[Cite as *MADFAN, Inc. v. Makris*, 2017-Ohio-979.]

[Please see vacated opinion at 2016-Ohio-7395.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103655

MADFAN, INC., ET AL.

PLAINTIFFS-APPELLEES

vs.

DINO MAKRIS, ET AL.

DEFENDANTS-APPELLANTS

JUDGMENT:
REVERSED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-11-749225

BEFORE: S. Gallagher, J., Kilbane, P.J., and E.T. Gallagher, J.

RELEASED AND JOURNALIZED: March 9, 2017

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ON RECONSIDERATION[1]

SEAN C. GALLAGHER, J.:

{¶1} Michael Westerhaus appeals the $300,000 judgment entered against him after a jury trial, had upon MADFAN, Inc. ("MADFAN"), Fred Cieslik, Andrew Peloza, Alexander Stewart, and Michael Allen's complaint for fraud and conspiracy to commit the fraud. The four individuals will be referred to as "the shareholders" for the sake of simplicity, although several of the shareholders were directors of the corporation at one time or another. For the following reasons, we reverse and vacate the judgment with the added caveat that neither MADFAN nor the shareholders filed an appellate brief. Pursuant to App.R. 18(C), we accept Westerhaus's statements of facts and issues in his brief as correct and reverse the judgment because appellant's brief reasonably appears to sustain such action based on the trial record.

{¶2} In 2002, Dino Makris and the shareholders created MADFAN, the name of the corporation derived from an amalgamation of the founders' names. Westerhaus, an Ohio licensed attorney, provided the start-up and continuing legal services, and facilitated the filing of the articles of incorporation. By May 2004, the corporation issued shares to the shareholders and to Makris based on their respective initial contributions. The 348 shares were split evenly between the shareholders, who received 174 shares as a group,

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[1]The original announcement of decision, *MADFAN, Inc. v. Makris*, 8th Dist. Cuyahoga No. 103655, 2016-Ohio-7395, released October 20, 2016, is hereby vacated. This opinion, issued upon reconsideration, is the court's journalized decision in this appeal. App.R. 22(C); *see also* S.Ct.Prac.R. 7.01.

and Makris, who received the remaining 174 shares. Makris owned another corporation, Olympic Investment Limited, Inc. ("Olympic Investment"). Makris's 174 shares in MADFAN were titled to Olympic Investment. The shareholders' prevailing theme was that Westerhaus testified to knowing that Makris titled his shares of MADFAN to Olympic Investment because other creditors were pursuing claims against Makris at the time MADFAN was incorporated.

{¶3} Most of the shareholders served as officers of MADFAN at one time or another. Allen served as the treasurer, and Stewart served as secretary until 2007. Peloza took over for Stewart in 2007. Makris served as the president of the corporation from the beginning and took over the responsibilities of treasurer in 2007, two years after the restaurant business began operating. Peloza served as the vice president from the beginning and also became the assistant treasurer in 2007. Peloza worked in the day-to-day operations of the establishment, claiming to have worked between 80-100 hours a week. He anticipated and was actually paid a salary, although the amount of the salary and what he received was not introduced. Tr. 107:13-15.

{¶4} MADFAN was incorporated to operate a restaurant, which opened for business in 2005. In 2004, each share of MADFAN exhibited a declared value of $500. There was no evidence as to the present value. Further, in 2007, all the shareholders agreed to loan MADFAN $106,500, with Olympic Investment providing $65,000 of that amount. Other than the interest to accrue, the terms of those loans are not in the record.

The business venture was initially successful, with the shareholders claiming decent revenues in one of the earlier years, but the restaurant finally closed in 2010.

{¶5} At the trial, the jury awarded the shareholders and MADFAN $300,000 against Westerhaus personally. Westerhaus moved for a directed verdict and a judgment notwithstanding the verdict, in pertinent part claiming insufficient evidence demonstrating damages. The trial court denied Westerhaus's motions.

