

A11-353

State of Minnesota
In Court of Appeals

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

Appellants,

v.

Marshall B. Jackson,

Respondent,

v.

Kenneth Hertz,

Appellant.

**BRIEF AND APPENDIX OF RESPONDENT
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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).

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF THE ISSUE 1

STATEMENT OF THE CASE 2

 A. This Action Was Initiated by the LLCs Through Hertz, and Jackson
 Answered and Counterclaimed 3

 B. Jackson Was Compelled to Bring a Third-Party Complaint as a
 Defense to the LLCs Through Hertz’s Allegations 6

 C. The Case Was Tried to the Court in July 2010 7

 D. In the Parties’ Post-Trial Memorandums, Both Parties Sought
 Attorneys’ Fees 8

 E. Trial Court Entered Judgment on November 23, 2010 in Which It
 Awarded Jackson Attorneys’ Fees and Interest 10

 F. Jackson Presented Documentation as to Attorneys’ Fees and Interest
 to Which Appellants Offered No Response, and Judgment Was
 Entered Pursuant to the Court’s Amended Order on December 21,
 2010 Granting \$30,002.50 in Attorneys’ Fees, \$1,081.42 in Costs
 and \$9,756.37 in Interest 13

 G. Hertz Filed an Untimely Post-Trial Motion 15

 H. Appellants Appeal and This Court Finds the Appeal from the
 November 23, 2010 Judgment Untimely and Limits Scope of Review
 on Appeal to the December 21, 2010 Judgment 15

ARGUMENT 16

I. PURSUANT TO THIS COURT’S ORDER FILED MAY 5, 2011, THE SCOPE OF REVIEW ON APPEAL IS LIMITED TO THE JUDGMENT ENTERED ON DECEMBER 21, 2010. ALL OTHER CONTENTIONS OF APPELLANTS OUTSIDE THE SCOPE OF REVIEW OF THAT JUDGMENT ARE TO BE DISREGARDED BY THIS COURT 16

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING REASONABLE ATTORNEYS’ FEES IN THE AMOUNT OF \$30,002.50 17

 A. The Standard of Review Is Abuse of Discretion 17

 B. Appellants Waived any Objection to the Fees Awarded 18

 C. The Fees Awarded Are Not Excessive 18

 D. Fee Award in Accord With the November 23, 2010 Judgment 22

III. APPELLANT DOES NOT CHALLENGE ON APPEAL THE AMOUNT OF INTEREST AWARDED 23

IV. ISSUES RAISED BY APPELLANTS BUT NOT WITHIN THIS COURT’S SCOPE OF REVIEW ARE WITHOUT MERIT 23

 A. There Was No Stipulation That the Parties Could Not Seek and Be Awarded Attorneys’ Fees and Interest 24

 B. Appellants’ Assertion as to When Prejudgment Interest Can Be Awarded Is Contrary to Law 25

 C. The Attorneys’ Fees Are Authorized by Statute 25

CONCLUSION 27

CERTIFICATION OF BRIEF LENGTH 28

TABLE OF AUTHORITIES

Rules:

Minn. R. Civ. App. P. 128.02, subd. 4	23
Minn. R. Civ. App. P. 139	27

Statutes:

Minn. Stat. Chapter 322B	5, 6, 8
Minn. Stat. § 322B.373	8
Minn. Stat. § 322B.376	8
Minn. Stat. § 322B.38	6, 9, 13, 25, 26
Minn. Stat. § 322B.42	12
Minn. Stat. § 322B.43	12
Minn. Stat. § 322B.833	5, 25
Minn. Stat. § 322B.833, subd. 1(2)(i)	3
Minn. Stat. § 322B.833(7)	9, 13, 25, 26
Minn. Stat. § 334.01	25
Minn. Stat. § 549.09	25

Cases:

Automated Bldg. Components, Inc. v. New Horizon Homes, Inc., 514 N.W.2d 826 (Minn. Ct. App. 1994), <i>rev. denied</i>	1, 17
Beeson v. Beeson, 432 N.W.2d 501 (Minn. Ct. App. 1988)	16
C. Kowalski, Inc. v. Davis, 472 N.W.2d 872 (Minn. Ct. App. 1991), <i>rev. denied</i>	17
Cheyenne Land Co. v. Wilde, 463 N.W.2d 539 (Minn. Ct. App. 1990)	21
Deluxe Corp. v. MIPS Dataline America, Inc., 2001 WL 476584 (D. Minn. 2001)	19
Dennis Frandsen & Co. v. Kanabec County, 306 N.W.2d 566 (Minn. 1981)	16

Duxbury v. Spex Feeds, Inc., 681 N.W.2d 380 (Minn. Ct. App. 2004), <i>rev. denied</i>	25
Friend v. Gopher Co., 2010 WL 3547021 (Minn. Ct. App. 2010)	21
Geske v. Marcolina, 624 N.W.2d 813 (Minn. Ct. App. 2001)	17
Grundtner v. Univ. of Minn., 730 N.W.2d 323 (Minn. Ct. App. 2007)	3
In re Estate of Renczykowski, 409 N.W.2d 888 (Minn. Ct. App. 1987)	23, 25
Jadwin v. Kasal, 318 N.W.2d 844 (Minn. 1982)	17
Lienhard v. State, 431 N.W.2d 861 (Minn. 1988)	25
Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp., 487 F.2d 161 (3d Cir. 1973)	20
McIntire v. State, 458 N.W.2d 714 (Minn. Ct. App. 1990), <i>rev. denied</i>	1, 23, 26
McKay's Family Dodge v. Hardrives, Inc., 480 N.W.2d 141 (Minn. Ct. App. 1992), <i>rev. denied</i>	23
Morton v. Board of Comm'rs of Ramsey County, 301 Minn. 415, 223 N.W.2d 764 (1974)	1, 18, 23
Musicland Group, Inc. v. Ceridian Corp., 508 N.W.2d 524 (Minn. Ct. App. 1993), <i>rev. denied</i>	19
Summit Court, Inc. v. N. States Power Co., 382 N.W.2d 560 (Minn. Ct. App. 1986)	25

