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NO. A12-0713

State of Minnesota
In Court of Appeals

Diversified Water Diversion, Inc.,
Plaintiff/ Respondent,

v.

IDCA, Inc., et al.,
Defendants/ Appellants.

APPELLANTS' BRIEF AND APPENDIX

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I. STATEMENT OF THE ISSUES

- I. Whether a claim for tortious interference with business expectancy is a valid tort claim under Minnesota law?

The trial court ruled in the positive.

- II. Whether Appellant is entitled to a new trial, or, judgment as a matter of law where the jury verdict of interference with economic advantage was not justified by the evidence?

The trial court ruled in the negative

- III. Should Appellants' be granted a new trial or remittitur where the jury's damages were inconsistent, excessive and contrary to the evidence which demonstrates that the damage award could have only resulted from passion or prejudice?

The trial court ruled in the negative

- IV. Did the evidence produced at trial sufficiently support the verdict?

The trial court ruled in the positive

- V. Did the trial court err in finding an equitable remedy of piercing the corporate veil available to Respondent where Respondent had unclean hands?

The trial court ruled in the negative

- VI. Whether appellant is entitled to a new trial, or, judgment as a matter of law where the verdict and order for piercing the corporate veil is not justified by the evidence?

The trial court ruled in the negative

II. STATEMENT OF THE CASE

The case emanates from a judgment ("Fallon Judgment") against Arthur Hogenson ("Hogenson") that was assigned to MWH Properties, LLC ("MWH"). MWH initiated collection remedies against Hogenson that resulted in a sheriff's execution sale of Hogenson's shares of stock in Diversified Water Diversion, Inc.. IDCA, Inc. ("IDCA") was the successful purchaser of the shares of stock of Diversified at the Sheriff's sale.

Originally, Diversified brought an action against IDCA under theories of breach of fiduciary duty and injunctive relief. IDCA answered and counterclaimed asserting that the court dissolve the corporation, divide any assets of Diversified among the shareholders, and made a request of attorney fees and costs under Minnesota Statutes.

Since this case was filed and pleadings were served, this matter was stayed by agreement of the parties pending Art Hogenson's motion to vacate the Fallon Judgment on jurisdictional grounds. After appeal, this motion was ultimately successful at the trial court level as evidenced by an order filed by Judge Neville on August 27, 2010. Judge Neville amended her order to vacate the judgment on September 29th, 2010 and MWH, the assignee of that judgment appealed. The case was submitted to the Court of Appeals on the issue of whether the trial court's failure to allow MWH to participate in the hearing in which its judgment was vacated violated the due process clause of the state and federal constitutions and the Court of appeals affirmed.

Plaintiff amended its complaint to include counts of Conversion/Civil Theft, Replevin, Tortious Interference with Business Expectancy, Piercing the Corporate Veil, and added Debra Hogenson, Michael Hogenson, MWH Properties, LLC, and Standard Water Control, Inc. ("Standard") as parties. MWH Properties, LLC and Standard Water Control were dismissed prior to trial.

At trial, the jury found, as an advisory finder of fact for the court, that Defendant IDCA, Inc. breached its fiduciary duty to Plaintiff resulting in \$41,000.00 in damages and that the court should pierce the corporate veil. The jury awarded damages for replevin and conversion in the amount of \$10,000.00 and awarded damages for tortuous interference with business expectancy in the amount of \$220,000.00. The Trial Court

issued an order on December 1, 2011 rejecting the jury's findings of liability for breach of fiduciary duty and an order for judgment in the amount of \$10,000 for conversion and replevin and \$220,000 on the tortious business interference. Defendants filed a post trial motion seeking, in alternative theories, any available remedy under Minn.R.Civ.P. 59, a new trial, amended findings of fact and judgment as a matter of law. The trial court, the Honorable Kerry W. Meyer presiding, , Hennepin County District Court, denied the post trial motions and this appeal followed.

III. STATEMENT OF THE FACTS

1) This matter involves a long standing feud between two brothers and their competing companies, Standard, owned by Michael Hogenson, and Diversified owned in part by Arthur Hogenson. (Transcript Volume II, Pg. 105-111,). Jack Gieseke owned the other 50% interest in Diversified. Both companies were involved in waterproofing basements.

2) In 2007, MWH Properties, a company owned by Michael Hogenson, purchased a judgment wherein Art Hogenson was the judgment debtor in the matter of Thomas Fallon and Tara Fallon v. Art Hogenson, Individually and d/b/a Diversified Water Diversion (Hennepin County Court File No. 27-CV-07-3348) ("Fallon Judgment"). (Transcript Volume II, Pg. 109-11, 203-204, Volume III, 327, Trial court Exhibit 16).

3) Prior to January 30, 2009 and in anticipation of a execution sale with respect to the Fallon Judgment, IDCA and Asset Liquidators were formed to purchase Art Hogenson's shares of stock of Diversified and Hogenson Properties, Ltd. (Transcript Volume II, Pg. 138-139, Volume III 330-331).

4) IDCA had a separate bank account, was sufficiently capitalized, had active officers and had complied with Minnesota Statutes in its creation and operations.

(Transcript Volume III 277-285, 287-290, 331-332, Exhibits 49-51).

5) IDCA and Asset Liquidators were formed in order to protect the shareholders and officers, Debra Hogenson and Michael Hogenson from known and unknown liabilities of Diversified and Hogenson Properties. *Id and* (Transcript Volume II, Pg. 140-141, 146-147, Volume III, Pg. 330).

6) At the time of the sheriff's sale, *Diversified was no longer operating. Diversified had ceased operations, had no operating telephone number, business address and had liabilities of at least \$100,000.* (Transcript Volume II, Pg. 146-147, 120-122, Volume III pg. 332, Trial court Exhibit 1). Mike Hogenson denied putting Diversified out of business. (Transcript Volume II, Pg. 163).

