

NOTICE

The text of this order may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

FIFTH DIVISION
September 29, 2006

No. 1-05-1319

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

JEFFERY M. HAGEN,
Plaintiff-Appellant,

v.

DISTRIBUTED SOLUTIONS, INC., DISTRIBUTED
PAYROLL SOLUTIONS, INC., and CRAIG JOHNSON,
Defendants-Appellees.

) Appeal from the
) Circuit Court of
) Cook County
)
) No. 99 CH 011628
) No. 01 L 005328
)
) Honorable
) David Donnersberger,
) Judge Presiding.
)

ORDER

Almost fifteen years ago, plaintiff, Jeffery Hagen invested in, and began employment with, a small corporation. Things apparently did not go as planned as evidenced by several lawsuits that subsequently ensued between these parties in Lake County, DuPage County, and the chancery and law divisions of Cook County. Plaintiff now appeals from a final judgment of the circuit court of Cook County. We reverse and remand.

This matter was previously before this court concerning plaintiff's writ of *mandamus* to compel defendant, Distributed Solutions, Inc., (DSI), and its president, defendant Craig Johnson (Johnson), to allow plaintiff, as a shareholder, to inspect DSI's corporate records. We concluded

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that the trial court should have granted plaintiff's writ of *mandamus*. We remanded the matter and ordered the trial court to determine the amount of statutory penalties to which plaintiff was entitled pursuant to section 7.75(d) of the Illinois Business Corporations Act. 805 ILCS 5/7.75(d) (West 1992). The remanded case was returned to the trial court docket bearing the number 99 CH 011628. See *Hagen v. Distributed Solutions, Inc.*, 328 Ill. App. 3d 132, 764 N.E.2d 1141 (2002) (*Hagen I*).

This matter is now again before this court on plaintiff's *pro se*¹ appeal, which involves two separate cases: (1) plaintiff's appeal from the amount of the penalty assessed by the trial judge in *Hagen I*; and (2) the appeal of a separate lawsuit that plaintiff filed during the pendency of *Hagen I*.

The second case was originally filed on August 21, 2000 in DuPage County, and was subsequently transferred to Cook County, bearing the number 01 L 005328. In the second case, on July 1, 2002, plaintiff filed a first amended complaint which alleged breach of fiduciary duty against Johnson, usurpation of corporate opportunity against Johnson, and a derivative action against DPSL. Defendants filed a combined section 2-615/2-619 motion. 735 ILCS 5/2-615, 2-619 (West 2000).

On September 26, 2002, the trial court entered an order which (1) barred as *res judicata* all allegations of breach of fiduciary duty prior to March 1995; (2) denied the defendants' section 2-615 motion to dismiss count I of the first amended complaint for breach of fiduciary duty

¹We note that plaintiff was admitted to the Illinois bar during the pendency of this appeal.

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against Johnson²; (3) granted defendants' section 2-615 motion to dismiss Count II alleging Johnson's usurpation of corporate opportunity against DSI because it was incorrectly brought by plaintiff in his individual capacity, instead of being brought on behalf of the corporation; and (4) granted defendants' section 2-615 motion to dismiss count III against DPSI under a derivative theory finding that plaintiff failed to state a claim against DPSI.

On October 25, 2002, the trial court ordered that the two lawsuits be consolidated for purposes of further discovery and trial. On October 30, 2002, the trial court denied plaintiff's motion to reconsider the dismissal of count III and gave plaintiff leave to file an amended complaint.³ On November 8, 2002, plaintiff filed a two-count second amended complaint. Count I again alleged breach of fiduciary duty against Johnson. Count II was a derivative action

²In denying defendants' motion to dismiss plaintiff's breach of fiduciary claim, the trial court relied, in part, on the case of *Zokoych v. Spalding*, 36 Ill. App. 3d 654, 666, 344 N.E.2d 805, 815 (1976). We note that, in concluding that the plaintiff there had an individual cause of action for breach of fiduciary duty, the court concluded that the second stockholder owed a duty directly to the plaintiff and stated that the defendant, as "a corporate officer, joint venturer or partner, owed a fiduciary obligation to plaintiff as owner of one-half of the stock and interest in the corporation, to act honestly and with the utmost good faith. In the instant case, defendants have not raised, on appeal, any argument that Count I should have been dismissed in its entirety on September 26, 2002 and did not thereafter move to dismiss Count I in its entirety.

³The court also allowed plaintiff to withdraw a second amended complaint that he filed on October 4, 2002.

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claiming usurpation of corporate opportunity against DPSI *and* Johnson.

On December 24, 2002, defendants again filed a motion to dismiss pursuant to sections 2-615 and 2-619(4). Defendants argued that paragraph 43 of Count I, which alleged that "CSA performed services for DSI clients that were of the same nature, or reasonably incident to the nature of the business in which DSI was engaged..." resounded of the corporate opportunity doctrine. Defendants noted that the paragraph had previously been stricken by the court from Count I because usurpation of a corporate opportunity was a derivative action, but Count I merely alleged breach of fiduciary duty and was brought in plaintiff's individual capacity.

Defendants further contended that Count II should be dismissed. Defendants, however, asserted in their motion that Count II was a derivative action against DPSI, and did not discuss the fact that it was also a derivative action against Johnson. Defendants did not argue that plaintiff failed to state a cause of action against Johnson for usurpation of corporate opportunity, yet Johnson also prayed for dismissal of Count II. Moreover, defendants incorrectly - and twice - referred to "Count III" as failing to state a cause of action.

On May 9, 2003, the trial court again struck paragraph 43 of Count I. The remainder of Count I, stating a cause of action against Johnson, for breach of fiduciary duty, remained. The trial court also dismissed Count II, concluding that plaintiff failed to allege any wrongful conduct on the part of DPSI. The trial court, however, noted that the allegations were focused upon Johnson's actions as an officer of DSI. Thus, it is unclear whether the trial court decided that plaintiff failed to state a cause of action as to Johnson, especially since the court noted that allegations which amounted to claims for corporate usurpation *were* scattered throughout Count

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II. Indeed, although the entire count was dismissed, it was dismissed without prejudice.

Plaintiff, however, did not replead Count II because he apparently believed, as did defendants, that the court had ruled that plaintiff failed to state a cause of action against DPSI *or* Johnson.

