sufficiency of the evidence, it presents a question of law that appellate courts review de novo." *Jarupan* at ¶ 8, citing *Groob* at ¶ 14; *Goodyear Tire & Rubber Co. v. Aetna Cas. & Surety Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, ¶ 4, reconsideration denied sub nom., *Aetna Cas. & Sur. Co. v. Goodyear Tire & Rubber Co.*, 96 Ohio St.3d 1489, 2002-Ohio-4478. " '[D]e novo appellate review means that the court of appeals independently reviews the record and affords no deference to the trial court's decision.' " *Koehring v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 06AP-396, 2007-Ohio-2652, ¶ 10, quoting *BP Communications Alaska, Inc. v. Cent. Collection Agency*, 136 Ohio App.3d 807, 812 (8th Dist.2000), dismissed, appeal not allowed, 89 Ohio St.3d 1464, citing *Hall v. Ft. Frye Local School*

Dist. Bd. of Edn., 111 Ohio App.3d 690, 694 (4th Dist.1996); *see also Hicks v. Leffler*, 119 Ohio App.3d 424, 427 (10th Dist.1997).

B. First Assignment of Error

{¶ 12} In their first assignment of error, appellants contend the trial court erred in managing the case such that they were denied the ability to adequately prepare and try their case. First, under this assigned error, appellants argue the trial court abused its discretion in denying their request to continue the May 30, 2012 trial date. According to appellants, because the attorneys in the two cases with which this one was consolidated were to act as co-lead counsel at trial, appellants' trial plan and strategy was "radically altered" when those cases settled two weeks prior to trial. (Brief, 19.) It is appellants' position that, given the alteration of their plans and strategy, coupled with appellants' counsel being in a jury trial beginning May 21, 2012, and the recent retention of another attorney, the trial court abused its discretion in denying their motion for a continuance.

{¶ 13} We will not reverse a denial of a continuance absent an abuse of discretion. *In re B.G.W.*, 10th Dist. No. 08AP-181, 2008-Ohio-3693, ¶ 23. "There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied." *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964). In determining whether the trial court abused its discretion, we weigh the potential prejudice to the movant against the trial court's right to control its own docket and the public's interest in the prompt and efficient dispatch of justice. *State v. Unger*, 67 Ohio St.2d 65, 67 (1981). "In evaluating a motion for a continuance, a court should note, *inter alia*: the length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case." (Emphasis sic.) *Id.* at 67-68.

{¶ 14} Though citing *Unger* and the six factors outlined within, appellants do not set forth which factors are applicable here, nor do they set forth which factors demonstrate an abuse of the trial court's discretion in denying their continuance request.

Further, appellants provide no explanation regarding how they were prejudiced by the trial court's denial of their motion for continuance. *State v. McGrath*, 8th Dist. No. 77896 (Sept. 6, 2001) (though defendant complained denial of continuance was an abuse of discretion, defendant failed to identify any harm or prejudice suffered as a result thereof). Appellants do not argue the trial court's denial of the continuance prevented them from presenting any witnesses or evidence that arguably would have altered the outcome in this case, nor do appellants provide any specificity regarding how their trial strategy was affected by the trial court's denial of their continuance motion.

{¶ 15} The record reflects the parties had ample notice regarding the trial date of May 30, 2012, as the trial date was established on July 7, 2009, when the clerk filed its amended case scheduling order. Also, all of the parties were aware of the possibility of some or all of the claims being settled in this case as the trial court's April 15, 2011 journal entry encouraged the parties to discuss settlement and offered to schedule mediation with the court's magistrate.

{¶ 16} Moreover, we have reviewed the transcript of the pretrial conference held with the court on May 18, 2012. During the pretrial conference, the court referenced the settlement by indicating the matter had gone from "three cases down to only one." (Tr. 2.) When asked of the status of the case, appellants' counsel stated there was "a brief snag over the weekend and the beginning of this week" because of the departure of the other attorneys, but that appellants were "working as diligently as possible" to meet the court's deadlines. (Tr. 3.) Counsel for appellants discussed dropping some of their claims, outlined the witnesses expected to be called, and estimated the length of time needed for their case presentation. Additionally, appellants' recently retained counsel took an active role in the pretrial conference. At no time during the pretrial conference did any of the parties give any indication that a continuance might be necessary or that additional time was needed to prepare for trial.

