[Cite as *Harris v. Huff*, 2010-Ohio-3678.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

ROBERT W. HARRIS, et al.,	:	**O P I N I O N**
Plaintiffs-Appellees	:	**CASE NO. 2008-T-0090**
- vs -	:	
REGGIE HUFF, et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Court of Common Pleas, Case No. 2004 CV 648.

Judgment: Affirmed.

Robert F. Burkey, Burkey, Burkey & Scher Co., L.P.A., 200 Chestnut Avenue, N.E., Warren, OH 44483-5805 (For Plaintiffs-Appellees).

Robert R. Melnick, Melnick & Melnick, Federal Building, Suite 300, 18 North Phelps Street, Youngstown, OH 44503 (For Defendants-Appellants David Brys, Frank Johnson, and Engintec Corp.).

Reggie Huff, pro se, 856 Youngstown-Kingsville Rd., N.E., Vienna, OH 44473 (Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellants, Reggie Huff, David Brys, Frank Johnson, and Engintec Corp., appeal the judgment entered by the Trumbull County Court of Common Pleas. The trial court entered judgment in favor of appellees, Robert W. Harris, Mark J. Endre, Chris Miller, and Matthew K. Napier, and in favor of Engintec.

{¶2} Prior to 2002, Huff resided in Oregon, where he operated a company known as Acro-Tech, Inc. Acro-Tech had 120 to 130 investors, which collectively

contributed more than a million dollars. Acro-Tech marketed engine valve products, one of which is called the Vented Valve, a product intended to make motorcycle engines more fuel-efficient. Thereafter, Acro-Tech designed the Smart Valve, which was also a device intended to increase fuel-efficiency.

{¶3} Vincent Marino was affiliated with Acro-Tech. Huff entered into a contract with Marino, which gave Marino a right of first refusal related to the distribution of the Smart Valve.

{¶4} While at Acro-Tech, Huff offered his personal, unregistered shares of Acro-Tech to certain large investors at no cost, resulting in a lower per-share cost to those investors. This and other conduct resulted in a cease and desist order being filed against Huff and Acro-Tech, which prohibited Huff from selling any securities in the state of Oregon. In addition, a similar cease and desist order was filed against Huff in the state of Washington.

{¶5} In 2002, Huff moved to Ohio. Shortly thereafter, Engintec Corp. was formed. Harris, Endre, Miller, Napier, Brys, and Johnson each agreed to invest $30,000 in Engintec. They, along with Huff, were the shareholders of the corporation. Huff received a monthly salary and ran the day-to-day operations of Engintec. The goal of Engintec was to market the Smart Valve. However, at that time, the patent to the Smart Valve had not been transferred to Engintec.

{¶6} In 2003, the Smart Valve was still in the design phases. No units were being produced or distributed, and Engintec was not generating any revenue.

{¶7} Endre, Miller, and Napier became concerned about the lack of revenue and started questioning Huff's activities. Thereafter, they entered into a contract with Huff and Engintec entitled, "Consideration for Assignment of Patent Application." This

agreement gave Huff an additional 200 nonvoting shares of Engintec stock and required Huff to assign the patent for the Smart Valve to Engintec. Accordingly, after the agreement, appellants owned a majority of the combined voting and non-voting shares of Engintec, but appellees had control of the corporation by ownership of more voting shares.

{¶8} In 2004, appellees sent a "lack of confidence" letter to Huff, wherein they explained some of their concerns about the status of Engintec. After the letter was sent, appellants conducted an "emergency board meeting." Appellees did not attend this meeting. At the meeting, appellants voted to suspend appellees' voting rights, which could be reinstated if appellees resigned any positions held on the board of directors and paid an additional $15,000 to Engintec for "damages."

{¶9} Appellees filed a complaint against appellants alleging seven counts, including: breach of a fiduciary duty; improper accounting; conversion and/or diversion of assets; fraud; tortious interference with business; and breach of contract.[1] In addition, appellees sought a declaration of shareholders' rights regarding a February 20, 2004 board meeting. This matter was assigned case No. 2004 CV 648.