On appeal, plaintiff states that the trial court, in its two orders (dismissing Counts II and III of his first amended complaint and dismissing Count II of his second amended complaint) “was saying plaintiff could not bring [usurpation of corporate opportunity claims] either individually or derivatively.”

We conclude that the trial court erred in dismissing - in its entirety - Count II of plaintiff's second amended complaint. Plaintiff adequately stated a derivative cause of action against Johnson for usurpation of corporate funds. We feel compelled to note, however, that plaintiff's inartful pleading obviously affected the trial court's decision. The problem might have been avoided if plaintiff's complaint, although seeking a constructive trust upon the assets of DPSI, had contained separate counts against Johnson and DPSI on each cause of action, rather than combining the two defendants in one count.

We also note, however, that this court has stated that “a plaintiff seeking to enforce a claim which has accrued to a corporation must either (1) make a presuit demand requesting that the corporation's board of directors assert the claim, or (2) establish that such a demand would be futile, prior to the filing of a derivative cause of action. *Seinfeld v. Bays* 230 Ill. App. 3d 412,420, 595 N.E.2d 69, 75 (1992). We agree with plaintiff that such a demand would have been futile in the instant matter. Under Illinois law, “the futility of a pre-suit demand is established if, accepting the well-pleaded facts as true, the plaintiff raises a reasonable doubt that (1) the

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directors are disinterested and independent or (2) that the challenged transaction was the product of a valid exercise of the directors' business judgment. See *Silver v. Allard*, 16 F. Supp. 2d 966, 969 (N.D. Ill.1998).

In any event, at the time of trial, DPSI was no longer a defendant. DSI was a defendant only in *Hagen I*, the case remanded for the purpose of determining the amount of the statutory penalty due plaintiff as a result of defendants' preventing him from inspecting DSI's corporate records.

A consolidated bench trial on plaintiff's claim of breach of fiduciary duty against Johnson began on January 24, 2004 and concluded on August 13, 2004. On February 14, 2005, the trial court found in favor of Johnson. The court also awarded plaintiff \$75 for defendants' violation of section 7.75(d) of the Illinois Business Corporations Act. 805 ILCS 5/7.75(d) (West 1992) that was the subject of *Hagen I*. Plaintiff now appeals from numerous orders of the trial court, as specified in his notice of appeal.

BACKGROUND

The following procedural and factual background of the present matter is largely obtained from the parties' joint report of trial proceedings. In addition to the joint report of proceedings, we have also included excerpts from *Hagen I* for edification. The joint report of trial proceedings, which was certified by the trial court, contains 132 paragraphs, in addition to numerous exhibits. The record contains no transcript of the trial because plaintiff was unable to procure a court reporter.

Johnson established DSI with investor Bruce Larson in July 1991. Johnson was president

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and CEO of DSI, as well as the majority shareholder. Larson was vice-president of human resources. DSI was to have two business areas: (1) providing application software and consulting services to small to mid-sized manufacturing companies through value added reseller (VAR) relationships; and (2) providing payroll and medical billing services. As a VAR, DSI added value to the end-client that purchased software in that DSI additionally sold and provided consulting and integration programming for those end-clients' individual businesses. As a VAR, DSI employed professional problem solvers and project managers.

DSI subsequently never did provide medical billing services. Prior to starting DSI, Johnson had founded Manufacturing Control Consultants, Inc. (MCC), which was a consulting and computer software company. MCC became largely inactive in June 1991, approximately at the same time DSI was formed. In its November 1991 business plan, however, DSI disclosed that it intended to work with MCC for its pre-sales and post-sales application consulting.

In addition to Johnson and Larson, plaintiff was one of the initial investors in DSI in December 1991 or January 1992. He paid \$40,000 for which he received stock in DSI and an ownership interest of 18%. Also, in January 1992, plaintiff became an employee of DSI. His position was director of financial services. After approximately two months, plaintiff left DSI's employment, but remained a stockholder. DSI and plaintiff subsequently engaged in a series of unsuccessful negotiations to buy out his investment.

Johnson took compensation from DSI from 1992 to 1997. During 1991 and 1992, DSI paid \$82,421 to license the payroll software required by the payroll business and to purchase furniture and equipment to begin payroll operations. During 1992 and 1993, DSI absorbed

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\$254,732 in payroll operations losses. Plaintiff testified that DSI's business plan (1) recognized that the payroll business required a significant up-front investment of time when the business would not be profitable, and (2) anticipated the use of system implementation and development consulting services to help fund the payroll business start-up period.

In 1993, MCC changed its name to Client Server Applications, Inc., (CSA). CSA's employees were programmers, as opposed to DSI's employees who were professional problem solvers and project managers. Also in 1993, Johnson founded Distributed Payroll Solutions, Inc. (DPSI), and sold a portion of DSI's business – its payroll services for small companies – to himself and three other DSI employees who apparently became minority shareholders in DPSI. DPSI was also a defendant in this matter. Plaintiff's theory is that Johnson engaged in a scheme to siphon off DSI's assets so that DSI could be shut down, with the employees and the client list being shifted to DPSI.

As part of the sales contract between DSI and DPSI, DSI became a shareholder in DPSI. DPSI purchased DSI's payroll service bureau business for \$45,000 in cash and 2,675 shares of DPSI stock. The DPSI stock was entered on DSI's books with a value of \$45,000. Johnson subsequently operated DSI and DPSI out of the same location. Between 1993 and 1997, Johnson had three companies, DSI, DPSI, and CSA. Johnson was president and majority shareholder of all three companies. The other directors of the three companies were employees of DSI and/or DPSI.

After selling DSI's payroll service business to DPSI in 1993, DSI focused exclusively on the sale of application software and consulting services. In 1993, DSI signed an agreement with

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Lilly Software Associates (Lilly Software) to be Lilly Software's exclusive software sales and service representative in the Midwest. Johnson testified that from 1993 to 1997, DSI exclusively sold Lilly Software products. DSI's arrangement with Lilly Software did not require DSI to sell Lilly Software products exclusively. The Lilly Software products were sold under the name Visual, and DSI changed its operating name to Visual Midwest.⁴

In July 1994, original DSI investor Larson resigned as a DSI employee and his shares of DSI stock were bought by DSI for \$1 per share. From that point on, Larson oversaw DPSI's payroll business until he resigned in December 1995. At the time of his resignation, Larson entered into a separation agreement with DPSI whereby he returned his shares of DPSI stock for \$70,000 in consideration for a two-year covenant not to compete with over 500 DSI and DPSI clients and contacts.

