

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Ohio Vestibular & Balance
Centers, Inc., et al.

Court of Appeals No. L-11-1320

Trial Court No. CI0200706185

Appellants/Cross-Appellees

v.

Richard C. Wheeler, et al.

DECISION AND JUDGMENT

Appellees/Cross-Appellants

Decided: October 4, 2013

* * * * *

Marvin A. Robon and Larry E. Yunker, II, for appellants/cross-appellees.

John J. McHugh, III, Matthew M. McHugh and Matthew P. Waigand, for appellees/cross-appellants.

* * * * *

YARBROUGH, J.

{¶ 1} This is an appeal and cross-appeal from the judgment of the Lucas County Court of Common Pleas, entered upon a jury verdict following an 18-day trial. For the following reasons, we affirm, in part, and reverse, in part.

I. Facts and Procedural Background

{¶ 2} In 2001, St. James Therapy Center (“St. James”) was created. The original members of the company were Laurie Livingston, Joe Gomez, Ricky Gomez, Mike Schoen, and MWG, Inc. As set forth in its purpose statement, St. James was formed with the intent to provide a place for Livingston, a licensed physical therapist, to practice physical therapy. Livingston is a 25 percent member of St. James, and was the manager and clinical director of the company. The remaining members each initially possessed an 18.75 percent membership share in St. James. In addition to their membership shares, Joe Gomez was the owner of the facility where St. James was located, and thus was St. James’ landlord; Rick Gomez was Joe’s son and maintained the property; Mike Schoen was a physical therapist who subcontracted with St. James to provide certain in-home care; and MWG, Inc., which was owned and controlled by Duke Wheeler, provided administrative services for St. James.

{¶ 3} To help Livingston, St. James hired Marianne Keller, a licensed physical therapy assistant. The decision to hire Keller was made in part because Livingston suffers from a vestibular disorder that affects her balance and could cause her to be unable to work for long periods of time. To entice Keller to leave her current position, St. James offered her a 1.5 percent bonus on all of St. James’ gross receipts. The bonus agreement was never reduced to writing, however, and for the first few years Keller was paid separately by Mike Schoen. Duke Wheeler was never made aware of the bonus agreement.

{¶ 4} During the first few years of its existence, St. James flourished, increasing its revenues and profits on a yearly basis. Then, in late 2004, Livingston exercised her management discretion to terminate MWG as the administrative and billing services provider for St. James. Her decision was made in response to MWG's notice that it was increasing its fees. The termination was effective January 2005. Subsequently, but not necessarily as a result of the termination, St. James' financial condition began to decline.

{¶ 5} In 2005, Livingston and Keller began discussing the possibility of forming a separate therapy company that would specialize in vestibular and balance disorders in light of Livingston's experience and knowledge. In the fall of 2005, Ohio Vestibular & Balance Centers, Inc. ("Ohio Vestibular") was formed, with Livingston and Keller each having a 50 percent membership interest. Joe Gomez agreed to expand his facility so that Ohio Vestibular would have a place to operate. The result was that Ohio Vestibular shared much of the same space with St. James, including a reception area, kitchen area, and restrooms. Due to the required renovations to the facility, Ohio Vestibular did not begin to treat patients in earnest until May 2006.

{¶ 6} Livingston and Joe Gomez initially agreed that Ohio Vestibular would not pay rent during its start-up phase. Unfortunately, in 2006, Joe Gomez was diagnosed with terminal cancer. As part of his effort to tie up loose ends, Gomez restarted negotiations with Ohio Vestibular concerning a lease agreement. Ohio Vestibular, however, rejected Gomez's proposed lease agreement on the basis that it believed the amount of rent was commercially unreasonable. By August 2007, the parties had

attempted several rounds of negotiations, but had not reached an agreement. At that point, Joe Gomez elected to evict Ohio Vestibular. Contemporaneously, due to the declining financial position of St. James and the fact that it was now operating at a significant loss, a majority of the members of St. James—Joe Gomez, MWG, through Duke Wheeler, and Diane Gomez, the wife of Ricky Gomez and the recipient of his shares following his death—elected to terminate Livingston and Keller from the company. On Friday, August 24, 2007, Ohio Vestibular was evicted from the facility, and Livingston and Keller were notified that they were terminated from St. James.

{¶ 7} Immediately following the removal of Livingston and Keller, Duke Wheeler spoke with the employees at the facility. Most of the employees worked for St. James, although a few were present who worked solely for Ohio Vestibular. Nevertheless, Wheeler told everyone that if they wanted to continue to work, they should show up the following Monday morning, and there would be a place for them.

{¶ 8} Subsequently, Livingston, Keller, and Ohio Vestibular initiated the present lawsuit, alleging numerous claims including wrongful termination, breach of contract, and intentional interference with business relations. St. James, MWG, and Duke Wheeler responded by filing counterclaims including breach of fiduciary duty, breach of the operating agreement, and intentional interference with contractual and business relations. Many of the counterclaims were based on allegations that Livingston and Keller diverted patients to Ohio Vestibular who otherwise would have been treated at St. James. The matter proceeded to an 18-day jury trial, which concluded with the submission of

11 claims and 13 counterclaims to the jury. Of those, the jury returned a verdict in favor of the plaintiffs on one claim:

Claim IX – Verdict in the amount of \$6,339.85 for Ohio Vestibular on its claim against St. James for conversion of Medicare billings performed under St. James’ billing number.

