



STATE OF MINNESOTA  
IN COURT OF APPEALS

CASE TITLE:

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D. Y. N. Kiev, LLC,  
500 Club, LLC  
Cascade Springs, LLC  
Each through its member,  
Kenneth Hertz

Appellants

v.

APPELLATE COURT CASE  
NUMBER: A11-353

Marshall B. Jackson,  
Respondent,

And

Kenneth Hertz  
Appellant

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APPELLANTS' BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## STATEMENT OF LEGAL ISSUES

- I. Is the Respondent entitled to seek attorney fees or pre-judgment interest when the parties have stipulated to the claims that will be tried by the District Court and neither of these issues were stipulated to by the parties to be tried by the Court?

The District court did not rule on this issue.

Apposite authority: The District Court did not rule on this issue.

- II. Is Respondent entitled to pre-judgment interest when Respondent's claims are unliquidated claims and therefore not known or determined until the District Court determined them after trial?

The District Court did not address this issue directly but simply awarded pre-judgment interest to Respondent

Apposite authority:

- III. Is Respondent entitled to an award of attorney fees when 1) the fees are not authorized by statute, 2) are beyond the Court's directive and 3) and are excessive?

The District Court awarded Respondent all of the attorney fees and costs requested by Respondent.

Apposite authority: 322B.38, *Musicland Group, Inc. v. Ceridian*, 508 N.W.2d 524 (Minn. Ct. App. 1993).

## STATEMENT OF CASE

1. Appellants/Plaintiff commenced this action in July 2007 against Respondent/Defendant. However, the action was not filed with the Court until much later.
2. Prior to the commencement of the trial in this matter, the parties and their respective counsel reached a settlement on several of the properties in question and stipulated to the issues which would be heard by the Court. See attached

settlement agreement (App. 14-19) and stipulation of issues to be tried, T. 24-28, App. 20-24.

3. The trial in this matter commenced on July 07, 2010.
4. The Honorable William R. Howard issued a findings of fact, conclusions of law and order on October 22, 2010. App. 1-11.
5. On December 21, 2010, the Court amended its order for judgment dated October 22, 2010. App. 12-13.
6. This appeal was filed by mail on February 17, 2011.
7. The Court of Appeals ruled that the portion of the appeal regarding the issues determined at trial was filed late and therefore dismissed. The Court of Appeals allowed the appeal regarding attorney fees to continue.

#### STATEMENT OF FACTS

(The facts provided will be limited to those relevant the remaining issues in this appeal.)

1. Appellant, Kenneth Hertz (“Hertz”) and Respondent, Marshall Jackson (“Jackson”) formed three entities for the purpose of purchasing real estate. For each of these three entities, Hertz and Jackson owned 50% of the entities.  
Findings of Fact numbers 4, 7 and exhibit 11.
2. The first entity formed by Jackson and Hertz was 500 Club, LLC (“500 Club”) which was formed on or about December 1999. 500 club purchase a duplex in Minneapolis. Findings of Fact number 5.
3. Jackson and Hertz then formed Cascade Springs, LLC (“Cascade”) on or about March 2002 to purchase an apartment building in Duluth, MN. Findings of Fact number 7.

4. Finally, D. Y. N. Kiev, LLC (“Kiev”) was formed on or about February 2004 for the purchase of a commercial property in South Minneapolis. Findings of Fact number 10.
5. Hertz made contributions/loans to Cascade in the amount of \$13,000.00 that Jackson refused to match. Findings of Fact number 21.
6. Hertz made contributions/loans to Kiev in the amount of \$285,215.26 00 that Jackson refused to match. Findings of Fact number 22.
7. Jackson sent a letter to Hertz on June 21, 2007 in which he indicated that he would no longer make contributions to Kiev. Exhibit 21, p. 6; App. 25.
8. Prior to trial, Jackson and Hertz agreed that the only three issues which would be tried before the Honorable William Howard were:
  - a. The \$13,000.00 in contributions made by Hertz and unmatched by Jackson to Cascade.
  - b. The \$1,650.00 in laundry money earned by Cascade but kept by Jackson.
  - c. The \$287,000 contributed by Hertz to Kiev and which Jackson refused to match.