After the sale of the payroll service bureau to DPSI in 1993, Johnson devoted over 60 hours per week to actively running DSI, and he received a salary and bonuses from DSI. He received bonuses in 1995 and 1997 of \$10,750 and \$55,000, respectively. Yet, during 1995 and 1997, DSI purportedly had a serious cash flow problem and would have been bankrupt but for a substantial amount of money lent to DSI by DPSI to keep DSI afloat. This was according to a report prepared by Regina Schurman, a Certified Public Accountant hired by plaintiff to perform a one-day review of DSI's financial statements. Schurman's report was prepared after she met

⁴We take judicial notice that the Illinois Secretary of State's website indicates that a corporation known as Visual Midwest, formerly known as Distributed Solutions, was involuntarily dissolved on December 1, 1998.

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with Tamara Sheldon, DSI's CFO.

In 1994⁵, Lilly Software purchased two software products known as SQL/Pay and SQL/HR, which were software products developed that same year by Johnson's company, CSA, formerly known as MCC. After CSA sold its two software products to Lilly Software, CSA became inactive. Between 1993 and 1995, Johnson was the only stockholder in CSA. From that time until 1999, although CSA did not have any operations, it collected commissions on the sales of its software products to Lilly Software, which were split with DSI, the company actually responsible for the sales. In 1996⁶, Tamara Sheldon and John Savage became stockholders in

⁵As noted in *Hagen I*, in 1994, plaintiff filed an action in Lake County seeking to force a buyout of plaintiff's shares or seeking the dissolution of DSI. Plaintiff's complaint also sought personal liability against Johnson and Larson for alleged breach of fiduciary duty arising from the sale of the payroll service bureau to DPSL. DPSL was dismissed from the lawsuit upon the court's finding that plaintiff was neither a shareholder nor a judgment creditor of DPSL. Following a trial on the merits, the trial court entered judgment on behalf of Larson and DSI and against plaintiff on his claim of breach of fiduciary duty, finding that all of the corporate transactions were proper. In the instant case, as noted earlier, the trial court concluded that this decision barred as *res judicata* plaintiff's claims against Johnson for any breach of fiduciary duty occurring prior to March 1995.

⁶As noted in *Hagen I*, also in 1996, Johnson sued plaintiff alleging that he had not paid full value for his shares. Plaintiff, acting *pro se*, attempted to file a countersuit claiming oppressive actions by Johnson, but apparently failed to adequately state a cause of action.

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CSA. Savage was an employee of DSI and a stockholder in DSI and DPSI. Sheldon was DSI's chief financial officer and a stockholder in DPSI. Johnson testified that from 1993 to 1998, he was responsible for CSA's operations and Sheldon prepared CSA's books, while both were receiving their salaries from DSI. According to Regina Schurman's report, prepared after she met with Tamara Sheldon, DSI's CFO, "they [were] trying to figure out what to do with it [CSA]."⁷

In 1996, Johnson was informed by Lilly Software that it was making its stock options available. In late 1996, DSI paid \$20,000 to Lilly Software to purchase Lilly stock. In 1997 and 1998, Lilly Software paid \$40,000 in dividends to DSI.

In April 1997, Johnson reported to DSI shareholders, *i.e.*, Johnson and plaintiff, that "Lilly Software dropped DSI as an Associate and DSI was left without a product." Johnson also testified that he was unwilling to allow DSI to transact business with clients as Lilly Software requested.

After the end of the relationship between Lilly Software and DSI, Johnson decided not to pursue a new product for DSI, but to finish the consulting agreements it had in place with the DSI clients to whom it had sold Lilly Software products through the years. At the DSI shareholder meeting in December 1997, Johnson explained to DSI shareholders, *i.e.*, Johnson and plaintiff, that the loss of the Lilly Software products resulted in DSI trimming its 12-person

Johnson, after losing his suit in arbitration, rejected the arbitrator's decision and requested a trial. The court ultimately ruled in favor of plaintiff.

⁷We take judicial notice that the Illinois Secretary of State's website notes that CSA was involuntarily dissolved in 1998.

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staff to only three people to finish out the consulting contracts. At the shareholder meeting, Johnson advised plaintiff that Lilly Software had failed to pay DSI approximately \$180,000 in commissions, and that a lawsuit against Lilly Software might be necessary.

Also during the 1997 shareholder meeting, a resolution was passed that allowed DSI to sell 320 of its shares to Johnson for \$1 per share. Another resolution was passed to allow DSI to sell its 2,675 shares of DPSI stock to Johnson, John Savage and Tammy Sheldon for \$.10 per share. Later, in November and December 1998, Savage and Sheldon, as well as Pam Horton, the manager of DPSI, would sell all of their DPSI shares to Johnson for \$1 per share.

Johnson initially testified that he spent little time on the management of DPSI, and only dealt with the company when Horton needed assistance. Johnson later testified that Horton was employed by DPSI, but became an employee of DSI in January 1997 due to the volume of consulting business that was required by DSI's loss of the Lilly Software products.

Leases presented at trial showed that from 1995 until early 1997, DPSI had an office suite in Bannockburn, Illinois. During that time, DSI also had a separate office suite at the same address. DSI, however, sublet its own office space and used a portion of DPSI's office space. In February 1997, DSI moved into a large office facility in Northbrook Illinois and DPSI used two offices within DSI's space for which DPSI paid DSI \$7,122.74 in rent in 1997. In April 1998, DPSI signed a new lease for the Northbrook space, which it still occupied at the time of trial.

The record contains a copy of DSI's written policies and procedures for its employees and officers dated January 1, 1995. DSI's policies and procedures authorized reimbursement for travel expenses, mileage, and lodging. Additionally, it was the policy of DSI to compensate its

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officers, managers, and professional employees on a salary plus bonus basis.

Johnson testified that DSI paid his divorce expense, claiming that it was company policy for DSI to pay legal expenses for all employees, including himself. There is nothing, however, in the written policies and procedures that states that DSI would pay employees' legal fees.

Johnson also testified that DSI paid rent on his personal apartment, although he claimed he repaid the company. However, when shown the exhibit that Johnson said evidenced that repayment, he could not point to anything on the exhibit that showed any repayment.

