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C

Court of Appeals of Michigan.  
 John GILROY, Plaintiff-Appellee,  
 v.

Robert CONWAY, d/b/a Conway Studios, Defendant-Appellant.  
**Docket No. 79979.**

Submitted May 8, 1985.

Decided May 19, 1986.

Released for Publication Aug. 15, 1986.

Photographer partner brought action against managing partner for conversion of partnership assets and failure to pay or account for income from partnership. The Circuit Court, Kalamazoo County, Donald M. Goodwillie, Jr., J., entered judgment for photographer partner. Managing partner appealed. The Court of Appeals, Peterson, J., held that: (1) managing partner's fiduciary duty not to convert partnership property arose out of partnership contract and did not entitle photographer partner to award of exemplary damages upon breach; (2) Uniform Partnership Act did not entitle photographer partner to award of exemplary damages; and (3) defendant whose denial of allegations in complaint was unwarranted was liable for attorney fees and costs necessary to prove truth of allegations.

Affirmed as modified.

West Headnotes

**[1] Evidence 157** **574**

157 Evidence

157XII Opinion Evidence

157XII(F) Effect of Opinion Evidence

157k574 k. Conflict with Other Evidence.

**Most Cited Cases**

Evidence supported trial court's resolution of conflict of expert testimony as to value of partnership, trial court's findings as to value of business, and award to photographer partner of interest in busi-

ness after managing partner violated fiduciary relationship by converting partnership assets.

**[2] Evidence 157** **543(4)**

157 Evidence

157XII Opinion Evidence

157XII(C) Competency of Experts

157k543 Value

157k543(4) k. Personal Property. **Most****Cited Cases**

Trial court's exclusion of testimony of witness as to opinion on valuation of partnership was not abuse of discretion. **MRE 104(a).**

**[3] Partnership 289** **305**

289 Partnership

289VII Dissolution, Settlement, and Accounting

289VII(C) Distribution and Settlement

Between Partners and Their Representatives

289k305 k. Division of Capital. **Most****Cited Cases**

Managing partner upon dissolution of partnership with photographer partner was entitled to one half of value of checks from customers deposited in trust account of photographer partner's attorney and to one half of value of equipment left at place of business when managing partner converted assets of partnership.

**[4] Damages 115** **87(1)**

115 Damages

115V Exemplary Damages

115k87 Nature and Theory of Damages Additional to Compensation

115k87(1) k. In General. **Most Cited Cases**

Purpose of exemplary damages is to compensate for mental injury rather than to punish.

**[5] Damages 115** **57.42**

115 Damages

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**115III** Grounds and Subjects of Compensatory Damages

**115III(A)** Direct or Remote, Contingent, or Prospective Consequences or Losses

**115III(A)2** Mental Suffering and Emotional Distress

**115k57.41** Breach of Contract or Warranty

**115k57.42** k. In General. **Most Cited Cases**

(Formerly 115k56)

Damages for mental injury are not recoverable for breach of commercial contracts having as purpose economic, rather than personal, interest.

**[6] Partnership 289 ↪122.5**

**289** Partnership

**289III** Mutual Rights, Duties, and Liabilities of Partners

**289III(C)** Actions Between Partners

**289k122.5** k. Damages. **Most Cited Cases**

(Formerly 289k1221/2)

Managing partner's fiduciary duty not to convert partnership property to his own use arose from partnership contract, did not arise from tort independent of breach of partnership contract, and, therefore, did not justify award of exemplary damages upon breach. **M.C.L.A. §§ 449.19-449.22.**

**[7] Partnership 289 ↪122.5**

**289** Partnership

**289III** Mutual Rights, Duties, and Liabilities of Partners

**289III(C)** Actions Between Partners

**289k122.5** k. Damages. **Most Cited Cases**

(Formerly 289k1221/2)

Uniform Partnership Act did not entitle photographer partner whose right to partnership property was converted by managing partner to award of exemplary damages, but only required that photographer partner be made whole economically. **M.C.L.A. §§ 449.19-449.22.**

**[8] Partnership 289 ↪259.5**

**289** Partnership

**289VII** Dissolution, Settlement, and Accounting

**289VII(A)** Causes of Dissolution

**289k259.5** k. Election of Partner to Dissolve. **Most Cited Cases**

(Formerly 289k2591/2)