See T. 24 – 28.

#### ARGUMENT

##### I. RESPONDENT IS NOT ENTITLED TO SEEK ATTORNEY FEES OR PRE-JUDGMENT INTEREST WHEN THE PARTIES HAVE STIPULATED TO THE CLAIMS THAT WILL BE TRIED BY THE DISTRICT COURT

The Judgment in this case went beyond the scope of issues to be litigated. It is well settled that a judgment is limited to the issues presented to the court. *John Wright & Associates, Inc. v. City of Red Wing*, 97 N.W.2d 432, 434 (Minn. 1959); *Alsleben v. Oliver Corp.*, 94 N.W.2d 354, 358 (Minn. 1959); *Peters v. Mutual Ben. Life. Ins. Co.*,

420 N.W.2d 908, 915 (Minn. Ct. App. 1988); *Shandorf v. Shandorf*, 401 N.W.2d 439, 442 (Minn. Ct. App. 1987). In this case, the parties voluntarily limited the issues presented to the court by stipulation. Any judgment not based on those issues is surplusage. 97 N.W.2d at 434

Before trial, counsel for the parties met and settled some of the issues raised by the pleadings. Specifically, the entered into a settlement for two of the properties; this settlement was originally placed on the record and later reduced to writing. App. 14-19. Additionally, the parties orally conveyed the issues remaining to be litigated on the record. (T. 22-26). With most of the issues settled, there remained for the court only three issues to address. The court specifically accepted those three issues for judgment. (*Id.* at 25). Two of these issues were contribution issues for Cascade Springs. (*Id.*). The third issue was the D.N.Y. Kiev loan. (*Id.*) Defendant Jackson agreed that those three issues would be litigated. (*Id.* at 27) (“that is my understanding that the settlement agreement which Mr. Hertz and myself have agreed to stand alone and that you – the Court will adjudicate the three remaining monetary issues”).

The Court’s Order, initially filed October 22, 2010 (App. 1-11) and amended December 17, 2010 (App. 12-13), went beyond those three issues. In its Order, the Court entered judgment of \$50,000 plus interest for failure to follow corporate formalities. (Order, Oct. 22, 2010, at 6, ¶ 3). But because the issue of breach of fiduciary duty and failure to follow corporate formalities, along with the request for attorney fees and pre-judgment interest were not before the court, Hertz had no opportunity to – or reason to – address any issues outside of these three issues, and therefore put no evidence or argument into the record regarding it. To allow the judgment to stand without any

opportunity for Hertz to challenge it is unfairly prejudicial violation of his due process rights. He was not heard on the issue, nor should he have been, as the issue was not before the court. Therefore, this part of the judgment should be rejected as surplusage.

## II. THE COURT'S AWARD OF PRE-JUDGMENT INTEREST IN THIS CASE WAS INAPPROPRIATE

Additionally, the court awarded Defendant Jackson pre-judgment interest for the breach of fiduciary duty and failure to follow corporate formalities. (Order, Oct. 22, 2010, at 6, ¶ 3). However, pre-judgment interest on a claim of unliquidated damages such as this one is inappropriate.

An award of prejudgment interest in the case of unliquidated damages is appropriate “only where the damages were readily ascertainable by computation or reference to generally recognized standards such as market value and not where the amount of damages depended upon contingencies or upon jury discretion (as in actions for personal injury or injury to reputation).” *Potter v. Hartzell Propeller, Inc.*, 189 N.W.2d 499, 504 (Minn. 1971) (citing *Moosbrugger v. McGraw-Edison Co.*, 284 Minn. 143, 170 N.W.2d 72; *Employers Lia. Assur. Corp. v. Morse*, 261 Minn. 259, 111 N.W.2d 620; *Grand Forks Lbr. Co. v. McClure Logging Co.*, 103 Minn. 471, 115 N.W. 406; *Swanson v. Andrus*, 83 Minn. 505, 86 N.W. 465; *Varco v. Chicago, M. & St. P. Ry. Co.*, 30 Minn. 18, 13 N.W. 921). This is because “it would . . . be unreasonable to require defendant to compensate plaintiff for this loss where defendant could not have readily determined the amount of damages himself either by computation or reference to generally recognized standards such as market value.” 189 N.W.2d at 504.