On January 1, 1998, Johnson shut down DSI and transferred all remaining DSI employees to DPSL. Horton was also returned to DPSL's payroll in 1998. In 1998, DPSL paid Johnson a salary of \$223,543. Johnson testified that he wanted to sell DPSL in 1998, but did not, due to Horton's need for employment due to the illness of her spouse.

A lawsuit against Lilly Software was apparently filed and settled in May 1998. At the time of the settlement, Johnson was informed⁸ that Lilly Software was an S-corporation and that the stock had been sold to him. As a result, DSI's investment in Lilly Software was converted to a Loan to Officer on its books and the \$40,000 in dividends paid by Lilly Software to DSI was removed from DSI's books and given personally to Johnson. From that \$40,000, Johnson then returned the \$20,000 that DSI had initially paid for the Lilly Software stock and kept the rest, which he considered income and upon which he paid income tax. The Lilly Software suit was settled for a total amount of approximately \$250,000, including the return of the stock. However, after payment of costs and attorneys fees, DSI received approximately \$130,000.

⁸It is not clear who informed Johnson.

In a letter dated July 28, 1998, plaintiff was notified that Johnson, as the sole officer and majority shareholder, had adopted a resolution to dissolve DSI. Plaintiff was also provided with an income statement and balance sheet which showed that all of the assets of DSI had been sold or written off. The investment in DPSI had been sold to Johnson for \$267.50 and a write-off of \$44,732.50 was charged to DSI. The reasons contained in the resolution to dissolve DSI, signed by Johnson, were threefold: (a) the corporation conducted no business; (b) the corporation had no prospects for future business; and (c) there were no employees of the corporation.

On or about August 20, 1998, a special meeting of the shareholders took place which was attended by Johnson, plaintiff and plaintiff's attorney. Plaintiff voted against the dissolution of the corporation and Johnson voted for dissolution. Thus, the resolution was passed by a majority vote of the shareholders. DSI was thereafter dissolved.

At the time of DSI's dissolution in 1998, plaintiff was the only remaining minority shareholder, with a 26% interest in DSI. Johnson owned a 74% interest. At no time, did plaintiff receive any dividends or distributions from DSI.

DPSI still exists with Johnson as the majority shareholder.

ANALYSIS

Plaintiff asserts that the trial court made numerous errors including its admission of evidence, its consideration of witnesses, the admission of DSI's expert testimony, and its management of the trial in not helping plaintiff obtain a court reporter. Plaintiff argues that the trial judge's findings of fact conflict with the parties' joint report of proceedings and that nothing supports the trial judge's findings of fact. In addition to his generalized argument that the trial

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court's decisions are unsupported by the law and the facts, plaintiff has also raised numerous and more specific issues on appeal.

Johnson argues that, despite the panoply of alleged errors recited by plaintiff, none constitutes reversible error that would warrant a new trial. In order to provide what we believe is a coherent analysis, we shall attempt to address the specific issues contained in plaintiff's brief and will discuss plaintiff's more "generalized" arguments where applicable.

We shall first address plaintiff's argument regarding the lack of a court reporter. Plaintiff has raised an argument that the trial judge abused his discretion in his management of this trial by failing, in several ways, to assist plaintiff in obtaining a court reporter, including the court's failing to inform plaintiff of Illinois law. We find this argument specious.

As this court has explained:

"It is well established that parties proceeding *pro se* must follow all of the rules of procedure to which attorneys are held. [Citations.] A litigant is not entitled to the application of a more lenient standard simply because he or she is not represented by counsel. [Citation.] This rule is necessary, for, without it, litigation involving unrepresented parties would frequently grind to a halt, as courts undid mistakes made by *pro se* litigants." *Robbins v. Allstate Ins. Co.*, 362 Ill. App. 3d 540, 545, 841 N.E.2d 22, 26-27 (2005).

"Once a party chooses to represent himself, he is responsible for his own defense and may not expect favored treatment from the court." *Meeker v. Gray*, 142 Ill. App.3d 717, 724, 492 N.E.2d 508 (1986). Moreover, as Johnson notes, the trial judge kept his own notes in a bench book

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during each day of the trial, had his own set of exhibits from the parties, asked questions of the witnesses as he deemed necessary, and asked both parties to submit their own proposed findings of fact and conclusions of law.

Another issue raised by plaintiff is whether “the trial court erred in dismissing plaintiff’s derivative action against DPSI and striking allegation 43 of plaintiff’s second amended complaint. This issue contains two parts, which we shall address separately. Our standard of review for both, however, is the same. Our review of a trial court’s dismissal order under either section 2-615 or 2-619 is *de novo*. *Zahl v. Krupa*, 365 Ill. App. 3d 653, 658, 850 N.E.2d 304, 309 (2006).

The first part of this issue concerns the dismissal of plaintiff’s “derivative action.” As noted earlier, on September 26, 2002, the trial court entered an order which, among other things, granted defendants’ section 2-615 motion to dismiss count II of plaintiff’s first amended complaint, which was an *individual* action against Johnson alleging that he had usurped the corporate opportunities of DSL. In so doing, the trial court cited *In re Marriage of Schweih*s, 272 Ill. App. 3d 653, 650 N.E.2d 569 (1995) and agreed with defendants that only the corporation has a cause of action for the usurpation of corporate opportunities.

In *Schweih*s, the court stated: “A director’s usurpation of a corporate opportunity * * * breaches a duty to the corporation, not to the individual shareholders, who can only share in the corporation’s recovery from the director.” *In re Marriage of Schweih*s, 272 Ill. App. 3d 653, 665, 650 N.E.2d 569, 577 (1995). The trial court here, citing *Schweih*s, ruled that “Plaintiff has no claim under this theory. Any injury is the corporation’s, not plaintiffs’.”

As noted earlier, plaintiff filed a second amended complaint alleging breach of fiduciary duty against Johnson in count I and a derivative action against DPSI *and* Johnson in count II. Defendants then filed a motion to dismiss paragraph 43 of count I of the second amended complaint pursuant to section 2-619(4) and to dismiss count II pursuant to section 2-615.