7) On or about January 30, 2009, IDCA purchased the share ownership interest of Defendant Art Hogenson in Diversified at a sheriff's auction conducted by the Hennepin County Sheriff in Minneapolis, Minnesota. Defendant Art Hogenson's share ownership interest in Diversified was 50%. (Transcript Volume II, Pg. 111, 141-142, Trial Court Exhibit 19).

8) *After the January 30, 2009 sheriff's sale* represented by trial court Exhibit 19, Michael Hogenson, acting for IDCA in its capacity as shareholder of Diversified, though not an officer, director or shareholder of IDCA, completed the following acts:

a) On February 9, 2009, changed the registered address for

Diversified to IDCA's office address which is also Standard's address

(Transcript Volume II, Pg. 120-122, Trial court Exhibit 1); This was done

because the address for Diversified at the Secretary of State's office was its prior business address; (Transcript Volume II, Pg. 149); Gieseke claimed to get notices at his home and that customers had his home address. (Transcript Volume II, Pg. 240-241).

b) On February 10, 2009, requested North Suburban Towing to go to Art Hogenson's property and tow vehicles and equipment owned by Diversified (Transcript Volume II, Pg. 122 and 126); The vehicles were not insured, had been driven uninsured resulting in an accident, and were moved to an insured protected facility to avoid any further liability exposure. (Transcript Volume II, Pg. 153-154). Upon exhibiting proof of insurance, Diversified could have picked up the vehicles, but, Diversified did not do so as it was out of business. (Transcript Volume II, Pg. 154). IDCA's attorney was aware that IDCA was taking this action and did not object. (Transcript Volume II, Pg. 153). Gieseke admitted that "He [Mike Hogenson] took the trucks and said I could use them anytime I wanted." and that he never tried to get access to them. (Transcript Volume II, Pg. 243-244).

c) Obtained Diversified's tax returns (Transcript Volume II, Pg. 123, Trial court Exhibit 20-22);

d) On February 18, 2009 IDCA through Debra Hogenson, acting in her capacity as a 50% shareholder on behalf of Diversified, entered into a settlement agreement with Standard, to settle an outstanding judgment Diversified had obtained against Standard. Standard provided the

settlement proceeds and Debra Hogenson, acting in her capacity as a 50% shareholder of Diversified, provided a satisfaction of this judgment.

(Transcript Volume II, Pg. 127-131, Trial court Exhibit 23-27); IDCA's and Standard's attorneys reviewed the settlement agreement and did not object. (Transcript Volume II, Pg. 158-160, Trial court Exhibit 23-27)

Notably, the settlement agreement argument failed and Plaintiff was not damaged receiving the entire amount of the bond from the prior litigation.

(Transcript Volume II, Pg. 131-133, 202-203, Trial court Exhibit 27);

9) Gieseke claimed, contrary to his prior deposition testimony that after the equipment was taken he had a couple of jobs here and there. Gieseke did not indicate that Diversified could not nor did perform these jobs. (Transcript Volume II, Pg. 205). He agreed that he did not need the vehicles after they were seized. (Transcript Volume II, Pg. 244).

10) At trial and in his deposition on January 28, 2009, just prior to the foreclosure sale, Gieseke admitted that Diversified's last job was "the end of 2007 beginning of 2008. (Transcript Volume II, Pg. 246). Art Hogenson testified that Jack Gieseke informed him at the beginning of an 11 month jail from 2007-2008 that he was shutting Diversified down. (Transcript Volume III, Pg. 304).

11) At trial and in his deposition on January 28, 2009, just prior to the foreclosure sale, Gieseke admitted that Diversified had no place of business as of June or July of 2008. (Transcript Volume II, Pg. 247).

12) At trial and in his deposition on January 28, 2009, just prior to the foreclosure sale, Gieseke admitted that Diversified did not have a telephone number. (Transcript Volume II, Pg. 247-48).

13) At trial, Gieseke admitted Diversified had no bank accounts as of the date of his deposition on January 28, 2009, just prior to the foreclosure sale. (Transcript Volume II, Pg. 248)

14) At trial, Gieseke admitted that at the time of his January 28, 2009 deposition, Diversified's had no employees and no worker's compensation insurance. (Transcript Volume II, Pg. 248). He admitted to not renewing his license in 2009. Id.

15) At trial, Gieseke testified that Diversified had stopped operating by the time of the sheriff's sale. (Transcript Volume II, Pg. 248-49).

16) Gieseke claimed he had warranty work, but, that customers could not get a hold of him. (Transcript Volume II, Pg. 207). He never claimed that the Defendants did anything to his telephone numbers and indicated that people were able to contact him at his home. (Id and Transcript Volume II, Pg. 240).

17) Although Gieseke admitted Diversified lost money in 2004, 2005 and 2006, he testified that Diversified made money in 2008 without documentation or specifying an amount. (Transcript Volume II, Pg. 225).

18) Gieseke claimed as his "best estimate" that Diversified, had it been able to stay in business, would have had revenues consistent with its tax returns, give or take \$50,000. He estimated his expenses with guesses (Transcript Volume II, Pg. 225-231) and indicated that his officer compensation was profit for Diversified. Id at 231.

19) Gieseke testified that each of the partners provided a service to Diversified for their officer compensation. Gieseke would bid jobs, work jobs and tend to the business aspects of Diversified. (Transcript Volume II, Pg. 236, 249-251).

20) Gieseke testified that Diversified operated at a loss in the 2004 tax year of \$34,090.00, a loss for the 2005 tax year of \$67,463.00 and a loss for the 2006 tax year of \$81,673.00. (Transcript Volume II, Pg. 236, 249-254) The tax returns also showed that over the five year period prior to the 2004 tax return, Plaintiff's tax returns had showed a loss of an average of \$40,000.00 per year. (Transcript Volume III, Pg. 353).