{¶10} In May 2004, appellants filed a complaint against appellees and Vincent Marino, setting forth 13 claims for relief, including: three federal RICO claims; three state RICO claims; using a sham legal process; fraud; breach of contract; interference with business and economic relations; intentional infliction of emotional distress; and breach of fiduciary duty. In addition, appellants sought declaratory relief. This matter was assigned case No. 2004 CV 1103. The plaintiffs in the first case were the

1. In their initial complaint, appellees named Engintec as a plaintiff. Also, Lisa Huff was designated as a defendant; however, Lisa was dismissed as a party at the trial court level and is not a party in this appeal or the appeal in case No. 2008-T-0091.

defendants in the second, and the defendants in the first case were the plaintiffs in the second, with one exception. Marino was named as a defendant by appellants in case No. 2004 CV 1103.

{¶11} Upon joint motion of the parties, the trial court consolidated case Nos. 2004 CV 648 and 2004 CV 1103 for all purposes.

{¶12} In December 2004, appellees filed an amended complaint against appellants in case No. 2004 CV 648. In the amended complaint, Engintec was not listed as a plaintiff. In June 2007, appellees filed a second amended complaint, and Engintec was likewise not listed as a plaintiff in this pleading. In both amended complaints, Engintec was designated as a defendant.

{¶13} In April 2008, only days before the scheduled trial, appellants dismissed their claims against appellees and Marino in case No. 2004 CV 1103, pursuant to Civ.R. 41(A).

{¶14} The matter proceeded to a combined bench and jury trial in April 2008 in case No. 2004 CV 648. The jury was to decide the majority of the issues; however, the trial court stated it would rule on the equitable issues based on the evidence presented at the trial. After opening statements, the trial court dismissed the fraud and conversion of assets counts against Johnson, as well as the fraud count against Brys.

{¶15} At trial, several witnesses testified, including: Endre, Napier, Huff, Miller, and Johnson. In addition, several hundred exhibits were introduced, many of which were copies of emails and other correspondence between the shareholders.

{¶16} The jury found appellants had committed a breach of contract, as well as a breach of fiduciary duty by attempting to default appellees' shares of stock in Engintec. The jury found that Huff had converted $7,100 of Engintec assets for his personal use.

Also, the jury found that Huff had committed fraud upon appellees when he induced them into investing in Engintec without disclosing the Oregon activities. The jury also determined that appellees were entitled to punitive damages and attorney fees, but only against Huff.

{¶17} On May 8, 2008, Marino filed a motion for sanctions against appellants for maintaining the action in 2004 CV 1103. The trial court held a hearing on Marino's motion in July 2008.

{¶18} Appellants have filed two appeals to this court. In the instant matter, case No. 2008-T-0090, appellants appeal the trial court's judgment in relation to trial court case No. 2004 CV 648. In case No. 2008-T-0091, appellants appeal the trial court's judgment entry in regard to the sanctions it imposed in relation to case No. 2004 CV 1103.[2] We also decide case No. 2008-T-0091 today.

{¶19} Appellants filed a motion to stay the trial court's judgment in both appellate cases. This court granted appellants' motion to stay; however, the stays were conditioned upon the posting of supersedeas bonds. A review of the dockets reveals that appellants have not posted the requisite supersedeas bonds. Accordingly, the stays issued by this court have not gone into effect.

{¶20} Appellants raise 13 assignments of error. We will address their assigned errors out of numerical order. Appellants' fourth assignment of error is:

{¶21} "The trial judge erred to the prejudice of appellants in permitting appellees to include Engintec as a party-plaintiff when it was a direct shareholders' suit & not a derivative action brought in the interest of the corporation & appellees filed their action

2. These cases were initially consolidated by this court; however, upon further review, this court determined that the cases should proceed independently.

without the authority to proceed on behalf of Engintec which should have resulted in the pleadings being stricken."

{¶22} In their initial complaint, appellees named Engintec as a plaintiff. Appellants argue that appellees did not have authority to name Engintec as a plaintiff. As appellees note, they filed two amended complaints, which do not name Engintec as a plaintiff.

{¶23} Appellants argue that any pleadings with reference to the name Engintec as a plaintiff should have been stricken from the record. Appellants make the general assertion that they were prejudiced because the jury reviewed the pleadings with Engintec designated as a plaintiff. Appellants do not cite which specific documents they contend the jury viewed that caused the alleged prejudice. See App.R. 16(A)(7). Accordingly, they cannot demonstrate they were prejudiced by this perceived error.

{¶24} We note the interrogatories and verdict forms submitted to the jury do not have Engintec listed as a plaintiff. Instead, the captions of these documents properly reflect the plaintiffs as "Robert W. Harris, et al."

{¶25} Appellants' fourth assignment of error is without merit.