T.A. Schifsky & Sons, Inc. v. Barr Constr., LLC,
773 N.W.2d 783 (Minn. 2009), *reh'g denied* 16

Thiele v. Stich,
425 N.W.2d 580 (Minn. 1988) 18

Truesdale v. Friedman,
267 Minn. 402, 127 N.W.2d 277 (1964) 24

United Prairie Bank - Mountain Lake v. Haugen Nutrition & Equipment, LLC,
782 N.W.2d 263 (Minn. Ct. App. 2010) 17

STATEMENT OF THE ISSUE

DID THE TRIAL COURT ABUSE ITS DISCRETION IN ITS AWARD OF
ATTORNEYS' FEES TO RESPONDENT IN THE AMOUNT OF \$30,002.50?

By Judgment entered November 23, 2010, the trial court ordered Respondent Jackson was entitled to attorneys' fees and interest. This Court has ruled Appellants did not timely appeal that Judgment. After judgment was entered on November 23, 2010, the trial court ruled on Respondent Jackson's request for attorneys' fees in the amount of \$30,002.50 and interest in the amount of \$9,756.37. No timely opposition to the amount requested was filed by Appellants. An Amended Order for Judgment was filed on December 17, 2010, and Judgment in the amount of \$30,002.50 for attorneys' fees, \$9,756.37 in interest, and costs in the amount of \$1,081.42 was entered on December 21, 2010.

Automated Bldg. Components, Inc. v. New Horizon Homes, Inc., 514 N.W.2d 826 (Minn. Ct. App. 1994), *rev. denied*.

Morton v. Board of Comm'rs of Ramsey County, 301 Minn. 415, 223 N.W.2d 764 (Minn. 1974).

McIntire v. State, 458 N.W.2d 714 (Minn. Ct. App. 1990), *rev. denied*.

STATEMENT OF THE CASE

The trial court, the Honorable William R. Howard, by Judgment entered November 23, 2010, ruled Respondent Marshall B. Jackson (Jackson), among other things, was entitled to attorneys' fees and interest, but did not determine the amount of fees and interest to which Jackson was entitled. (Appellants' Appendix [A.] 5-6). Pursuant to this Court's jurisdictional ruling by Order filed May 5, 2011, that Judgment entered on November 23, 2010 is not before this Court for review on appeal because of Appellants D.Y.N. Kiev, LLC, 500 Club, LLC and Cascade Springs, LLC, each through its member Kenneth Hertz, and Kenneth Hertz's (Hertz) failure to timely appeal.¹ (Respondent's Appendix [R.A.] 1). The only judgment at issue is the December 21, 2010 Judgment, which Amended Judgment was issued pursuant to the trial court's Amended Order for Judgment. (R.A. 4; A. 12). This Amended Order and resulting Judgment determines only the amount of attorneys' fees to which Jackson is entitled, as well as the amount of interest and costs. (A. 12-13).

Despite this Court's jurisdictional ruling, Appellants, in their brief to this Court, have raised issues and make arguments which are not within this Court's scope of review. And because of this Court's jurisdictional ruling, Appellants apparently chose not to have the trial transcript completed. (R.A. 45). All that has been transcribed is day one of a

¹ Appellants will refer collectively to Plaintiffs D.Y.N. Kiev, LLC, 500 Club, LLC and Cascade Springs, LLC, each through its member Kenneth Hertz, and Third-Party Defendant Kenneth Hertz.

three-day trial. The appellant bears the burden of providing an adequate record. Grundtner v. Univ. of Minn., 730 N.W.2d 323, 334 (Minn. Ct. App. 2007). The Appellants' Statement of the Facts is neither complete nor accurate, given the record on appeal. For the Court's benefit and based on the record on appeal, which does not include the complete trial transcript, Jackson provides the procedural history, which also constitutes the material facts of this case.

A. This Action Was Initiated by the LLCs Through Hertz, and Jackson Answered and Counterclaimed.

The Plaintiffs who initiated this action are Appellants D.Y.N. Kiev, LLC (Kiev), 500 Club, LLC and Cascade Springs, LLC, each through its member Kenneth Hertz (referred to collectively here as the LLCs through Hertz). (R.A. 9). The Respondent/Defendant is Jackson. (Id.) Hertz and Jackson are the only two members of the LLCs. (R.A. 10, 13). The LLCs through Hertz brought this action against Jackson seeking relief on three different issues. (Id.)

First, the LLCs through Hertz asserted that the LLCs should be dissolved based on Minn. Stat. § 322B.833, subd. 1(2)(i).² (R.A. 9). Second, the LLCs through Hertz sought contribution from Jackson. (R.A. 10). It was alleged that in the past the 500 Club, LLC and Cascade Springs, LLC had made loans to Kiev, but that Jackson had asserted these LLCs cannot lend money or contribute to Kiev. (Id.) Therefore, Hertz had made loans to

² Minn. Stat. § 322B.833, subd. 1(2)(i) is an action by a member seeking equitable relief from the court because the governors are deadlocked in the management of the affairs of the limited liability company (LLC).

Kiev, which he personally guaranteed. The LLCs through Hertz assert Jackson was obligated to make capital contributions to Kiev or allow the other LLCs to make contributions to Kiev and Jackson “should be required to be added to the [personal] guarantee of the [Kiev] loan.” (Id.) The LLCs through Hertz also claimed that Jackson had not complied with various document requests “and assets of the entities.” It is asserted that “Hertz is entitled to these financial documents and assets” (R.A. 10-11).