21) Gieseke indicates that he quit working at Diversified in 2007 or 2008 anticipating that Mike Hogenson would own half the company stating, "So, I am going to work my tail off for him to own half of my company.". (Transcript Volume II, Pg. 256, 217).

22) Gieseke admitted that Art Hogenson contributed \$307,000 in cash contributions to Diversified and that the losses would have been more significant without these contributions. (Transcript Volume II, Pg. 253).

23. Defendants argued at trial that Diversified was not harmed by the actions of IDCA because it was not operating at the time of the seizure in February of 2009 and the damages it claimed were speculative. (Transcript Volume III, Pg. 341-355).

24. If Plaintiff, however, never ceased operations it had a duty to mitigate its damages. Diversified apparently had mitigated damages, but, that fact was unknown to Defendants and the jury. (Transcript Volume II, Pg. 217-221).

25. At Summary Judgment Defendants provided evidence of the following:

a. Thomas Fallon (“Fallon”) was working on a job site of the Plaintiff herein and sustained an injury that eventually resulted in the Fallon Judgment. (Affidavit of K. Griffitts submitted with Summary Judgment, Para.4, Para. 23, Ex. B, Pgs. 20-23, Para. 33).

b. Fallon, through his wife, filed a First Report of Injury and, in response, Jack Gieseke and Art Hogenson caused a letter to be submitted to Thomas Fallon’s attorney indicating that Fallon was not an employee of Diversified. (Affidavit of K. Griffitts submitted with Summary Judgment, Para.5).

c. Gieseke and Hogenson also caused a response to be filed with Berkley Risk Administration Company “Berkley”, Diversified’s work compensation insurance provider, indicating that Fallon was not an employee of Diversified, walked on to the job site, engaged in activity not requested and was injured. (Affidavit of K. Griffitts submitted with Summary Judgment, Para.6, Para. 23, Ex. B, Pgs. 20-23, Para. 33).

d. Additionally, Gieseke sent a letter to Fallon’s attorney, approximately 7 months after the accident denying Fallon was an employee of Diversified, or, that he was injured on the job site. (Affidavit of K. Griffitts submitted with Summary Judgment, Para. 32).

e. Gieseke took the actions described above despite the fact that Gieseke knew from Arthur Hogenson that Fallon was performing work for Diversified and that he was hired by Art Hogenson shortly after Gieseke knew about Fallon’s claims. (Affidavit of K. Griffitts

submitted with Summary Judgment, Para. B, Pgs. 20-23, Para. 33 and Para 24, Ex. C, pages 17-20).

f. Based on these and other statements from Plaintiff and Third-Party Defendants indicating that Fallon did not work for Diversified, Berkley denied Fallon's Worker's Compensation Claim. (Affidavit of K. Griffiths submitted with Summary Judgment, Para.7).

g. Based on these same statements, instead of pursuing a worker's compensation claim, Fallon filed a personal injury action ("Fallon Action") that resulted in the Fallon Judgment. (Affidavit of K. Griffiths submitted with Summary Judgment, Para.8).

h. As part of the Fallon Action the court referred the matter to Minneapolis arbitration for alternative dispute resolution on August 6, 2007 and Art Hogenson, without excuse, failed to appear or take any action in the matter resulting in the Fallon Judgment totaling \$737,679.65. (Affidavit of K. Griffiths submitted with Summary Judgment, Para.9).

IV. STANDARD OF REVIEW

a. Summary Judgment

"The district court's denial of a motion for summary judgment is not within the scope of review on appeal from a judgment entered after a jury verdict." Bahr v. Boise Cascade Corp., 766 N.W.2d 910, 912 (Minn. 2009). But the supreme court has recognized that an exception to this rule may exist if the denial of summary judgment is "based on a legal conclusion on an issue that is not presented to the jury for

determination.” *Id.* at 918. Here, the trial court, in its summary judgment order and in its order denying a new trial, allowed the jury to determine a new tort, tortious interference with a prospective economic advantage, not yet recognized by Minnesota courts. The denial of summary judgment was based on a legal conclusion on an issue not presented to the jury for determination and should be reviewed by this court. As well the court ruled, in its summary judgment motion that the equitable doctrine of piercing the corporate veil was available to the Plaintiff even though it had unclean hands. The denial of summary judgment was based on a legal conclusion on an issue not presented to the jury for determination and should be reviewed by this court

b. general verdicts

“[J]ury verdicts are to be set aside only if manifestly contrary to the evidence viewed in a light most favorable to the verdict. A verdict will not be set aside unless the evidence against it is practically conclusive.” Ouellette by Ouellette v. Subak, 391 N.W.2d 810, 817 (Minn. 1986).

A district court’s “Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses. In applying Minn. R. Civ. P. 52.01, “we view the record in the light most favorable to the judgment of the district court.” Rogers v. Moore, 603 N.W.2d 650, 656 (Minn. 1999). “The decision of a district court should not be reversed merely because the appellate court views the evidence differently.” *Id.* “Rather, the findings must be manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole.” *Id.* “Findings of fact are clearly erroneous only if the reviewing court is left with the definite

and firm conviction that a mistake has been made.” Fletcher v. St. Paul Pioneer Press, 589 N.W.2d 96, 101 (Minn. 1999).

c. amount of award in general

“Generally, we will not disturb a damage award unless the ‘failure to do so would be shocking or would result in plain injustice.’” Dunn v. Nat’l Beverage Corp., 745 N.W.2d 549, 555 (Minn. 2008) (citing Hughes v. Sinclair Mktg., Inc., 389 N.W.2d 194, 199 (Minn. 1986)).