{¶26} Appellants' twelfth assignment of error is:

{¶27} "The court erred to the prejudice of appellants in upholding the recusal of Judge Logan on an alleged ex parte letter which was not ex parte in that all parties were notified contemporaneous with the letter."

{¶28} Appellants claim Judge Logan erred by recusing himself. We note "a judge's decision to voluntarily recuse himself is a matter of judicial discretion." *State ex rel. Gomez v. Nau*, 7th Dist. No. 08 NO 355, 2008-Ohio-5685, at ¶19. (Citation

omitted.) If, in fact, Judge Logan recused himself, there is nothing in the record to indicate that such a decision was an abuse of his judicial discretion.

{¶29} In their brief, appellants assert that Judge Logan recused himself from this case after Huff sent a letter to Judge Logan. However, the record in this matter is void of any indication as to why Judge Logan was removed from this case. Similarly, there is nothing in the record to indicate that appellants objected to the termination of Judge Logan's involvement in this case. Accordingly, appellants have not demonstrated that they were prejudiced by this perceived error.

{¶30} Appellants' twelfth assignment of error is without merit.

{¶31} Appellants' first and second assignments of error are:

{¶32} "[1.] The trial judge erred to the prejudice of appellants by failing to hold a hearing on the nonjury declaratory judgment/equitable issues before proceeding with the jury trial on the legal issues.

{¶33} "[2.] The trial court erred to the prejudice of appellants by the order in which the bench & jury trials were held since its rulings in equity created inconsistent judgments."

{¶34} Due to the similar nature of these assigned errors, we will address them in a consolidated analysis.

{¶35} Appellants argue the trial court erred in the manner in which it conducted the trial. They argue that the trial court should have heard the equitable claims prior to the other claims proceeding to a jury trial.

{¶36} This court reviews a trial court's decision on bifurcation issues under the abuse of discretion standard of review. *Spencer v. Lakeview School Dist.*, 2005-T-0083, 2006-Ohio-3429, at ¶17. (Citation omitted.) This is because the trial court is in

the best position to decide whether bifurcating issues is appropriate. Id. An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶37} In this matter, the trial court discussed the issue of how the trial would proceed with the parties. It explained that there would be one trial, with the jury deciding the majority of the issues and the trial court deciding the equitable issues. Appellants raised concerns about this procedure. In response, the trial court stated it would permit appellants to present additional evidence on the bench issues at a later time after the jury trial concluded. However, the trial court stressed that appellants should question the witnesses who were present with regard to those issues.

{¶38} In this matter, we conclude the trial court did not abuse its discretion in refusing to bifurcate the issues. One of the trial court's concerns was the burden and expense associated with having the witnesses, some of which live out-of-state, being forced to testify on two different occasions.

{¶39} Appellants argue that the trial court's decision finding the consideration for assignment contract to be valid conflicts with the jury's findings. We disagree. First, we note that appellants cite to a statement made by the trial court during the July 2008 hearing that the consideration for the assignment contract was binding. This oral finding was made by the court in support of its conclusion that Huff should be awarded 200 additional shares. We note that a trial court "speaks through its journal entries." *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, at ¶47. (Citation omitted.) The trial court did not make a finding in its judgment entry that the contract was valid and enforceable in all respects.

{¶40} In addition, the trial court's finding and the jury's verdict are not mutually exclusive. Appellants argue the statement in the consideration for assignment contract that full performance of the business plan is not complete contradicts the jury's conclusion that appellants breached the underlying contract by failing to aggressively market and produce the Smart Valve. The jury, after hearing all the evidence regarding appellants' conduct, found them to have breached the underlying agreement. Even if the trial court found the statement in the consideration for assignment contract regarding lack of full performance binding, there is no absolute conflict with the jury's verdict. This is because the statement regarding the business plan is general and not necessarily subject to the interpretation now given to the term by appellants.

{¶41} Appellants' first and second assignments of error are without merit.

{¶42} Appellants' third assignment of error is:

{¶43} "The trial court erred to the prejudice of appellants by the intensity, tenor, range & persistence of its interrogation of witnesses & commenting which exceeded the limited scope of such conduct permitted by Evid.R. 614 having the cumulative affect [sic] of undermining the credibility of appellants before the jury."

{¶44} Appellants claim the trial court exceeded its authority when it questioned witnesses during the trial.