{¶ 17} Upon review of the record and for all the above-stated reasons, we discern no abuse of the trial court's discretion in denying appellants' motion for a continuance of the trial date.

{¶ 18} Next, under this assigned error, appellants assert the trial court erred in allowing appellees to conduct a direct examination of the witnesses appellants called as if

on cross-examination. According to appellants, this procedure fails to follow R.C. 2315.01 as to the order of presenting evidence. As is relevant here, R.C. 2315.01(A) provides, "[w]hen the jury is sworn, unless for special reasons the court otherwise directs, the trial shall proceed in the following order * * * (3) The party who would be defeated if no evidence were offered on either side, first, shall produce that party's evidence, and the adverse party shall then produce the adverse party's evidence."

{¶ 19} At the May 18, 2012 pretrial conference, the trial court informed all counsel that it would allow appellees to conduct a direct examination of witnesses appellants called as if on cross-examination. The record reveals no objection to this procedure either at the pretrial or during trial, and, therefore, appellants waived this issue for purposes of appeal. *Winkler v. Winkler*, 10th Dist. No. 02AP-937, 2003-Ohio-2418, ¶ 81. *See also Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121 (1997) (noting that, absent plain error, failure to advise trial court of possible error results in waiver of issue for purposes of appeal).

{¶ 20} Notwithstanding the failure to object, it is well-settled that " '[a] trial court has the discretionary authority to control the mode and order of proof.' " *Winkler* at ¶ 93, quoting *Mason v. Swartz*, 76 Ohio App.3d 43, 54 (6th Dist.1991). *See also Cities Serv. Oil Co. v. Burkett*, 176 Ohio St. 449 (1964), paragraph two of the syllabus ("[g]enerally, the order in which evidence shall be produced on the trial of an action lies within the sound discretion of the court, and, unless such discretion is patently abused, no reversible error occurs"); Evid.R. 611(A).

{¶ 21} The trial court explained its reasoning for this procedure was to avoid duplication in testimony and provide the jury the "whole story * * * at once rather than cutting it up piecemeal." (Tr. 25.) Appellants fail to explain how the trial court's actions amount to an abuse of discretion or how they were prejudiced thereby. Moreover, the order of witness examination required by the trial court has been utilized and approved in several cases. "[A] court may permit the adverse party's counsel to examine his own client's representative immediately after the witness was taken as if on cross-examination, or the court may refuse to permit such an examination." *In re Guardianship of Salaben*, 11th Dist. No. 2008-A-0037, 2008-Ohio-6989, ¶ 92, citing *Cities Serv. Oil* and *Seley v. G.D. Searle & Co.*, 67 Ohio St.2d 192 (1981); *see also Kukay v. Crown Controls Corp.*, 6th

Dist. No. S-90-7 (Oct. 25, 1991); *Keeney v. SuperAmerica*, 4th Dist. No. 97 CA 4 (Mar. 5, 1998). Accordingly, we find no abuse of discretion in the trial court allowing appellees to conduct a direct examination of the witnesses appellants called as if on cross-examination.

{¶ 22} Also under this assigned error, appellants assert the trial court erred in placing "strict" time limitations on the length of appellants' case. (Brief, 22.) According to appellants, the trial court permitted appellants only 14 hours to try their entire case in this "complex business dispute." (Brief, 23.)

{¶ 23} Again, we note the record contains no indication that appellants objected to the time constraints placed upon the parties. More importantly, however, the record establishes that, contrary to the contentions of appellants, the court did not impose exact time limits, as the time constraints set forth by the trial court were developed based on an estimate from appellants' counsel on how long it would take to try the case. At the pretrial conference, the trial court asked the parties' "best guess" of how many hours each side would need for trial. (Tr. 24.) Appellants' counsel responded, "It should be down to 14 or 15, Your Honor, just quickly in my head." (Tr. 24.) After discussions, the trial court stated, "plaintiffs say they can get their case in 14 hours. I want the defense in 14 hours. That's still a long trial. * * * If for good reason we have to extend it, I'll listen to you. I want you to shoot to get your side of this case done in about 14 hours, okay?" (Tr. 29-30.) The court explained its reasoning was that finding trial time for two to three week trials is difficult. Additionally, we note appellants provide no indication of what impact this may have had on their case as they provide no information regarding what evidence or testimony they were prevented from presenting in this case.