In this case, Defendant Jackson does not base the court's award of \$50,000 for breach of fiduciary duty and failure to follow corporate formalities on any readily

ascertainable monetary loss. In fact, the court's Findings of Fact never mentions a \$50,000 loss, nor does the Memorandum attached to the Oct. 22 Order. The judgment is punitive in that it is intended to punish what the court called "Hertz' self-dealing during the purchase of the Dunne Mansion." (Concl. Of Law, Oct. 22, 2010, at 5, ¶ 4). The court distinguishes this from other, readily determinable losses, such as the court's judgment against Third-Party Defendant Hertz for \$1,600 "to reimburse the illegal disbursement." (Order, Oct. 22, 2010, at 6, ¶ 2). In the case of "punitive damages, fines, or other damages that are noncompensatory in nature," as here where the court specifies no pecuniary loss of \$50,000 being compensated, prejudgment interest is inappropriate. Minn. Stat. § 549.09, subd. 1(b)(3) (2010). The nature of the judgment would have made it impossible for Mr. Hertz to settle the judgment, and therefore he "[could not] be expected to tender payment and thereby stop the running of interest." *Potter*, 189 N.W.2d at 504.

"Awards of prejudgment interest are designed to serve two functions: (1) to compensate prevailing parties for the true cost of money damages incurred, and (2) to promote settlements when liability and damage amounts are fairly certain and deter attempts to benefit unfairly from delays inherent in litigation." *Solid Gold Realty, Inc. v. Mondry*, 399 N.W.2d 681, 683 (Minn. Ct. App. 1987) (citing *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743, 752 (8th Cir.1986)). The award of prejudgment interest here serves neither, since the judgment was not for money damages that Defendant Jackson incurred, nor was it possible to settle the case based on "fairly certain" damage amounts. The court determined the judgment amount it felt appropriately punitive for the nature of Mr. Hertz' actions, but before that judgment had been entered,

there was no way to determine the amount that might or should be owed. Therefore, the award of prejudgment interest is inappropriate.

III. RESPONDENT IS NOT ENTITLED TO AN AWARD OF ATTORNEY FEES WHEN 1) THE FEES ARE NOT AUTHORIZED BY STATUTE, 2) ARE BEYOND THE COURT'S DIRECTIVE AND 3) AND ARE EXCESSIVE

On October 22, 2010, this Court granted Jackson "reasonable attorney's fees in Defending against Plaintiffs and Third-Party Defendant's claims." Emphasis added.

October 22, 2010 Order at 6 (App. 12-13). This Court based that decision on Minn. Stat. §§ 322B.38, which states that

[i]f a limited liability company or a manager or governor of the limited liability company violates a provision of this chapter, a court in this state may, in an action brought by a member of the limited liability company, grant any equitable relief it considers just and reasonable in the circumstances and award expenses, including attorneys' fees and disbursements, to the member.

October 22, 2010 Order at 5-6.<sup>1</sup> On this basis, Jackson's attorney Leslie Anderson, Esq. filed an Affidavit of Attorney's Fees pursuant to Minn. R. Gen. Prac. 119. Because the award of attorney's fees as ordered by the Court is not authorized under Minnesota law, because contrary to the Court's Order the fees invoiced by Attorney Anderson reflect both the defense of Jackson and prosecution of Jackson's claims against Hertz, and because those fees are excessive, Respondent should not have been awarded attorney fees in this matter.

*A. The Attorneys Fees Awarded By The Court's Order Are Not Authorized By Statute*

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<sup>1</sup> In this case, Jackson requested attorney's fees under both this statute and under Minn. Stat. § 322B.833(7). October 22, 2010 Order at 10. However, § 322B.833 allows attorney's fees only if "a party to a proceeding brought under this section has acted arbitrarily, vexatiously, or otherwise not in good faith." Minn. Stat. § 322B.833(7). The Court in this case made no findings consistent with that statute, and quoted only Minn. Stat. § 322B.38. *Id.* at 6. Therefore, the basis of the award is only under that statute.