The jury also returned a verdict in favor of the counterclaimants on all 13 counterclaims, of which only six are relevant to this appeal:

Claim XIII – Verdict in the amount of \$24,407.70 for St. James on its claim against Livingston for her breach of St. James’ operating agreement;

Claim XIV – Verdict in the amount of \$11,404.11 for St. James on its claim against Livingston for the breach of her fiduciary duty to St. James;

Claim XVI(A) – Verdict in the amount of \$1.00 for St. James on its claim against Livingston for her intentional interference with St. James’ contractual and business relations by diverting St. James’ patients, referrals, revenues, and goodwill;

Claim XVI(B) – Verdict in the amount of \$1.00 for St. James on its claim against Keller for her intentional interference with St. James’ contractual and business relations by diverting St. James’ patients, referrals, revenues, and goodwill;

Claim XVI(C) – Verdict in the amount of \$1.00 for St. James on its claim against Ohio Vestibular for its intentional interference with St. James’ contractual and business relations by diverting St. James’ patients, referrals, revenues, and goodwill, with the finding that those damages occurred prior to August 24, 2007;

Claim XVII(A) – Verdict in the amount of \$1.00 for St. James on its claim against Livingston for her conspiracy to commit intentional interference with St. James’ contractual and business relations by diverting St. James’ patients, referrals, revenues, and goodwill;

Claim XVII(B) – Verdict in the amount of \$1.00 for St. James on its claim against Keller for her conspiracy to commit intentional interference with St. James’ contractual and business relations by diverting St. James’ patients, referrals, revenues, and goodwill;

Claim XVII(C) – Verdict in the amount of \$76,000.00 for St. James on its claim against Ohio Vestibular for its conspiracy to commit intentional interference with St. James’ contractual and business relations by diverting St. James’ patients, referrals, revenues, and goodwill, with the finding that those damages occurred prior to August 24, 2007, and the further finding that no punitive damages should be awarded, but that attorney fees should be awarded against Ohio Vestibular;

Claim XXIII(A) – Verdict in the amount of \$1.00 for MWG on its claim against Livingston for her intentional interference with St. James’ contractual and business relations by diverting its patients, referrals, revenues, and goodwill, with the finding that those damages occurred prior to August 24, 2007;

Claim XXIII(B) – Verdict in the amount of \$1.00 for MWG on its claim against Keller for her intentional interference with St. James’ contractual and business relations by diverting its patients, referrals, revenues, and goodwill, with the finding that those damages occurred prior to August 24, 2007;

Claim XXIII(C) – Verdict in the amount of \$1.00 for MWG on its claim against Ohio Vestibular for its intentional interference with St. James’ contractual and business relations by diverting its patients, referrals, revenues, and goodwill, with the finding that those damages occurred prior to August 24, 2007;

Claim XXIV(A) – Verdict in the amount of \$1.00 for MWG on its claim against Livingston for her conspiracy to commit intentional interference with St. James’ contractual and business relations by diverting St. James’ patients, referrals, revenues, and goodwill, with the finding that those damages occurred prior to August 24, 2007;

Claim XXIV(B) – Verdict in the amount of \$1.00 for MWG on its claim against Keller for her conspiracy to commit intentional interference with St. James’ contractual and business relations by diverting St. James’ patients, referrals, revenues, and goodwill, with the finding that those damages occurred prior to August 24, 2007;

Claim XXIV(C) – Verdict in the amount of \$224,622.00 for MWG on its claim against Ohio Vestibular for its conspiracy to commit intentional interference with St. James’ contractual and business relations by diverting St. James’ patients, referrals, revenues, and goodwill, with the finding that those damages occurred prior to August 24, 2007, and the further finding that no punitive damages should be awarded, but that attorney fees should be awarded against Ohio Vestibular.

{¶ 9} Following the verdict, the parties each filed post-judgment motions for judgment notwithstanding the verdict or a new trial, which the trial court denied. Livingston, Keller, and Ohio Vestibular (collectively “appellants”) have timely appealed, asserting ten assignments of error. MWG and St. James (collectively “appellees”) have cross-appealed, asserting two assignments of error.

II. Analysis

{¶ 10} For ease of discussion, we will address the assignments of error out of order, relative to the claim they contest.

A. Claims Against Livingston, Keller, and Ohio Vestibular for Intentional Interference with Business Relations and Conspiracy to Commit Intentional Interference with Business Relations

{¶ 11} Both St. James and MWG brought claims for intentional interference with business relations and conspiracy to commit intentional interference with business relations. In both cases, the jury awarded nominal damages of \$1 against Livingston, Keller, and Ohio Vestibular on the claims of intentional interference with business relations. On the conspiracy claims, the jury again awarded nominal damages against Livingston and Keller in both cases. However, as against Ohio Vestibular, the jury awarded \$76,000 in favor of St. James, and \$224,622 in favor of MWG. We will address MWG’s claims first.

1. MWG’s Claims (Claims XXIII and XXIV)

{¶ 12} Appellants’ second and fourth assignments of error are related, and we will address them together. As their second assignment of error, appellants state,

The Trial Court Erred in denying Plaintiffs’ Motion for Directed Verdict on the issue of MWG, Inc.’s standing to bring independent claims for Intentional Interference with the Business Relations of St. James Therapy Center, Ltd. (hereinafter “SJTC”) and the associated claim for conspiracy to commit Intentional Interference with the Business Relations of SJTC.

{¶ 13} Alternatively, for their fourth assignment of error, appellants argue,

The Trial Court Erred in denying Plaintiff’s Motion for JNOV, Remittitur, and/or a new trial after having been presented argument showing that the jury’s verdict with respect to claims for conspiracy to commit Intentional Interference with Business Relations was duplicative and irreconcilable with the facts.

We find appellants’ second assignment of error to be dispositive on these claims.

{¶ 14} We review the denial of a motion for directed verdict de novo. *Nageotte v. Cafaro Co.*, 160 Ohio App.3d 702, 2005-Ohio-2098, 828 N.E.2d 683, ¶ 24 (6th Dist.). A directed verdict is appropriate where “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.” Civ.R. 50(A)(4).