Photographer partner had no right to compel continuation of partnership that was not for definite term. **M.C.L.A. § 449.31.**

**[9] Partnership 289 ↪346**

**289** Partnership

**289VII** Dissolution, Settlement, and Accounting

**289VII(D)** Actions for Dissolution and Accounting

**289k346** k. Costs. **Most Cited Cases**

Managing partner, whose answer denied each allegation of photographer partner's complaint for conversion of partnership assets and failure to pay income from partnership or to account for income, who later admitted truth of many allegations, and who was found to have done acts alleged, was liable to photographer partner for costs and attorney fees necessary to prove allegations denied without justification. GCR 1963, 111.6; **MCR 1.101** et seq., **2.114(D, E).**

**\*\*420 \*630** Alan H. Silverman, P.C. by Alan H. Silverman, Kalamazoo, for plaintiff-appellee.

Vandervoort, Cooke, McFee, Christ, Carpenter & Fisher by Nelson Karre, Battle Creek, for defendant-appellant.

Before SHEPHERD, P.J., and MAHER and PETERSON,<sup>FN\*</sup> JJ.

**FN\*** William R. Peterson, 28th Judicial Circuit Judge, sitting on Court of Appeals by assignment pursuant to **Const.1963, Art. 6, Sec. 23**, as amended 1968.

PETERSON, Judge.

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Defendant cheated his partner\*631 and appeals from the trial court's judgment granting that partner a remedy.

Plaintiff was an established commercial photographer in Kalamazoo who also had a partnership interest in another photography business, Colonial Studios, in Coldwater. In 1974, defendant became plaintiff's partner in Colonial Studios, the name of which was changed to Skylight Studios. Under the partnership agreement, defendant was to be the operating manager of the partnership, in return for which he would have a guaranteed draw. Except for the guaranteed draw, the partnership was equal in ownership and the sharing of profits.

Prior to defendant's becoming a partner, the business had acquired a small contractual clientele of schools for which the business provided student portrait photographs. The partners agreed to concentrate on this type of business, and both partners solicited schools with success. Gross sales, which were \$40,000 in 1974, increased every year and amounted to \$209,085 in 1980.

In the spring of 1981, defendant offered to buy out plaintiff and some negotiations followed. On June 25, 1981, however, plaintiff was notified by the defendant that the partnership was dissolved as of July 1, 1981. Plaintiff discovered that defendant: had closed up the partnership's place of business and opened up his own business; had purchased equipment and supplies in preparation for commencing his own business and charged them to the partnership; and had taken with him the partnership employees and most of its equipment.

Defendant had also stolen the partnership's business. He had personally taken over the business of some customers by telling them that the partnership was being dissolved; in other cases he simply took over partnership contracts without \*632 telling the customers that he was then operating on his own. Plaintiff also learned that defendant's deceit had included the withdrawal, without plaintiff's knowledge, of partnership funds for defendant's personal

use in 1978 in an amount exceeding \$11,000.

The trial judge characterized the case as a "classic study of greed" and found that defendant had in effect appropriated the business enterprise, holding that defendant had "knowingly and wilfully violated his fiduciary relationship as a partner by converting partnership assets to his use and, in doing so, literally destroying the partnership". He also found that the partnership could have been sold as a going business on June 30, 1981, and that after a full accounting, it had a value on that date of \$94,596 less accounts payable of \$17,378.85, or a net value of \$77,217.15. The division thereof after adjustments for plaintiff's positive equity or capital, resulted in an award to plaintiff for his interest in the business of \$53,779.46.<sup>FN1</sup>

**FN1.** While other methods of computing damages might have been argued, neither party quarrels with this method of determining plaintiff's remedy for economic damages.

[1] Defendant argues that the finding of the trial judge as to the value of the \*\*421 business as of June 30, 1981, was not supported by the proofs at trial. The gist of the argument, however, is not that there were no proofs to substantiate the finding as to value, but that the witness whose testimony was the basis for the finding was less credible than defendant's accountant who gave the opinion that the business had no value except for its cash on hand and the value of equipment and fixtures. The expert upon whose testimony the trial judge relied had substantial experience in the field of school portrait photography and was in fact an expert \*633 brought to trial by the defendant whose valuation testimony was brought out by cross-examination. The weight and credence to be given to the testimony of the experts was for the trial judge to determine, *Sampson v. Veenboer*, 252 Mich. 660, 234 N.W. 170 (1931); *Coats v. Bussard*, 94 Mich.App. 558, 288 N.W.2d 651 (1980), and a review of the record does not persuade us that his conclusions were clearly erroneous. GCR 1963, 517.1, now **MCR 2.613(C)**; *Pre-*

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*copio v. Detroit*, 415 Mich. 457, 330 N.W.2d 802 (1982).