The first issue before the Court is whether the fees awarded by this Court are authorized. This Court authorized “reasonable attorney’s fees in Defending against Plaintiffs and Third-Party Defendant’s claims.” October 22, 2010 Order at 6. However, this is contrary to the plain language of the statute authorizing attorney’s fees. That statute allows attorney’s fees “in an action brought by a member.” Minn. Stat. § 322B.38. In this case the award fails to meet that standard for two reasons: first, because the action was not *brought* by a member, and second, because the action was not brought by a *member*.

First, the Court’s Order contravenes the plain language of the statute when it authorizes attorney’s fees “in *Defending* against Plaintiffs and Third-Party Defendant’s claims.” October 22, 2010 Order at 6 (emphasis added). The statute only authorizes attorney’s fees “in an action *brought* by a member.” Minn. Stat. § 322B.38 (emphasis added). The action in this case was “brought” by Appellants/Plaintiffs; the only action “brought” by Jackson was the third-party claims against Hertz. Any attorney’s fees in prosecuting this action are beyond the scope of the Order, which only authorizes fees for “Defending” the action. *Id.* Therefore by definition, the statute allows none of the attorney’s fees authorized by the Court.

Second, the statute only authorizes attorney’s fees “in an action brought by a *member*.” Minn. Stat. § 322B.38 (emphasis added). In this case, despite Appellants’ assertions to the contrary, the Court has questioned whether Jackson is even a member. The Court affirms this in its “Conclusions of Law” stating that Hertz was “the sole member of Kiev.” October 22, 2010 Order at 4. This conclusion was the basis of the Court’s denial of the claim for contribution from Jackson. *Id.* at 10 (“Jackson owes no

obligation to contribute more money to Kiev, particularly in light of the complete lack of evidence that any membership interest was ever transferred to him”). Appellants have maintained that Jackson was, in fact, a member. Nevertheless, at the very least, Jackson cannot claim attorney’s fees under a statute which only authorizes fees for actions by “members” while at the same time avoiding the obligations of membership by claiming he was never a member. The inconsistent position of Jackson’s membership undercuts any award of attorney’s fees.

Therefore, because the award of attorney’s fees in this case contradicts the clear language of the statute, Defendant respectfully requests this Court reconsider the award of any attorney’s fees in this case. However, even if the Court disagrees with Appellants’ analysis on the first issue, the Court should still examine and reduce Jackson’s claim of attorney’s fees based on the plain language of the Court’s October 22, 2010 Order.

*B. The Attorney’s Fees Claimed By Jackson Go Beyond The Court Order*

The second issue before the Court is whether the Affidavit of Attorney’s Fees submitted by Attorney Anderson claims fees beyond what was authorized by this Court’s order. This Court authorized the award of attorney’s fees for “Defending against Plaintiffs and Third-Party Defendant’s claims.” October 22, 2010 Order at 6. The Court did *not* authorize attorney’s fees for prosecuting Jackson’s own claims against Hertz. Yet in the affidavit and accompanying invoices attached as exhibits, Jackson appears to include *all* legal work done on his behalf. This work billed for prosecuting Jackson’s claims goes beyond the scope of the Order authorizing fees for *defending* Jackson against claims in this case, by not severing the work done in prosecuting Jackson’s claims or clarifying to which issue ambiguous line items relate.

For example, the August 31, 2007, September 30, 2007 and October 31, 2007 Invoices from Jensen, Sondrall & Persellini indicate work done on the Third Party Complaint. (Affidavit of Leslie Anderson at Ex. A). This is work done prosecuting Jackson's claims, and should have been severed. Additionally, the Affidavit is replete with ambiguous descriptions such as "Review documents: Attend Trial" (July 31, 2010 Invoice), "Review court's ruling: Telephone conference with Marshall" (October 31, 2010) or "File review" (April 30, 2008). As a result, much of the bill, which is ambiguous as to which claims it relates, is suspect under the Court's Order.<sup>2</sup> Line items which are ambiguous must be stricken from the award.