{¶ 15} In support of their second assignment, appellants argue that they were entitled to a directed verdict because MWG suffered no injury separate and apart from its status as a member of St. James, and thus cannot maintain an independent cause of action against appellants. MWG, on the other hand, argues that it did suffer a separate and distinct harm in that it was terminated as the provider of administrative and billing services. MWG states that this termination was part of the plan to divert the patients, revenues, referrals, and goodwill, and prevented MWG from accruing fees for its services

going forward. Therefore, it argues that the jury award of \$224,622 against Ohio Vestibular, and the nominal awards against Livingston and Keller, is appropriate.

{¶ 16} We find that MWG’s argument is flawed for two reasons. First, the jury instructions relative to this claim specify that the jury must find that Livingston, Keller, and Ohio Vestibular “engaged in a civil conspiracy to divert patients, referrals, revenues, and goodwill away from *St. James Therapy Center* to Ohio Vestibular.” (Emphasis added.) Similarly, the verdict form refers to conspiracy to intentionally interfere with “*St. James Therapy Center’s* contractual and business relations.” (Emphasis added.) Thus, the claims themselves do not contemplate any direct injury to MWG. Rather, they focus on the injury to St. James. Second, MWG was terminated as the administrative and billing services provider effective January 2005, approximately ten months before Ohio Vestibular even came into existence. Thus, MWG cannot demonstrate any direct injury from a conspiracy involving Ohio Vestibular, since at the time Ohio Vestibular was formed, MWG was no longer providing services.

{¶ 17} The Ohio Supreme Court has held that “[A] plaintiff-shareholder does not have an independent cause of action where there is no showing that he has been injured in any capacity other than in common with all other shareholders as a consequence of the wrongful actions of a third party directed towards the corporation.” *Adair v. Wozniak*, 23 Ohio St.3d 174, 178, 492 N.E.2d 426 (1986). Because MWG has not been injured by the intentional interference with business relations in any capacity other than as a shareholder

of St. James, it does not have an independent cause of action. Therefore, appellants are entitled to a directed verdict on these claims.

{¶ 18} Accordingly, appellants' second assignment of error is well-taken, thereby rendering their fourth assignment of error moot.

2. St. James' Claims (XVI and XVII)

{¶ 19} The remainder of appellants' assignments of error relative to these claims addresses both the claims of St. James and MWG. However, in light of our disposition of appellants' second assignment of error, we will review these assignments only as they pertain to St. James' claims (Claims XVI and XVII).

i. Consent to Competition

{¶ 20} Appellants present as their first assignment of error,

The Trial Court Erred in denying Plaintiff's Motion for JNOV, Remittitur, and/or a new trial after having been presented with uncontroverted evidence that the counterclaimants consented to the very competition upon which the counterclaimants based their claims.

{¶ 21} When reviewing a trial court's ruling on a motion for judgment notwithstanding the verdict, "we must test whether the evidence, construed most strongly in favor of appellees, is legally sufficient to sustain the verdict." *Environmental Network Corp. v. Goodman Weiss Miller, L.L.P.*, 119 Ohio St.3d 209, 2008-Ohio-3833, 893 N.E.2d 173, ¶ 23. Since this is a question of law, we review the ruling de novo. *Id.*

{¶ 22} The gravamen of appellants' argument is that they were justified in competing with St. James by virtue of the operating agreement. Specifically, appellants point to Section 5.4.3 of the operating agreement, which states:

Except as otherwise expressly provided in Section 5.4.3, nothing in this Agreement shall be deemed to restrict in any way the rights of any Member, or of any Affiliate of any Member, to conduct any other business or activity whatsoever, and the member shall not be accountable to the Company or to any Member with respect to that business or activity even if the business or activity competes with the Company's business.

Thus, appellants conclude that St. James could not succeed on its claim for intentional interference with business relations because that claim requires that the interference be done "without privilege." See *A&B-Abell Elevator Co., Inc. v. Columbus/Cent. Ohio Bldg. & Constr. Trades Council*, 73 Ohio St.3d 1, 14, 651 N.E.2d 1283 (1995) ("The torts of interference with business relationships and contract rights generally occur when a person, *without a privilege to do so*, induces or otherwise purposely causes a third person not to enter into or continue a business relation with another, or not to perform a contract with another." (Emphasis added.)); *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 176, 707 N.E.2d 853 (1999) ("[E]ven if an actor's interference with another's contract causes damages to be suffered, that interference does not constitute a tort if the interference is justified.").

{¶ 23} Appellees, in contrast, argue that while competition between the companies is permitted, unfair, dishonest, and unlawful competition is not. Therefore, they conclude the trial court did not err in denying appellants' motion for judgment notwithstanding the verdict.

{¶ 24} Here, we hold that the evidence construed most strongly in appellees' favor is sufficient to sustain the verdict. In determining whether an actor has improperly interfered with the business relationship of another, consideration should be given to the following factors:

(a) the nature of the actor's conduct, (b) the actor's motive, (c) the interests of the other with which the actor's conduct interferes, (d) the interests sought to be advanced by the actor, (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other, (f) the proximity or remoteness of the actor's conduct to the interference, and (g) the relations between the parties. *Fred Siegel Co., L.P.A.* at 178-179, citing 4 Restatement of the Law 2d, Torts, Section 767 (1979).

{¶ 25} Applying these factors, we find that although the relationship between the parties weighs in favor of appellants because the operating agreement specifically permits competition, the nature of appellants' conduct in diverting patients while in the act of working for and managing St. James is sufficient to sustain the jury verdict. Therefore, the trial court did not err in denying appellants' motion for judgment notwithstanding the verdict.

{¶ 26} Accordingly, appellants' first assignment of error is not well-taken.

ii. Intra-Corporate Conspiracy Doctrine

{¶ 27} For their seventh assignment of error, appellants state,

The Trial Court Erred in denying Plaintiff's Motion for JNOV, Remittitur, and/or a new trial after having been presented with legal authority that the jury's verdict violates the corporate conspiracy doctrine.

