

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' REPLY BRIEF AND SUPPLEMENTAL 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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## ARGUMENT

In response to Respondent's Brief of July 15, 2011, Appellants would like to address five issues raised by Respondent. First, Respondent claims that there was no stipulation that the parties could not seek and be awarded attorney's fees. (R. Brief at 24). Second, Respondent claims that Appellants never objected to the trial court's award of attorney's fees. (R. Brief at 13). Third, Respondent claims that Appellants' post-trial motion was untimely. (R. Brief at 15). Fourth, Respondent claims that the broad attorney's fee award was appropriate since their Third-Party Complaint was a "defense" to Appellants' claims. (R. Brief at 22). Finally, Respondent claims that pre-judgment interest is allowable in this case. (R. Brief at 25). These issues are addressed in turn.

### **A. There Was a Stipulation Preventing The Parties From Seeking Attorney's Fees**

Respondent contends that there was no stipulation regarding attorney's fees. (R. Brief at 24). However, this is not the case.

"Trial court must base its relief on issues either raised by pleadings or litigated by consent." *See, e.g., Peters v. Mutual Ben. Life Ins. Co.*, 420 N.W.2d 908, 915 (Minn. Ct. App. 1988). The parties and the trial court agreed on the record that there were three items in dispute in the underlying action. (Transcript at 28). The trial court and the parties went into detail on what was to be litigated, and most importantly, what were the amounts at issue. (*Id.* at 24-28). In other words, the settlement of some issues and the stipulation as to the remaining issues limited the possible recover on each side: \$13,000 for contribution to Cascade Springs, \$1,650 in laundry money, and \$287,000 in D.Y.N. Kiev money. (*Id.*) These three specific dollar amounts make up the stipulation as to the amounts at issue, and importantly, are intended to limit the liability on each side. The

parties acted in reliance on this intent as to their possible liability of these issues and for the settled issues.

Respondent now argues that this stipulation should be read with a different intent: the intent to allow not only those liabilities, but other liabilities which he plead but were not set forth in the stipulation of the issues before the court. Respondent cannot have it both ways. If Appellants are bound by the underlying judgment, *both* parties must be bound by it, and it cannot change the nature of the stipulation on appeal. The stipulation bound both parties to be limited to the recovery they bargained for, agreed to, placed on the record, and relied upon. Therefore, attorney's fees were barred by the stipulation in this case.

However, even if this Court finds that attorney's fees were not barred by the stipulation, they are still inappropriate in this case.

#### **B. Appellants Objected to the Award of Attorney's Fees**

As Respondents admit, Appellants objected to the award of attorney's fees on November 22, 2010. (R. Brief at 14; R.A. 40). A little over a week later, the court replied, asking for a formal written objection or request for hearing. (R. Brief at 14; R.A. 41). The trial court set no deadline on this objection. (R.A. 41). Two weeks later the trial court requested a proposed order from Respondent without input from Appellants. (R.A. 42), and filed its order three days later. (A. 12). The trial court ignored Appellants' objection on December 14<sup>th</sup> and their formal response on December 20<sup>th</sup>, and entered judgment on December 21, 2010. (A. 13).

Respondent contends that "Appellants have waived any such objection" to the award of attorney's fees by failing to respond or object to the award. (R. Brief at 18). This is not the case. Appellants did notify the trial court that they intended to respond, but

were given no deadline to do so. Appellants did not allow an unreasonable period of time to pass before presenting their objection; in fact, a mere two weeks had passed before the trial court, without setting a deadline or further notice to Appellants, asked Respondent for a proposed order. Despite the fact that Appellants raised specific objection and filed a formal response, the trial court entered judgment on December 21, 2010. (A. 13).

Because the trial court's November Order did not specify the amount of attorney's fees, it would have been irrational to object separately to the *award* or attorney's fees and the *amount* of attorney's fees. In the interests of judicial economy, it makes much more sense to address the award and the amount of the award at the same time. *Am. Family Mut. Ins. Co. v. Peterson*, 380 N.W.2d 495, 497 (Minn. 1986). Appellants were never heard by the trial court on the issue of either the award of attorney's fees or the amount of attorney's fees, despite their requests to be heard. (R.A. 43) (demonstrating both Appellants' and Appellants' attorney's request for a hearing). It is therefore appropriate to address this issue on appeal.

### **C. Appellants' Motion to the Court Was Not Untimely**

Respondent also raise the issue of whether Appellants' motion to the trial court was untimely. (R. Brief at 15). By its argument, the January 18, 2011 motion of Appellants was untimely to challenge any of the trial court's order. However, by Respondent's own admission, judgment was entered on the attorney's fee award on December 21, 2010.

A motion for amended findings or a new trial may be made within 30 days. Minn. R. Civ. P. 52.02, 59.03. January 18<sup>th</sup> is well within 30 days of December 21<sup>st</sup>. Therefore, even if this Court decides that the motion was untimely on the merits of the underlying claim, it was at least valid with regard to the award of attorney's fees on December 21<sup>st</sup>.