In severing claims for attorney's fees, Minnesota law recognizes that in some cases, "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide hours expended on a claim-by-claim basis." *Musicland Group, Inc. v. Ceridian Corp.*, 508 N.W.2d 524, 535 (Minn. Ct. App. 1993). Nevertheless, if the claims are sufficiently discrete as to make them severable, fees should not be awarded for unrelated claims. *Id.* In this case, the claims brought by Appellants were for contribution, while the claim brought by Jackson was for breach of fiduciary duty and failure to observe corporate formalities. October 22, 2010 Order at 5. Applying the *Ceridian* analysis, these claims are separate and discrete, as they do not share a common core of facts based on related legal theories. *Ceridian*, 508 N.W.2d at 535. Though both relate to questions of the common business, they do not share facts or

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<sup>2</sup> Defendant clarifies that the assertion of ambiguity in the Invoices is in no way intended to accuse Jackson's attorneys of any sort of misconduct or trickery; the ambiguities are simply the natural result of billing for multiple legal issues. Defendant does, however, assert that given the Court's Order, these ambiguities make it impossible *post hoc* to separate the work done as required by the Order.

theories so inextricably intertwined as to make research, drafting, or argument on one issue duplicative of all issues. Therefore, the Court must sever the claims.

The burden of proving the validity of its attorney fee request rests squarely on Respondent. Respondent has an obligation to not only prove that the attorney fees it is seeking to recover are reasonable but also to provide sufficient detail so that the Court can determine what fees were expended for “Defending against Plaintiffs and Third-Party Defendant’s claims” and what fees were expended for prosecuting against its own claims. Since Attorney Anderson’s affidavit fails to provide the detail necessary for this Court or the Trial Court to make this determination, Respondent’s claims for attorney fees should be dismissed or at a minimum remanded to the Trial Court for more specific findings.

*C. The Attorney’s Fees Claimed By Jackson Are Excessive*

The next issue before the Court is whether the attorney’s fees claimed by Jackson are excessive. In this case, Appellants point to two separate items that go beyond the scope of the attorney’s fee award granted to Jackson. First, the December 31, 2009 Invoice lists a consultation with “M. Cornelious.” This research involved claims which were not only not prosecuted against Defendant but were waived by Respondent in the pre-trial stipulation limiting the issues to be tried. However, this item was still included in the attorney invoices. Second, the August 31, 2010 Invoice lists the costs of mediation attempted by the parties. Such mediation was the responsibility of each party, and the costs were split between the parties. To add these costs to the invoiced amount chargeable to Hertz violates the cost-sharing agreement. Additionally, it brings up a final issue: the Order acknowledged Jackson’s claims of “attorney’s fees and disbursements” (October 22, 2010 Order at 10), but granted only “reasonable attorney’s fees.” October

22, 2010 Order at 6, 10. Jackson is not allowed his costs or disbursements under this Order, and therefore any amount attributable as such should be stricken from any award.

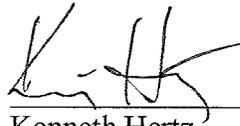
*D. The Trial Court did not provide sufficient findings of facts, conclusions of law and order to determine how it arrived at the amount of attorney fees awarded.*

The parties are entitled to findings on an attorney fee request specifying the bases of the award. See *Becker v. Alloy Hardfacing & Eng'g Co.*, 401 N.W.2d 655, 661 (Minn. 1987) (remanding for additional findings on attorney-fee award). In this case, the Trial Court made no findings and provided no basis or rationale for its decision. Rather, the Trial Court simply amended its previous order and supplied the amount of pre-judgment interest and attorney fees awarded to Respondent. This “findings” is not sufficient and at a minimum, this matter should be remanded for additional findings.

### **CONCLUSION**

The parties stipulated on the record the remaining three issues to be tried; none of Respondent’s claims were included in those three issues. More importantly, the claim for attorney fees and pre-judgment interest was not included in the three remaining triable issues. Therefore, the attorney fee and pre-judgment interest awarded to Respondent should be reversed and dismissed. If the Court does decide that attorney fees and pre-judgment interest were properly before the Trial Court, there is no basis in fact or law to award pre-judgment interest to Respondent. Moreover, the award of attorney’s fees as ordered by the Court is not authorized under Minnesota law, because the fees invoiced by Attorney Anderson reflect both the defense of Jackson and prosecution of Jackson’s claims against Hertz contrary to the Court’s Order, and because those fees are excessive.

Dated: June 13, 2011



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