The district court’s determination on whether an award of damages is excessive “will only be disturbed for a clear abuse of discretion.” Dallum v. Farmers UnionCent. Exch., Inc., 462 N.W.2d 608, 614 (Minn. App. 1990) (quoting Nelson v. Nelson, 283 N.W.2d 375, 379 (Minn. 1979)), see Myers v. Hearth Techs., Inc., 621 N.W.2d 787, 792 (Minn. App. 2001), *review denied* (Minn. Mar. 13, 2001).

A reviewing court should not set aside a jury verdict on damages “unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict.” Raze v. Mueller, 587 N.W.2d 645, 648 (Minn. 1999).

d. equitable relief

“Granting equitable relief is within the sound discretion of the [district] court. Only a clear abuse of that discretion will result in reversal.” Nadeau v. Cnty. of Ramsey, 277 N.W.2d 520, 524 (Minn. 1979); see Citizens State Bank v. Raven Trading Partners, Inc., 786 N.W.2d 274, 277 (Minn. 2010).

e. motion for new trial

“We review a district court’s new trial decision under an abuse of discretion standard.” Moorhead Econ. Dev. Auth. v. Anda, 789 N.W.2d 860, 892 (Minn. 2010).

An appellate court “will not set aside a jury verdict on an appeal from a district court’s denial of a motion for a new trial unless it is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict.” Navarre v. S. Wash. Cnty. Sch., 652 N.W.2d 9, 21 (Minn. 2002) (quotations omitted).

“The discretion to grant a new trial on the ground of excessive damages rests with the [district] court, whose determination will only be overturned for abuse of that discretion.” Advanced Training Sys., Inc. v. Caswell Equip. Co., 352 N.W.2d 1, 11 (Minn. 1984).

f. motion for judgment as a matter of law

In 2006, the Minnesota Rules of Civil Procedure Advisory Committee eliminated the nominal distinction between motions for directed verdict and motions for judgment notwithstanding the verdict (JNOV), which have historically been decided under the same standard. Both are now characterized by the rule as motions for judgment as a matter of law. *See* Minn. R. Civ. P. 50.04 2006 advisory comm. cmt. “JMOL” should now be used instead of “JNOV.” Longbehn v. Schoenrock, 727 N.W.2d 153, 159 (Minn. App. 2007).

“[JMOL] should be granted: ‘only in those unequivocal cases where (1) in the light of the evidence as a whole and making an independent determination of whether there is sufficient evidence to present an issue of fact for the jury., it would clearly be the duty of the [district] court to set aside a contrary verdict as being manifestly against the entire evidence, or where (2) it would be contrary to the law applicable to the case.’”

Jerry’s Enters., Inc., v. Larkin, Hoffman, Daly & Lindgren, Ltd., 711 N.W.2d 811, 816 (Minn. 2006) (quoting J.N. Sullivan & Assocs., Inc. v. F.D. Chapman Constr. Co., 304

Minn. 334, 336, 231 N.W.2d 87, 89 (1975)); *see also* Glorvigen v. Cirrus Design Corp., 796 N.W.2d 541, 549 (Minn. App. 2011). “We apply de novo review to the district court’s denial of a Rule 50 motion.” Bahr v. Boise Cascade Corp., 766 N.W.2d 910, 919 (Minn. 2009); Glorvigen v. Cirrus Design Corp., 796 N.W.2d 541, 549 (Minn. App. 2011).

V. ARGUMENT

I. TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY SHOULD NOT BE A VALID TORT CLAIM UNDER MINNESOTA LAW. IF THIS NEW TORT IS ACCEPTED BY THIS COURT, APPELLANT IS ENTITLED TO A NEW TRIAL, OR, JUDGMENT AS A MATTER OF LAW BECAUSE THE JURY VERDICT WAS NOT JUSTIFIED BY THE EVIDENCE.

Tortious interference with a prospective economic advantage has not been a claim recognized in Minnesota. U.S. Federal Credit Union v. Stars & Strikes, LLC, 2011 WL 1466383 (Minn.App. 2011). The court in Harbor Broad Inc., refused to rule on such a tort indicating:

We decline to decide whether a claim for tortious interference with business expectancy is a valid tort claim under Minnesota law. United Wild Rice, which the federal district court of Minnesota and appellants note as approving a claim for tortious interference with business expectancy, only recognized the tort of intentional interference with prospective contractual relations. United Wild Rice, 313 N.W.2d at 632-33. One of the elements a plaintiff must prove to establish a claim for intentional interference with prospective contractual relations is that the defendant “prevent[ed] the [plaintiff] from acquiring or continuing [a] prospective [contractual] relation.” *Id.* at 633 (quoting Restatement (Second) of Torts § 766B (1979)). Appellants' complaint alleges that they were wrongfully denied the fruits of a business expectancy of increased advertising revenues; the complaint does not allege that respondents' failure to comply with the Upgrade Order interfered with WWAX's prospective *contractual* relationship with a specific third party. Whether this is a distinction without a difference we leave for another day.

Harbor Broad, Inc. v. Boundary Waters Broadcasters, Inc., 636 N.W. 2d 560, 569

(Minn.Ct.App. 2001).

This court has the power to recognize and abolish common law doctrines. The common law is not composed of firmly fixed rules. Rather, as has been recognized, the common law:

is the embodiment of broad and comprehensive unwritten principles, inspired by natural reason, an innate sense of justice, adopted by common consent for the regulation and government of the affairs of men. It is the growth of ages, and an examination of many of its principles, as enunciated and discussed in the books, discloses a constant improvement and development in keeping with advancing civilization and new conditions of society. Its guiding star has always been the rule of right and wrong, and in this country its principles demonstrate that there is in fact, as well as in theory, a remedy for all wrongs. State ex rel. City of Minneapolis v. St. Paul, M. & M. Ry. Co., 98 Minn. 380, 400–01, 108 N.W. 261, 268 (1906).