{¶45} Evid.R. 614(B) is titled, "[i]nterrogation by court" and provides:

{¶46} "The court may interrogate witnesses, in an impartial manner, whether called by itself or by a party."

{¶47} Appellants cite this court's opinion in *Mentor-on-the-Lake v. Griffin* (1995), 105 Ohio App.3d 441. However, in *Griffin* this court described the trial court's questioning as "extensive." Id. at 450. In addition, this court held that the trial court's

actions exceeded the parameters of merely questioning witnesses, in that its comments could have been interpreted by the jury as biased statements. Id.

{¶48} In this matter, the trial court questioned witnesses from both sides. A review of the trial court's questions does not reveal that the court's questions showed the court's opinion of a particular issue. Instead, the trial court's questions merely sought to focus the answers of the witnesses. Appellants point to three instances where the trial court questioned witnesses. The first instance occurred during the following colloquy:

{¶49} "Q. [By Huff]: How long did you keep that website up?

{¶50} "A. [Miller]: The website - - the two web addresses were purchased –

{¶51} "THE COURT: What does this have to do with this case?

{¶52} "MR. HUFF: It has everything to do with it.

{¶53} "THE WITNESS: No, it doesn't.

{¶54} "MR. HUFF: These guys claim that they were always out just to help the corporation. And they're putting up a website that's telling everybody, Stay away from Engintec because the guy running it is a crook and doesn't keep books. And if you've got any other information about him, I'll pay you cash for it.

{¶55} "And it was our website. It was the company's website. It was Engintec and Engintec Northwest, and he took control of it."

{¶56} "THE COURT: Is that true?

{¶57} "THE WITNESS: No, it's not. None of it is. ***"

{¶58} In this instance, Huff was interjecting purported testimony through his questioning of Miller. However, at that time, Huff was cross-examining Miller; thus, he should not have been attempting to testify. The trial court merely questioned Miller to

determine if he agreed with the purported facts being advanced by Huff in his questioning. The trial court's question was not improper.

{¶59} The next instance appellants contend the trial court erred was during the testimony of Huff. Since Huff was acting pro se, he testified in the narrative. Due to the nature of the narrative, the trial court attempted to focus his testimony on the relevant issues. The trial court had a specific question as to why the product was not placed on the market. Huff answered the trial court's question by addressing another issue. Thereafter, on two occasions the trial court instructed Huff to "pay attention" and answer its specific question.

{¶60} When reviewing this colloquy, it does not appear that the trial court acted partially. Instead, it appears the trial court was attempting to narrow the focus of Huff's testimony to the specific issues in the case.

{¶61} Finally, appellants argue they were prejudiced by the trial court during the following colloquy:

{¶62} "Q. [by Attorney Burkey]: How many total shares were issued to Acro-Tech?

{¶63} "A. [Huff]: Boy I couldn't tell you offhand. It was - - you know, we had upwards of several million shares, I think it was.

{¶64} "Q. This says 129,000 shares. This says $774,000 maximum to be sold. You got to a million dollars?

{¶65} "A. Correct.

{¶66} "Q. You admit to that?

{¶67} "A. Over a million.

{¶68} "Q. There were other circulars, weren't there?

{¶69} "A. Yeah. Like I said, I don't know whether that's the first year or the second year. The Business Plan didn't change, however.

{¶70} "Q. And we flagged through here - - references - - time and time again about how the company plans to develop and produce the Vented Valve?

{¶71} "A. Correct.

{¶72} "Q. Produce; doesn't that mean revenue?

{¶73} "A. Eventually, yes.

{¶74} "Q. Okay.

{¶75} "A. There was a plan to do a second round of funding. That round of funding was not going to bring the product to market.

{¶76} "Q. Awful similar to the EnginTec situation?

{¶77} "THE COURT: How much did you raise for the first round of funding for Acro-Tech?

{¶78} "THE WITNESS: Well, your Honor, the answer to that is a little difficult to nail down, because there was some funding that took place before we ever got to that point.

{¶79} "And so - - you know, that was the first official registered round of funding. But there were angel investors and there were some other investors that had come in before. So I had raised several $100,000 prior to that.

{¶80} "THE COURT: With no production?

{¶81} "THE WITNESS: It was never intended to be a production. I keep saying this. I don't know why it can't be understood."

{¶82} The trial court did not err in this exchange. The trial court simply provided Huff an opportunity to clarify why there was no production of the product from Acro-Tech.