[2] Defendant also claims that the trial court committed error in excluding the testimony of one Jack Dehn as to his opinion on the valuation of the partnership. The qualification of a witness to testimony is a preliminary question to be determined by the trial judge, MRE 104(a). The trial court found that the witness was not qualified as an expert and we find no abuse of discretion in his ruling. *Elsasser v. American Motors Corp.*, 81 Mich.App. 379, 265 N.W.2d 339 (1978).

We do, however, acknowledge the accuracy of defendant's claim that the findings of the trial judge failed to take into account equipment left at the place of business, which plaintiff took into his possession on July 1, 1981, and checks from customers deposited in the trust account of plaintiff's attorney. Since the trial judge's award was based on the total value of the partnership business on June 30, 1981, defendant claims that he is entitled to credit for one-half the value of such property and checks. Plaintiff makes no response to this claim.

[3] There is no difficulty in ascertaining from the record the amount of the checks which plaintiff's counsel acknowledged. They total \$2,851.33. There is more difficulty determining the value of the equipment left behind by defendant since the trial \*634 judge made no finding pertaining thereto. Defendant had prepared a listing of those items of equipment in which listing he placed a valuation thereon. That valuation is clearly highly inflated and is unsubstantiated by any evidence. Plaintiff testified that he sold a phone system for \$1,500, but that many of the items listed by defendant were not found, that others were obsolete or out of repair, and that the total value of those items was roughly \$690. That testimony was not contradicted and we take it as accurate. Defendant is thus entitled to credit for one-half of the total value of such checks and equipment, \$5,041.33, or \$2,520.66, and the judgment may be modified accordingly.

Plaintiff also sought exemplary damages. Count II of the complaint alleged that defendant's conduct constituted a breach of defendant's fiduciary duty to his partner under §§ 19-22 of the Uniform Partnership Act,<sup>FN2</sup> and Count III alleged conversion of partnership property. Each count contained allegations that defendant's conduct was wilful, wanton and in reckless disregard of plaintiff's rights and that such conduct had caused injury to plaintiff's feelings, including humiliation, indignity and a sense of moral outrage. The prayer for relief sought exemplary damages therefor.

FN2. M.C.L. §§ 449.19-449.22; M.S.A. §§ 20.19-20.22. Sections 19, 20 and 22 provide for the keeping of books, the right of partners to inspect same, the duty of partners to render information, and the right of partners to an accounting. Section 21 makes a partner accountable to the partnership as a fiduciary.

Plaintiff's testimony on the point was brief. He said:

"The effect of really the whole situation, and I think it was most apparent when I walked into the empty building, was extreme\*\*422 disappointment and really total outrage at the fact that something that \*635 I had given the utmost of my talent and creativity, energy, and whatever time was necessary to build, was totally destroyed and there was just nothing of any value that was left \* \* \*. My business had been stolen and there wasn't a thing that I could do about it. And to me, that was very humiliating that one day I had something that I had worked 10 years on, and the next day I had absolutely nothing of any value \* \* \*."

As noted above, the trial judge found that defendant had literally destroyed the partnership by knowingly and wilfully converting partnership assets in violation of his fiduciary duty as a partner. He also found that plaintiff had suffered a sense of outrage, indignity and humiliation and awarded him \$10,000 as exemplary damages.

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Defendant appeals from that award, asserting that plaintiff's cause of action arises from a breach of the partnership contract and that exemplary damages may not be awarded for breach of that contract.