It must be remembered that the common law is the result of growth, and that its development has been determined by the social needs of the community which it governs. It is the resultant of conflicting social forces, and those forces which are for the time dominant leave their impress upon the law. It is of judicial origin, and seeks to establish doctrines and rules for the determination, protection, and enforcement of legal rights. Manifestly it must change as society changes and new rights are recognized. To be an efficient instrument, and not a mere abstraction, it must gradually adapt itself to changed conditions. Tuttle v. Buck, 107 Minn. 145, 148–49, 119 N.W. 946, 947 (1909).

Plaintiff's claimed action is not the result of "conflicting social forces" nor is it a product of any "new condition of society". There is no need for this court to recognize any "new rights" that would be established through the recognition of the tort of "interference with the expectancy of business relations". The tort is, by its nature, too remote, too speculative to be recognized as a legal claim. If such a tort is available the Plaintiff, a claim for interference with economic advantage would require a showing of:

- (1) a reasonable expectation of economic advantage;
- (2) the Defendants' knowledge of a

reasonable expectation of economic advantage; (3) the Defendants wrongfully without justification interfered with Plaintiff's reasonable expectations; (4) that in the absence of the wrongful act, it is reasonable and probable that Plaintiff would have realized his advantage and that Plaintiff sustained damages.

This tort should not be recognized by Minnesota Courts because it confers too much cause for speculation by the jury. The controlling principle governing actions for damages in Minnesota is that "damages which are speculative, remote, or conjectural are not recoverable." Hornblower & Weeks-Hemphill Noyes v. Lazere, 301 Minn. 462, 467, 222 N.W.2d 799, 803 (1974). The law does not require mathematical precision in proof of loss, but proof as to a "reasonable, although not necessarily absolute, certainty." Northern Petrochemical Co. v. Thorsen & Thorshov, Inc., 297 Minn. 118, 125, 211 N.W.2d 159, 166 (1973). Once the fact of loss has been shown, the difficulty of proving its amount will not preclude recovery so long as there is proof of a reasonable basis upon which to approximate the amount. Northern States Power Co. v. Lyon Food Products, Inc., 304 Minn. 196, 229 N.W.2d 521 (1975). Minnesota has recognized the general rule that "...proof of loss of profits in a new business is too speculative to be the basis for recovery." Village of Elbow Lake v. Otter Tail Power Co., 281 Minn. 43, 46, 160 N.W.2d 571, 574 (1968). This general rule derives from the fact that, lacking a history of profits, new businesses rarely have evidence upon which an award of damages may be based with the requisite degree of certainty. McCormick, *Damages*, s 29, p. 107. The new tort, if recognized is rife with subjective conjecture. "A reasonable expectation", part of the first element of the tort, is by very definition, nothing more than an assumption or guess by the Plaintiff that he would have expected to have an economic advantage but

for the conduct of the Defendant. An economic advantage is left undefined and presumably is more broad than lost profits, but, is again little more than a guess. Finally, the tort requires a finding that, absent the wrongful conduct, it is reasonable and probable that Plaintiff would have realized his economic advantage and, additionally, that Plaintiff sustained damages. There would be no requirement, in the new tort, that Defendant interfere with a specific contract, or, any contract for that matter. Plaintiff would merely need a showing that a Defendant interfered with an economic advantage, whatever an economic advantage may be. Herein, the prospective profits were even more speculative than that of a new business that had not been in operation because Plaintiff had only a history of losses and the evidence showed that it ceased business operations before the sheriff sale. The prospective economic advantage is too speculative to be recognized by Minnesota Courts.

In contrast, Minnesota has recognized a claim for tortious interference with a prospective contractual relation. This related tort requires a showing that (1) the offender intentionally and improperly interfered with a prospective contractual relation, (2) causing “pecuniary harm resulting from loss of the benefits of the relation,” and (3) the interference either (a) induced or otherwise caused a third person not to enter into or continue the prospective relation or (b) prevented the continuance of the prospective relation. United Wild Rice, Inc. v. Nelson, 313 N.W .2d 628, 633 (Minn.1982). The claim of tortious interference with a prospective contractual relation requires the identification of a specific third party, a specific contract and a loss of that contract. The harm is not speculative, but, precise.

“For purposes of this tort [tortious interference with a prospective contractual relation], “improper” means those acts that are independently wrongful such as threats, violence, trespass, defamation, misrepresentation of fact, restraint of trade or any other wrongful act recognized by statute or the common law.” Harman v. Heartland Food Co., 614 N.W.2d 236, 241 (Minn.App.2000) (quotation omitted).

The tortuous acts alleged here do not rise to this level and were justified actions taken by Defendants. The acts complained of are: (1) the exercise of creditor remedies with respect to the Fallon Judgment, the judgment being valid at the time of sale, resulting in the execution sale on January 30, 2009 in which IDCA purchased the share ownership interest of Art Hogenson in Diversified. (Trial Court Exhibit 19); (2) After the January 30, 2009 sheriff's sale, Michael Hogenson changed the registered address for Diversified to IDCA's office address (Transcript Volume II, Pg. 120-122, Trial court Exhibit 1); On February 10, 2009, Michael Hogenson requested North Suburban Towing to go to Art Hogenson's property and tow vehicles and equipment owned by Diversified (Transcript Volume II, Pg. 122 and 126); (3) IDCA obtained Diversified's tax returns (Transcript Volume II, Pg. 123, Trial court Exhibit 20-22); and (4) On February 18, 2009 IDCA entered into a settlement agreement with Standard, to settle an outstanding judgment Diversified had obtained against Standard. (Transcript Volume II, Pg. 127-131, Trial court Exhibit 23-27);

The sheriff's sale concerned a valid judgment that Art Hogenson could have, but, choose not to stay pending appeal. It is reasonable to assume a creditor would exercise creditor's remedies even if the judgment was being challenged in court and this action of Defendants was justified by the validity of the judgment at the time of sale. The change

of address at the Secretary of State's office from an old business address of Diversified caused Diversified to suffer no recognizable harm. The towing of Diversified's vehicles from Art Hogenson's yard, at a time when Diversified was clearly not operating and when the vehicles would have been available if insured, caused Diversified no damages. There are no allegations that obtaining Diversified's tax returns caused it any harm. These acts were reasonably justified and did not amount to tortuous activity against Diversified.