{¶83} Appellants' third assignment of error is without merit.

{¶84} Appellants' sixth assignment of error is:

{¶85} "The trial court erred to the prejudice of appellants in permitting references to arrest warrants, cease and desist orders & civil judgments of the Appellant Reggie Huff in Oregon, which had the prejudicial effect of inflaming the jury & prejudicially effecting [sic] the verdict in violation of Evid.R. 403."

{¶86} We note that the admission of evidence lies within the discretion of the trial court. *Peters v. Ohio State Lottery Comm.* (1992), 63 Ohio St.3d 296, 299. (Citations omitted.) Thus, this court will not disturb the trial court's evidentiary rulings unless it is demonstrated that the trial court abused its discretion. Id. Appellants argue the trial court erred by admitting evidence regarding Huff's prior actions in Oregon. Evid.R. 403(A) provides:

{¶87} "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

{¶88} The actions in Oregon were relevant, as they went to the issue of whether Huff fully disclosed the prior instances to appellees. In addition, evidence regarding the Oregon actions had the danger of unfair prejudice and confusing the issues. However, upon review, we cannot say that the relevancy of this evidence was *substantially* outweighed by the danger of unfair prejudice or confusion of the issues.

{¶89} Appellants argue that the trial court admitted on the record that it should not have admitted this evidence. We disagree. The trial court stated, "I also admonished the jury not to accept his testimony, which was not relevant and not admissible under the Ohio Rules of Evidence[.]" It is important to note that the trial court was referring to Huff's testimony. The comment was made in response to appellees' counsel's motion for a mistrial due to Huff's testimony. The trial court denied the motion for a mistrial, holding that appellees opened the door to the issue by introducing evidence regarding the Oregon cease and desist order. The trial court noted that it then permitted Huff to testify as to why he believed the cease and desist order was unfair. However, when Huff's subsequent testimony on this topic went too far, the trial court sustained appellees' objection to Huff's testimony and ordered the jury to disregard it.

{¶90} The trial court did not abuse its discretion by admitting evidence regarding Huff's actions while in Oregon.

{¶91} Appellants' sixth assignment of error is without merit.

{¶92} Appellants' seventh assignment of error is:

{¶93} "The trial judge erred to the prejudice of appellants in permitting non-expert opinion testimony on both issues of value & alleged damages on the conversion claim."

{¶94} Appellants argue the trial court admitted improper opinion evidence. Evid.R. 701 provides:

{¶95} "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1)

rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."

{¶96} Appellants claim the trial court erred by permitting the testimony of Chris Miller. Miller testified regarding Marino's right of first refusal to market the product.

{¶97} "Q. In your opinion, does that have a significant affect [sic] on the value?

{¶98} "A. It devalues our stock. Because we had always been told that we have 'the one.' Well, apparently, there are two. So that's a definite affect [sic]."

{¶99} Appellants did not object to this testimony. Thus, they have waived all but plain error. We note that the plain error doctrine, in the context of civil cases, is to only be used "in the extremely rare case involving exceptional circumstances." *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, syllabus.

{¶100} In this matter, the trial court's evidentiary decision did not rise to the level of plain error. The witness was clearly testifying regarding his personal, lay opinion about the value of Engintec's stock, in which he was a primary shareholder.

{¶101} The trial court did not abuse its discretion by admitting this evidence.

{¶102} Appellants' seventh assignment of error is without merit.

{¶103} Appellants' thirteenth assignment of error is:

{¶104} "The trial court erred to the prejudice of appellants in allowing the jury to see the exhibits during the course of the trial and before deliberation."

{¶105} Appellants contend the trial court erred by permitting the jury to review certain exhibits. The record reveals certain exhibits were published to the jury during the testimony of Napier. However, as appellees note, these exhibits were admitted into evidence. At the conclusion of appellees' case, the trial court admitted all the exhibits "in mass." Appellants did not object to any of the exhibits. Accordingly, they have

waived all but plain error, which we again note is to be rarely used in civil cases. See *Goldfuss v. Davidson*, supra, syllabus. Moreover, since the jury was ultimately permitted and required to consider the admitted exhibits, any perceived error that may have occurred is not prejudicial.

{¶106} Appellants' thirteenth assignment of error is without merit.

{¶107} Appellants' eighth assignment of error is:

{¶108} "The trial court erred to the prejudice of appellants in ruling on appellees' motion for a telephonic trial deposition of Robert W. Harris before appellants had an opportunity to respond & by not granting appellants' request for a video/audio deposition of deponent before the jury to preserve questions of credibility & demeanor."