{¶6} We employ a de novo standard of review in evaluating the grant or denial of a motion for directed verdict or judgment notwithstanding the verdict. *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170, ¶ 14. A motion for directed verdict is properly granted if "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). In other words, we must review whether the evidence was legally sufficient to sustain the jury's verdict. *Link v. FirstEnergy Corp.*, 147 Ohio St.3d 285, 2016-Ohio-5083, 64 N.E.3d 965, ¶ 22. If a jury award exceeds the damages sought at trial, although not always dispositive, it is safe to assume that something went awry. *See, e.g., J. Norman Stark Co., L.P.A. v. Santora*, 8th Dist. Cuyahoga No. 81543, 2004-Ohio-5960, ¶ 45, fn. 3 (jury's award exceeded the itemized damages, and therefore, the jury's verdict cannot be afforded any deference); *Bokar v. Lax*, 8th Dist. Cuyahoga No. 75929, 2000 Ohio App.

LEXIS 1654, *13-14 (Apr. 13, 2000) (without any evidence of itemized damages for the associated injury, the jury's verdict must be presumed to be speculative).

{¶7} "In order to prevail on a claim of conspiracy to defraud, the asserting party must prove both the elements of conspiracy and fraud." *GM Acceptance Corp. v. Hern Oldsmobile-GMC Truck*, 8th Dist. Cuyahoga No. 67921, 1995 Ohio App. LEXIS 3897, *27 (Sept. 7, 1995). Fraud, in turn, requires proof of six elements:

> (1) a representation or, where there is a duty to disclose, omission of a fact, (2) that is material to the transaction at hand, (3) 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, (4) with the intent of misleading another into relying upon it, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance.

Stancik v. Deutsche Natl. Bank, 8th Dist. Cuyahoga No. 102019, 2015-Ohio-2517, ¶ 51, citing *Cohen v. Lamko, Inc.*, 10 Ohio St.3d 167, 462 N.E.2d 407 (1984). Our focus in the current appeal is solely on the evidence demonstrating the final element, the actual injury proximately caused by the fraudulent acts.

{¶8} In doing so, we must bear in mind that in "Ohio, a tort recovery may not be had for damages which are speculative." *Johnson v. Univ. Hosps. of Cleveland*, 44 Ohio St.3d 49, 58, 540 N.E.2d 1370 (1989); *Carey v. Down River Specialties, Inc.*, 8th Dist. Cuyahoga No. 103595, 2016-Ohio-4864, ¶ 29. "'Ohio courts have generally followed, whether specifically noted or not, the principles set forth in the Restatement (Second) of Torts when discerning the propriety and amount of damages in fraud cases.'" *Northpoint Props. v. Charter One Bank*, 8th Dist. Cuyahoga No. 94020, 2011-Ohio-2512, ¶ 32,

quoting *Auto Chem Laboratories, Inc. v. Turtle Wax, Inc.*, S.D.Ohio No. 3:07cv156, 2010 U.S. Dist. LEXIS 100677 (Sept. 24, 2010). The applicable provisions provide that one may recover for fraud, including in the concealment or omission, the difference in the value of what was actually received as compared against the purchase price or other value given. Restatement of the Law 2d, Torts, Section 549 (1977).

{¶9} As much emphasis as the shareholders placed on Westerhaus's alleged wrongdoing, none of that matters with respect to measuring damages for the alleged wrongful acts of the defendant. This appeal solely hinges on whether the shareholders presented sufficient evidence to sustain the $300,000 judgment entered in their favor.

{¶10} The only evidence of damages presented to the jury was the shareholders' initial purchase of the MADFAN shares totaling $87,000 and the $41,500 the shareholders loaned to the corporation pursuant to the meeting of the directors (the directors included three of the shareholders) on May 21, 2007. The jury's award of $300,000 in damages, therefore, was demonstrably speculative.

