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# Henderson v. Henderson Inv. Properties, L.L.C. Appellant's Brief Dckt. 35138

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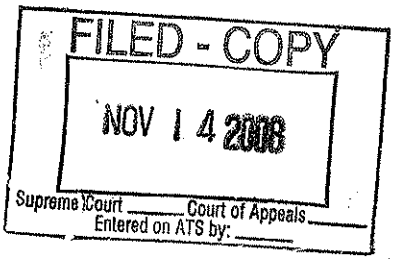
**IN THE SUPREME COURT OF THE STATE OF IDAHO**

| | |
|---|---|
| RALPH J. HENDERSON, an individual,<br><br>Appellant,<br><br>vs.<br><br>HENDERSON INVESTMENT PROPERTIES, L.L.C., an Idaho Limited Liability Company, ROGER E. HENDERSON, an individual, and LISA A. HENDERSON, an individual,<br><br>Respondents. | Supreme Court<br>Docket No. 35138 |




# APPELLANT'S BRIEF

Appeal from the Sixth Judicial District Court

Bannock County, Idaho

Honorable Ronald E. Bush, District Judge

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### NATURE OF THE CASE

This action commenced upon Appellant's filing a Complaint for Judicial Dissolution on July 27, 2005 ("Dissolution Complaint"). Appellant's Complaint sought judicial dissolution under Idaho Code (I.C.) § 53-643, and a decree dissolving Henderson Investment Properties ("HIP"). HIP is an Idaho limited liability company in which Appellant is a member. The Respondents, Roger and Lisa Henderson, are also members of HIP.

Following a court trial, the trial judge found that Appellant established only one of two elements required for judicial dissolution under I.C. § 53-643. Specifically, the Court found that the parties were deadlocked in the management of HIP's affairs, but that Appellant failed to show irreparable injury to HIP as a result of the deadlock. The Court subsequently dismissed another action filed by Appellant against the Respondents which had been consolidated into the action for dissolution.

The Respondents moved for an award of costs and fees incurred by them. Respondents contended they were entitled to such an award on three grounds: (1) I.C. § 12-120, (2) I.C. § 12-121, and (3) a provision for costs and attorney fees contained in the Operating Agreement for HIP.

The trial court denied Respondents' motion for costs and fees under I.C. § 12-120 or § 12-121. However, the Court awarded costs and fees to Respondents pursuant to a provision in the HIP Operating Agreement. Appellant argues the trial court erred in awarding costs and fees, because the provision of the HIP Operating Agreement upon which the trial court relied does not apply under the circumstances of this case.

## COURSE OF PROCEEDINGS

Ralph Henderson filed the Dissolution Complaint on July 27, 2005. R. pp. 1-5. Count I of the Dissolution Complaint sought judicial dissolution under I.C. § 53-643(1)(a). R. 4. Count II sought judicial dissolution under I.C. § 53-643(1)(b). R. p. 4.

Respondents' Answer was filed August 26, 2005. R. pp. 6-9. The Answer asserted three affirmative defenses. The First Affirmative Defense alleged the Dissolution Complaint failed to state a claim upon which relief could be granted. R. p. 8. The Second Affirmative Defense claimed that certain promises or agreements "alleged by the Plaintiff [Ralph] to have been made by the Defendants [Roger and Lisa], which is not in writing or contained in the parties' Operating Agreement as amended, is unenforceable...." R. p. 8. The Third Affirmative Defense was based on waiver and/or equitable estoppel. R. p. 8.

Thereafter, Ralph filed a Complaint for Declaratory Judgment on April 10, 2007 ("Declaratory Complaint"). R. pp. 48-70. This action sought a declaratory judgment that Roger and Lisa were dissociated from HIP under I.C. § 53-641(1)(e), on the grounds that more than 120 days had elapsed from the filing of the action for judicial dissolution. R. p. 51.

By Minute Entry & Order, filed May 21, 2007, Ralph's suit for judicial dissolution and his suit for declaratory judgment were consolidated. R. pp. 125-126. This action was taken *sua sponte* by the Court pursuant to Idaho Rule of Civil Procedure (I.R.C.P.) 42(a). R. p. 126.