In their prayer for relief, the LLCs through Hertz requested, among other things, that

- Jackson be required to make contributions to Kiev or in the alternative or in conjunction allow the other LLCs to make loans to Kiev.
- Require Jackson to become a joint guarantor of the Kiev loan until Kiev is sold.

(R.A. 11).

The LLCs through Hertz also asserted the trial court should award “Defendant³ costs and attorneys’ fees” (Id.)

Jackson answered and counterclaimed. (R.A. 13). Jackson denied that the members had allowed 500 Club and Cascade Springs to make loans to Kiev. He denied any obligation to make capital contributions and/or allow the other entities to make

³ The Defendant in this action is Jackson.

contributions to Kiev. He also denied that he should be required to be added to the guarantee of any purported loan by Hertz to Kiev. (R.A. 10, 14).

Jackson agreed the LLCs should be dissolved, but because their assets were being misapplied, wasted or illegally distributed. (R.A. 13, 16). He requested the court intervene in accord with Minn. Stat. § 322B.833, which allows for judicial intervention and the grant of equitable relief when sought by a member. (R.A. 16). Illegal distributions had been made by the LLCs to Hertz and the LLCs had made loans to Kiev and/or Hertz in violation of Minn. Stat. Chapter 322B. (R.A. 15, 17). A receivership needed to be put in place immediately and accountings required. (R.A. 17-18). The court was requested to stop the loans or illegal distributions between the LLCs and Hertz and order the reimbursement and indemnification of any prior loans or illegal distributions so made. (R.A. 17). Jackson also asserted the LLCs had failed to follow corporate formalities and Jackson was damaged. (R.A. 18-19).

In Jackson's prayer for relief, he requested, among other things, an order from the court

- Directing Hertz and the LLCs to cease all loans and illegal distributions between the parties.
- An award of \$50,000 in damages for the LLCs' failure to follow corporate formalities.
- An award for any illegal distributions made to Hertz.
- Awarding Jackson other relief as the court deems equitable and just, including interest, attorneys' fees, costs and disbursements.

(R.A. 19-20).

B. Jackson Was Compelled to Bring a Third-Party Complaint as a Defense to the LLCs Through Hertz's Allegations.

In addition to the Counterclaims, Jackson also filed a Third-Party Complaint against Hertz. (R.A. 23). Jackson felt compelled to do so as a defense to the LLCs' claims through Hertz. (R.A. 26-28, 30). The LLCs, as Plaintiffs, had failed to assert any claims against Hertz. (R.A. 30). Jackson was required to bring this third-party action against Hertz as a defense to the LLCs through Hertz's Complaint "because of the [LLCs'] failure, deliberate or otherwise, to act upon the primary right to seek reimbursement from Hertz." (R.A. 30-31).

Pursuant to Minn. Stat. § 322B.38, as a member, Jackson requested judicial intervention. (R.A. 28, 31). Jackson alleged Hertz had performed acts in excess of his authority, as it relates to the LLCs, and he had breached his duties owed under Minn. Stat. Chapter 322B. (R.A. 32-33). Hertz should be held accountable for his actions and inactions under the statutes. (Id.)

Hertz is now, and was at the time the LLCs were formed, a Minnesota licensed attorney. (R.A. 25). The Third-Party Complaint alleges that Hertz had taken illegal distributions from the LLCs and that Hertz is required to obtain Jackson's consent prior to distribution, but consent was never given. Hertz is to be held liable for any illegal loans or distributions made without authority, ratification or approval. (R.A. 30-31).

In Jackson's prayer for relief, he sought, among other things, \$50,000 for Hertz's failure to follow corporate formalities, an award for any illegal distributions or loans

made to Hertz and “such other relief the Court deems equitable and just . . . including interest, attorneys’ fees, costs and disbursements.” (R.A. 34).

Hertz answered and submitted a Counterclaim against Jackson. (R.A. 35). He asserted that the LLCs have established a practice and course of dealing “in which the transferring of funds between the entities . . . was an accepted and approved practice by all members” (R.A. 35). Hertz denied he was responsible in his capacity as a member to produce any financial documents. (R.A. 36). He asserted Jackson and his counsel “are acting in bad faith” and asserted Jackson had received financial documents. (Id.)

C. The Case Was Tried to the Court in July 2010.

The case was set for trial on July 7, 2010. On the first day of trial, the trial court explained its concern over Hertz’s representation of the LLCs given the claims by Jackson against Hertz and Hertz’s counterclaim against Jackson. It was established that Attorney Douglass Turner would represent the LLCs with Hertz, an attorney, representing himself. (T. 3-4).⁴

On the first day of trial, the parties placed on the record their agreement resolving certain issues with regard to 500 Club, LLC and Cascade Springs, LLC. (T. 4-28; A. 14). The trial court accepted the parties’ oral settlement agreement, but required it be reduced

⁴ The signature block to Appellants’ appellate brief reflects that the LLCs and Hertz are being represented by Hertz alone on appeal.

to writing. (T. 28; A. 14). The parties stipulated to the sale of Hertz's membership interest in Cascade Springs to Jackson and reached an agreement concerning the 500 Club. (Finding of Fact 26; A. 4). The remaining issues were to be presented in a trial to the court. (T. 29).

The trial court requested that after the close of testimony both parties submit simultaneous post-trial briefs and proposed findings of fact, conclusions of law, etc. (T. 31-32). The parties were given an opportunity to respond to the other party's brief. (T. 32).