On May 9, 2003, the trial court struck, with prejudice, paragraph 43 of plaintiff's second amended complaint, and dismissed count II of the second amended complaint without prejudice. Count II alleged a derivative action against DPSI and Johnson and sought the imposition of a constructive trust upon the revenues of DPSI. Count II of the second amended complaint was dismissed without prejudice. As noted earlier, plaintiff did not seek to replead count II.

As defendants correctly note, despite the trial court's ruling, in its September 26, 2002 order, that plaintiff could not bring an *individual* action for usurpation of a corporate opportunity, plaintiff nonetheless alleged in paragraph 43 of his second amended complaint that "CSA performed services for DSI clients that were of the same nature, or reasonably incident to the nature of the business in which DSI was engaged; to wit, providing software and software programming services to manufacturing businesses." In other words, paragraph 43 alleged that CSA usurped the corporate opportunities of DSI and, as with the first amended complaint, plaintiff was seeking individual damages. As the trial court correctly noted, however, it had previously ruled that claims for usurpation belong to the corporation, not to the shareholders. Moreover, although an individual shareholder may bring an individual action for breach of fiduciary duty (*Schweih's*, 272 Ill. App. 3d at 665, 650 N.E.2d at 577), which plaintiff had done in count I, as the trial court noted, the allegations in paragraph 43 were not part of any individual

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breach of fiduciary duty claim. Moreover, the allegations in paragraph 43 were not included in Count II of plaintiff's second amended complaint. Thus, the trial court correctly struck, with prejudice, paragraph 43 of Count I of plaintiff's second amended complaint.

Plaintiff additionally argues that the trial court erred in dismissing Count II of his second amended complaint, *i.e.*, his derivative action against DPSI and Johnson. We agree.⁹

⁹We note that plaintiff initially filed a three-count second amended complaint on October 4, 2002. On October 30, 2002, the trial court ruled that this second amended complaint was voluntarily withdrawn. The court also denied plaintiff's motion to reconsider dismissal of Count III of his *first* amended complaint. Plaintiff then filed a two-count second amended complaint on November 8, 2002. Defendants filed a motion to dismiss plaintiff's second amended complaint on December 24, 2002. The motion, however, appears to be more responsive to the withdrawn second amended complaint in that it refers to the substance of Count "III." and refers only to the allegations against DPSI, but not those against Johnson. In his response, plaintiff again refers to DPSI and Johnson together, does not address the fact that he may have sufficiently alleged a cause of action for usurpation of corporate opportunity against Johnson, even if he did not do so against DPSI. Moreover, plaintiff incorrectly refers to the no longer existent "Count III" of his second amended complaint in (1) his notice of appeal and (2) his table of contents of the record on appeal. More disturbingly, in his response to defendants' motion to dismiss his second amended complaint, plaintiff makes inappropriate *ad hominem* attacks on defendants, accusing them of bias against him because he was a non-attorney and claiming that defendants were "simply trying to nit pick the complaint thinking they can intimidate a non-attorney and confuse

“In Illinois, a shareholder may bring a derivative action and an individual claim at the same time if he has suffered a different injury from his fellow shareholders. Thus, ‘where the wrongful acts are not only against the corporation but are also violations of a duty * * * owed directly by the wrongdoer to the stockholders’ a stockholder may sue both derivatively and individually to obtain redress for these wrongs.” *Levy v. Markal Sales Corp.*, 268 Ill. App. 3d 355, 371, 643 N.E.2d 1206, 1218 (1994), quoting *Zokoych v. Spalding*, 36 Ill. App. 3d 654, 663, 344 N.E.2d 805 (1976).

“Whether a cause of action is individual or derivative must be determined from the ‘nature of the wrong alleged’ and the relief, if any, which could result if plaintiff were to prevail.’

(Citations.)” *Spillyards v. Abboud*, 278 Ill. App. 3d 663, 670, 662 N.E.2d 1358, 1363 (1996).

A derivative lawsuit consists of two causes of action: one against the directors for failing to sue, and a second based upon the right belonging to the corporation. *Brown v. Tenney*, 125 Ill. 2d 348, 532 N.E.2d 230,232 (1988). The shareholder derives the power to sue from the unexercised authority of the corporation. *Mallinga v. Harvey Family Medical Center*, 293 Ill. App. 3d 1001,

the matter before the Court.” Now that plaintiff is an attorney, we would admonish him to refrain from making *ad hominem* attacks and stick to the legal issues. We would also hope that he has a new found appreciation for the challenges faced by attorneys and the Court when dealing with *pro se* litigants who, while they may be quite accomplished in another profession, lack the education and training provided during three years of law school, and often, the skills of effective advocacy.

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688 N.E.2d 816, 820 (1997).

“In a shareholder's derivative suit, the shareholder sues on behalf of the corporation for harm done to it whereas, in a direct action, the shareholder brings suit individually and/or on behalf of the class of shareholders for injuries done to them in their individual capacities. Recovery in the former inures to the corporation while recovery in the latter inures to the individual shareholder or class of shareholders.” *Spillyards*, 278 Ill. App. 3d at 670, 662. N.E.2d at 1363.

The trial court concluded plaintiff failed to state, in either Count II of his first amended complaint or in Count II of his second amended complaint, any cause of action against DPSI. Plaintiff's allegations in Count II of his second amended complaint, according to the trial court, were still focused on *Johnson's* wrongful actions as president and majority shareholder of DSI. The trial court dismissed Count II without prejudice, but plaintiff chose not to replead.

Plaintiff sought the imposition of a constructive trust on DPSI's assets, in favor of DSI and its shareholders. The trial court concluded, however, that plaintiff's allegations were based upon *Johnson's* actions and not based upon the actions of DPSI. And, in dismissing Count III of plaintiff's *first* amended complaint, the trial court had earlier noted that plaintiff had sought the imposition of a constructive trust on the basis that there was a lack of consideration and that the agreement between DSI and DPSI was not entered into at arm's length. The trial court decided that plaintiff had failed to sufficiently allege factual allegations to state a cause of action for the imposition of a constructive trust upon the assets of DPSI based upon *Johnson's* alleged usurpation of a corporate opportunity. We agree. However, although we believe that it would not

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be proper to impose a constructive trust upon *all* of the assets of DPSI (see *Graham v. Mimms*, 111 Ill. App. 3d 751, 768, 444 N.E.2d 549, 560 (1982)), as we shall explain later it would be proper to impose a constructive trust upon proceeds of usurped corporate opportunities and proceeds resulting from Johnson's breaches of fiduciary duty. We also believe that plaintiff, in Count II of his second amended complaint, adequately stated a derivative cause of action against Johnson for usurpation of a corporate opportunity (in addition to plaintiff's individual claim of breach of fiduciary duty.)