To hold otherwise; to hold that Appellants' 30 days to file a Rule 52 motion began to run on October 22<sup>nd</sup>, as the trial court held (R.A. 6)<sup>1</sup>, is nonsensical, as it would have Appellants filing its motion for Amended Findings before the *judgment was even entered*. The trial court made its Order on December 20<sup>th</sup>. It entered Judgment on December 21<sup>st</sup>. Appellants' post-trial motion was made within 30 days of both, and was therefore timely.

**D. Respondent Was Awarded Attorney's Fees Only "in Defending Against Plaintiffs and [Appellants'] Claims"**

Respondent also claims that the attorney's fees granted were in accord with the trial court's November 23, 2010 Judgment. (R. Brief at 22). That Judgment allowed attorney's fees to respondent "in *Defending* against Plaintiffs and [Appellants'] claims." Paragraph 4 of October 22, 2010 Findings of fact, conclusion of law and order, App. 6. However, respondents now assert that they are entitled to attorneys fees *for their own claims*, because "in order to defend against the LLC represented by Hertz's Complaint, [Respondent] needed to make [Appellants] a party to the case." (*Id.*)

This claim cannot be supported. Respondent cites no reason bringing a claim was necessary for his defense, and indeed, no such claim was necessary. The LLCs were the plaintiffs, and there was no reason to bring Appellants into the suit except to prosecute Respondent's claims against them. As such, any attorney's fee award may be supported only to the extent that they were spent *defending* against claims. However, this is an issue with no factual support on the record, since the trial court made no factual findings with regard to the attorney's fees award – a fact which Respondent admits. (R. Brief at 17).

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<sup>1</sup> Appellants note that the October 22 date of "final judgment" used by the trial court to support its denial of Appellants' motion (R.A. 6) is also unsupported by the record. Even Respondents concede that the correct date should be November 23, 2010. (R. Brief at 2, 10, 13, 15, 16, 19, 22, 23).

Because the trial court's award of attorney's fees violated its own order for attorney's fees, it was an abuse of discretion to grant that award.

**E. Pre-Judgment Interest Is Not Permissible In This Case**

Respondent also alleges that pre-judgment interest is allowable in this case. (R. Brief at 25). In suppose of this, Respondent states that "In 1984, Minn. Stat. § 549.09 was amended to allow prejudgment interest regardless of the ability to ascertain the amount of damages." (*Id.*) It is true that the statute was amended in 1984, and also true that interest was allowed in *some* cases not before permitted. However, the post-1984 statute allows pre-judgment interest on *pecuniary* damages. Minn. Stat. § 549.09, subd. 1(b). The damages claimed in this case are not pecuniary in nature, but are equitable damages intended as a punishment, fine, or other non-compensatory award, not to cover some loss by Respondent, and are therefore not appropriate for prejudgment interest. Minn. Stat. § 549.09, subd. 1(b)(3).

There is a split in Minnesota Courts with regard to even whether pecuniary damages are available if the damage amount is not "readily ascertainable." *Duxbury v. Spex Feeds, Inc.*, 681 N.W.2d 380, 391 n.5 (Minn. Ct. App. 2004). While the *Duxbury* court held that "prejudgment interest is available notwithstanding ascertainability of the judgment," it did so in the context of the *pecuniary* losses in that case. *Id.* at 391, 394. As recently as 2010, this Court has followed the "readily ascertainable" common-law rule as well. *Williams v. Heins, Mills, & Olson, PLC*, 2010 WL 3305017, at \*8 (Minn. Ct. App., August 24, 2010) (unpublished opinion).

In this case, however, the losses claimed are not pecuniary. "Pecuniary" losses are "[m]onetary; relating to money; financial, consisting of money or that which can be valued in money." *Black's Law Dictionary* 1131 (6th ed. 1990); *Skifstrom v. City of Coon*

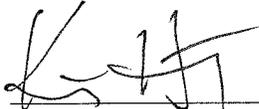
*Rapids*, 524 N.W.2d 294, 295 (Minn. Ct. App. 1994). Although some courts (including *Skifstrom*) have allowed that monetary losses do not necessarily mean the loss of money, they have not gone so far as to award prejudgment interest for equitable claims. In this case, the award underlying this settlement was for breach of fiduciary duties and failure to follow corporate formalities. Findings of fact, conclusion of law and order, App. 1 – 11. Respondent had suffered no pecuniary loss in any rational sense of the word; indeed, the claims of Plaintiffs was for contribution from *Respondent*. (R.A. 10).

Even if this Court followed the statutory and not the common-law rule, pecuniary damages are just that. The award in this case was an equitable award for failure to follow corporate formalities, not an award to Respondents to compensate them for some loss. Therefore, the award of pre-judgment interest was inappropriate.

### **CONCLUSION**

For these reasons, as well as reasons previously argued in Appellants' brief, Appellants respectfully request that the trial court's judgment be reversed and the case be remanded for review in light of this Court's rulings.

Dated: July 28, 2011

  
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