Trial on the Dissolution Complaint was held June 6-8, 2007. R. pp. 127-129. Thereafter, the Court took the matter under advisement. R. p. 129.

In its Memorandum Decision, Findings of Fact and Conclusions of Law, filed August 2, 2007, the Court refused judicial dissolution, holding that Ralph had failed to show "actual or

threatened irreparable injury" as a result of the deadlock or "illegal, oppressive or fraudulent acts" by the Respondents as managers of HIP. R. p. 140.

Subsequently, the Court dismissed the action for declaratory judgment under I.R.C.P. 12(b)(6). R. pp. 169-170.

The Court then issued a Memorandum Decision and Order on Motion for Fees and Costs on February 12, 2008. R. pp. 175-187. In that decision, the Court determined Respondents were not entitled to attorney fees and court costs under I.C. §§ 12-120 or 12-121; however, the Court did award the Respondents fees and costs based upon a certain provision in the HIP Operating Agreement. Following judgment on the February 12, 2008 decision, this appeal was filed on March 21, 2008. R. pp. 190-194.

## STATEMENT OF FACTS

This litigation stems from a family business endeavor that went sour. The persons involved were Appellant, Ralph J. Henderson ("Ralph"), his late wife, Lena R. Henderson ("Lena"), and the Respondents, Roger E. Henderson ("Roger") and Roger's wife, Lisa A. Henderson ("Lisa"). Roger is the son of Ralph and Lena.

On or about September 27, 2000, Ralph, Roger, Lisa and Lena formed Henderson Investment Properties, L.L.C. ("HIP"). R. p. 2. The Operating Agreement for Henderson Investment Properties, L.L.C. ("Operating Agreement"), was signed on that same date. R. pp. 54, 63. Included in the Operating Agreement were an "Appendix A," which contained definitions applicable to the Operating Agreement (R. pp. 64-65), Schedule I – List of Members (R. p. 66), and Schedule II – Membership Interests (R. p. 67).

According to the Operating Agreement, HIP was formed in order to operate a Jimmy John's Gourmet Sandwich Shop in Pocatello, Idaho. *See* Operating Agreement at 2, ¶ III-A (R. p. 55). According to the Operating Agreement, Ralph, Lena, Roger and Lisa made initial capital contributions to HIP in the amount of $33,000.00 each, giving each individual a 25% membership interest in HIP. *See* Operating Agreement at 2 ¶ IV-A (R. p. 55) and Schedule II (R. p. 67). However, Ralph contended that Roger and Lisa made no such initial capital contributions to HIP. *See* Dissolution Complaint at 2 ¶ 11 (R. p. 2).

Before the first year of operations for HIP, Lena passed away on August 28, 2001. Dissolution Complaint at 2 ¶ 12 (R. p. 2). In January of 2002, Ralph, Roger and Lisa amended the Operating Agreement whereby Ralph was assigned Lena's membership interest in HIP, resulting in Ralph owning a 50% interest in the company. Dissolution Complaint at 2 ¶ 13 (R. p. 2).

During the course of HIP's business operations, Ralph, Roger and Lisa became deadlocked about Roger and Lisa's management of HIP. Dissolution Complaint at 3 ¶ 19 (R. p. 3).

On July 27, 2005, Ralph commenced this litigation by filing the Dissolution Complaint. R. p. 1. The Dissolution Complaint sought judicial dissolution of HIP on two grounds.

First, Ralph contended that HIP's members were "deadlocked in the management of HIP's affairs, and because no member [held] a majority of the membership interests, no member of HIP [could] resolve the deadlock without the cooperation of the other two members." Dissolution Complaint at 4 ¶ 28 (R. p. 4). Ralph further alleged that, as a result, HIP suffered or would suffer irreparable harm. Dissolution Complaint at 4 ¶ 29 (R. p. 4). *See generally* I.C. § 53-643(1)(a).

Second, Ralph asserted that "Roger and/or Lisa, managers of HIP, have misappropriated HIP assets for personal use," that these illegal, oppressive or fraudulent acts directly contravened the

Operating Agreement, and that as a result, HIP had or would suffer irreparable injury. Dissolution Complaint at 4 ¶¶ 31-32 (R. p. 4). *See generally* I.C. § 53-643(1)(b).

