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Johnson v. Crossett Appellant's Reply Brief Dckt. 44791

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IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVID JOHNSON, an individual, and TESSA COUSINS, an individual,

Plaintiffs-Appellants

v.

DAVID CROSSETT, an individual

Defendant-Respondent

Supreme Court No. 44791.

And

SCOTT H. LEE, an individual, DRUG TESTING COMPLIANCE GROUP, LLC, an Idaho limited liability company, VURV, LLC, an Idaho limited liability company, BO W. and KRYSTAL SCHMELLING, a married couple,

Defendants.

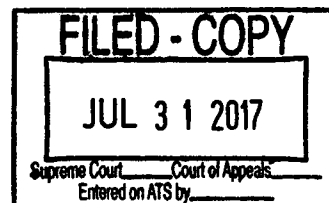
REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County.

HONORABLE D. DUFF MCKEE, District Judge presiding.

JAMES F. JACOBSON
Residing at Boise, Idaho, for Appellant

MICHELLE R. POINTS
Residing at Boise, Idaho, for Respondent.



IN THE SUPREME COURT OF THE STATE OF IDAHO

DAVID JOHNSON, and individual, and
TESSA COUSINS, an individual,

Plaintiffs-Appellants,

vs.

DAVID CROSSETT, an individual,

Defendant-Respondent,

and

SCOTT H. LEE, , an individual, DRUG
TESTING COMPLIANCE GROUP, LLC,
an Idaho limited liability company, VURV,
LLC, an Idaho limited liability company,
BO W. and KRYSTAL SCHMELLING, a
married couple,

Defendants.

Supreme Court Case No. 44791

ADA COUNTY CASE NO. CV 0C 1513887

REPLY BRIEF

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COMES NOW Plaintiffs, by and through their attorney of record, Jacobson & Jacobson, PLLC, and hereby submits Reply Brief.¹

I.

INTRODUCTION

Defendant Crossett's arguments surrounding the issues of this case brought up on appeal, are (1) consistently contradictory and conclusory, and (2) fail to apply the appropriate legal standard, whether statutory or case law based, to the facts of this case. As such, he has failed to show that the District Court (1) correctly applied the facts of this case to the appropriate legal standards, (2) did not commit multiple prejudicial errors in law as outlined in Appellants' Brief, (3) did not abuse its discretion in denying Plaintiffs' motion for new trial due to said prejudicial errors as outlined in Appellants' Brief, and (4) did not err in granting Defendant Crossett attorney's fees under Idaho Code Section 12-120(3) as outlined in Appellants' Brief. Therefore, Plaintiffs respectfully request this Court reverse (1) the district court's denial of Plaintiffs' motion for new trial and (2) the district court's award of attorney's fees to Defendant Crossett, and remand this action to the district court for further proceedings consistent therewith.

II.

ARGUMENT

A. Defendant Crossett's arguments regarding the District Court's treatment of his admission and its denial of the motion for new trial are contradictory and conclusory.

¹ As Plaintiffs do not provide any new authorities in this brief in addition those listed in Table of Cases and Authorities submitted with their Appellants' Brief, Plaintiffs do not provide a list of cases and authorities in this brief. For a fully detailed list of cases and authorities that support Plaintiffs' arguments, please refer to the Table of Cases and authorities submitted as part of the Appellants' Brief.

Defendant Crossett's arguments surrounding his admission and the denial of the motion for new trial are consistently contradictory and conclusory. Defendant Crossett's erroneously argues (1) that an oral agreement existed between the parties that signing the written operating agreement was a condition precedent to membership in DTC Group, and (2) that DTC Group was a single-member LLC with Defendant Crossett as its sole member.

Initially, Defendant Crossett argues that the District Court's treatment of his admission in the pleadings was not erroneous because Plaintiffs failed to satisfy a condition precedent to becoming a member—that is signing the drafted, written operating agreement. *See* Respondent's Brief, p. 6-7. However, this argument raises multiple problems for Defendant Crossett.

First, Defendant Crossett fails to provide any evidence that any such condition precedent ever existed. There is no qualification in Defendant's admission in his pleading and no evidence in the record of any oral agreement with a condition precedent. Yet, throughout his brief, Defendant Crossett refers to this alleged condition precedent. *See* Respondent's Brief, p. 8, 11-12. This argument seems to be an attempt to explain the District Court's finding that the simple drafting of the proposed written operating agreement superseded any previous oral agreements between the parties. (*See* R000081-000083). But, rather than make an effort to show why the District Court's finding was correct through evidence in the record or through statutory or case law, Defendant Crossett simply presumes that the District Court's findings was correct. Such an argument is conclusory and not based on any facts or evidence.