{¶ 24} Accordingly, we discern no abuse of discretion in the trial court's time management of this trial.

{¶ 25} Lastly, under this assigned error, appellants argue the overall impact of the trial court's actions outlined in this assignment of error denied them the opportunity to fairly try their claims in violation of the Ohio Constitution. Having rejected each of appellants' individual challenges to the trial court's management of this trial, we find no merit to their argument that they were denied a fair trial by the trial court's collective actions.

{¶ 26} For all of the foregoing reasons, appellants' first assignment of error is overruled.

C. Second Assignment of Error

{¶ 27} In their second assignment of error, appellants challenge the trial court's decision granting appellees' motion for directed verdict. Appellants argue the trial court "transmuted" their claims into a single claim for breach of fiduciary duty and then proceeded to improperly weigh the evidence and assess credibility in contravention of Civ.R. 50. Additionally, appellants argue that, in its "truncated" legal analysis, the trial court failed to address two of its specific claims. (Brief, 27.)

{¶ 28} According to appellants, out of the ten counts asserted in the amended complaint, this appeal relates to only three claims, specifically (1) breach of contract for failure to offer appellants the fair market value for their units as required by the operating agreement, (2) breach of fiduciary duty by the managing members of AKSM for depriving appellants of the fair market value of their units, and (3) breach of fiduciary duty by the majority members of AKSM for endorsing a scheme to "squeeze out" appellants from AKSM. (Brief, 28.) We note, however, that the amended complaint does not assert a cause of action against appellees in their capacity as fellow "members" or "unitholders." Instead, appellants' amended complaint expressly asserts that each appellee is being "sued here solely in his or her capacity as an AKSM Manager." (Amended Complaint, ¶ 8.) Because this constitutes not only a new argument being raised on appeal for the first time, but appears to be an attempt to raise a new claim for the first time on appeal, we do not address whether appellees, as majority members of AKSM, breached a fiduciary duty to appellants, and we consider only whether the trial court erred in granting a directed verdict in favor of appellees on appellants' claims for breach of contract and breach of fiduciary duty, as those claims relate to the fair market value as that term is used in the operating agreement governing this matter. *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 128, 2006-Ohio-954 (court refusing to address claims raised for the first time on appeal); *King v. Ross Corr. Inst.*, 10th Dist. No. 02AP-256, 2002-Ohio-7360 (a plaintiff cannot espouse a theory of liability for the first time on appeal and then argue evidence adduced at trial supported such theory when the theory was not pled in the complaint or argued at trial); *State ex rel. Dispatch Printing Co. v. Columbus*, 10th Dist.

No. 99AP-766 (Aug. 5, 1999) (claims raised for the first time on appeal will not be addressed by appellate court).

{¶ 29} We next address appellants' argument that the trial court failed to adequately address their claim for breach of contract. On June 7, 2012, the trial court dictated its bench opinion granting appellees' motion for directed verdict on all claims. The final judgment entry reflecting such action was entered on June 21, 2012. At no time, either during the trial court's announcement of its decision on the record or between June 7 and 21, did appellants ask for further specification or clarification of the trial court's ruling. Accordingly, appellants have waived their right to challenge the adequacy of the court's ruling. *Silverman v. Am. Income Life Ins. Co. of Indianapolis*, 10th Dist. No. 01AP-338 (Dec. 18, 2001) (assertion that trial court failed to clearly articulate reasons for Civ.R 50 decision waived for failing to request further specificity in the court's ruling); *Campbell v. Pritchard*, 73 Ohio App.3d 158 (12th Dist.1991) (if further explanation was required for granting of Civ.R. 50 motion, it was incumbent upon the appellant to request such from the trial court); *Grange Mut. Cas. Co. v. Fleming*, 8 Ohio App.3d 164 (10th Dist.1982) (failure to comply with Civ.R. 50(E) argument waived for not being raised in the trial court).