We next address an issue raised by plaintiff that is related to discovery. On March 14, 2002, in defendants' response to plaintiff's request for written discovery, defendants stated that MCC was "*dissolved* in approximately 1992." (Emphasis added.) On May 20, 2002, defendants' attorney confirmed that "Manufacturing Control Consulting was dissolved in 1992, *as stated in defendants' answer* [to request for written discovery]." (Emphasis added.) Defendants' attorney further stated as follows: "CSA was a *separate*, now defunct, corporation, and as previously stated, it is a non-party to this litigation." (Emphasis added.) Plaintiff attempted to impeach Johnson with the interrogatories, but the trial court denied plaintiff's attempts on the grounds that the interrogatories were not verified by Johnson.

Pretrial answers to interrogatories may constitute judicial admissions. *Van's Material Co. v. Department of Revenue*, 131 Ill. 2d 196, 211, 545 N.E.2d 695 (1989). The issue here was not whether the answer could be admitted into evidence but, rather, whether it could be used for impeachment purposes. Interrogatories may be used to impeach. *Estate of Whittington v. Emdeko National Housewares, Inc.*, 96 Ill. App. 3d 1007, 1011, 422 N.E.2d 26, 30 (1981). In

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York v. El-Ganzouri, 353 Ill. App. 3d 1, 18, 817 N.E.2d 1179, 1194 (2004), *aff'd* ___ Ill. 2d ___, ___ N.E.2d ___ (2006), the court observed that “[t]he determinative factor as to when a document prepared by and signed by another may be used against a witness is whether the witness was aware of and approved of the contents of the document.” See also *Nystrom v. Bub*, 36 Ill. App. 2d 333, 348-49, 184 N.E.2d 273, 280 (1962) (where court allowed a party to be impeached with an interrogatory answer prepared by its attorney because “[t]he defendants’ attorney had authority to make the admission; the weight to be given the testimony and the admission were for the jury”).

The trial court here abused its discretion in flatly denying the use of Johnson’s answers to interrogatories merely because they were signed by his attorney, and not verified by Johnson, without further considering whether Johnson “was aware of and approved of the contents of the document” (*York*, 353 Ill. App. at 18, 817 N.E.2d at 1194), entitled “defendants’ response to plaintiff’s request for written discovery.” Nonetheless, in the instant case involving a bench trial, we conclude that this error alone does not warrant reversal.

Plaintiff further contends that the trial court’s findings of fact conflicted with the joint report of proceedings and also devotes substantial discussion to defending his request for the imposition of a constructive trust upon the assets of DPSL.

Regarding the trial court’s judgment entered after the bench trial in this civil case, our standard of review is whether the trial court’s decision that there was no breach of fiduciary duty was against the manifest weight of the evidence. *Franz v. Calaco Development Corp.*, 352 Ill. App. 3d 1129, 1139, 818 N.E.2d 357, 368 (2004); *Dowd and Dowd, Ltd. v. Gleason*, 352 Ill.

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App. 3d 365, 373, 816 N.E.2d 754 (2004). Our supreme court has also explained that “where findings of fact depend on the credibility of witnesses, it is particularly true that a reviewing court will defer to the findings of the trial court unless they are against the manifest weight of the evidence.” *Eychaner v. Gross*, 202 Ill.2d 228, 251, 779 N.E.2d 1115, 1130 (2002). “A judge’s findings of fact are ‘not against the manifest weight of the evidence merely because the record might support a contrary decision.’ (Citation.)” *Dowd and Dowd*, 352 Ill. App. 3d at 373, 816 N.E.2d at 762. A trial court’s decision is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence. *Eychaner v. Gross*, 202 Ill. 2d 228, 252, 779 N.E.2d 1115, 1130 (2002); see also *Dowd and Dowd*, 352 Ill. App. 3d at 373, 816 N.E.2d at 762 (stating that manifest weight of the evidence standard is “a level of proof that leads to a result that is ‘clearly evident, clear, plain and indisputable.’ (Citation.)”).

The trial judge concluded that plaintiff failed to meet his burden that Johnson breached his fiduciary duty as president and CEO of DSI to the corporation or to plaintiff as a shareholder. The court found that there was no credible evidence that Johnson profited or enhanced his personal interests at the expense of the corporation. The court also decided that no credible evidence was created to rebut the presumption that Johnson’s decisions as director of DSI were made on an informed basis, in good faith, and with an honest belief that his choices were made in the best interest of the corporation. We conclude that the trial court’s decision that Johnson did not breach his fiduciary duty to plaintiff was against the manifest weight of the evidence. We conclude that plaintiff met his burden of proof that Johnson breached his duty to plaintiff in

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several ways.

Moreover, we conclude that plaintiff also proved his allegations in the dismissed Count II by showing that Johnson usurped corporate funds. Plaintiff met his burden of proof in showing that Johnson appropriated assets of the corporation for his personal use, e.g., the Lilly stock, the corporate apartment that he used for his personal reasons, and the legal fees for his divorce. Johnson, however, failed to meet his burden of showing that these were corporate expenses or that he exercised good faith. “[W]hen a corporate officer in a fiduciary relationship obtains an interest in property adverse to that of the corporation, the burden rests on him to prove by clear and convincing evidence that he has exercised good faith. *Zokoych v. Spalding*, 36 Ill. App. 3d 654, 664-665, 344 N.E.2d 805, 814 (1976).

As this court has explained: “Directorial interest exists whenever divided loyalties are present, or a director either has received, or is entitled to receive, a personal financial benefit from the challenged transaction which is not equally shared by the stockholders.” *Seinfeld v. Bays*, 230 Ill. App. 3d 412, 420, 595 N.E.2d 69, 75 (1992).