The Defendants served an Answer on August 26, 2005 ("Answer"). R. pp. 6-9. In their Answer, Roger and Lisa admitted the Operating Agreement was executed. Answer at 2 ¶ 3 (R. p. 7). Their Answer generally denied the allegations that formed the basis for Ralph's judicial dissolution claims. Answer at 2 ¶ 6 (R. p. 7).

Respondents' Answer also asserted three affirmative defenses. The First Affirmative Defense alleged the Dissolution Complaint failed to state a claim upon which relief could be granted. Answer at 3 (R. p. 8). The Second Affirmative Defense invoked the statute of frauds as to alleged oral or other agreements not contained in the HIP Operating Agreement. Answer at 3 (R. p. 8). The Third Affirmative Defense cited waiver and estoppel. Answer at 3 (R. p. 8).

On April 10, 2007, Ralph commenced another lawsuit against HIP, Roger and Lisa by filing the Declaratory Complaint. The Declaratory Complaint sought a judgment that Roger and Lisa were dissociated from HIP by virtue of I.C. § 53-641(1)(e), because more than 120 days had elapsed from the filing of the earlier action for judicial dissolution. Declaratory Complaint at 4 ¶¶ 18-21 (R. p. 51).

Trial on the Dissolution Complaint was held June 6-8, 2007. R. pp. 127-129. The Court took the matter under advisement. R. p. 129.

On August 2, 2007, the Court issued its Memorandum Decision, Findings of Fact and Conclusions of Law. R. pp. 134-155. The Court refused judicial dissolution, finding that, while the evidence established deadlock in the management of HIP, the evidence failed to show (1) "actual or threatened irreparable injury" resulting from the deadlock, or (2) "illegal, oppressive or fraudulent

acts on the part of Roger and Lisa, as managers of the company." R. p. 140. The Court acknowledged the evidence presented at trial by Ralph, which showed violations of the HIP Operating Agreement, was offered to show irreparable injury to HIP. R. p. 140. The Court agreed the HIP Operating Agreement had been violated, but not to the irreparable harm of HIP. R. pp. 140-141.

As for the Declaratory Complaint, the Court granted Respondents' motion to dismiss pursuant to I.R.C.P. 12(b)(6). R. pp. 169-170.

On February 12, 2008, the Court filed its Memorandum Decision and Order on Motion for Fees and Costs. R. pp. 175-187. The Court ruled Roger and Lisa were not entitled to attorney fees and court costs under I.C. § 12-120 or § 12-121. However, the Court awarded Roger and Lisa fees and costs based upon a provision in the HIP Operating Agreement. R. pp. 177-178. That provision read as follows:

> In any action or proceeding brought to enforce any provision of this Agreement, or where any provision is validly asserted as a defense, the successful party is entitled to recover reasonable attorneys' fees in addition to any other available remedy.

Operating Agreement for Henderson Investment Properties, L.L.C., at 9 ¶ XIV(G), R. p. 62. Based on this provision, the Court also awarded Roger and Lisa fees and costs incurred in defending the Declaratory Complaint. R. p. 184.

The Judgment Awarding Costs and Attorney Fees to Defendants Roger and Lisa Henderson was filed on February 15, 2008. R. pp. 188-189. This appeal followed. R. p. 190-194.

## ISSUE PRESENTED ON APPEAL

Did the trial court err in awarding Respondents their attorney fees under the Operating Agreement for Henderson Investment Properties, L.L.C.?

## LEGAL ARGUMENT

### I.

### STANDARD OF REVIEW

An award of attorney fees in a civil action is discretionary and thus reviewed for an abuse of discretion. *Mihalka v. Shepherd*, 145 Idaho 547, 549, 181 P.3d 473, 475 (2008). In reviewing a trial court's exercise of discretion, an appellate court uses a three-step analysis: (1) whether the trial judge properly perceived the issue as a discretionary one, (2) whether the judge acted within the boundaries of that discretion and consistently with legal standards applicable to specific choices available, and (3) whether the decision was reached by an exercise of reason. *Lee v. Nickerson*, 146 Idaho 5, 10, 189 P.3d 467, 472 (2008).