{¶ 30} Notwithstanding the issue of waiver, we next address appellants' argument that the trial court improperly transmuted their claims of breach of contract and breach of fiduciary duty. According to appellants, the breach of contract claim arises from the Amended and Restated Operating Agreement effective September 30, 2008 ("2008 OA"), which amended and restated in its entirety AKSM's original operating agreement of April 1996, as amended in 1997, 2003, 2004, and 2007. The 2008 OA provided that AKSM would be directed, managed, and controlled by managers having "full and complete authority, power and discretion to manage and control the business, affairs, and properties of the Company, to make all decisions regarding those matters and to perform any and all other acts or activities customary or incident to the management of the Company's business." (2008 OA Section 4.1.)

{¶ 31} With respect to redemptions, the 2008 OA provides in section 7.13(b)(i):

> "Fair Market Value" means, for each Unit as of the Redemption Date, the then-current fair market value of the

> Unit as determined by the most recent independent third-party valuation obtained by the Company prior to the Redemption Date. If the Company elects to obtain more than one independent third-party valuation of the Units, then the Company may exercise its discretion to determine the methodology to use to determine the Fair Market Value between, among, or from those valuations.

{¶ 32} Appellants' breach of contract claim alleged their not being paid the fair market value for their units constituted a breach of the 2008 OA, and appellants' breach of fiduciary claim alleged the managing members breached their duty by depriving appellants of the fair market value of the units. As alluded to by the trial court during arguments on appellees' motion for directed verdict, the trial court was concerned in this case with defining "discretion," as used in the 2008 OA, in light of the statutory provisions governing limited liability companies as codified in R.C. Chapter 1705. Specifically, R.C. 1705.29 provided during the relevant times of this litigation:

> (A) If the operating agreement of a limited liability company provides for managers, then the business of the company shall be exercised by or under the direction of its managers, except to the extent applicable law or the operating agreement provides otherwise.
>
> (B) A manager of a limited liability company shall perform his duties as a manager in good faith, in a manner he reasonably believes to be in or not opposed to the best interests of the company, and with the care that an ordinarily prudent person in a similar position would use under similar circumstances.
>
> (C) For purposes of division (B) of this section:
>
> (1) A manager of a limited liability company shall not be found to have violated division (B) of this section unless it is proved, by clear and convincing evidence, in any action brought against the manager, including, but not limited to, an action involving or affecting a termination or potential termination of his service to the company as a manager or his service in any other position or relationship with the company, that he has not acted in good faith, in a manner he reasonably believes to be in or not opposed to the best interests of the company, or with the care that an ordinarily

> prudent person in a similar position would use under similar circumstances.
>
> * * *
>
> (D) A manager of a limited liability company is liable in damages for any action that he takes or fails to take as a manager only if it is proved, by clear and convincing evidence, in a court with jurisdiction that his action or failure to act involved an act or omission undertaken with deliberate intent to cause injury to the company or undertaken with reckless disregard for the best interests of the company. Nothing contained in this division limits the relief available under section 1705.31 of the Revised Code. This division does not apply if and only to the extent that, at the time of the act or omission of a manager that is the subject of complaint, the articles of organization or the operating agreement of the company state by specific reference to this division that its provisions do not apply to the company.

{¶ 33} Because R.C. 1705.29 provides that managers of limited liability companies are only liable in damages for actions involving a "deliberate intent to cause injury to the company or undertaken with reckless disregard for the best interests of the company," the trial court inquired of appellees' counsel as follows:

> [Court]: But if boards of managers are insulated, unless they've breached their fiduciary duty and it's proven by clear and convincing evidence, then why doesn't that effectively help define what the "discretion" word means in the operating agreement? How can we have the board of managers acting under this set of standards and then we judge a company under something different when we're talking about the same conduct?

(Tr. Vol. VI, 232.)

{¶ 34} Thereafter, the following exchange occurred:

> [Appellees' Counsel]: I would accept the proposition, Your Honor, that to infuse the concept of abuse of discretion in the contract with the language out of 1705.29(D) would be entirely acceptable; that is, in order to have an abuse of discretion, you have to have intent or you have to have reckless disregard.

> [Court]: It doesn't make any sense to me, otherwise, frankly. I can't figure out how many different standards we're going to throw at this thing. It becomes a Christmas tree. The Hunt case talks about the operating agreement defines the specific business's obligations, but it does so against the backdrop of the statutes and they interconnect.

(Tr. Vol. VI, 232-33.)