Furthermore, this argument is contradictory as Defendant Crossett himself did not sign the written operating agreement, and therefore also did not satisfy this claimed condition precedent. Defendant Crossett alleges that “[Plaintiff] Johnson and [Defendant] Crossett formed

DTC Group, and orally agreed that becoming a member in DTC was contingent upon signing a written operating agreement.” Respondent’s Brief, p. 8. Yet, Defendant Crossett did not sign the written operating agreement himself. It seems disingenuous that, on the one hand, Defendant Crossett argues that an alleged oral agreement between the parties required signing the written operating agreement as a condition precedent to becoming a member of DTC Group, and then claim to be a member when he failed to satisfy this alleged condition precedent. Carried to its logical conclusion, Defendant Crossett’s argument that the written operating agreement had to be signed for any person to become a member of DTC Group means that DTC Group was an LLC with no members.

Next, Defendant Crossett claims that Plaintiffs were not members of DTC Group as it was a single-member LLC from its inception, and therefore the District Court did not err in either ignoring Defendant Crossett’s admission nor in its denial of Plaintiffs’ motion for a new trial. However, Defendant Crossett again fails to provide any evidence, either in the record or in the law, to support his conclusion beyond conclusory statements in the District Court’s Findings of Fact and Conclusions of Law. Again, rather than make an effort to show why the District Court’s finding was correct through evidence in the record or through statutory or case law, Defendant Crossett simply presumes that the District Court’s findings was correct. On the other hand, Plaintiffs’ brief provides ample evidence, in both the record and that law, that DTC Group was never a single-member LLC and that Plaintiffs were members from the inception of DTC Group. *See Generally* Appellant’s Brief. Like Defendant Crossett’s previous argument discussed above, such an argument is conclusory and not based on any facts or evidence.

Furthermore, this argument contradicts other statements Defendant Crossett makes in his brief. First, it is contradictory to argue that DTC Group was a single-member LLC on the one hand, and then later claim that Defendant Crossett “was to receive a guaranteed distribution of \$60,000 to \$65,000 per year.” Respondent’s Brief, p. 14. If DTC Group is, and always was a single-member LLC, there would be no need for an agreement that Defendant Crossett would receive a guaranteed distribution each year. The fact that there was a “guaranteed distribution” agreed upon for Defendant Crossett presupposes that other members of DTC Group were also owed a distribution. And, as only members can receive a distribution (*See* I.C. §§ 30-25-102(3), 30-25-102(11)), it also presupposes that there are more members besides Defendant Crossett. Therefore, it is contradictory to argue, on the one hand, that DTC was a single-member LLC with Defendant Crossett as the only member, and then later argue that there was an agreement that Defendant Crossett would receive a guaranteed distribution each year.

This argument also contradicts Defendant Crossett’s reasoning behind his admission in the pleadings. Defendant Crossett claims that it is “untenable” and “frivolous” to argue that “if [Defendant Crossett] really thought he was the only member then he could only *deny*” the allegation in the pleadings. Respondent’s Brief, p. 8. However, it stands to reason that, if Defendant Crossett truly believed, as he so vigorously argues in his brief, that he was the only member of DTC Group from its inception and continued to be its only member throughout its history up until its dissolution, he would clarify that he is “the” member of DTC Group, not just “a” member. As such, it is neither untenable nor frivolous for Plaintiffs to make such a claim, especially when one considers the law surrounding admissions in pleadings. *See Knowles v. New Sweden Irrigation Dist.*, 16 Idaho 217, 229, 101 P. 81, 85-86 (1908), reversed on other grounds,

Knowles v. New Sweden Irrigation Dist., 16 Idaho 235, 101 P. 81 (1909) (“Admissions made in a pleading are denominated solemn admissions and are not required to be supported by evidence on the part of the adverse party. Such admissions are taken as true against the party making them, without further proof or controversy.”).

B. Defendant Crossett’s arguments fail to apply both statutory and case law standards in his arguments.²

Like the District Court in its ruling, Defendant Crossett fails to appropriately apply the statutory and case law standards surrounding the issues in this case. First, Defendant Crossett argues that the District Court did not err in its treatment of his admission in the pleadings because “[t]here is a difference in a group of people forming a company and becoming a member of a limited liability company.” Respondent’s Brief, p. 7. However, this ignores the clear standard set by the legislature in Idaho Code Sections 30-25-401 and 30-25-102(a)(9). *See* I.C. § 30-25-401 (stating that founders “become members as agreed by the persons before the formation of the company” and that organizers, like Defendant Crossett, act on behalf of the founders.); I.C. § 30-25-102(a)(9), cmt. (showing that when founders agree to join their activities by the formation of an LLC, they become the initial members of the LLC “without further ado or agreement.”; Appellants’ Brief, pp. 15-16. Defendant Crossett cites to no law or legal standard which supports his assertion. In contrast, Plaintiffs provide ample law to support their assertion that, as founders, they were the initial members pursuant to an oral operating agreement and that

² The purpose of this section, and of this brief in general, is to point out the flaws in Defendant Crossett’s arguments. It is not to simply rehash the law and arguments Plaintiffs outlined in detail in the Appellants’ Brief. Plaintiffs believe that the arguments and legal standards in the Appellant’s Brief speak for themselves and that a full restatement of the law in this section would be a waste of this Court’s time. Therefore, Plaintiffs’ statements of the law in this section will be brief, and will refer summarily to the more detailed arguments set forth in the Appellants’ Brief.

the written operating agreement was meant to be an amendment to the oral operating agreement. *See* Appellant's Brief, pp. 15-19. However, the written agreement was never executed, and therefore cannot be applied to this case.