D. In the Parties' Post-Trial Memorandums, Both Parties Sought Attorneys' Fees.

In Jackson's post-trial brief, Jackson asserted that Hertz had provided testimony and exhibits that he was the chief manager of Kiev, placing the Chapter 322B statutory responsibilities on Hertz's shoulders. Hertz failed to provide financial statements as required by Minn. Stat. §§ 322B.376 and 322B.373 and had failed to transfer an interest in Kiev to Jackson despite Jackson's contributions of \$114,000 to Kiev. (Defendant and Third-Party Plaintiff's Post-Trial Brief, pp. 4-6, dated July 21, 2010).

In his proposed findings of fact, conclusions of law and order for judgment, Jackson proposed that Hertz be held individually responsible to Jackson for \$114,000 in damages for Hertz's failure to follow Minn. Stat. Chapter 322B and as an equitable remedy for Jackson's contribution to Kiev. (Jackson's Proposed Findings of Fact, Conclusions of Law and Order for Judgment, pp. 8, 11). Jackson asserted the trial court

should conclude Hertz had engaged in self-dealing and as such breached his fiduciary duties. (Id. at Conclusion of Law 7).

Jackson also requested his costs and expenses, including attorneys' fees, be awarded pursuant to Minn. Stat. §§ 322B.38 and 322B.833(7). Jackson argued:

Because of the conduct of the opposing parties, Jackson had to spend a significant amount of attorneys' fees to defend himself and to prosecute his claim against the opposing parties. The attorneys' fees were requested in the counterclaim and cross claim of Defendant Jackson. The plaintiff entities brought an action against Jackson for capital contributions in clear neglect of Minn. Stat. §§ 322B.42 and 322B.43. The Court is allowed to award attorneys' fees as part of equity pursuant to Minn. Stat. §§ 322B.38 and 322B.833. Jackson respectfully requests an award of attorneys' fees and therewith costs and disbursements be awarded in his favor as a result of the conduct of the opposing parties and the violations of Minnesota Statutes.

(Defendant and Third-Party Plaintiff's Post-Trial Brief, p. 11). This request was placed in Jackson's proposed order for judgment, paragraph 3.

Appellants also submitted a post-trial memorandum. In their memorandum, Appellants asserted they were "entitled to attorney fees pursuant to Minn. Stat. § 322B.833, subd. 7 and Minn. Stat. § 322B.38" from Jackson.⁵ (Plaintiff and Hertz's Post-Trial Memorandum of Law, p. 3, dated July 21, 2010). In Appellants' proposed findings, Appellants asserted entitlement "to their attorneys' fees in this matter" and that

⁵ Despite Appellants' assertion in this regard post trial, Appellants argue to this Court that the parties stipulated to the trial court at the beginning of trial that the issue of attorneys' fees and prejudgment interest was not before it. (Appellants' Brief, p. 4). The record does not in any respect so reflect, such issue is beyond this Court's scope of review and, given Appellants' own post-trial submissions, the record is to the contrary.

Hertz was entitled to judgment against Jackson “in the amount of \$150,920.13 plus prejudgment interest and its costs and disbursements.” (Proposed Order ¶¶ 28, 29).

Both parties filed post-trial responsive memoranda of law. No party asserted that the issue of attorneys’ fees and interest was not properly before the trial court.

E. Trial Court Entered Judgment on November 23, 2010 in Which It Awarded Jackson Attorneys’ Fees and Interest.

The parties’ pretrial stipulation was reduced to writing on October 13, 2010.

(A. 14). The trial court issued its Findings of Fact, Conclusions of Law and Order for Judgment on October 22, 2010. (A. 1). The trial court found as fact that Kiev was started by Hertz and Vernon Holien (Holien). (Finding of Fact 11; A. 3). While Holien and Hertz were negotiating to purchase the Dunne Mansion through Kiev, it was determined Holien could not participate because of his credit problems. (Finding of Fact 13; A. 3). Holien assigned his membership interest in Kiev to Hertz, for which Holien was paid \$30,000. (Id.) Hertz then contacted Jackson seeking to have him acquire Holien’s interest in Kiev. Jackson agreed. (Id.)

Jackson was instructed by Hertz to pay Holien \$30,000 for his interest and also pay, as part of Jackson’s initial contribution to Kiev, \$15,000 to Hertz for Hertz’s legal fees billed to Holien for work done in the purchase of the Dunne Mansion. (Id.; Finding of Fact 14; A. 3). Jackson made an additional \$69,000 in contributions to Kiev. (Finding of Fact 16; A. 3). Despite Jackson’s contributions in the amount of \$114,000, Holien’s membership interest was never transferred by Hertz to Jackson. (Conclusion of Law 2;

A. 4). It was instead transferred to Hertz, and Jackson received nothing for his contributions. (Id.) Jackson was not provided with Kiev's financial statements, balance sheets, capital account reconciliations or tax returns. (Findings of Fact 18, 19; A. 4).

In addition, Plaintiff Cascade Springs, LLC, in which Hertz and Jackson are the only members, loaned Kiev \$16,500, to which Jackson states he objected. (Finding of Fact 20; A. 4). Plaintiff 500 Club, LLC, in which Hertz and Jackson are the only members, also loaned Kiev \$1,600, which Jackson asserted he did not authorize. (Finding of Fact 25; A. 4).

“No evidence was presented to show whether payments into Kiev's account by Hertz or his law firm were credited to Hertz' capital account or recorded as loans from Hertz' law firm corporation.” (Finding of Fact 17; A. 3). Hertz claimed to have made loans to Kiev payable under promissory notes to himself and his wife. (Finding of Fact 22; A. 4). Many of the loans were paid from the Hertz Law Office, P.A. checking account. (Finding of Fact 23; A. 4). The law firm is not a member of Kiev and the trial court found as fact there “is no evidence Jackson had any knowledge of these loans or approved them.” (Finding of Fact 22, 24; A. 4).

In the trial court's Conclusions of Law, the trial court concluded, among other things, that

- Hertz never transferred any membership interest to Jackson for his contributions.
- Only members, not the LLCs, can bring an action for contribution and indemnification.