{¶ 35} The trial court posed a similar query to appellants' counsel and the following exchange occurred:

> [Appellants' Counsel]: Unfortunately, Your Honor, I wish I was in the legislature and could do something about it, but that's what I'm stuck with as the plaintiff's lawyer. There are two standards, one for managers and one for the company.
>
> [Court]: Or we glom them together and we say the one that's statutory covers both the individual manager's obligations, and because the company can only act through the managers, necessarily, that's the same standard for the company, and that's what "discretion" means in the operating agreement.
>
> [Appellants' Counsel]: That would make sense. We would argue, Your Honor, we've demonstrated there has been an abuse of discretion by the board of managers. In fact, again, it goes back to lack of controls by the board of managers, by the chairman of the audit committee, the unanimous approvals without any investigation whatsoever.

(Tr. Vol. VI, 252.)

{¶ 36} Thus, the record reflects appellants' counsel seemingly agreed with the trial court's inclination that this matter should be determined in light of R.C. 1705.29. Under the doctrine of invited error, an appellant cannot attack a judgment based on error the appellant induced the court to commit or for which the appellant is actively responsible. *In re J.B.*, 10th Dist. No. 11AP-63, 2011-Ohio-3658, ¶ 10, citing *Daimler-Chrysler Truck Fin. v. Kimball*, 2d Dist. No. 2007-CA-07, 2007-Ohio-6678, ¶ 40. Under this principle, a party may not complain about an action taken by the court in accordance with the party's own suggestion or request. *Id*. To the extent that both parties seemingly consented to the trial court's inclination as to how to review this matter and neither party argued it should be otherwise, we find no error with respect to the same.

{¶ 37} Regardless, after reviewing the record in this case, we conclude the trial court did not err in granting a directed verdict on appellants' claims for breach of fiduciary duty or breach of contract as those claims relate to the fair market value used in the 2008 OA.

{¶ 38} Contrary to appellants' repeated assertions that the trial court weighed evidence and made credibility determinations, we discern no such conduct by the trial court. Moreover, the trial court's decision expressly acknowledges the prohibition against assessing credibility and states evidence was construed in appellants' favor, as is required by Civ.R. 50.

{¶ 39} In order to find in favor of appellants on their claim for monetary damages, R.C. 1705.29(D) requires that there be a finding that the managers of AKSM acted with deliberate intent to cause injury to the company or undertaken with reckless disregard for the best interests of the company. As the trial court stated, this record presents no evidence upon which a jury could find that the managers, individually or collectively, acted with deliberate intent to cause injury to AKSM or with reckless disregard for AKSM's best interests. On appeal, appellants argue the managers' actions in this case "created a high degree of legal risk for the company." (Brief, 31.) The only evidence to which appellants direct this court is the statement from AKSM's general counsel that, if there is a stable company with above-market returns and ownership of that company is linked to physicians in a position to refer patients, "you have a target on your back under the anti[-]kickback statute." (Tr. Vol. V, 172.) However, this evidence, in and of itself, does not lead to an inference that the managers acted with intent to cause injury to AKSM or with reckless disregard for its interests. The testimony does not conclude appellees' actions constituted an illegal action, but, at most, consists of a speculative comment that such circumstances, the existence of all three factors in a company, *could* lead to government investigation.

{¶ 40} With respect to appellants' breach of contract claim, there has been no evidence presented that appellees breached the 2008 OA. The evidence presented established that AKSM obtained three independent valuations from three independent valuation firms. Then, to determine the fair market value, the managing members averaged the three valuations. As per the 2008 OA, this methodology was permitted and

appellants presented no evidence that use of this methodology constituted a breach of contract. Though appellants' expert witness criticized the methodology and suggested alternatives that could have been used, such testimony does not equate to evidence that the managing members breached the 2008 OA for using the method they chose to use.

{¶ 41} For all of the above stated reasons, we conclude the trial court did not err in granting appellees' motion for a directed verdict. Accordingly, we overrule appellants' second assignment of error.

IV. CONCLUSION

{¶ 42} In conclusion, appellants' two assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

KLATT, P.J., and VUKOVICH, J., concur.

VUKOVICH, J., of the Seventh Appellate District, sitting by assignment in the Tenth Appellate District.