[4] Plaintiff argues that the claim for exemplary damages is not for breach of the partnership contract but rather that the breach of a fiduciary duty and the conversion on partnership assets by a partner are torts independent of the partnership contract, for which torts exemplary damages may be awarded. Plaintiff cites no authority for that proposition, nor do we find any such precedent.<sup>FN3</sup> It \*636 is true that decisions may be found in other states allowing punitive damages for breach of a fiduciary duty, as in *Jerman v. O'Leary*, 145 Ariz. 397, 701 P.2d 1205 (App.1985), a partnership case. Those decisions, however, are found in forums in which, unlike Michigan, punitive damages are recoverable as punishment for intentional wrongs.<sup>FN4</sup> In Michigan, however, the purpose of exemplary damages has not been to punish the defendant but to render the plaintiff whole by compensating for mental injury<sup>FN5</sup> in a limited class of cases where such mental injury is the result of outrageous conduct. *Wise v. Daniel*, 221 Mich. 229, 190 N.W. 746 (1922); *Smith v. Jones*, 382 Mich. 176, 169 N.W.2d 308 (1969); *Willett v. Ford Motor Co.*, 400 Mich. 65, 253 N.W.2d 111 (1977); *Bailey v. Graves*, 411 Mich. 510, 309 N.W.2d 166 (1981). This is not such a case.

FN3. In *Hayes-Albion Corp. v. Kuberski*, 421 Mich. 170, 364 N.W.2d 609 (1984), a claim was made by plaintiff corporation for exemplary damages arising from defendant employee's breach of a fiduciary duty to preserve the employer's trade secrets. The Court, after noting that exemplary damages are not punitive but compensatory, merely said that the claimed injury (in addition to lost profits), loss of time that defendant devoted to a competitor while being paid by plaintiff, might be

compensable but not as exemplary damages. The Court did not discuss the question of whether a breach of fiduciary duty would justify exemplary damages where there is consequential mental injury. And, quaere, how can a corporation suffer mental injury?

FN4. For cases allowing exemplary damages for fraud or for malicious and intentional breach of a fiduciary duty, see annotations in 84 ALR 1345, 1351 and 67 ALR2d 952, and *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567 (Tex., 1963).

FN5. The mental injury has been characterized in terms of feelings of anguish, distress, embarrassment, humiliation and indignity. See, e.g., *Veselenak v. Smith*, 414 Mich. 567, 574-576, 327 N.W.2d 261 (1982).

[5] Damages for mental injury are not recoverable for breach of commercial contracts having as their purpose economic rather than personal interests. *Valentine v. General American Credit, Inc.*, 420 Mich. 256, 362 N.W.2d 628 (1984); *Stewart v. Rudner*, 349 Mich. 459, 84 N.W.2d 816 (1957); *Kewin v. Massachusetts Mutual Life Ins. Co.*, 409 Mich. 401, 295 N.W.2d 50 (1980). Moreover, as note in *Kewin*, pp. 420-421, 295 N.W.2d 50:

“ \* \* \* absent allegation and proof of tortious conduct *existing independent of the breach* (citation omitted) exemplary damages may not be awarded in common-law actions brought for breach of a commercial contract.” (Emphasis added.)

\*\*423 \*637 [6] If it were to be assumed that a partner's breach of his fiduciary duty or appropriation of partnership equipment and business contract to his own use and profit are torts,<sup>FN6</sup> it is clear that the duty breached arises from the partnership contract. One acquires the property interest of a co-

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tenant in partnership only by the contractual creation of a partnership; one becomes a fiduciary in partnership only by the contractual undertaking to become a partner. There is no tortious conduct here existing independent of the breach of the partnership contract.

**FN6.** To the contrary, it does not appear that a co-tenant in partnership can maintain a tort action for fraudulent conversion of partnership property against another co-tenant in partnership. *Reed v. Gould*, 105 Mich. 368, 63 N.W. 415 (1895). Neither can a partner maintain an action in tort against a partner who by arbitrary or bad faith breach of the partnership contract has caused the termination of the partnership. 60 Am.Jur.2d, *Partnership*, § 364, p. 248.

[7] Neither do we see anything in the Uniform Partnership Act to suggest that an aggrieved partner is entitled to any remedy other than to be made whole economically. The act defines identically the partnership fiduciary duty and the remedy for its breach, *i.e.*, to account:

“Sec. 21. (1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property;” M.C.L. § 449.21; M.S.A. § 20.21.