{¶ 28} The "intra-corporate conspiracy doctrine" provides that "[w]here all defendants, allegedly co-conspirators, are members of the same collective entity, there are not two separate 'people' to form a conspiracy." *Kerr v. Hurd*, 694 F.Supp.2d 817, 834 (S.D.Ohio 2010). Appellants contend that because Livingston and Keller are members of Ohio Vestibular, they all form the same collective entity. Further, since no other no other co-conspirators were named, appellants conclude that the conspiracy claims must fail as a matter of law.

{¶ 29} Appellees counter that other co-conspirators, such as Mike Schoen, while already dismissed at the time of trial, were nonetheless named in the complaint. Thus, appellees contend that even if Livingston, Keller, and Ohio Vestibular are considered to be one "person," a conspiracy still exists with other non-defendants. *See Ohio Bur. of Workers' Comp. v. MDL Active Duration Fund, Ltd.*, 476 F.Supp.2d 809, 825-826 (S.D.Ohio 2007) (fact that defendants have been dismissed for lack of personal jurisdiction does not mean that they may not be proved to be separate co-conspirators for purposes of establishing a conspiracy claim). However, we reject appellees' argument

because, although others may have been mentioned in the complaint, the jury instructions referred only to Livingston, Keller, and Ohio Vestibular when describing what the jury must find to establish a conspiracy—“Before you can find for [St. James] on this claim you must find by the greater weight of the evidence that Laurie Livingston, Mari Anne Keller, individually and/or as agents for Ohio Vestibular participated in a malicious combination.” Thus, the other alleged co-conspirators cannot be used to justify the jury’s verdict where the jury had no occasion to find that they were involved in the conspiracy.

{¶ 30} Even so, we hold that the intra-corporate conspiracy doctrine does not apply in this case. In *Kerr*, the plaintiff argued that because one of the actors was paid entirely by another organization, she was not part of the defendant company, and thus a conspiracy could exist. The court rejected this argument, reasoning that even though she was paid by another organization, all of the actor’s actions were done in her capacity as the chief operating officer of the defendant company, and thus the intra-corporate conspiracy doctrine did apply to defeat the conspiracy claim. *Kerr* at 834; *see also Jackson v. City of Columbus*, 194 F.3d 737, 753 (6th Cir.1999) (“[M]embers of the same legal entity cannot conspire with one another as long as their alleged acts were within the scope of their employment.”). Here, we are presented with the opposite situation. Livingston and Keller, while members of Ohio Vestibular, allegedly committed the tortious acts in their capacity as the manager and employee of St. James, respectively. Therefore, they cannot be said to form the same “collective entity” with Ohio Vestibular. Consequently, the intra-corporate conspiracy doctrine does not apply.

{¶ 31} Accordingly, appellants' seventh assignment of error is not well-taken.

iii. Inconsistent Jury Verdicts

{¶ 32} As their sixth assignment of error, appellants argue,

The Trial Court Erred in denying Plaintiff's Motion for JNOV, Remittitur, and/or a new trial after having been presented with contradictory jury verdict forms which cannot be reconciled.

{¶ 33} In this assignment, appellants contend that the jury verdict based on the conspiracy to commit intentional interference with business relations claim is inconsistent with the jury verdict awarding them damages for conversion (Claim IX). The conversion claim was based on the fact that during its early stages, Ohio Vestibular would bill patients using St. James' Medicare number. When Medicare would submit a payment to St. James, St. James would then remit to Ohio Vestibular the portion of the payment attributable to Ohio Vestibular's patients. Appellants alleged, and the jury found, that St. James failed to pay Ohio Vestibular \$6,339.85. In support of their assignment of error, appellants claim that it is inconsistent for the jury to "simultaneously [find] that the patients were Ohio Vestibular's and [St. James']."

{¶ 34} In opposition, appellees argue that the verdict is not inconsistent. They contend that the issue of whether Medicare reimbursements were distributed is independent from the issue of whether appellants intentionally interfered with St. James' business relationships by wrongfully diverting its patients, referrals, revenues, and goodwill. Furthermore, appellees argue that even if the verdicts were inconsistent,

appellants waived the issue by failing to raise the issue of inconsistency before the jury was discharged. We agree on both points.

{¶ 35} Here, the jury found that Ohio Vestibular treated the patients, and thus was entitled to the Medicare payments. In addition, the jury found that appellants intentionally interfered with St. James' business relationships by diverting those patients to Ohio Vestibular. Under both scenarios, the individuals being treated are patients of Ohio Vestibular. Thus, the jury verdict is not inconsistent.

{¶ 36} As to the waiver argument, Ohio courts have held that failure to raise the issue of inconsistent verdicts before the jury is discharged must be considered to be a waiver of the issue. *Arrow Machine Co., Ltd. v. Array Connector Corp.*, 197 Ohio App.3d 598, 2011-Ohio-6513, 968 N.E.2d 515, ¶ 54 (11th Dist.); *Napierala v. Szczublewski*, 6th Dist. Lucas No. L-02-1025, 2002-Ohio-7109, ¶ 19; *Romp v. Haig*, 110 Ohio App.3d 643, 647, 675 N.E.2d 10 (1st Dist.1995).

The rationale for such a rule is clear. When a jury returns two inconsistent verdicts, a party can object, just as a party can object when a jury returns a verdict inconsistent with corresponding interrogatories. A trial court has a number of options at its disposal at that time, including the option of allowing the jury to deliberate further to clear up any ambiguities that may have arisen. However, if the objection is allowed after the jury is dismissed, the party has unnecessarily limited the court's options. If such

tactically placed objections were allowed, parties could circumvent the jury if they felt that the jury would not return a favorable verdict. *Romp* at 647.