Indeed, Johnson acknowledges that it is undisputed that persons in control of a corporation owe a fiduciary duty to the corporation and to its shareholders. *Graham v. Mimms*, 111 Ill. App. 3d 751, 444 N.E.2d 549, 556 (1982). As was explained long ago, and is still true today:

“That the officers and directors of a private corporation are in a fiduciary relation to the corporation and to the stockholders is elementary. Their duty, under the principles of equity, is to serve their trust beneficiaries honestly, faithfully and

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without negligence. They may not avail themselves of their position for their own gain, profit or advantage when to do so involves negligence of duty, loss of their service or other loss, injury, detriment or disadvantage to the beneficiaries of their trust." *Kelly v. Fahrney*, 145 Ill. App 80, ___ (1908); *aff'd*, 242 Ill. 240, 89 N.E. 984 (1909.)

As this court later reiterated:

"The duties that an officer or director owe to his corporation are so well established as to need no citation of authority to support them. They include the requirement of undivided, unselfish, and unqualified loyalty, of unceasing effort never to profit personally at corporate expense, of unbending disavowal of any opportunity which would permit the fiduciary's private interests to clash with those of his corporation." *Patient Care Services, S. C. v. Segal*, 32 Ill. App. 3d 1021, 1029, 337 N.E.2d 471, 478 (1975).

As fiduciaries, directors cannot "place themselves in a position where their own individual interests might interfere with the performance of their duties to their corporation" [and [cannot] use their positions for their own personal gain.[Citation.]]" *Levy v. Markal Sales Corp.*, 268 Ill. App. 3d 355, 365, 643 N.E.2d 1206, 1214 (1994). Additionally, they are "governed by 'the corporate opportunity doctrine, [which] prohibits a corporation's fiduciary from taking advantage of business opportunities which are considered as "belonging" to the corporation.' [Citation.]" *Levy*, 268 Ill. App. 3d at 365, 643 N.E.2d at 1214. "The corporate opportunity doctrine provides that a fiduciary cannot usurp a business opportunity that was developed through the use of

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corporate assets." *Anest v. Audino*, 332 Ill. App. 3d 468, 477, 773 N.E.2d 202, 210-210 (2002).

In any transaction in which an officer acquires corporate property, the burden of proof lies with him to establish that the transaction was fair. *Mid-American Elevator Co., Inc. v. Norcon, Inc.*, 287 Ill. App. 3d 582, 589, 679 N.E.2d 387, 392 (1996); *Levy*, 268 Ill. App. 3d at 365, 643 N.E.2d at 1214.

In *Levy*, a case that shares some factual similarity to the instant case, the trial court awarded a shareholder \$3,000,000 in punitive damages and \$2,000,000 in compensatory damages, after finding that the directors of the corporation used corporate assets to develop a new corporation. The appellate court affirmed the decision of the trial court, but made various modifications of the damages awards. The appellate court held that the trial court's decision that there was a breach of fiduciary duty was supported by evidence that: (1) after the directors had formed a new entity, they ceased giving their full-time efforts to the corporation; (2) they performed many activities on behalf of the new entity while they were still employees of the corporation; (3) employees working for the new entity remained on the corporation's payroll; and (4) the new entity underpaid rent to the corporation for space they shared. *Levy v. Markal Sales Corp.*, 268 Ill. App. 3d at 365, 643 N.E.2d at 1214. The appellate court also noted, however, that the only evidence establishing that the directors did not give large amounts of time to the new entity while employed by the corporation was their own testimony, which the trial judge was free to disbelieve. *Levy v. Markal Sales Corp.*, 268 Ill. App. 3d at 365, 643 N.E.2d at 1214. Apparently, in the instant case, however, the trial judge chose to believe the testimony of Johnson. Here, however, there was additional contrary evidence, including contrary testimony

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from Johnson.

“ [T]he proscription against appropriation of corporate property for private gain is of broader application than the corporate opportunity rule. The latter is but a specialized application of the former. It essentially treats a corporation's expectations regarding certain business opportunities which are in the corporation's line of business and of practical advantage to it as corporate property which may not be appropriated for private gain. On the other hand, the general proscription against misapplication of corporate funds applies equally to business opportunities outside the corporation's line of business. Thus, a business opportunity falling outside a corporation's line of business and which would not otherwise be considered a corporate opportunity, nevertheless will be deemed a corporate opportunity if developed or financed with corporate funds.’ ” *Graham v. Mimms*, 111 Ill. App. 3d 751, 763-64, 444 N.E.2d 549, 557 (1982).

We agree with plaintiff that the application of this principle would bar use of corporate employees and executive time to develop other businesses. The evidence here showed that, in the instant case, DSI's management, employee time, office space, support staff, furniture and equipment were used to support the operations of CSA and DPSI.

The undisputed evidence, contained in the certified joint report of trial proceedings, established that Johnson was responsible for the overall management of DPSI from its inception in 1993 through the end of 1998. Also from 1995 to 1997, Johnson operated CSA out of the same corporate offices as DSI. Between 1995 and 1997, Johnson received his salary exclusively

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from DSI. In 1998, he started receiving his salary from DPSI.

Notably, Johnson claimed that between 1995 and 1998, DPSI required less than 5% of his time and he only dealt with it when the manager, Pam Horton needed assistance. Nevertheless, although Johnson testified that Horton was a DPSI employee, he admitted that she became an employee of DSI in January 1997 due to the volume of consulting business that was required by DSI's loss of the Lilly Software products. Horton then returned to DPSI's payroll in 1998. Thus, as plaintiff correctly notes, in 1997, DPSI's entire management team was receiving its salaries from DSI.

Also, in 1997, DSI moved into a new office with a training facility and a staff of 12, with the intention of selling Lilly products. But this finding is inconsistent with Johnson's testimony that he transferred Horton to DSI to help after the loss of the Lilly Software products. Horton was actually transferred in January 1997, before that move and, therefore, before the loss of Lilly was known.

In addition, from 1993 to 1998, Johnson was responsible for CSA's operations and Tamara Sheldon, DSI's CFO, prepared CSA's books while both were receiving their salaries from DSI. Although CSA was successor of MCC, Johnson had represented to plaintiff that MCC was dissolved in 1992 when, in fact, it had been renamed and was doing work for Lilly Software, DSI's primary business partner.

Contrary to the trial court's decision, this evidence was sufficient for plaintiff in meeting his burden of showing that Johnson breached his fiduciary duty as president and CEO of DSI to the corporation and to plaintiff as a minority shareholder.