{¶11} There is no other evidence supporting that award, further punctuated by the fact that plaintiffs' counsel could not even offer a number or method of calculating damages during closing argument. *Carey v. Down River Specialties, Inc.*, 8th Dist. Cuyahoga No. 103595, 2016-Ohio-4864, ¶ 29; *Kinetico, Inc. v. Indep. Ohio Nail Co.*, 19 Ohio App.3d 26, 30, 482 N.E.2d 1345 (8th Dist.1984). The shareholders' claims for (1) lost profits (2) unpaid salaries, (3) $65,000 in rent arrearage paid by MADFAN, (4) Makris's purchases of food under MADFAN's accounts for other business ventures, and

(5) Makris's self-paid consulting fees were discussed at trial, but the shareholders failed to provide the jury a reasonable guide to computing an itemized value for those damages. The jury was left to speculate what the profits should have been or what salaries should have been paid.

{¶12} Further demonstrating the speculative nature of the final judgment, the shareholders' trial counsel invited the jury to award an indeterminate amount of damages to cover future debts should an unknown creditor ever seek repayment from the shareholders for unsubstantiated debts of MADFAN. *Fisher v. Univ. of Cincinnati Med. Ctr.*, 10th Dist. Franklin No. 14AP-188, 2015-Ohio-3592, ¶ 22 (future damages cannot be based on a mere guess or speculation; there must be some data on which a reasonable estimate of future expenses can be derived).

{¶13} Irrespective of that invitation to speculate, the only damages evidence of itemized or quantified damages introduced at trial was incomplete. As the jury was unambiguously instructed, the damages sought upon the fraud and civil conspiracy claims were "the actual damage directly caused by the fraud. The measure of damages in this case is the difference between the represented value and the actual value at the time of the transaction." Tr. 258:2-5, 260:11-14. "Actual damages" are not to be confused with a measure of those damages. Actual damages are defined as compensation for actual and real loss or injury. *Whitaker v. M.T. Automotive, Inc.*, 111 Ohio St.3d 177, 2006-Ohio-5481, 855 N.E.2d 825, ¶ 18. The measure of damages, on the other hand, is the mechanism the jury uses to calculate the actual damages.

{¶14} With respect to the value of the corporate worth, there is no evidence of any ascertainable damages even if we assume that the shareholders individually had the right to recover for diminution of corporate worth caused by the fraudulent acts. *Adair v. Wozniak*, 23 Ohio St.3d 174, 178, 492 N.E.2d 426 (1986) (wrongdoing of a defendant damaging the corporate worth, demonstrated through the diminution in value of stock, accrues to the corporation and not to the shareholders individually). It should be noted that the shareholders did not tender the stock certificates — the subscription agreement and investment letter recording the transactions indicated the securities were not registered for the purposes of the Ohio Securities Act (R.C. Chapter 1707) — for the full amount paid pursuant to R.C. 1707.43. Purchasers of securities have the right to seek the full amount paid for a stock transaction from any person aiding the seller, based on the allegations of fraud in procuring the investment, within five years of the transaction. R.C. 1707.43. Rescission, or voiding the purchase of the 2004 stock transaction, to seek a return of the full value of the investment may not have been a remedy even available at the time the shareholders filed the complaint. *Kondrat v. Morris*, 118 Ohio App.3d 198, 205, 692 N.E.2d 246 (8th Dist.1997) (claims for fraudulent sale of unregistered securities are covered by the five-year statute of limitations found in R.C. 1707.43); *Metz v. Unizan Bank*, 649 F.3d 492, 499 (6th Cir.2011) (if the claim implicates securities fraud, which includes the fraudulent sale of shares of stock in a corporation under R.C. 1707.01(B), the five-year statute of limitations under R.C. 1707.43(B) applies). Regardless, the

shareholders limited their measure of damages at trial to the difference between the represented value of the purchased stock and its actual value.