{¶ 37} Here, following the verdict and before the jury was discharged, the trial court asked the parties if they had anything further for the record. Appellants did not make any objections at that time. Therefore, appellants have waived the issue.

{¶ 38} Accordingly, appellants' sixth assignment of error is not well-taken.

iv. Damages Based on Underlying Unlawful Act

{¶ 39} Appellants state as their third assignment of error,

The Trial Court Erred in denying Plaintiff's Motion for JNOV, Remittitur, and/or a new trial after having been presented with legal authority demonstrating that the jury failed to apply the law as contained within the jury instructions with respect to the awards made upon claims of civil conspiracy.

{¶ 40} Civil conspiracy constitutes "a malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages." *LeFort v. Century 21-Maitland Realty Co.*, 32 Ohio St.3d 121, 126, 512 N.E.2d 640 (1987), citing *Minarik v. Nagy*, 8 Ohio App.2d 194, 196, 193 N.E.2d 280 (8th Dist.1963). "The element of 'resulting in actual damages' means that, if a plaintiff suffers no actual damages from the underlying unlawful act, there can be no successful civil conspiracy action." *Gosden v. Louis*, 116 Ohio App.3d 195, 220, 687 N.E.2d 481 (9th Dist.1996).

{¶ 41} Here, appellants point out that the jury found only nominal damages on the underlying claim for intentional interference with business relations. Thus, appellants conclude that since St. James suffered no “actual” damages from the underlying unlawful act, the jury’s verdict on the conspiracy claim is contrary to law.

{¶ 42} Appellees, on the other hand, argue that a conspiracy can increase the amount of damages suffered by a plaintiff. *Id.* at 221 (“A civil conspiracy claim, therefore, serves only to enlarge the pool of potential defendants from whom a plaintiff may recover damages and, possibly, *an increase in the amount of those damages.*” (Emphasis added.)). Thus, they conclude that the difference in damages can be attributed to the aggravation caused by the conspiracy. However, in the present case, the issue is not whether the act of conspiracy caused additional damages, rather it is whether the underlying unlawful act caused any damages at all. *See id.* at 220 (“[I]f a plaintiff suffers no actual damages from the underlying unlawful act, there can be no successful civil conspiracy action.”). Thus, appellees’ argument is misplaced and without merit.

{¶ 43} Nonetheless, appellants’ argument is also without merit. Appellants contend that the jury’s finding on civil conspiracy is contrary to law. However, when viewed in isolation, the conspiracy claim is not contrary to law—the jury could have found, and evidently did find, that a malicious combination existed to intentionally interfere with St. James’ business, and that interference caused actual damages. Instead, appellants’ contention is only justified when the conspiracy claim is viewed in conjunction with the jury verdict awarding only nominal damages on the underlying

direct claim for intentional interference with business relations. Thus, the real issue is that the two verdicts are inconsistent with one another. However, because appellants failed to object to these verdicts before the jury was discharged, they have waived the issue. *Arrow Machine Co., Ltd.*, 197 Ohio App.3d 598, 2011-Ohio-6513, 968 N.E.2d 515 at ¶ 54.

{¶ 44} Accordingly, appellants' third assignment of error is not well-taken.

v. Damages are Confiscatory and Contrary to Law

{¶ 45} As their fifth assignment of error, appellants state,

The Trial Court Erred in denying Plaintiff's Motion for JNOV, Remittitur, and/or a new trial after having been presented with legal authority demonstrating that the jury's award for Conspiracy to commit Intentional Interference with Business Relations was confiscatory and contrary to law.

{¶ 46} In this assignment of error, appellants argue that appellees did not demonstrate the existence of their lost profits with reasonable certainty. Damages for intentional interference with business relations can include "lost profits, reduced by the expenditures saved by not having to produce that profit, if both the existence of the loss and the dollar amount of the loss are proven to a reasonable certainty." *UZ Engineered Prods. Co. v. Midwest Motor Supply Co., Inc.*, 147 Ohio App.3d 382, 2001-Ohio-8779, 770 N.E.2d 1068, ¶ 55 (10th Dist.), citing *Digital & Analog Design Corp. v. N. Supply Co.*, 44 Ohio St.3d 36, 40, 540 N.E.2d 1358 (1989). "A plaintiff may not merely assert

that it would have made a particular amount of profits, but must prove lost profits with calculations based on facts.” *Id.*, citing *Gahanna v. Eastgate Properties, Inc.*, 36 Ohio St.3d 65, 68, 521 N.E.2d 814 (1988).

{¶ 47} In particular, appellants contend that appellees failed to demonstrate that St. James had an existing or prospective business relationship with the patients of Ohio Vestibular, and that St. James could have treated those patients at no additional cost. Further, appellants contend that even if St. James could have treated all of the patients at no additional cost, the amount awarded to appellees was still excessive because it exceeded the gross revenues of Ohio Vestibular.

{¶ 48} As to the first argument, we agree with appellees’ counter-argument that the jury was presented with sufficient testimony to determine that Ohio Vestibular’s patients were prospective patients of St. James, and that St. James could have treated them at no additional cost. At trial, Phyllis Pence testified that prior to opening Ohio Vestibular, Livingston provided vestibular care and treatment to St. James’ patients. Pence further testified that after Ohio Vestibular opened, she was instructed to place any patient that called with a vestibular or balance problem on Ohio Vestibular’s schedule, regardless of whether the patient called on St. James’ phone line or Ohio Vestibular’s phone line. This testimony was corroborated by Christine Hoffman. Further, Duke Wheeler testified that St. James had sufficient staffing to handle the extra patients without any increase in overhead. *See Digital & Analog Design Corp.* at 40-41 (“There are * * * exceptions to the general rule requiring that plaintiff expressly prove its own costs for the

generation of lost profits. For example where there would have been no additional costs to the party to generate those profits which he lost * * * then he need only assert and prove such circumstances.”).