Further all the acts complained of by Plaintiff occurred after the foreclosure sale and after Diversified was out of business. At trial and in his deposition on January 28, 2009, just prior to the foreclosure sale, Gieseke admitted that Diversified's last job was "the end of 2007 beginning of 2008. (Transcript Volume II, Pg. 246). Art Hogenson testified that Jack Gieseke informed him at the beginning of an 11 month jail from 2007-2008 that he was shutting Diversified down. (Transcript Volume III, Pg. 304). As further evidence that Diversified was out of business at the time of the sheriff's sale, it had no place of business as of June or July of 2008 (Transcript Volume II, Pg. 247), Gieseke admitted that at that same time period Diversified did not have a telephone number (Transcript Volume II, Pg. 247-48), Diversified had no bank accounts (Transcript Volume II, Pg. 248), Diversified's had no employees and no worker's compensation insurance (Transcript Volume II, Pg. 248), Diversified had no license to operate. *Id.* At trial, Gieseke testified that Diversified had stopped operating by the time of the sheriff's sale. (Transcript Volume II, Pg. 248-49). Gieseke claimed he had warranty work, but, that customers could not get a hold of him. (Transcript Volume II, Pg. 207). He never claimed that the Defendants did anything to his telephone numbers and indicated that

people were able to contact him at his home. (Id and Transcript Volume II, Pg. 240).

The overwhelming and clear evidence at trial established that Diversified was out of business before the sheriff's sale and the only thing Defendants had done up to that point and time was buy a judgment.

Even if tortious interference with a prospective economic advantage is a claim available to Plaintiffs, there was not an existence of a reasonable expectation of economic advantage or benefit belonging to Plaintiff, nor can Plaintiff reasonably claim to be damaged. As was previously discussed, Plaintiff was bleeding money and required capitalization from Art Hogenson to survive. When Art Hogenson quit making capital contributions, Diversified quit operating. Defendants had no knowledge of Plaintiff's expectation of economic advantage because on January 16, 2009 (before the sheriff's sale), Art Hogenson and Jack Gieseke, under oath at deposition, provided testimony that Diversified was no longer operating. Their testimony was consistent at trial. There is absolutely no reason to believe that, in the absence of the acts complained, it was reasonably probable that Plaintiff would have realized an economic advantage or benefit. Plaintiff cannot prove it sustained damages as a result of the activity of which it complains. Defendant is entitled to judgment as a matter of Law because in viewing the evidence in the light most favorable to the Plaintiff "the verdict is manifestly against the entire evidence" and "the moving party is entitled to judgment as a matter of law." Navarre v. S. Washington County Sch., 652 N.W.2d 9, 21 (Minn.2002). In the alternative, Defendants request a new trial as the verdict is manifestly and palpably contrary to the evidence viewed as a whole and in the light most favorable to the verdict

II. APPELLANTS' SHOULD BE GRANTED A NEW TRIAL AS THE JURY'S DAMAGE AWARDS WERE INCONSISTENT, EXCESSIVE AND CONTRARY TO THE EVIDENCE WHICH DEMONSTRATES THAT THE DAMAGE AWARD COULD HAVE ONLY RESULTED FROM PASSION OR PREJUDICE

A motion for a new trial based on excessive damages may be granted when the evidence demonstrates that the damage award could have resulted only from passion or prejudice. Minn. R. Civ. P. 59.01(e); Gale v. Howard, 413 N.W.2d 234, 237 (Minn.App.1987); see also Flanagan v. Lindberg, 404 N.W.2d 799, 800 (Minn.1987). Even where *passion and prejudice are absent*, appropriate action may be necessary where the evidence does not justify the amount of a verdict. Knox v. City of Granite Falls, 245 Minn. 11, 72 N.W.2d 67, 53 A.L.R.2d 1091. “[A] trial judge has large discretion in determining if damages are excessive and whether the cure is a remittitur or a new trial.” Hanson v. Chi., Rock Island & Pac. R.R., 345 N.W.2d 736, 739 (Minn.1984) (quotations omitted). A new trial may be granted for “[e]xcessive or insufficient damages, appearing to have been given under the influence of passion or prejudice.” Minn. R. Civ. P. 59.01(e). But, through granting remittitur, a trial court may set aside a verdict it regards as excessive and “should not hesitate to do so where it feels the evidence does not justify the amount, even if the verdict was not actuated by passion and prejudice.” Mrozka v. Archdiocese of St. Paul & Minneapolis, 482 N.W.2d 806, 813 (Minn.App.1992), review denied (Minn. May 24, 1992).

The reasonableness of a jury's damage award is largely left to the discretion of the judge who presided at trial and, accordingly, the district court's ruling on this question will not be disturbed unless a clear abuse of discretion is shown. Bigham v. J. C. Penney

Co., 268 N.W.2d 892 (Minn.1978). Or, as stated by the court in Dawydowycz v. Quady, 300 Minn. 436, 440, 220 N.W.2d 478, 481 (1974), a trial judge's decision regarding the excessiveness of damages will not be interfered with on appeal “unless the failure to do so would be ‘shocking’ and result in a ‘plain injustice.’”