The trial court also found that there was no credible evidence that Johnson profited or enhanced his personal interests at the expense of the corporation. This decision was also contrary to the manifest weight of the evidence in view of the undisputed evidence that DSI paid Johnson's personal legal expenses for his divorce although such an expense is clearly not a usual business expense or a corporate expense and, importantly, was not included in the copy of DSI's written policies and procedures for its employees and officers dated January 1, 1995. This court believes it is highly unlikely that a corporation would have a policy of paying for a corporate officer or director's divorce expenses. Similarly, after plaintiff established that DSI paid for Johnson's personal apartment, the burden was on Johnson to show, by more than self-serving testimony, that he reimbursed the corporation for that expense. No evidence was produced nor did any appear in DSI's corporate records.

Another breach of fiduciary duty occurred with respect to Johnson's handling of the Lilly Software stock purchase by DSI, which was to essentially keep all of the dividends for himself personally. Johnson asserts that he had to do what he did because DSI was legally unable to buy the stock in the first instance. However, this court has explained as follows:

“[A] corporate opportunity is one that is reasonably incident to an entity's present or prospective business and is one in which the entity can engage. [Citation.] In *Graham v. Mimms*, 111 Ill. App. 3d 751, 444 N.E.2d 549 (1982)], the court stated that 'it is relevant to consider whether it was feasible for the corporation to take advantage of the opportunity.' [Citation.]. The court continued that, '[n]evertheless, the "core principle" of the corporate opportunity doctrine is that a

corporation's fiduciary will not be permitted to usurp a business opportunity *which was developed through the use of corporate assets.*' Thus, when corporate assets are used to develop an opportunity, "the fiduciary is estopped from denying that the resulting opportunity belongs to the corporation whose assets were misappropriated, *even if it was not feasible for the corporation to pursue the opportunity or it had no expectancy in the project.*" [Citation]. Here, the trial court ruled that there was no breach of any fiduciary duty because it found that Precision Pour was financially incapable of accepting the distributorship offer. *However, in light of Graham, that factor does not control.* Thus, we find that the court's ruling was against the manifest weight of the evidence." *Anest v. Audino* 332 Ill. App. 3d 468, 478, 773 N.E.2d 202, 211 (2002).

Similarly, in the instant case, it is irrelevant that Lilly Software may have been prohibited from selling shares to another S corporation. DSI had long ago made the decision to use DSI funds for the purpose of purchasing Lilly stock, which was entered on DSI's books. Those DSI funds were therefore unavailable to DSI for any other purpose. Indeed, Johnson was arguably negligent in purchasing the Lilly stock if DSI could not benefit from that transaction. When it was learned that Lilly could not sell its stock to an S corporation such as DSI, Johnson's choice of a solution – to take the dividends for his personal use – is a clear example of self dealing. If the stock and its dividends had to go to individuals, the corporation's "profit" should have gone to the shareholders personally - *all* shareholders. Johnson's assertions that "he paid taxes" on the proceeds is of no import. He still received 100% of a benefit that belonged to the corporation,

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yet he did not have a 100% interest in the corporation. Thus, Johnson clearly “profited” from the transaction and plaintiff established that Johnson breached his fiduciary duty. See *Coduti v. Hellwig*, 127 Ill. App. 3d 279, 469 N.E.2d 220, 229 (1984), reversed on other grounds, 174 Ill. 2d 63, 672 N.E.2d 1171 (1996). The trial court’s ruling that there was no breach of fiduciary duty was against the manifest weight of the evidence.

Thus, based upon Johnson’s breach of fiduciary duty, it would be proper to impose a constructive trust on the proceeds of the usurped opportunities. *Graham*, 111 Ill. App. 3d at 768, 444 N.E.2d at 560. However, this court is “unable to perform the trial court’s function of tracing the proceeds of the misappropriated opportunities.” *Graham*, 111 Ill. App. 3d at 768, 444 N.E.2d at 560. Thus, this cause must be remanded for a calculation of the amount constituting the proceeds of the corporate opportunities usurped by Johnson. *Graham*, 111 Ill. App. 3d at 768, 444 N.E.2d at 560.

Financial or other inability of a corporation to take advantage of a business opportunity does not automatically absolve officers from usurpation of a corporate opportunity. See generally 16 A.L.R.4th 185 and cases cited therein); see *e.g.*, *In re H. King & Associates*, 295 B. R. 246 (N.D. Ill. 2003)(if fiduciary uses a corporation’s assets to develop a business opportunity, fiduciary is estopped under Illinois law from denying that the resulting opportunity belongs to the corporation whose assets were misappropriated, *even if it was not feasible for the corporation to pursue the opportunity or if the corporation had no expectancy in the project*); see also *Faraclas v. City Vending Co.*, 232 Md 457, 194 A2d 298 (1963) (officer breached his fiduciary duty to corporation in purchasing outstanding shares of corporate stock for himself, even though *the*

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purchase was conceived at a time when it could not be legally realized as corporation was insolvent at the time it made it a company purpose to acquire stock; court stated that the issue to be determined was whether a purchase for the director's own account had the effect of thwarting a declared corporate policy).

The trial court stated that no credible evidence was created to rebut the presumption that Johnson's decisions as director of DSI were made on an informed basis, in good faith, and with an honest belief that his choices were made in the best interest of the corporation. We disagree. We conclude that, in view of the undisputed evidence, the trial court's decision that Johnson did not breach his fiduciary duty to plaintiff was contrary to the manifest weight of the evidence. We reverse the decision of the trial court and remand for the entry of a judgment in favor of plaintiff on his breach of fiduciary duty action. We also remand for a hearing on damages due plaintiff as a result of (1) Johnson's use of corporate funds to pay his legal expenses related to his divorce; (2) Johnson's appropriation of the entire Lilly stock dividends, instead of apportioning the dividends among the shareholders; (3) Johnson's use of DSI funds to pay for an apartment for his personal use; and (4) Johnson's use of DSI corporate assets, including employee time and office space to run his other corporations; and (5) punitive damages as the trial court deems appropriate.

In view of our decision, the amount of \$75, which the court awarded plaintiff for Johnson's violation of Section 7.75(d) of the Illinois Business Corporations Act (805 ILCS 5/7.75(d) (West 1992)) that was the subject of *Hagen I*, must be recalculated upon remand.

Reversed and remanded with directions.

GALLAGHER, J., with O'BRIEN, P.J., and NEVILLE, J., concurring.