> **{¶15}** Using the initial investments as a measure of damages necessarily implicates the value of the shares the shareholders received in consideration for the initial investment. In order to demonstrate injury, the shareholders had to demonstrate that the consideration received in exchange for the investment was worth less than anticipated because of the fraudulent misrepresentation. Restatement of the Law 2d, Torts, Section 549 (1977). Although the shares were initially valued at $500 per share in 2004, the shareholders failed to demonstrate the actual value of those shares in order to determine the damage caused by the fraudulent misrepresentation. This is fatal to the damages award. If, notwithstanding the falsity of the representation, the thing that the plaintiff acquires through the fraudulent transaction is of equal or greater value than the price paid and he has suffered no harm through using it in reliance upon its being as represented, he has suffered no loss and can recover nothing under the rule stated in this Clause.

Restatement of the Law 2d of Torts, Section 549, Comment on Clause (1)(a). In order to claim damages to their investments, the actual value of those shares must be determinable from the evidence so the jury could determine the difference between the actual value and

the $500 represented value of each share. Otherwise, the claim for damages is speculative.

{¶16} We acknowledge the possibility that the actual value of the shares could be derived from the valuation of the corporate worth. The shareholders only testified that the restaurant ceased operations; however, that evidence alone does not support an inference that the shares in the parent corporation are worthless so as to entitle the shareholders to full recovery of their stock purchase. To reach a conclusion as to the ending value of the shares, one would impermissibly be required to stack an inference — that MADFAN disposed of every asset after ceasing the restaurant's operations, which directly impacts the value of the shares — on top of another inference — that the sale of those assets was insufficient to cover all outstanding liabilities and buy out the dissatisfied shareholders. *Bier v. Am. Biltrite*, 8th Dist. Cuyahoga No. 97085, 2012-Ohio-1195, ¶ 22 (Ohio law precludes the stacking of inferences to prove a claim); *Mercer v. Wal-Mart Stores, Inc.*, 10th Dist. Franklin No. 13AP-447, 2013-Ohio-5607, ¶ 20 (drawing an inference from a deduction that itself is purely speculative and unsupported by established fact violates Ohio law).

{¶17} Moreover, we cannot presume that MADFAN's assets were entirely disposed of after the restaurant ceased operations. Ceasing business operations is not the same as liquidating a corporation's assets for the purpose of evaluating the value of the shareholders' remaining interest in the corporation. The diminution in value of the stock as a measure of damages to the corporate worth (among other measures of damages, such

as reduced earnings or accumulation of personal debt and liabilities from the company's financial decline) cannot be demonstrated through the value of the initial stock purchase alone. Determining the value of the shares requires a comprehensive inquiry into the corporation's assets, liabilities, and receivables. *See, e.g., Armstrong v. Marathon Oil Co.*, 32 Ohio St.3d 397, 406, 513 N.E.2d 776 (1987) (the "fair cash value" a shareholder is entitled to receive for shares is the intrinsic value of the shares determined from the assets and liabilities of the corporation and consideration of every other factor bearing on value); R.C. 1701.01(N) (liquidation price is the "amount or portion of assets required to be distributed to the holders of shares of any class upon dissolution, liquidation, merger, or consolidation of the corporation, or upon sale of all or substantially all of its assets").

{¶18} Any damages caused by the alleged fraud and based on the value of the stock are impossible to determine and cannot be deduced from the fact that the restaurant ceased operations. Future business is but one factor to consider in determining the value of an investment into a corporate entity. In allowing the jury to consider a conclusion on the damages stemming from the shareholders' initial investment, the jury was required to speculate as to the value of those shares at the time of trial with no evidence of corporate assets, liabilities, or receivables. The evidence of damages from diminution in the value of the shares owned by the shareholders was not ascertainable based on the evidence in the record.