{¶109} Appellants argue that the trial court erred by permitting Harris to testify by way of deposition that was recorded by a stenographer. Appellees took the deposition of Harris for trial purposes. Appellees provided notice to appellants about the time and place the deposition was to occur. Appellant Huff objected to the manner in which the deposition was to be taken, so it did not occur at the originally set time. Since their notice of deposition was unsuccessful, appellants filed a "motion to take trial deposition of Robert W. Harris." In addition, the motion requested sanctions against Appellant Huff. The trial court construed the motion to take deposition as a motion for protective order and issued a protective order stating that Miller's deposition would occur at the Trumbull County Courthouse, with Harris testifying via telephone from Seattle, Washington. A court reporter was present and created a transcript of Harris' testimony, which was subsequently read into the record at trial.

{¶110} Appellant Brys filed a motion asking the trial court to take a video and/or audio deposition of Harris. The trial court did not rule on Brys' motion, thus it is

presumed the trial court denied the motion. See *Tenan v. Huston*, 165 Ohio App.3d 185, 2006-Ohio-131, at ¶53. (Citations omitted.) In addition, Huff filed a motion to void the "ex-parte" protective order of the trial court. Therein, Huff accused appellees and their counsel of "unethical, illegal and even criminal acts." In concluding, Huff stated, "[f]or the sake of all [that] is good and decent, Judge Curran, I beg you muster the will and integrity to remove this illegal abomination of a judgment entry, the trial date and yourself from this case." The trial court did not rule on Huff's motion, thus it is presumed the trial court denied the motion. See *Tenan v. Huston*, 165 Ohio App.3d 185, 2006-Ohio-131, at ¶53.[3]

{¶111} We note Loc.R. 9.07 of the Trumbull County Court of Common Pleas provides, in part:

{¶112} "Counsel is encouraged to cooperate in pre-trial discovery procedures to reduce, in every way possible, the filing of unnecessary discovery motions. To curtail undue delay in the administration of justice, no discovery motion filed under Rules 16 through 37 of the Rules of Civil Procedure, to which objection or opposition is made by the responding party, shall be taken under consideration by the court unless the party seeking discovery shall first advise the court, in [writing], that after sincere attempts to obtain voluntary compliance by the responding party, they are unable to reach an accord."

{¶113} Appellees complied with this rule by first attempting to take Harris' deposition by notice to the other parties. On the date of the deposition, appellees' counsel, Marino's counsel, and Huff were all present for the deposition. At this point,

3. Huff and Brys cited this incident regarding the deposition in their petition to disqualify Judge Curran filed in the Supreme Court of Ohio.

Huff demanded, according to appellees' motion, that the "court reporter furnish him a copy of her back up audio recording or he would not agree to the continuation of the deposition." At this point, appellees sought intervention of the trial court by filing the motion to take the trial deposition.

{¶114} On appeal, appellants argue they were denied a fair trial because the jury was not able to fully evaluate Harris' credibility. We note that appellants do not allege that any of the deposition testimony was inaccurately recorded.

{¶115} In this matter, appellants did not object to the manner in which the deposition was to occur until the start of the deposition on the originally set date. This resulted in the deposition having to be rescheduled. This manner of preserving testimony for use at trial is sometimes necessary for a variety of reasons, including the fact that a party may not be able to compel the attendance of the out-of-state witness. In light of the totality of the circumstances, including Huff's actions that required a continuation, we conclude that the trial court did not abuse its discretion by permitting Harris' deposition to be transcribed by a stenographer and used at trial in lieu of live testimony.

{¶116} Appellants' eighth assignment of error is without merit.

{¶117} Appellants' fifth assignment of error is:

{¶118} "The court erred to the prejudice of appellants in denying appellants' motion for directed verdict after appellees' opening statement, after the close of appellees' case in chief & at the end of the case in that appellees did not present a prima facie case on their causes of action before the jury under Civ.R. 50."

{¶119} Appellants claim the trial court erred by not granting their motions for directed verdicts made at the end of appellees' opening statement, at the end of appellees' case-in-chief, and at the close of all the evidence.

{¶120} Civ.R. 50(A) provides, in part:

{¶121} "(1) A motion for a directed verdict may be made on the opening statement of the opponent, at the close of the opponent's evidence or at the close of all the evidence.