- Hertz's self-dealing during the purchase of the Dunne mansion by Kiev was a breach of the fiduciary duty he owed as a member of Kiev.
- Hertz neglected his duties as governor and manager of Kiev and did not discharge his duties in the best interests of the entity.
- Hertz also failed to act with the care of an ordinary and prudent person in a like position and similar circumstances.
- Hertz failed to maintain the requisite financial records from a limited liability company. He also failed to provide financial information to Jackson as required by Minnesota law.
- Hertz was required as a licensed attorney to conduct himself in a like manner expected of any attorney entering into a business transaction or investment transaction with a client or former client.
- Any transactions noted as loans or repayable debts are not considered capital contributions.
- In order to be enforceable, a contribution agreement must be in writing and signed by the contributors. Minn. Stat. §§ 322B.42 and 322B.43.
- No written record exists of Hertz and Jackson's capital contributions accounts. Hertz had failed to prove his capital contributions to Kiev exceeded Jackson's.

(A. 5).

The trial court ordered a \$1,600 judgment be entered against Hertz for the illegal distribution from Cascade Springs, LLC to Kiev, with that money being ordered paid to Cascade Springs. The trial court ordered that judgment be entered against Hertz and in favor of Jackson in the amount of \$50,000 plus interest, as requested in Jackson's Third-Party Complaint, for Hertz's breach of fiduciary duty and failure to follow corporate formalities. (A. 6). The trial court also granted Jackson's request for reasonable

attorneys' fees in defending against "Plaintiffs' and Third-Party Defendants' claims."

(Id.)

In its attached Memorandum, the trial court acknowledged but denied Hertz's request for attorneys' fees. (A. 11). It acknowledged and granted Jackson's request for attorneys' fees sought pursuant to Minn. Stat. §§ 322B.38 and 322B.833(7). (Id.)

Jackson thereafter prepared and served a Notice of Filing of that Order. (R.A. 7). Judgment was entered pursuant to that Order on November 23, 2010.

F. Jackson Presented Documentation as to Attorneys' Fees and Interest to Which Appellants Offered No Response, and Judgment Was Entered Pursuant to the Court's Amended Order on December 21, 2010 Granting \$30,002.50 in Attorneys' Fees, \$1,081.42 in Costs and \$9,756.37 in Interest.

Based on the trial court's grant to Jackson of attorneys' fees and interest, Jackson's counsel, on November 10, 2010, filed his affidavit in support of attorneys' fees and interest. (R.A. 39; A. 47). Jackson's counsel explained the hourly rate charged, that it was both reasonable and conservative, and that the work performed was necessary. (A. 47-48). He attached the billing records sent to Jackson which itemized the tasks performed and the amounts billed. (A. 53-87). The total fees requested were \$30,002.50, which fees had been incurred through October 22, 2010. (A. 48). The total costs requested totaled \$1,081.42. (Id.) Being uncertain as to whether a motion was required, Jackson asked the trial court to inform him if a motion was also required. (R.A. 39). At the same time, Jackson submitted his interest calculation on the \$50,000 awarded, calculating it to be \$9,756.37. (A. 50).

Twelve days later, on November 22, 2010, Turner, who was counsel for the LLCs, wrote a letter to the trial court stating that “[o]n behalf of Mr. Hertz, the request for attorneys’ fees will be opposed and Mr. Hertz would like to know if the Court plans on requiring written submissions without a hearing” (R.A. 40). By email dated December 1, 2010, Turner and Hertz were informed by the trial court that the court “would like a formal written objection.” (R.A. 41). By December 14, 2010, and having received no formal objection to Jackson’s attorneys’ fees and interest submissions, the trial court, having reviewed the information provided, found the requests were reasonable in light of the duration and complexity of the litigation and requested a proposed order be prepared by Jackson’s counsel. (R.A. 42). Upon receipt of that email, Hertz wrote a letter to the trial court stating he would submit a formal response by December 20, 2010. (R.A. 43).

The trial court filed its order on attorneys’ fees and interest on December 17, 2010. (A. 12). It awarded \$30,002.50 in attorneys’ fees, \$9,756.37 in interest, and \$1,081.42 in costs and disbursements. (A. 13). Judgment was entered on the Court’s Order of December 20, 2010 on December 21, 2010.⁶ (Id.)

⁶ Appellants have submitted a trial court brief in opposition to attorneys’ fees dated December 20, 2010. (A. 41). The docket sheet does not reflect that such brief was filed with the district court. (R.A. 49). Jackson has separately filed a motion to strike.

G. Hertz Filed an Untimely Post-Trial Motion.

Thereafter, on January 18, 2011, Attorney Michael Kemp filed a “Third-Party Defendant’s Notice of Motion and Motion for Amended Findings or New Trial.” The trial court ruled that Third-Party Defendant’s Motion was untimely. (R.A. 5). The trial court explained:

The October 22, 2010 Order was the Court’s final decision on the merits as is presented in the ten pages of Findings of Fact and Conclusions of Law issued by the Court. Notice of that Order was properly made by Mr. Anderson on behalf of his client six days later on October 28, 2010. Plaintiffs’ [sic] and Mr. Hertz have known the Court’s final decision since that date and have failed to raise any objection to that decision until now.

(R.A. 6).

H. Appellants Appeal and This Court Finds the Appeal from the November 23, 2010 Judgment Untimely and Limits Scope of Review on Appeal to the December 21, 2010 Judgment.

On February 17, 2011, the LLCs through Hertz and Hertz appealed the Judgments entered on December 21, 2010 and November 23, 2010. (A. 88). This Court questioned jurisdiction over the November 23, 2010 judgment and determined by Order filed May 5, 2011 that any appeal from the Judgment entered on November 23, 2010 be dismissed as untimely. (R.A. 1). The only Judgment that can be addressed on appeal is the December 21, 2010 Judgment. (Id.)