Here, the evidence at trial does not support the jury verdict and can only be explained by passion and/or prejudice of the jury. First, the jury advisory finding of fact that Defendants breached a Fiduciary Duty owed to Plaintiff was impossible without the jury feeling passionate and prejudicial against Defendants. Jack Gieseke testified that he did not trust Defendants, an essential element of a finding of a fiduciary. There was no reasonable basis for the jury to find that Defendants owed a fiduciary duty to Plaintiff as Plaintiff clearly did not expect Defendants to act in its best interest. However; contrary to the overwhelming evidence to the contrary, this jury found that Defendants had a fiduciary duty owed to Defendants that was breached. This conclusion by the jury was wholly inconsistent with the evidence. The jury’s finding of a fiduciary relationship is illustrative of the fact that they were generally swayed by passion and prejudice. The trial court, in its verdict, dismissed the jury’s advisory opinion in this regard and found no fiduciary duty was owed to Plaintiff by Defendants.

Further, the jury awards were inconsistent, though the basis for damages of each cause of action (breach of fiduciary duty, replevin, conversion and tortious business interference) was Defendants’ seizure of the trucks. The Defendants’ breach of fiduciary duty (the seizure of the trucks) damaged Plaintiff in the amount of \$41,000 although there was an attorney fee figure that was submitted to the jury as well. The amount that would

compensate Plaintiff for the conversion and replevin with respect to the same seizure of the trucks was \$10,000. The damages associated with the tortious business interference, again, the seizure of the trucks after the foreclosure sale, was \$220,000. The question as to the manner in which the jury determined this wide range of figures for the same act is puzzling and the inconsistency supports Defendants' claim that the jury was affected by passion and prejudice rather than a well reasoned calculation of damages.

Of course, the \$220,000 to \$10,000 disparity is a difficult discrepancy to reconcile. Damage to the property itself was not alleged. Instead, Diversified claims in the tortious business interference and conversion/replevin claims that it was damaged by being deprived of the use of the property. However; Jack Gieseke admitted in deposition testimony and at trial that Diversified was not operating after 2008 and, in fact, there were no tax returns filed by Diversified for the tax years of 2007-present date, although Gieseke claims the IRS filed tax returns for Diversified for 2007. Diversified's tax returns for the year of 2006 showed a loss of \$81,673.00. Diversified's tax returns for 2005 show a loss of \$67,463.00 and its tax returns for 2004 show a loss of \$34,203.00. The parties stipulated at trial that Art Hogenson lent Diversified \$307,000.00 to keep it running indicating the losses were not paper losses, but, that Plaintiff needed cash other than amounts it was generating to stay afloat. Bromelkamp testified that, beyond the losses for the tax years indicated above, Diversified had substantial carryover losses from previous years. Plaintiff's counsel suggested that amounts paid to the principles of Diversified were discretionary, but, the work performed by the principles was necessary to the operation of Diversified and it is reasonable that Diversified pay for this work.

Additionally, Diversified was out of business prior to the seizure of the trucks. Despite all the evidence that Plaintiff had lost money throughout its existence and was out of business at the time the acts complained of, the jury still awarded Plaintiff \$220,000, or, \$41,000, or, \$10,000 for Defendants seizure of some of Plaintiff's equipment.

Defendants are entitled to a new trial, or, in the alternative, remittitur, because the damage award was excessive. A new trial may be granted for excessive damages where the damages appear to have been given "under the influence of passion or prejudice." Minn.R.Civ.P. 59.01(e). "In determining whether a verdict is excessive, the trial judge must consider all the evidence, the demeanor of the parties, and the circumstances of the trial..." *Id.* at 343 (citing Jangula v. Klocek, 284 Minn. 477, 488, 170 N.W.2d 587, 594 (1969)). A verdict should be set aside if it "shocks the conscience." Verhel v. Independent Sch. Dist. No. 709, 359 N.W.2d 579, 591 (Minn.1984). The jury award herein shocks the conscience because it is completely out of line with the evidence at trial that would suggest minimal damages, if any. Defendants are entitled to a new trial on damages.

As well, Defendant is entitled to Judgment as a matter of Law because in viewing the evidence in the light most favorable to the Plaintiff "the verdict is manifestly against the entire evidence" and "the moving party is entitled to judgment as a matter of law." Navarre v. S. Washington County Sch., 652 N.W.2d 9, 21 (Minn.2002). The evidence adduced at trial supports only a finding that Diversified lost money in each of the years of its existence. Additionally, the evidence introduced at trial would lead a reasonable juror to believe that Diversified was not damaged by any of the complained of acts of

Defendants because the acts occurred after Diversified was already out of business.

Defendants are entitled to judgment as a matter of law.

III. THE TRIAL COURT ERRED IN FINDING AN EQUITABLE REMEDY OF PIERCING THE CORPORATE VEIL AVAILABLE TO RESPONDENT AS RESPONDENT HAD UNCLEAN HANDS AND APPELLANT IS ENTITLED TO A NEW TRIAL, OR, JUDGMENT AS A MATTER OF LAW WHERE THE VERDICT AND ORDER FOR PIERCING THE CORPORATE VEIL IS NOT JUSTIFIED BY THE EVIDENCE?