{¶ 49} Appellants, for their part, contest the testimony, and in particular contend that Wheeler’s testimony is unbelievable, and that it does not take into account the cost for billing services for those patients. “However, the determination of the credibility of these witnesses and the weight to give the evidence is a matter for the trier of fact.” *Brookeside Ambulance, Inc. v. Walker Ambulance Serv.*, 112 Ohio App.3d 150, 157, 678 N.E.2d 248 (6th Dist.1996). Therefore, upon our review of this testimony, and the entirety of the evidence produced at trial, we hold that the jury had sufficient evidence on which to base its findings.

{¶ 50} Turning to appellants’ second argument—that the award of damages was excessive in that it exceeded Ohio Vestibular’s gross revenues—we again hold that sufficient evidence existed to support the jury’s findings. Appellants argue that the entire award of \$300,622 to St. James and MWG combined, is greater than Ohio Vestibular’s gross revenues of \$265,000. Thus, appellants conclude that the jury’s award cannot be reconciled with the facts of the case. However, appellants again look at the jury verdicts in conjunction with each other instead of in isolation. We have already determined that the \$224,622 award to MWG cannot stand; therefore, we are only concerned with the \$76,000 award to St. James. In considering that award, we find that appellees provided

sufficient evidence in the form of tax returns, income statements, and balance sheets, and the testimony relating to those documents, to support the jury's verdict.

{¶ 51} Accordingly, appellants' fifth assignment of error is not well-taken.

vi. Joint and Several Liability

{¶ 52} In their cross-appeal, appellees first assign as error,

The trial court erred prejudicially in declining to enter judgment of joint and several liability against all co-conspirators upon a jury verdict of conspiracy.

{¶ 53} Appellees contend the trial court erred when it denied their motion for judgment notwithstanding the verdict, in which they sought to impose joint and several liability on the conspiracy claims. Appellees are correct in recognizing that Ohio law imposes joint and several liability on co-conspirators. *See Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 476, 700 N.E.2d 859 (1998) ("In a conspiracy, the acts of coconspirators are attributable to each other."). However, as did the trial court, we conclude that appellees' argument is governed by the invited error doctrine. Under that doctrine, "a party is not permitted to take advantage of an error that he himself invited or induced the court to make." *Davis v. Wolfe*, 92 Ohio St.3d 549, 552, 751 N.E.2d 1051 (2001).

{¶ 54} Here, rather than explaining that co-conspirators are jointly and severally liable, the jury verdict forms provided by the parties specifically requested that the jury enter an amount of compensatory damages as to each co-conspirator. Therefore, because appellees were responsible for creating the jury verdict forms, the invited error doctrine

prevents them from now assigning as error the trial court's refusal to alter the jury's verdict that followed those forms. Accordingly, appellees' first assignment of error on cross-appeal is not well-taken.

vii. Attorney Fees

{¶ 55} Appellees present as their second assignment of error,

The trial court erred prejudicially in declining to charge the jury that attorneys' fees could only be rendered in a tort action upon, or incidental to, a specific award of punitive damages.

{¶ 56} As an initial matter, the parties agree that punitive damages are a prerequisite to awarding attorney fees in this tort case. *See Columbus Fin., Inc. v. Howard*, 42 Ohio St.2d 178, 183, 327 N.E.2d 654 (1975) ("If punitive damages are proper, the aggrieved party may also recover reasonable attorney fees."). Here, before the verdict forms were read, the parties learned that in a couple of instances the jury awarded attorney fees, but did not award punitive damages. In light of this, appellees requested that the trial court instruct the jury that punitive damages must be awarded before attorney fees can be awarded. The trial court declined to do so. Appellees now argue that the trial court's decision constituted an abuse of discretion.

{¶ 57} Again, we find that this issue can be resolved under the invited error doctrine. Appellees, along with appellants, created the jury verdict forms that did not

clarify that punitive damages must be found before attorney fees could be awarded.¹

Furthermore, this issue was discussed and resolved prior to the jury verdicts being read, and prior to the request to re-instruct the jury:

THE COURT: The parties did contemplate I think [appellees' attorney] you may have been the one that brought this question up, what if they decide that no punitive damages should be awarded but they decide attorney fees should be awarded, and I believe we have come to the resolution we would not have to worry about the second portion of attorney fees being decided if the punitive damages were not awarded because the only way to get to attorney fees is if damages were awarded. Is that consistent with—

[APPELLEES' ATTORNEY]: That was consistent. I was raising the question did it confuse the jury the way we had it, *but all of us agreed in the absence of an award of punitive damages, attorney fees even if they were awarded would not be endorsed by the Court.* (Emphasis added.)

* * *

THE COURT: All right. Well, what we might be able to do in that situation, maybe by agreement of the parties is as I read the verdict forms in

¹ The instructions that were provided to the jury informed them that “If you decide a party is liable for punitive damages you must also decide whether the Defendant is liable for reasonable attorney fees of Counsel employed by the prevailing party in the prosecution of this action.”

Court if I read that no punitive damages are awarded then I don't even address whether or not attorney fees are awarded or not simply because you can't get there without first having the punitive. So if we don't have punitive then I won't even address the fact of whether or not attorney fees are awarded or not. Does that make sense?

[APPELLEES' ATTORNEY]: It does.

Therefore, because appellees were actively involved in creating the error, the invited error doctrine prevents them from raising it on appeal.

{¶ 58} Accordingly, appellees' second assignment of error on cross-appeal is not well-taken.

B. Claim Against Livingston for Breach of Operating Agreement (Claim XIII)

{¶ 59} In Claim XIII, St. James requested damages for Livingston's breach of the operating agreement through her actions in paying Keller unauthorized bonuses, failing to manage the company for the benefit of all members, and wrongfully diverting patients, referrals, revenue, and goodwill from St. James to Ohio Vestibular. Following the presentation of evidence, appellants moved for a directed verdict on the grounds that St. James lacked standing to bring a claim for breach of the operating agreement. The trial court denied the motion and submitted the matter to the jury. Ultimately, the jury found in favor of St. James on this claim, and awarded \$24,407.70 in damages.