ARGUMENT

I. PURSUANT TO THIS COURT’S ORDER FILED MAY 5, 2011, THE SCOPE OF REVIEW ON APPEAL IS LIMITED TO THE JUDGMENT ENTERED ON DECEMBER 21, 2010. ALL OTHER CONTENTIONS OF APPELLANTS OUTSIDE THE SCOPE OF REVIEW OF THAT JUDGMENT ARE TO BE DISREGARDED BY THIS COURT.

Hertz and the LLCs failed to timely appeal the Judgment entered on November 23, 2010. (R.A. 1). In that November 23, 2010 Judgment, the trial court entered judgment against Hertz and in favor of Jackson in the amount of “\$50,000 plus interest” and granted Jackson’s request “for reasonable attorneys’ fees in defending against [LLC and Hertz’s] claims.” (A. 6). Having failed to timely appeal that Judgment, the LLCs and Hertz are bound by the determinations made in that Judgment. Dennis Frandsen & Co. v. Kanabec County, 306 N.W.2d 566, 570 (Minn. 1981) (party who failed to appeal first judgment is bound by determinations left undisturbed by amendment); Beeson v. Beeson, 432 N.W.2d 501, 502 (Minn. Ct. App. 1988). Accordingly, in this appeal, Appellants cannot assert that Jackson was not entitled to attorneys’ fees or interest, or otherwise contest the issues as decided by Judgment entered November 23, 2010, as they do in their appellate brief.

The Judgment entered on December 21, 2010 determines the amount of attorneys’ fees as well as the amount of interest and costs. (A. 13). Accordingly, the only issues reviewable on appeal, if raised by Appellants to this Court in their appellate brief, would be the amount of fees and interest. T.A. Schifsky & Sons, Inc. v. Barr Constr., LLC, 773 N.W.2d 783, 790 (Minn. 2009), *reh’g denied*. No other issue is properly before the

Court. Jackson respectfully requests that all other assertions by Appellants be dismissed and disregarded as not within this Court's scope of review on an appeal from the December 21, 2010 Judgment.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN AWARDING REASONABLE ATTORNEYS' FEES IN THE AMOUNT OF \$30,002.50.

A. The Standard of Review Is Abuse of Discretion.

This Court will not reverse a district court's award of attorneys' fees absent an abuse of discretion. United Prairie Bank - Mountain Lake v. Haugen Nutrition & Equipment, LLC, 782 N.W.2d 263, 272 (Minn. Ct. App. 2010). "A court's award of attorney fees may be based on observation of the services performed or proof of their value." Id. In determining the amount of fees, a district court considers facts such as time and effort required, the customary charges for similar services and the results secured at trial. See C. Kowalski, Inc. v. Davis, 472 N.W.2d 872, 878 (Minn. Ct. App. 1991), *rev. denied*; citing Jadwin v. Kasal, 318 N.W.2d 844, 848 (Minn. 1982), as to factors to be considered.

The lack of specific findings is not fatal to an attorneys' fee award where the district court is familiar with the history of the case. Automated Bldg. Components, Inc. v. New Horizon Homes, Inc., 514 N.W.2d 826, 831 (Minn. Ct. App. 1994), *rev. denied* (affirming attorney fees award finding no error in absence of specific findings related to award because record contained detailed time reports and explanatory affidavit which supported the amount of the award). See Geske v. Marcolina, 624 N.W.2d 813, 817

(Minn. Ct. App. 2001) (lack of findings not fatal where trial court was familiar with the case).

B. Appellants Waived any Objection to the Fees Awarded.

The record reflects that Jackson submitted his fee request on November 10, 2010. (R.A. 39; A. 47, 53-87). By a December 1, 2010 email, counsel for all parties were informed the trial court requested a formal written objection to the fee request if Appellants were going to object. (R.A. 41). By December 14, 2010, having still not received any written formal objection, the parties were informed the court had reviewed Jackson's fee request and accepted Jackson's fee request. Jackson's counsel was told to draft a proposed order, which order was signed on December 17, 2010. (R.A. 42).

Having presented no formal or detailed objection before the trial court's ruling, Appellants have waived any such objection as they now raise on appeal. Thiele v. Stich, 425 N.W.2d 580, 582 (Minn. 1988) (a reviewing court is generally limited to those issues presented to the trial court); Morton v. Board of Comm'rs of Ramsey County, 301 Minn. 415, 223 N.W.2d 764, 771 (1974) (general rule is a party is not entitled to raise a question for the first time on appeal). The amount of fees awarded should be affirmed.

C. The Fees Awarded Are Not Excessive.

If the Court should consider Appellants' objections now raised on appeal as to the amount of fees awarded, they are without merit. The attorneys' fees awarded are reasonable. There was no abuse of discretion.

Appellants' claim that the fees awarded are excessive is without basis in the record or the law. The record shows that Jackson submitted his attorneys' fee request on November 10, 2010. (R.A. 39; A. 47, 53-88). As the record reflects, the litigation was commenced in 2007, but was not tried until July 2010. (R.A. 12; A. 1). The litigation was complex and consisted of a three-day trial. Yet the attorneys' fees requested by Jackson were only \$30,002.50 and at an hourly rate of \$200 an hour. (A. 47-48). Jackson only submitted his attorneys' fees through October 22, 2010, even though the first Judgment was entered on November 23, 2010. He did not even present a fee request for the actions that occurred thereafter. (A. 48).