### II.

### THE TRIAL COURT ERRED IN AWARDING RESPONDENTS THEIR ATTORNEY FEES.

A court may award reasonable attorney fees to a prevailing party when allowed by statute or contract. I.R.C.P. 54(e)(1). Thus, Idaho adheres to the "American Rule" which requires a party to bear its own attorney fees unless a contract or statute provides otherwise. *Rohr v. Rohr,* 128 Idaho 137, 143, 911 P.2d 133, 139 (1996). Accordingly, attorney fees may be awarded to the prevailing party only when provided for by statute or contract. *Ervin Construction Co. v. Van Orden*, 125 Idaho 695, 704, 874 P.2d 506, 515 (1993); *Burns v. County of Boundary*, 120 Idaho 623, 626, 818 P.2d

327, 330 (Ct. App. 1990), *aff'd*, 120 Idaho 614, 818 P.2d 318 (1991). In this case, there is no basis, in court rules or Idaho statute, for an award of attorney fees to the Respondents.

### A. The trial court correctly ruled Respondents were not entitled to attorney fees under I.C. § 12-120(3).

Citing *Kelly v. Silverwood Estates*, 127 Idaho 624, 903 P.3d 1321 (1995), the trial court concluded an action for judicial dissolution was not grounded in a commercial transaction sufficient to invoke I.C. § 12-120(3). R. p. 179. The *Kelly* case involved dissolution of a partnership. *Kelly*, 127 Idaho at 627, 903 P.2d at 1324. The instant case was one for dissolution of a limited liability company. As the Supreme Court held in *Kelly*, if the gravamen of the action is "to enforce a statutory scheme of dissolution," I.C. § 12-120(3) does not apply. *Kelly*, 127 Idaho at 631, 903 P.2d at 1328. Because the case at bar was to enforce the dissolution provisions of the Idaho Limited Liability Company Act, the trial court was correct in declining to award attorney fees under I.C. § 12-120(3).

### B. The trial court correctly ruled Respondents were not entitled to attorney fees under I.C. § 12-121.

The Court found this "case involved many subjects of disputed facts and some areas of unusual legal issues," and characterized its decisions on those issues as "close ones." R. p. 179. Having so found, the Court was correct in holding that Respondents were not entitled to attorney fees under I.C. § 12-121.

### C. The trial court erred in awarding Respondents their attorney fees under the terms of the HIP Operating Agreement.

The HIP Operating Agreement provided as follows:

> In any action or proceeding brought to enforce any provision of this Agreement, or where any provision is validly asserted as a defense, the successful party is entitled to recover reasonable attorneys' fees in addition to any other available remedy.

Operating Agreement for Henderson Investment Properties, L.L.C., at 9 ¶ XIV(G), R. p. 62. In awarding Respondents their attorney fees under this provision, the Court concluded that "Ralph sought to enforce a variety of Operating Agreement provisions, for the purpose of obtaining dissolution of the business entity, and he was unsuccessful in that pursuit." R. p. 178.

However, the Court was erroneous in this regard. The provision at issue does not apply for at least two reasons. First, the actions for judicial dissolution and declaratory judgment were not instituted to enforce any provision of the HIP Operating Agreement. Second, the Respondents never asserted a provision of the HIP Operating Agreement as a defense to either action brought by Ralph.

### 1. *Neither of the lawsuits instituted by Ralph were brought to* enforce any provision of the HIP Operating Agreement.

As noted, the first action filed by Ralph sought judicial dissolution of HIP. R. pp. 1-5. Obviously, an action for judicial dissolution of a limited liability company does not seek enforcement of the operating agreement for the limited liability company; rather, it seeks to dissolve the limited liability company itself. If a court grants the relief requested, the operating agreement is rendered *meaningless* – a document which governed a limited liability company that no longer exists. Thus, a dissolution action is anything but an effort to enforce an operating agreement. The desired result will render the operating agreement moot.