Piercing the corporate veil is an *equitable remedy* that may be applied in order to avoid an injustice. Roepke v. W. Nat'l Mut. Ins. Co., 302 N.W.2d 350, 352 (Minn.1981). Unclean hands is an equitable defense that restricts the availability of equitable remedies to parties who are guilty of unconscionable conduct. Fred O. Watson Co. v. U.S. Life Ins. Co., 258 N.W.2d 776, 778 (Minn.1977). For a successful unclean hands defense, a party's conduct must be unconscionable by reason of a bad motive or because the result brought about by the conduct would be unconscionable. Creative Communications Consultants, Inc. v. Gaylord, 403 N.W.2d 654, 658 (Minn.App.1987). The decision to grant equitable relief is within the discretion of the court and will not be reversed unless there is a clear abuse of that discretion. Medtronic, Inc. v. Advanced Bionics Corp., 630 N.W.2d 438, 450 (Minn.App.2001). A piercing the corporate veil argument is not available to Plaintiff because Plaintiff has unclean hands. Jack Gieseke, Arthur Hogenson and Diversified made false statements to Berkley Risk administrators and Fallon's attorney, denying that Fallon was an employee of Diversified. The above identified litigants participated in this unconscionable conduct in order to save itself a rate increase for its worker's compensation insurance. Jack Gieseke lied to Diversified's

work compensation carrier implying that Thomas Fallon was an unknown person strolling by the job site who just happened to start working. (Affidavit of K. Griffiths submitted with Summary Judgment Motion, Para. 31, Ex. J and Para. C, Pgs 10-22). Even after Arthur Hogenson informed Gieseke about Thomas Fallon Gieseke took no corrective action and in fact communicated to Fallon's attorney that Fallon was not employed by Diversified. *Id.* (Affidavit of K. Griffiths submitted with Summary Judgment Motion, Para. 23, Ex. B, Pages 20-24). Plaintiff's equitable relief of piercing the corporate veil should be denied and summary judgment should have been granted Defendants because Plaintiff had unclean hands.

A court may pierce the corporate veil to hold a party liable for the acts of a corporate entity if the entity is used for a fraudulent purpose or the party is the alter ego of the entity. Minn.Stat. § 322B.303, subd. 2 (2006) (stating that veil piercing also applies to limited liability companies); Victoria Elevator Co. v. Meriden Grain Co., 283 N.W.2d 509, 512 (Minn.1979). "When using the alter ego theory to pierce the corporate veil, courts look to the reality and not form, with how the corporation operated and the individual defendant's relationship to that operation." Hoyt Properties, Inc. v. Prod. Res. Group, L.L.C., 736 N.W.2d 313, 318 (Minn.2007) (quotation omitted). Several factors are relevant to the inquiry, including:

insufficient capitalization for purposes of corporate undertaking, failure to observe corporate formalities, nonpayment of dividends, insolvency of debtor corporation at time of transaction in question, siphoning of funds by dominant shareholder, nonfunctioning of other officers and directors, absence of corporate records, and existence of corporation as merely facade for individual dealings.

Victoria Elevator, 283 N.W.2d at 512. If the corporation or limited liability company is found to be an “alter ego” or mere “instrumentality,” a court may pierce the corporate veil if there is an “element of injustice or fundamental unfairness.” *Id.* There is no allegation that IDCA was formed for a fraudulent purpose and, thus, Plaintiff relied on a claim that IDCA lacked corporate formality and that justice required the piercing of the corporate veil.

IDCA was formed for the sole purpose of purchasing Art Hogenson’s shares of Diversified which were bid out for \$5,000.00. IDCA held a separate checking account and has been funded by shareholder capital contributions and loans from shareholders during its existence. IDCA had a separate bank account, was sufficiently capitalized, had active officers and had complied with Minnesota Statutes in its creation and operations. (Transcript Volume III 277-285, 287-290, 331-332, Exhibits 49-51). IDCA and Asset Liquidators were formed for the legitimate purpose of protecting the shareholders and officers, Debra Hogenson and Michael Hogenson from known and unknown liabilities of Diversified and Hogenson Properties. *Id and* (Transcript Volume II, Pg. 140-141, 146-147, Volume III, Pg. 330).

IDCA has appropriate corporate documents, financial statements and tax returns. Under the facts of this case, it cannot be found that IDCA was anyone’s alter ego as there was sufficient capitalization for purposes of the corporate undertaking (purchasing Art Hogenson’s shares of Diversified), there was not a failure to observe corporate formalities where the only asset of IDCA was in limbo for eighteen months due to litigation. Nonpayment of dividends is not a factor and there is no insolvency of the

debtor corporation at the time of transaction in question. Plaintiff makes no allegation that there is a siphoning of funds by a dominant shareholder, or, nonfunctioning of officers and directors, or an absence of corporate records, but merely suggests that the existence of the corporation is merely a facade for individual dealings. Appellant is entitled to a new trial, or, judgment as a matter of law because the verdict and order for piercing the corporate veil is not justified by the evidence.

VI. CONCLUSION

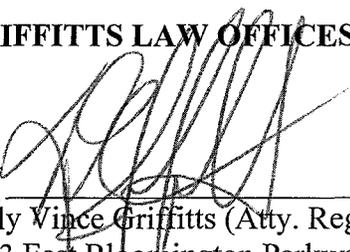
Tortious interference with business expectancy should not be a valid tort claim under Minnesota law and Appellant is entitled to judgment as a matter of law. In the alternative, if this new tort is accepted by this court, Appellant is entitled to judgment as a matter of law, or, a new trial because the jury verdict was not justified by the evidence.

Appellants' should be granted a new trial, or, remittitur as the jury's damage awards were inconsistent, excessive and contrary to the evidence. The damage award could have only resulted from passion or prejudice.

Finally, the trial court erred in finding an equitable remedy of piercing the corporate veil available to Respondent as Respondent had unclean hands and Appellant is entitled to a new trial, or, judgment as a matter of law where the verdict and order for piercing the corporate veil is not justified by the evidence.

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