Next, Defendant Crossett argues that it is "untenable" and "frivolous" to argue that "if [Defendant Crossett] really thought he was the only member then he could only *deny*" the allegation in the pleadings. Respondent's Brief, p. 8. However, as discussed above, this is counter to the clear standard Idaho courts have set for the treatment of admissions in pleadings. Again, Defendant Crossett provides no legal support as to why his admission should be treated differently than how Idaho case law explains it should be treated, let alone any support for his claim that Plaintiffs' argument is "frivolous."

Defendant further argues that the Idaho Code does not apply to Plaintiffs because the District Court found that Plaintiffs were not members of DTC Group. Respondent's Brief, p. 9. This is a conclusory argument similar to Defendant Crossett's arguments discussed in the first section of this brief. Like the District Court, Defendant Crossett fails to apply the clear standards set forth in Title 30, Section 25 of the Idaho Code which exclusively details the treatment of limited liability companies in the law. *See* Appellants' Brief, pp. 15-19 (showing that proper application of the Idaho Code to the facts of this case establishes that the District Court committed prejudicial errors in law and abused its discretion).

Finally, Defendant Crossett argues that the District Court did not err in granting him attorney fees under Idaho Code Section 12-120(3) because Plaintiffs did not "get to" the statutory penalties as the District Court found that they were not members of DTC Group. Respondent's Brief, pp. 14-17. Defendant Crossett seems to believe that the standard for what

comprises a commercial transaction is based on the ruling and not what is the gravamen of the lawsuit. *See Id.* This is a clear misstatement of the legal standard for attorney fee actions brought under the commercial transaction clause of Idaho Code Section 12-120(3). The standard for such attorney fee actions is a determination of whether the commercial transaction comprises the *gravamen of the action*. *See Great Plains Equip., Inc. v. Nw. Pipeline Corp.*, 136 Idaho 466, 471, 36 P.3d 218, 223 (2001) (quoting *Bingham v. Montane Res. Assocs.*, 133 Idaho 420, 426, 987 P.2d 1035, 1041 (1999)); *Kelly v. Silverwood Estates*, 127 Idaho 624, 631, 903 P.2d 1321, 1328 (1995); *Gumprecht v. Doyle*, 128 Idaho 242, 245, 912 P.2d 610, 613 (1995).³ It is not whether the commercial transaction comprises the gravamen of the ruling or outcome of the case. As this action was brought to enforce statutory penalties, it is not considered a commercial transaction under Idaho Code Section 12-120(3). *See* Appellants' Brief, pp. 23-26. Like many of Defendant Crossett's other arguments, this one simply concludes that the District Court was correct without any effort to show why it was correct. And, like the District Court, Defendant Crossett failed to apply the appropriate legal standard to attorney fee actions brought under the commercial transaction clause of Idaho Code Section 12-120(3).

III.

CONCLUSION

Defendant Crossett's arguments in his Respondent's Brief are largely contradictory, conclusory, or fail to apply the appropriate legal standard to the issues in this case. In short, Defendant Crossett failed to establish that the District Court correctly applied the law to the facts

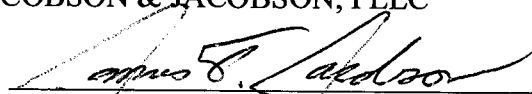
³ It is odd, considering the vast amount of case law establishing and defining this standard, that Defendant Crossett neither cites to any of the cases nor mentions this standard in his Respondent's Brief.

of this case with regards to the issues brought up in this appeal. Indeed, it is clear, as detailed in the Appellant's Brief, and based on application of the facts of this case to the appropriate legal standards, that the District Court (1) committed multiple prejudicial errors in law and abused its discretion by denying Plaintiffs' motion for new trial due to said prejudicial errors; and (2) erred in awarding attorney's fees to Defendant Crossett under Idaho Code Section 12-120(3). Therefore, Plaintiffs respectfully request this Court reverse (1) the district court's denial of Plaintiffs' motion for new trial and (2) the district court's award of attorney's fees to Defendant Crossett, and remand this action to the district court for further proceedings consistent therewith.

RESPECTFULLY SUBMITTED this 31st day of July, 2017

JACOBSON & JACOBSON, PLLC

By



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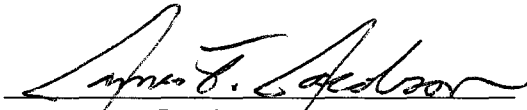
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 31st day of July, 2017, a true and correct copy of the foregoing document(s) was served upon:

Michelle R. Points
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DATED this 31st day of July, 2017.

By: 
James F. Jacobson