{¶ 60} In their eighth assignment of error, appellants argue,

The Trial Court Erred in denying Plaintiffs' Motion for Directed Verdict on the issue of [St. James'] standing to bring a Claim for Breach of Operating Agreement.

{¶ 61} We again note that we review the trial court's denial of appellants' motion for a directed verdict de novo. *Nageotte*, 160 Ohio App.3d 702, 2005-Ohio-2098, 828 N.E.2d 683 at ¶ 24. Here, the parties agree that only a party to the contract, or an intended third-party beneficiary of the contract, may bring an action on a contract. *Grant Thornton v. Windsor House, Inc.*, 57 Ohio St.3d 158, 161, 566 N.E.2d 1220 (1991). Further, it is not disputed that St. James is not a party to the operating agreement. Thus, the issue we must decide is whether St. James is an intended third-party beneficiary of the operating agreement.

{¶ 62} "A third-party beneficiary is one for whose benefit a promise has been made in a contract but who is not a party to the contract." *Perrysburg v. Toledo Edison Co.*, 171 Ohio App.3d 174, 2007-Ohio-1327, 870 N.E.2d 189, ¶ 20 (6th Dist.). "The third party need not be named in the contract, as long as he is contemplated by the parties to the contract and sufficiently identified." *Id.*, quoting *Chitlik v. Allstate Ins. Co.*, 34 Ohio App.2d 193, 196, 299 N.E.2d 295 (8th Dist.1973). "Moreover, the 'promisee must intend that a third party benefit from the contract in order for that third party to have enforceable rights under the contract.'" *Id.*, quoting *Laverick v. Children's Hosp. Med. Ctr. of Akron, Inc.*, 43 Ohio App.3d 201, 204, 540 N.E.2d 305 (9th Dist.1988).

{¶ 63} We agree with appellees that St. James is an intended third-party beneficiary of the operating agreement. Two sections of the operating agreement are persuasive on this point. First, Section 5.4.1, which describes Livingston's duties as the manager to act for the benefit of the company, states:

The Manager is to devote to the Company such time as is reasonably necessary to carry out the business of the Company in order to accomplish its purposes. The Manager, on behalf of the Company and at the expense of the Company is authorized to execute all documents that may be necessary to effectuate the provisions of this Agreement and to enable the Company to conduct its business; to conduct the affairs of the Company in compliance with applicable laws and in the best interest of the Company and its Members; not permit the use of Company funds or assets for other than the benefit of the Company and the Members; hold all Company property in the Company name or, in the case of cash or cash equivalence, in one or more depository accounts as to which the Company is the beneficial owner; and, use reasonable efforts not to cause the Company to incur debts or other liabilities beyond the Company's ability to pay such liabilities.

Second, Section 5.5.1, which describes the members' liability to the company and to each other, states:

A Member shall not be liable, responsible, or accountable, in damages or otherwise, to any other Member *or to the Company* for any act performed by the Member with respect to Company matters, except for fraud, gross negligence, or *an intentional breach of this Agreement*.

(Emphasis added.)

{¶ 64} From these sections, it is clear that the parties intended that St. James benefit from the manager's performance of her duties. Moreover, the parties even contemplated that a member would be liable to St. James for an intentional breach of the operating agreement. Therefore, we hold that St. James is an intended third-party beneficiary of the operating agreement and has standing to pursue the claim for breach of that agreement.

{¶ 65} Accordingly, appellants' eighth assignment of error is not well-taken.

C. Motion to Amend the Pleadings to Conform to the Evidence

{¶ 66} As their ninth assignment of error, appellants state,

The Trial Court Erred in denying Plaintiff's motion to amend the pleadings to conform to the evidence.

{¶ 67} Some additional background facts are necessary. Before the trial, appellants requested St. James' 2010 financial statements. Appellants did not receive these documents until several weeks into the trial. Upon examining the documents, appellants realized that St. James had paid \$156,000 in management fees to MWG at the end of 2010. Notably, MWG was a majority shareholder at the time, owning 56 percent

of the membership interest of St. James. Without objection, appellants entered the documents into evidence, and questioned Duke Wheeler concerning them. Appellees then cross-examined Wheeler on those same documents.

{¶ 68} Following the presentation of evidence, appellants moved to amend the pleadings to conform to the evidence. In effect, they sought to add a claim for breach of fiduciary duty based on MWG's conduct in paying allegedly exorbitant management fees to itself, thereby draining St. James of any funds to disburse to the other shareholders, i.e., Livingston. Prior to this motion, appellants' claims had focused exclusively on the events surrounding Livingston's termination and the eviction of Ohio Vestibular. Notably, appellants had also initially brought a claim for breach of fiduciary duty based on the amount MWG charged for billing services before Livingston terminated it in the beginning of 2005. However, appellants voluntarily dismissed this claim prior to the start of the trial.

{¶ 69} In support of their motion, appellants argued that the evidence, along with MWG's earlier billing charges, demonstrated a pattern of conduct that could lead the jury to conclude that MWG, through Wheeler, breached its fiduciary duty. For their part, appellees opposed the motion, arguing that the proposed additional issue was too far removed from the issues the parties had agreed would be litigated, namely whether appellees breached a fiduciary duty when St. James terminated Livingston. After accepting the arguments from the parties, the trial court noted that appellants specifically

dropped the breach of fiduciary claim relative to the billing practices before trial, and subsequently denied their motion.