"The starting point for determining reasonable attorney fees is the number of hours reasonably expended working on the case multiplied by a reasonable monthly rate." Musicland Group, Inc. v. Ceridian Corp., 508 N.W.2d 524, 535 (Minn. Ct. App. 1993), *rev. denied*. That is what the trial court, who was very familiar with this case, awarded. There was no enhanced lodestar adjustment requested or made. The rate of \$200 an hour, which is what Jackson paid his counsel, is eminently reasonable, given the fact that such an hourly rate was recognized as reasonable 10 years ago. See Deluxe Corp. v. MIPS Dataline America, Inc., 2001 WL 476584 at *3 (D. Minn. 2001) (R.A. 57) (so awarding in a default judgment case).

Jackson's counsel, in addition to his affidavit, presented his billing statements to Jackson, which included entries with descriptions with time billed by the tenth of an hour, or six-minute intervals. (A. 53-87). The entries are detailed and the fees are reasonable

considering this case. (Id.) As stated in the trial court's email to counsel on December 14, 2010, the fees "requested are reasonable in light of the duration and complexity of the litigation." (R.A. 42). There is no basis to reduce the fees awarded as an abuse of discretion.

Jackson's assertions that Appellants were not entitled to contribution are intertwined with Jackson's contention that Hertz breached his fiduciary duty and failed to observe corporate formalities. The trial court, being knowledgeable about the claims, understood that the claims asserted in this litigation are inextricably intertwined. The trial court's Findings of Fact, Conclusions of Law and Memorandum acknowledge and demonstrate that the issues are intertwined. (A. 1, 4, 6).

Contrary to Appellants' assertion, there is no requirement that the attorney detail the exact number of minutes spent nor the precise activity to which each hour was devoted. All that is required is information be provided as to the time devoted to general activities – i.e., pretrial discovery, legal research, etc. Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 178 (3d Cir. 1973).

Appellants have no record basis to contest, as they do on page 11 of their Appellants' Brief, the December 8, 2009 entry of two hours which details a "[c]onference with [Jackson]: Research Dunn [sic] Mansion property records and M. Cornelious" and assert that an award of fees for those efforts is an abuse of discretion. (A. 61). The

Dunne Mansion is the property purchased through Kiev. (Findings of Fact 12, 13, 14, 15; A. 3). This obviously was the subject of the litigation. (Id.)

Appellants complain that certain entries are ambiguous. For example, Appellants complain about the July 9, 2010 entry contained on the July 31, 2010 invoice for 4.60 hours to “Attend Trial: Research issues.” (Appellants’ Brief, p. 10; A. 69). It is difficult to understand Appellants’ assertion. The trial court was obviously present at trial and knew the length of the trial day. Jackson need not present the exact details of the legal research that was conducted that day for the attorneys’ fees to be properly awarded by the trial court.

It is not unreasonable for an attorney to bill .70 for receiving and reviewing the trial court’s Findings of Fact and Conclusions of Law issued on October 22, 2010 and discussing it with the client, as Appellants contest on page 10 of their Appellants’ brief. (A. 72). And it certainly is not unreasonable to bill .50, which totals \$100, on April 1, 2008 while discovery is in progress. (A. 80-83). The award of such fees was not an abuse of discretion.

As to the mediation costs, the trial court is accorded broad discretion in awarding expenses of litigation to the prevailing party, which is not to be disturbed on appeal. Cheyenne Land Co. v. Wilde, 463 N.W.2d 539, 540 (Minn. Ct. App. 1990). There is no record developed by the Appellants as to the mediation fee, as argued at page 11 of their brief, that would support reversal. Therefore, this Court must affirm. Friend v. Gopher Co., 2010 WL 3547021 at *6 (Minn. Ct. App. 2010) (R.A. 51).

D. Fee Award in Accord With the November 23, 2010 Judgment.

Appellants claim the attorneys' fees go beyond that authorized by the trial court's November 23 Judgment. (Appellants' Brief, pp. 7-11). Appellants, in essence, assert that Jackson's Third-Party Complaint against Hertz is not "defending against Plaintiffs and Third-Party Defendants' claims." But as the record reflects, that is not true. As Hertz asserted and the Third-Party Complaint reiterates, the only members of the LLCs were Hertz and Jackson. (Complaint ¶ 9 at R.A. 10; Answer ¶ 4 at R.A. 13; Third-Party Complaint ¶ 26 at R.A. 28).

The problem was the LLCs did not assert any action against Hertz, but only sought reimbursement/contribution from Jackson, even though it was Hertz who had been the beneficiary of and/or had conducted the wrongful actions. The trial court, in fact, concluded Hertz had made illegal distributions from Cascade Springs to Kiev and ordered Hertz to reimburse Cascade Springs. (A. 6). He was also found to have violated duties he owed under Minnesota law as a member. (A. 5).

Necessarily, in order to defend against the LLC represented by Hertz's Complaint, Jackson needed to make Hertz a party to the case. That is why he brought the Third-Party Complaint. Jackson specifically filed a Third-Party Complaint against Hertz in order to defend himself against the claims of the LLCs through Hertz, as the Third-Party Complaint on its face makes clear. (R.A. 26-28, 30). Hertz then counterclaimed against Jackson's Third-Party Complaint against him. (R.A. 35). All of the fees requested and awarded are in accord with the trial court's grant of attorneys' fees.

III. APPELLANT DOES NOT CHALLENGE ON APPEAL THE AMOUNT OF INTEREST AWARDED.

Having failed to timely appeal the November 23, 2010 Judgment awarding interest, the only issue that could be raised on appeal with regard to interest is the amount of interest awarded. Appellants, however, do not challenge the amount of interest awarded on appeal. Such issue, if it had been raised, would be reviewed for an abuse of discretion. McKay's Family Dodge v. Hardrives, Inc., 480 N.W.2d 141, 148 (Minn. Ct. App. 1992), *rev. denied*; In re Estate of Renczykowski, 409 N.W.2d 888, 892 (Minn. Ct. App. 1987). But since it was not raised or argued in their Appellants' Brief, that issue is waived and cannot be revived in their reply brief. McIntire v. State, 458 N.W.2d 714, 717 n. 2 (Minn. Ct. App. 1990), *rev. denied*; see also Minn. R. Civ. App. P. 128.02, subd. 4.