So, the cases involving a partner's breach of the fiduciary duty to their partners have been concerned solely with placing the wronged partners in the economic position that they would have enjoyed but for the breach. See, *e.g.*, *Lynn v. Arehart*, 231 Mich. 144, 203 N.W. 834 (1925); \*638*Penner v. DeNike*, 288 Mich. 488, 285 N.W. 33 (1939); *Van Stee v. Ransford*, 346 Mich. 116, 77 N.W.2d 346 (1956).

And finally, we think that the absurdity of allowing

damages for mental injury because of the breach of a partnership contract, or the duties stemming therefrom, is shown by answering the question asked in *Veselenak v. Smith*, 414 Mich. 567, 575, 327 N.W.2d 261 (1982): “[W]hat injury is sought to be compensated?”

[8] The answer, from plaintiff's testimony is that the mental injury stemmed from the termination of the business that he had worked hard to create. However disappointing that may have been to plaintiff, he had no right to compel the continuation of the partnership. No definite term having been specified for the duration of the partnership, it was terminable at the will of either partner. M.C.L. § 449.31; M.S.A. § 20.31. One who enters into such a fragile relationship cannot claim damages for disappointment when it shatters.

#### COSTS

[9] Defendant also argues that the trial court erred in assessing costs, including attorney fees, under GCR 1963, 111.6, which provides <sup>FN7</sup> as follows:

**FN7.** The Michigan Court Rules of 1985 not only continue the substance of GCR 1963, 111.6, but also authorize sanctions against counsel.

**MCR 2.114(D)** provides:

“Effect of Signature. The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by a signer that \* \* \* (2) to the best of his or her knowledge, information, and belief formed after reasonable inquiry, the pleading *is well grounded in fact* \* \* \*.” (Emphasis added.)

**MCR 2.114(E)** provides:

“Sanctions for Violation. If a pleading is signed in violation of this rule, the court,

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on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, including reasonable attorney fees.”

\*639 “Unwarranted Allegations and Denials. If it appears at the trial that any fact alleged or denied by a pleading ought not to have been so alleged or denied and such fact if alleged is not proved or if denied is proved or admitted, the court \*\*424 may, if the allegation or denial is unreasonable, require the party making such allegation or denial to pay to the adverse party the reasonable expenses incurred in proving or preparing to prove or disprove such fact as the case may be, including reasonable attorney fees.”

The trial judge's findings were as follows:

“Plaintiff has further brought to this court's attention the defendant's blatant disregard of the provisions of GCR 1963, 111.6 in defendant's answers to paragraphs 8, 20, and 25 of plaintiff's first amended complaint, thereby requiring plaintiff to interview, subpoena, and present in court, ten witnesses whose testimony could have been avoided by defendant's adherence to the court rules. Accordingly, plaintiff may assess his actual attorney fees and costs resulting therefrom.”

The factual allegations of paragraphs 8, 20 and 25 of the first amended complaint referred to by the trial judge asserted that defendant took for himself the benefits of the partnership contracts and failed to pay the income therefrom to the partnership or to account therefor; that defendant appropriated partnership accounts and assets to his own use; that defendant withdrew capital of the partnership and applied it to his own use without notice to plaintiff or accounting to the partnership; that defendant failed

to pay plaintiff \*640 the capital and income due plaintiff; <sup>FN8</sup> and that defendant took possession of, and used as his own, partnership property including inventory, equipment, customer lists, contract rights and expectancies, and accounts. Each of the allegations, thus, were factual; indeed, they were allegations of facts the truth or falsity of which had to be within defendant's personal knowledge.

FN8. Paragraph 20E also alleged that defendant failed to hold plaintiff harmless from liability for partnership debts. The trial judge made no specific finding on that point and the record does not establish that that was true, but neither does it indicate that expenses and attorney fees were taxed as to that particular allegation.

Defendant's answer denied each allegation. Each was proved by plaintiff's evidence to be true; indeed, during the course of his testimony, defendant admitted the truth of many of the allegations.

We find no abuse of discretion in the conclusion of the trial judge, *Christensen v. Christensen*, 126 Mich.App. 640, 337 N.W.2d 611 (1983). The denials were unreasonable and plaintiff is entitled to recover his expenses of proving that which should have been admitted. *Valley National Bank of Arizona v. Kline*, 108 Mich.App. 133, 310 N.W.2d 301 (1981).

The judgment is affirmed as modified herein.

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