{¶ 70} Motions to amend the pleadings to conform to the evidence are governed by Civ.R. 15(B), which provides:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment. Failure to amend as provided herein does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

{¶ 71} The Ohio Supreme Court has identified, “there are two types of amendments provided for under the rule. The first applies when the parties have expressly or impliedly consented to the trial of issues not contained in the pleadings. * * * A second type of

amendment may arise where there is an objection to the evidence offered on grounds that it is not within the issues framed by the pleadings.” *Hall v. Bunn*, 11 Ohio St.3d 118, 121, 464 N.E.2d 516 (1984). Appellants rely on the analytical framework associated with the second type of amendment to argue that the trial court erred when it denied their motion. Specifically, appellants contend the trial court failed to examine whether “(1) the presentation of the case’s merits will be subserved thereby, and (2) the objecting party [satisfied] the court that admission of the evidence would prejudice him in maintaining his case upon the merits.” *Id.* However, this framework is inapplicable to the present situation.

{¶ 72} The second type of amendment arises only where there is an objection to evidence on the grounds that it is not within the issues framed by the pleadings. Here, no objection was made either when the 2010 financial statements were introduced or when they were formally submitted. In fact, appellants questioned Wheeler concerning the documents without objection, and appellees further cross-examined Wheeler concerning the documents. Thus, because appellees did not object that the evidence was outside the scope of the pleadings, the second type of amendment under Civ.R. 15(B) is inapplicable, and appellants’ argument based on that analytical framework is without merit.

{¶ 73} Moreover, although not raised by the parties in their appellate briefs, we also note that the first type of amendment under Civ.R. 15(B) likewise does not require that the pleadings be amended. “It is axiomatic that cases are to be decided on the issues actually litigated at trial. Although Civ.R. 15 allows for liberal amendment of the

pleadings toward that end, the rule will only apply when, as stated therein, the amendment would ‘conform to the evidence’ and when the issue is tried by either the ‘express or implied consent of the parties.’” *State ex rel. Evans v. Bainbridge Twp. Trustees*, 5 Ohio St.3d 41, 44, 448 N.E.2d 1159 (1983). In determining whether the parties impliedly consented to litigate an issue, courts should consider “whether [the parties] recognized that an unpleaded issue entered the case * * *; whether the opposing party had a fair opportunity to address the tendered issue or would offer additional evidence if the case were to be retried on a different theory * * *; and whether the witnesses were subjected to extensive cross-examination on the issue.” *Id.* at 45-46. “Under Civ.R. 15(B), implied consent is not established merely because evidence bearing directly on an unpleaded issue is introduced without objection. Rather, it must appear that the parties understood the evidence was aimed at the unpleaded issue.” *Id.* at 46.

{¶ 74} Here, based on our review of the record, we do not find that the parties impliedly consented to litigate the breach of fiduciary claim that was based on MWG’s management fee. Before the trial, the parties worked diligently to identify the issues and claims that would be presented to the jury. As identified, Livingston’s claims focused only on her termination. In pursuit of these claims, part of Livingston’s trial strategy was to paint Wheeler and MWG in a negative light, to show them as conniving and conspiratorial. Thus, it would be difficult for appellees to recognize that the evidence surrounding the management fee was the foundation for an additional, unpleaded claim, rather than just another attempt to attack Wheeler’s character. In addition, appellees

stated that if they knew the unpleaded claim was at issue, they would have called additional witnesses, and offered further evidence to show that the management fee was retroactive to 2007, and was approved by the other shareholders of St. James. Therefore, although Wheeler was subject to cross-examination on the subject, we conclude that the parties did not impliedly consent to try the issue, and amendment of the pleadings would have been improper.

{¶ 75} Accordingly, appellants' ninth assignment of error is not well-taken.

D. Manifest Weight

{¶ 76} As their tenth, and final, assignment of error, appellants state,

The Trial Court Erred in denying Plaintiff's Motion for JNOV, Remittitur, and/or a new trial where the Jury's Verdict is against the Manifest Weight of the Evidence.

{¶ 77} In reviewing a manifest weight claim, the appellate court, sitting as a "thirteenth juror," reviews the evidence and must determine whether "the jury clearly lost its way and created such a manifest miscarriage of justice that the [verdict] must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the [verdict]." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983); *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517. "In weighing the

evidence, the court of appeals must always be mindful of the presumption in favor of the finder of fact.” *Eastley* at ¶ 21.

{¶ 78} Appellants argue that the verdict is against the manifest weight of the evidence in that the evidence shows that Wheeler acted abusively while he was in control of St. James, whereas when Livingston was in control, she conducted the business in conformity to the terms and conditions of the partnership agreement with the consent of the majority of the shareholders. Appellants conclude, “Given the overwhelming weight of the evidence, no reasonable mind could find both for Plaintiff Ohio Vestibular and simultaneously for counterclaim-Plaintiffs [St. James] and MWG, Inc.”

{¶ 79} Upon our review of the record, we do not think this is the exceptional case where the jury clearly lost its way. The jury heard three weeks of witness testimony and saw countless documents supporting each party’s theory of the case. Ultimately, it found appellees’ evidence to be more persuasive. Being mindful of the deference we afford to the jury’s findings, we cannot say that the jury’s verdict was such a manifest miscarriage of justice that would require a new trial.

{¶ 80} Accordingly, appellants’ tenth assignment of error is not well-taken.

{¶ 81} III. Conclusion

{¶ 82} In conclusion, appellants’ second assignment of error is well-taken; the remaining assignments of error in the appeal and cross-appeal are not well-taken. The judgment of the Lucas County Court of Common Pleas is affirmed, in part, and reversed, in part. The judgment entered upon the jury verdict on claims XXIII and XXIV is

reversed and vacated. The remainder of the trial court's judgment is affirmed in its entirety. Costs of the appeal are to be split evenly between the parties pursuant to App.R. 24.

Judgment affirmed, in part,
and reversed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, P.J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.