

OPINION SUMMARY

MISSOURI COURT OF APPEALS EASTERN DISTRICT

DIVISION ONE

TOM BIRKENMEIER, T.J. BIRKENMEIER,)	No. ED92671
INC., d/b/a ORCA PARTNERSHIP,)	
Respondents/Cross-Appellants,)	Hon. Colleen Dolan
)	
v.)	Appeal from the Circuit Court of
)	St. Louis County
KELLER BIOMEDICAL, LLC, PERIO)	
PROTECT, LLC, DUANE KELLER and)	
CAROL KELLER, Appellants.)	Filed: April 20, 2010

OPINION SUMMARY

The appellants, Duane and Carol Keller (“the Kellers”), Keller Biomedical, LLC and Perio Protect (collectively “Defendants”) appeal from the trial court’s judgment in favor of the respondent and cross appellant, Tom Birkenmeier (“Birkenmeier”) d/b/a Orca Partnership, Inc. After the Kellers transferred the Keller Biomedical assets to Perio Protect, Birkenmeier filed an eleven count petition alleging that he was a member of Keller Biomedical. Birkenmeier cross appeals from the trial court’s dismissal of two of the counts and its grant of summary judgment on four of the other counts in his second amended petition.

The Kellers raise two points on appeal. First, they claim that the trial court erred in admitting Birkenmeier’s Exhibit 99, a portion of their personal tax return, the Schedule C, because Birkenmeier failed to establish a foundation for its admission. Second, they claim that the trial court erred in rejecting their proffered jury instruction on recoupment and accepting Birkenmeier’s jury instruction.

Birkenmeier raises three points on cross appeal. First, he claims that the trial court erred in dismissing Count III for promissory estoppel and Count IV for violation of Missouri Uniform Fraudulent Transfer Act, Sections 428.005 to 428.059¹ (“MUFTA”). Second, he claims that the trial court erred in finding that there was no genuine issue of material fact that Birkenmeier was not a member of Keller Biomedical and granting partial summary judgment. Third, Birkenmeier claims that the trial court erred in granting partial summary judgment on Count XI, breach of contract, because he was not required to be a member of Keller Biomedical to state a cause of action for breach of contract against the Kellers.²

¹ All statutory references are to RSMo. 2000, unless otherwise indicated.

² This court has reviewed the Motion taken with the case. Appellants’ Motion to Strike and/or Dismiss Respondents’ Points Relied on is denied.

AFFIRMED

DIVISION ONE HOLDS: 1) The trial court did not err in admitting Birkenmeier's Exhibit 99, the Kellers' Schedule C from their tax return. 2) The trial court did not err in rejecting the Kellers' proffered jury instruction on recoupment and accepting Birkenmeier's jury instruction. 3) The trial court did not err in dismissing Counts III and IV of Birkenmeier's second amended petition for promissory estoppel and violation of MUFTA, respectively. 4) The trial court did not err in finding that there was no genuine issue of material fact that Birkenmeier was not a member of Keller Biomedical and granting partial summary judgment. 5) The trial court did not err in granting summary judgment on Count XI for breach of contract because Birkenmeier could not prove a claim whether or not he was a member of Keller Biomedical.

Opinion by: Nannette A. Baker, J.
Kathianne Knaup Crane, P.J., and Clifford H. Ahrens, J., concur.

Attorneys for Appellants: Colleen C. Jones and Jason K. Turk

Attorneys for Respondent/Cross-Appellants: Brian E. McGovern and Robert A. Miller

**THIS SUMMARY IS NOT PART OF THE OPINION OF THE COURT.
IT HAS BEEN PREPARED FOR THE CONVENIENCE OF THE READER AND
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