The court itself acknowledged that evidence offered at trial by Ralph, showing violations of the Operating Agreement for HIP, were offered to show irreparable injury to HIP – an element of judicial dissolution. R. p. 140. The Court conceded the evidence of violations was offered "as the basis for seeking judicial resolution...." R. p. 178. However, the Court then concluded that "Ralph sought to ***enforce*** a variety of Operating Agreement provisions, for the purpose of obtaining dissolution of the business entity, and he was unsuccessful in that pursuit." R. p. 178 (emphasis added). Clearly, the Court did not reach this conclusion by an exercise of reason, because this

rationale is internally inconsistent. One does not obtain judicial dissolution of a limited liability company by enforcing an operating agreement. Judicial dissolution will render the operating agreement of no effect.

The second action brought by Ralph sought declaratory relief under the Idaho Limited Liability Company Act, not the HIP Operating Agreement. R. pp. 50-51. Again, this was not an effort to enforce any provision of the HIP Operating Agreement. Indeed, Ralph was able to bring the action only because no provision of the HIP Operating Agreement precluded him from doing so. Declaratory Complaint at 4 ¶¶ 20-21 (R. p. 51).

Accordingly, neither of the actions brought by Ralph sought enforcement of any provision of the HIP Operating Agreement. Therefore, the attorney fee provision in the HIP Operating Agreement did not apply to either action. Thus, the Court erred in awarding fees under that provision.

**2. Roger and Lisa did not validly assert any provision of the HIP Operating Agreement as a defense.**

In defending both actions brought by Ralph, Roger and Lisa did not invoke any provision of the HIP Operating Agreement as a defense. In the dissolution action, Roger and Lisa pled the following as affirmative defenses: (1) failure to state a claim upon which relief can be granted, (2) statute of frauds, and (3) waiver and estoppel. R. p. 8. In the action for declaratory judgment, Roger and Lisa never filed an answer, but successfully moved for dismissal under I.R.C.P. 12(b)(6). R. pp. 169-170. Thus, Roger and Lisa did not rely on any provision of the HIP Operating Agreement in defending either action.

**3. The Court erred in ruling that the attorney fee provision of the HIP Operating Agreement applied in this case.**

The attorney fee provision of the HIP Operating Agreement applies in either of two instances:

(1) where the action is brought to enforce any provision of the HIP Operating Agreement or (2) where any provision of the HIP Operating Agreement is validly asserted as a defense. Operating Agreement for Henderson Investment Properties, L.L.C., at IX ¶ 14(G), R. p. 62. As shown above, neither situation applies to this case. Consequently, the Court erred in ruling the attorney fee provision applied. If "specific enforcement" of the terms of the operating agreement is not the basis of the suit, such an attorney fee provision will not apply. *Lane Ranch Partnership v. City of Sun Valley*, 144 Idaho 584, 591-92, 166 P.3d 374, 381-82 (2007). The Court reasoned that "[b]ut for the contract in the form of the Operating Agreement, there would have been no reason nor opportunity for Ralph to bring a lawsuit...." R. p. 178. However, the mere existence of the agreement does not entitle Roger and Lisa to attorney fees where the lawsuit was not brought to ***enforce*** the agreement. *Mannos v. Moss*, 143 Idaho 927, 937, 155 P.3d 1166, 1176 (2007).

## CONCLUSION

In awarding attorney fees to Respondents, the trial court abused its discretion. First of all, the Court acted beyond its discretion in applying the attorney fee provision of the HIP Operating Agreement to a case where it was clearly not applicable. Neither lawsuit was brought to enforce any provision of the operating agreement. Second, the trial court did not exercise reason in determining to apply the attorney fee provision. After conceding that the lawsuits were attempts to obtain dissolution of the limited liability company, the court then characterized the lawsuits as actions to ***enforce*** provisions of the operating agreement. Again, this exceeded the bounds of the discretion available to the court, given the plain terms of the provision at issue. Accordingly, the Appellant requests this Court to reverse the district court in its award of attorney fees to the Respondents.

RESPECTFULLY SUBMITTED this 12th day of November, 2008.

NORMAN G. REECE, P.C.

By Norman G. Reece, Jr.
Norman G. Reece, Jr., Attorney for Appellant