{¶19} Without evidence demonstrating damages, the plaintiffs were unable to establish each element of their claims at trial. Even if we assume that plaintiffs proved

every other element of the fraud and conspiracy to commit fraud claims, Westerhaus was entitled to a defense judgment as a matter of law on the damages issue alone. The trial court erred in not granting a directed verdict or judgment notwithstanding the verdict in favor of Westerhaus on the two alleged tort claims. The judgment against Westerhaus is reversed and vacated. Final judgment is entered in favor of Westerhaus.

It is ordered that appellant recover from appellees costs herein taxed. The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

MARY EILEEN KILBANE, P.J., CONCURS;
EILEEN T. GALLAGHER, J., DISSENTS WITH SEPARATE OPINION

EILEEN T. GALLAGHER, J., DISSENTING:

{¶20} I respectfully dissent because I believe there was sufficient evidence to support a modified damages award.

{¶21} The majority argues appellees limited their measure of damages to the difference between the represented value of their shares in MADFAN at the time of their purchase and its actual value. However, appellees did not allege securities fraud claim

pursuant to R.C. 1707.43, in which case damages might be limited to a difference in stock value at the time of the transaction. Indeed, the complaint does not mention R.C. 1707.43. Rather, appellees alleged that Westerhaus conspired with Makris to fleece the corporation over a period of time after the business had started making money.

{¶22} The majority acknowledges that damages could be determined from the valuation of corporate worth, but concludes there was insufficient evidence establishing a diminution in the value of corporate stocks as a result of Westerhaus's fraud and conspiracy to commit fraud because there was no evidence regarding the value of corporate assets, liabilities, or receivables. I believe there was sufficient evidence on which the jury could determine to a reasonable degree of certainty that the corporation was insolvent and, as a result, appellees' shares were worthless.

{¶23} There was evidence that (1) Andrew, who worked approximately 80 hours per week was not getting paid his salary "most of the time"; (2) none of the shareholders were receiving their share of the profits; (3) Olympic Investment was charging back rent for a two-year arrearage, pursuant to a lease that was executed without appellees' knowledge; (4) Makris was paying himself "consulting fees"; and (5) Makris was caught purchasing food for one of his other restaurants on MADFAN's account. There was also evidence that creditors were suing MADFAN and individual shareholders for unpaid bills, and the state of Ohio revoked its liquor license because MADFAN had not paid taxes. Indeed, Andrew testified "there was no money in the business." (Tr. 99.) Even

the building, which was owned by Olympic Investments, was subject to foreclosure proceedings.

{¶24} The assessment of damages is a matter within the province of the jury. *Wilburn v. Cleveland Elec. Illum. Co.*, 74 Ohio App.3d 401, 599 N.E.2d 301 (8th Dist.1991). Based on the evidence in the record, I would not disturb the jury's conclusion that MADFAN shares had no value. As noted by the majority, appellees initially invested $87,000 to purchase shares in MADFAN and later loaned $41,500 to the corporation for a total investment of $128,500. The jury reasonably concluded that appellees lost the entire amount of their investment in MADFAN as a result of Westerhaus's conspiracy to commit fraud with Makris. Therefore, I believe there was sufficient evidence to support a damages award in the amount of $128,500.

{¶25} I agree with the majority that not all of the jury's $300,000 damage award was supported by sufficient evidence. However, an appellate court has "the same power and control of verdicts and judgments as the trial court and may exercise [its] independent judgment on questions of excess damages if no passion or prejudice is apparent on the record." *Berry v. Lupica*, 196 Ohio App.3d 687, 2011-Ohio-5381, 965 N.E.2d 318, ¶ 45 (8th Dist.), citing *Duracote Corp. v. Goodyear Tire & Rubber Co.*, 2 Ohio St.3d 160, 443 N.E.2d 184 (1983). Although a portion of the jury's $300,000 was excessive, the excess was based on speculation and there was no evidence of passion or prejudice. Therefore, I would modify and affirm the trial court's judgment by ordering a remittitur of $171,500,

which represents the difference between the jury's award of $300,000 and the $128,500 in damages supported by the evidence, in accordance with *Berry*.