{¶122} "***

{¶123} "(4) When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

{¶124} Appellants argue that appellees did not set forth sufficient evidence on their claims of fraud and conversion of assets against Huff. In addition, they claim they were entitled to a directed verdict on appellees' breach of contract and breach of fiduciary claims.

{¶125} The Supreme Court of Ohio has noted the following elements of a fraud claim:

{¶126} "'"(a) a representation or, where there is a duty to disclose, concealment of a fact,

{¶127} "'"(b) which is material to the transaction at hand,

{¶128} """(c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,

{¶129} """(d) with the intent of misleading another into relying upon it,

{¶130} """(e) justifiable reliance upon the representation or concealment, and

{¶131} """(f) a resulting injury proximately caused by the reliance."""" *Williams v. Aetna Fin. Co.* (1998), 83 Ohio St.3d 464, 475. (Citations omitted.)

{¶132} In this matter, appellees presented evidence that showed Huff did not fully disclose the existence of the cease and desist orders or other activities that occurred in relation to Huff's activities at Acro-Tech (which led to the legal proceedings in Oregon and Washington) to appellees prior to their investment in Engintec. In addition, there is evidence in the record that Huff did not disclose the fact that Marino had a right of first refusal to market the Smart Valve. Since there was evidence presented that Huff did not disclose relevant information when he had a duty to do so, the trial court did not err by denying the motion for directed verdict in regard to the fraud count.

{¶133} The Fifth Appellate District has held the following are necessary elements for a claim of conversion: "(1) a defendant's exercise of dominion or control; (2) over a plaintiff's property; and (3) in a manner inconsistent with the plaintiff's rights of ownership." *Bush v. Signals Power & Grounding Specialists, Inc.*, 5th Dist. No. 08 CA 88, 2009-Ohio-5095, at ¶15. (Citations omitted.)

{¶134} Appellants argue that Miller's testimony regarding Huff's conversion of $8,100 was not supported by sufficient evidence because appellees did not offer expert testimony on this issue. We disagree. Miller testified that certain money had been converted by Huff. At this point, appellees presented sufficient evidence on the

conversion count for the trial court to permit the matter to go to the jury. Huff was permitted to give his explanation that there were no accounting irregularities. Then, it was up to the jury, as the trier of fact, to determine whether a conversion had occurred. As there was evidence in the record pertaining to the alleged conversion, the trial court did not err by denying the motion for directed verdict on this count.

{¶135} In regard to the breach of contract and breach of fiduciary claims, these arise from appellants' actions at the emergency board meeting, in which appellants attempted to suspend appellees' ownership interest in Engintec pending their submission of an additional $15,000.

{¶136} "In order to prevail in an action for breach of contract, a plaintiff must establish the existence of a contract, plaintiff's performance under that contract, defendant's breach, and damages." *Garrett v. Ohio Farmers Ins. Co.*, 11th Dist. No. 2003-L-182, 2005-Ohio-413, at ¶23, citing *Doner v. Snapp* (1994), 98 Ohio App.3d 597, 600.

{¶137} "'A "fiduciary" has been defined as "'a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking.'"' [*Strock v. Prensell* (1988), 38 Ohio St.3d 207, 216.] A breach-of-fiduciary-duty claim essentially is a negligence claim involving a higher standard of care. Id. Thus, the party asserting such a breach must establish the existence of a fiduciary duty, a breach of that duty, and an injury proximately resulting therefrom. Id." *Hurst v. Enterprise Title Agency, Inc.*, 157 Ohio App.3d 133, 2004-Ohio-2307, at ¶39. (Emphasis omitted.) In this matter, appellants, as members of the board of directors of Engintec, owed a fiduciary duty to appellees, as shareholders of Engintec. See, e.g., *Huang v. Lanxide Thermocomposites, Inc.* (2001), 144 Ohio App.3d 289, 299.

{¶138} There was evidence presented that appellants breached the underlying contract as well as their fiduciary duties by attempting to totally devalue appellees' ownership interest in Engintec.

{¶139} The trial court did not err by denying appellants' motions for directed verdict.

{¶140} Appellants' fifth assignment of error is without merit.

{¶141} Appellants' eleventh assignment of error is:

{¶142} "The jury verdict was against the manifest weight of the evidence & therefore prejudiced appellants."

{¶143} "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C. E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, syllabus.

