

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

MAJOR HAMMETT, II

Appellant-Respondent

v.

MICHAEL D. ATCHESON; MICHAEL D. ATCHESON,
TRUSTEE OF THE MICHAEL DEAN ATCHESON TRUST

Respondent-Appellant

DOCKET NUMBER WD75551 and WD75586

DATE: August 12, 2014

Appeal From:

Circuit Court of Jackson County, MO
The Honorable Michael W. Manners, Judge

Appellate Judges:

Division Three
Gary D. Witt, P.J., Joseph M. Ellis, and Thomas H. Newton, JJ.

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**MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

MAJOR HAMMETT, II, Appellant-Respondent, v. MICHAEL D. ATCHESON; MICHAEL D. ATCHESON, TRUSTEE OF THE MICHAEL DEAN ATCHESON TRUST, Respondent-Appellant

WD75551 and WD75586

Jackson County

Hammett and Atcheson (as trustee of the Atcheson Trust) organized Simon Square Development, LLC, to complete a large real estate development project. Each held a fifty percent ownership interest under an Operating Agreement (OA). Upon Hammett's recommendation, Larry Haas was added as a third partner, and the three entered into a Restated Operating Agreement (ROA), wherein each held a one-third interest. Under the ROA, Atcheson was designated "First Manager," and was granted complete authority to manage the business. The partners also entered into a Buy-Sell Agreement that, *inter alia*, required thirty days' written notice to all members before company units could be transferred.

Haas later transferred his units to the Atcheson Trust without providing notice to Hammett. The Atcheson Trust then held a majority interest. As First Manager, Atcheson used his authority for personal benefit. Hammett sued Atcheson as an individual and as a trustee of the Atcheson Trust, asserting five claims: (1) breach of the Buy-Sell Agreement as a trustee; (2) breach of the ROA as an individual; (3) breach of fiduciary duty as an individual; (4) fraud as an individual; and (5) fraud as a trustee.

A jury trial was held, and Atcheson was found liable on all counts. The jury awarded damages in the amount of \$280,650. The trial court assessed damages and costs to the Atcheson Parties, but did not award attorney fees.

Hammett filed a post-trial motion to amend the judgment to include attorney fees, court costs, and restoration of himself as a fifty percent owner of the LLC. The Atcheson Parties filed post-trial motions for JNOV and a new trial. The trial court allowed ninety days to lapse without ruling on the motions; the motions were deemed denied, pursuant to Rule 81.05(a)(2)(A). Hammett appeals, and the Atcheson Parties cross-appeal.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Division Three Holds:

Atcheson Parties' cross appeal – The cross-appeal is addressed first because it is dispositive. The Atcheson Parties raise six points. In the first point, they argue that the trial court erred in denying the motions for a directed verdict and JNOV because the Buy-Sell Agreement permitted Haas to transfer his units to the Atcheson Trust without Hammett's consent, the duty to disclose the transfer was attributable to Haas and not Atcheson, and Hammett cannot claim that an agreement is void and later assert rights to benefits contained

therein. Based on the plain and ordinary meaning of relevant sections of the Buy-Sell Agreement, it is clear that members may transfer units to other members without consent, but thirty days' written notice of such transfers is required by the transferor. Therefore, the failure to provide notice was a violation of the agreement by Haas. Hammett's request to be restored as a fifty percent owner of the LLC is immaterial to the validity of the existing Buy-Sell Agreement. Point one is granted.

In point two, the Atcheson Parties challenge the 2006 and 2008 fraud claims, arguing that Hammett failed to establish the existence of fraud. Fraudulent misrepresentation requires proof of: (1) a false, material misrepresentation; (2) the speaker's knowledge of the falsity or ignorance of the truth; (3) the speaker's intent that the receiver will act upon the representation in a reasonably contemplated manner; (4) the receiver's ignorance of the falsity; (5) the receiver's reliance on the truth of the representation; (6) the receiver's right to rely on the speaker's statement; and (7) the misrepresentation proximately caused injury to the receiver. Hammett testified that Atcheson advised him that Haas would need to be added to the partnership for access to additional capital, but Atcheson failed to advise Hammett that the terms of the ROA would be different from the OA, nor did he provide Hammett an advance copy of the ROA so that he could review it before meeting to sign it. As Atcheson's partner, Hammett was justified in relying on Atcheson's statements, and did so to his detriment. Hammett established the elements of fraud, and the trial court did not err in submitting the 2006 and 2008 fraud claims to the jury. Point two is denied.

The third and fourth points are addressed together because they contain related arguments. In the third point, the Atcheson Parties argue that the trial court erred in submitting to the jury Hammett's claim for breach of the ROA because Hammett cannot claim the restructure of the ROA is invalid and then sue for the "benefit of the bargain." In the fourth point, they argue that the court wrongfully submitted to the jury Hammett's claims of breach of the Buy-Sell Agreement, breach of the ROA, breach of fiduciary duty, and fraud because Hammett failed to establish a causal link between Atcheson's acts and the resulting damages, and he also failed to present "competent evidence" of said damages. They further argue that the ROA was binding on the Atcheson Trust, but not on Atcheson as an individual, because Atcheson was not a signatory.

Although an LLC is ordinarily considered a separate legal entity that is distinct from its members, and members are generally not liable for its debts, the corporate veil may be pierced and relief granted when such an entity is used for an improper purpose and to perpetuate injustice by avoiding its legal obligations. For a court to pierce the corporate veil, a Plaintiff must demonstrate (1) control of business practices that render the actor and entity inseparable, (2) such control was used to commit wrongdoing, and (3) the control proximately caused the injury. Although Atcheson did not sign the ROA as an individual, his actions were inseparable from those that were attributable to the LLC or the Atcheson Trust; Atcheson used this complete control to commit wrongful acts that proximately caused injury to Hammett. Points three and four are denied.

In point five, the Atcheson Parties raise several subpoints to support their argument that the trial court erred in failing to grant a new trial. They argue, *inter alia*, that a new trial is warranted because one of the theories submitted to the jury—that notice of the intra-member unit

transfer was required of the Atcheson Trust—was defective. They claim that, without apportionment, there is no way to determine what portion of the award should be attributed to the defective claim, thereby necessitating a new trial. In instances where an unapportioned award stems from multiple theories submitted to the jury, with one theory later found to have been defective, we cannot speculate as to how damages should be divided among the remaining valid claims, nor can we presume that a general damage award applies to each claim. For this reason, the granting of a new trial is warranted. Point five is granted, but only with respect to a determination of damages.

Lastly, in point six, the Atcheson Parties argue that the trial court erred in failing to amend the judgment to reflect an offset for monies Hammett received from settling defendants. Because point five was granted, requiring a new trial on the issue of damages only, and because the subject matter of this point on appeal is inextricably interwoven with the issue of damages, point six is denied without prejudice to the Atcheson Parties' ability to attempt to establish a right to offset on remand.

Hammett's appeal – Hammett raises one point. He argues that the trial court erred in failing to amend the judgment to include attorney fees and costs because the Buy-Sell Agreement allowed for such by the prevailing party of any action instituted to enforce any rights under the agreement. Missouri courts generally follow the rule that each party pays their own attorney fees, unless such payment is authorized by statute or contract. Under contract, only the prevailing party may be awarded attorney fees. Because we have granted the Atcheson Parties relief that requires this matter to be remanded for a new trial on the issue of damages only, Hammett's point is denied without prejudice so he can attempt to establish a right to the recovery of attorney fees on remand.

Opinion by Thomas H. Newton, Judge

August 12, 2014

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