Moreover, at no time did the Appellants contest before the trial court Jackson's calculation of interest owed. Accordingly, such challenge cannot be heard on appeal. Morton, 223 N.W. at 771.

IV. ISSUES RAISED BY APPELLANTS BUT NOT WITHIN THIS COURT'S SCOPE OF REVIEW ARE WITHOUT MERIT.

As previously stated, Appellants have raised issues outside this Court's scope of review of the December 21, 2010 Judgment. Jackson respectfully requests that these issues not be addressed.

If, however, this Court should decide to address those issues, they are all without merit.

A. There Was No Stipulation That the Parties Could Not Seek and Be Awarded Attorneys' Fees and Interest.

As this Court ruled, the attorneys' fees awarded here pursuant to statute are analogous to costs and disbursements. (R.A. 3). There was no stipulation that the parties could not seek attorneys' fees or interest, as Appellants contend. The post-trial submissions show Appellants' assertion has no record basis. (See discussion in Respondents' Brief at pages 7-9, *supra*). Appellants' argument is demonstrably contrary to the record.⁷

It is elementary that the party seeking review has the duty to see that the appellate court is presented with a record which is sufficient to show the alleged errors and all matters necessary for consideration of the question presented. Truesdale v. Friedman, 267 Minn. 402, 127 N.W.2d 277, 279 (1964). Since Appellants did not order the entire transcript, there is no ability for this Court to conclude anything other than there was no stipulation.

⁷ Although unclear from Appellants' Brief, Appellants appear to assert the issue of breach of fiduciary duty and failure to follow corporate formalities was not before the trial court. Again, such issue cannot be raised on appeal from the December 21, 2010 judgment. Such assertion is contrary to the record as set out in the post-trial briefing.

B. Appellants' Assertion as to When Prejudgment Interest Can Be Awarded Is Contrary to Law.

Appellants assert that prejudgment interest cannot be awarded in the case of unliquidated damages. That is an incorrect statement of the law. In 1984, Minn. Stat. § 549.09 was amended to allow prejudgment interest regardless of the ability to ascertain the amount of damages. Interest accrues from the time the action is commenced, demand for arbitration is made or written notice of claim is made, whichever occurs first. Lienhard v. State, 431 N.W.2d 861, 865 (Minn. 1988); Duxbury v. Spex Feeds, Inc., 681 N.W.2d 380, 391 (Minn. Ct. App. 2004), *rev. denied*. Here, interest was awarded commencing at the filing of Jackson's Third-Party Complaint. (A. 13, 50).

Under Minnesota law, the trial court has broad authority to order interest if the equities so require. Minn. Stat. § 322B.833; see Estate of Renczykowski, 409 N.W.2d at 892 (so allowing in partnership situation). (Conclusion of Law 4; A. 5). There is no challenge on appeal to the interest as calculated from October 1, 2007 at 6% simple interest, as set forth in Minn. Stat. § 334.01. (A. 51). Summit Court, Inc. v. N. States Power Co., 382 N.W.2d 560, 562 (Minn. Ct. App. 1986).

C. The Attorneys' Fees Are Authorized by Statute.

The trial court, in granting Jackson attorneys' fees, acknowledged the fee request was pursuant to Minn. Stat. § 322B.38 and § 322B.833(7). (A. 11). Appellants do not challenge an award under § 322B.833(7). Even if this issue were properly before the

Court, Appellants have waived any challenge by not addressing § 322B.833(7) in their Appellants' Brief. McIntire, 458 N.W.2d at 717 n. 2.

Appellants only assert that fees cannot be awarded under Minn. Stat. § 322B.38. (Appellants' Brief, p. 8). Minn. Stat. § 322B.38, entitled "Equitable Remedies," states:

If 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.

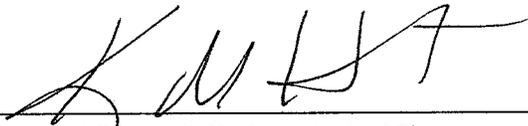
The LLCs through Hertz's Complaint is stated to be brought by a member – i.e., Hertz. (R.A. 8). And Jackson, in responding to that action, asserted in his Answer, his Counterclaim and his Third-Party Complaint that he was doing so as a member. See Answer ¶ 5 at R.A. 13; Counterclaim ¶ 2 at R.A. 15; and Third-Party Complaint ¶¶ 4, 20, 26, 29, 31 at R.A. 24, 27-29, which are incorporated into each count of the Third-Party Complaint. (R.A. 29, 30, 31, 32). Therein Jackson asserted Hertz, as a member, had violated Chapter 322B in numerous respects, and the trial court so found. (A. 4-5; see also A. 7, 10-11). And regardless of whether Hertz wrongfully failed to assign Holien's membership interest to Jackson, Jackson and Hertz were both members of Cascade Springs, LLC and 500 Club, LLC. There is no legal or factual basis for Appellants' contention that fees could not be awarded pursuant to Minn. Stat. § 322B.38.

CONCLUSION

Respondent Jackson respectfully requests the trial court be affirmed. Respondent Jackson will seek his attorneys' fees in responding to this appeal in accord with Minn. R. Civ. App. P. 139.

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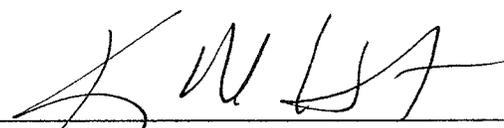
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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font. The length of this brief is 6,479 words. This brief was prepared using Word Perfect 10.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

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