{¶144} In this matter, as we noted in our analysis of appellants' fifth assignment of error, the ultimate verdict and judgment of the trial court is supported by competent, credible evidence. Thus, the jury's verdict is not against the manifest weight of the evidence.

{¶145} Appellants' eleventh assignment of error is without merit.

{¶146} Appellants' ninth assignment of error is:

{¶147} "The trial judge erred by permitting the jury to award punitive damages & attorney's fees against Appellant Reggie Huff in that there was insufficient evidence to support either an award of punitive damages or attorney's fees."

{¶148} Appellants argue there was not sufficient evidence that Huff acted with actual malice or ill will to support the jury's verdict regarding punitive damages and attorney fees.

{¶149} We note that punitive damages are intended to punish the defendant and to act as a deterrent of future wrongdoing. *Wiles v. Medina Auto Parts*, 96 Ohio St.3d 240, 2002-Ohio-3994, at ¶21, citing *Preston v. Murty* (1987), 32 Ohio St.3d 334, 335. Historically, punitive damages were permitted in Ohio tort actions concerning fraud, malice, or insult. *Preston v. Murty*, 32 Ohio St.3d at 334.

{¶150} Appellants contend there "must be a showing of actual malice" to support a punitive-damages award. However, as noted above, fraud can be a predicate action to support a punitive-damages award. *Preston v. Murty*, 32 Ohio St.3d at 334. Upon reviewing the record in this matter, we conclude that there is adequate evidence in the record to support the jury's award of punitive damages and attorney fees against Huff. There was evidence that Huff committed fraud by failing to disclose his inappropriate activity in Oregon to appellees.

{¶151} Moreover, we disagree with appellants' contention that there was insufficient evidence in the record that Huff acted with actual malice. The Supreme Court of Ohio has defined "actual malice" as:

{¶152} "Actual malice, necessary for an award of punitive damages, is (1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, *or* (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm." *Preston v. Murty*, 32 Ohio St.3d 334, syllabus. (Emphasis sic.)

{¶153} In addition to Huff's failure to disclose his activities associated with Acro-Tech, after he was presented with the lack of confidence letter, Huff participated in the emergency board meeting and attempted to suspend appellees' shares in Engintec subject to their payment of an additional $15,000.

{¶154} There was sufficient evidence in the record to support an award of punitive damages and attorney fees.

{¶155} Appellants' ninth assignment of error is without merit.

{¶156} Appellants' tenth assignment of error is:

{¶157} "The trial court erred to the prejudice of appellants in not granting a motion for a new trial per Civ.R. 59 in that there were irregularities and errors at law in the proceedings and judgment was both contrary to law, not sustained by the weight of the evidence."

{¶158} Appellants contend the trial court erred by denying their motion for a new trial. Motions for new trial are governed by Civ.R. 59, which provides, in part:

{¶159} "(A) Grounds.

{¶160} "A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:

{¶161} "(1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;

{¶162} "(2) Misconduct of the jury or prevailing party;

{¶163} "(3) Accident or surprise which ordinary prudence could not have guarded against;

{¶164} "(4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;

{¶165} "(5) Error in the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury or detention of property;

{¶166} "(6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;

{¶167} "(7) The judgment is contrary to law;

{¶168} "(8) Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial;

{¶169} "(9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application.

{¶170} "In addition to the above grounds, a new trial may also be granted in the sound discretion of the court for good cause shown.

{¶171} "When a new trial is granted, the court shall specify in writing the grounds upon which such new trial is granted.

{¶172} "On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter a new judgment.

{¶173} "(B) Time for motion.

{¶174} "A motion for a new trial shall be served not later than fourteen days after the entry of judgment."

{¶175} This court reviews a trial court's decision on a motion for new trial under the abuse of discretion standard. *Willoughby v. Kvasnicka*, 11th Dist. No. 2008-P-0081, 2009-Ohio-2302, at ¶34, citing *Mannion v. Sandel* (2001), 91 Ohio St.3d 318, 321.

{¶176} In this assigned error, appellants reiterate many of their individual claims set forth above. For the reasons set forth in our analysis of those issues, we conclude the trial court did not abuse its discretion by denying appellants' Civ.R. 59 motion for a new trial.

{¶177} Appellants' tenth assignment of error is without merit.

{¶178} The judgment of the Trumbull County Court of Common Pleas is affirmed.

MARY JANE TRAPP, P.J.,

COLLEEN MARY O'TOOLE, J.,

concur.