IN THE SUPREME COURT OF OHIO

VASILE BUNTA, Plaintiff-Appellee, vs. **FIRMAN D. MAST,** Defendant-Appellant.	Case No. 2021-0066 On Appeal from the Holmes County Court of Appeals, Fifth Appellate District Court of Appeals Case No. 20CA006

MERIT BRIEF OF APPELLANT FIRMAN D. MAST

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PRELIMINARY STATEMENT

Ohio law must clearly identify a manager's obligations when dissolving a limited liability company ("LLC"). After all, about 88% of all new business entities formed in Ohio are LLCs.[1] And about half of these businesses fail within five years of opening.[2]

Fortunately, there are "distinct legal principles" that govern the rights and obligations of managers and members in an LLC dissolution. The LLC's operating agreement, as well as Ohio's Limited Liability Company Act ("Act")[3] and the Ohio Revised Limited Liability Company Act[4], define these rights and obligations.

Here, the manager complied with the operating agreement and the Act when he satisfied the LLC's obligations to creditors at dissolution. In fact, the jury unanimously found that the defendant manager had the sole authority to manage, dissolve, and wind down the LLC and that he acted in good-faith in doing so.

But when the dissolving LLC's obligations to its creditors outweigh its assets, complying with the terms of the operating agreement and the dictates of the Act can lead to members who become disappointed when they do not receive payment for their

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[1] https://www.ohiobar.org/about-us/media-center/osba-news/OSBA-to-Modernize-the-LLC-Act/

[2] https://www.bls.gov/bdm/oh_age_total_table7.txt

[3] R.C. 1705.01 et seq., was repealed effective January 1, 2022.

[4] R.C. 1706.01 and 1706.02 were enacted effective April 12, 2021 to create Chapter 1706 of the Revised Code to be cited as the "Ohio Revised Limited Liability Company Act."

membership interest at dissolution. The court of appeals summarized the disappointed member's claim: "The thrust of Bunta's argument was that he was not compensated when Firman Mast dissolved VacuPress." (Appx. 3, Appellant's Appx. 10, ¶ 21.)

The trial court created, and the Fifth District adopted, a theory that provides members with another bite at the apple and exposes managers to severe personal liability—even when they have satisfied their contractual and fiduciary obligations.

If allowed to stand, the court of appeals' decision creates tremendous uncertainty at a most critical time—the dissolution of a limited liability company. Managers responsible for the task of dissolving and winding up the business must have assurance that if they comply with their duties under the operating agreement and the Act, they do not expose themselves to personal liability from members dissatisfied with the outcome.

To promote the orderly dissolution of LLCs (including timely satisfaction of the dissolving LLC's obligations to creditors), and to encourage—rather than discourage—compliance with the operating agreement, the decision below must be reversed.

STATEMENT OF FACTS

A. Creation of VacuPress

Firman Mast ("Mast") and Vasile Bunta ("Bunta") met in 2013. Mast, a member of the Amish community in Holmes County, Ohio, had an eighth grade education and was a diligent worker who built a successful roofing company. (Supp. 5, Appellant's Supp. 147-150, Tr. 298-300.) Bunta is a Romanian citizen who was in the United States on a green card in 2013. He had some experience in the timber exporting industry, where he learned about a type of business that used special vacuum machines (kilns) to dry wood for the lumber industry. (Supp. 6, Appellant's Supp. 151-154, Tr. 152-153, 176.)

These highly specialized vacuum kilns pull moisture from freshly cut lumber with heat and suction. (Supp. 7, Appellant's Supp. 155-156, Tr. 116.) The purpose of this vacuum drying process is to avoid splitting and warping, which occurs when fresh lumber is cut due to the moisture in the wood. (Supp. 8, Appellant's Supp. 157-159, Tr. 154-155.) In their initial meeting, Bunta told Mast about these vacuum kilns and the potential profit that could be had by investing in that technology. (Supp. 9, Appellant's Supp. 160-163, Tr. 156-157, 179.)

Mast and Bunta discussed opening a lumber drying business, which would require the purchase of vacuum kilns, timber inventory, and a facility to conduct the enterprise. (Supp. 10, Appellant's Supp. 164-169, Tr. 299-301, 303-304.) That decision

was put on hold based on Bunta's financial difficulties and the expensive start-up costs. Bunta had poor credit and no assets to purchase the kilns, the necessary inventory, or a facility. The specialized nature of the kilns made them costly. (Supp. 11, Appellant's Supp. 170-173, Tr. 306-308.)

Mast had assets and creditworthiness to obtain sufficient financing for this type of venture. (Supp. 12, Appellant's Supp. 174-176, Tr. 181-182.) Also, Mast's father Dennis Mast co-signed loans and mortgaged his farm to help obtain financing to get the business started. (Supp. 13, Appellant's Supp. 177-180, Tr. 78-79, 94.) So in 2014, Mast and his father established Superior VacuPress, LLC (hereinafter "VacuPress"), in which Mast owned 85% of the company and his father owned 15%. (Supp. 14, Appellant's Supp. 181-182, Tr. 120.) VacuPress acquired several bank loans, ultimately exceeding $1,500,000.00. (Supp. 15, Appellant's Supp. 183-189, Tr. 520-523, 533-534.)

VacuPress's first vacuum kiln became operational in December 2014. From 2014 through 2015, Bunta was not listed on the books and records as an owner of VacuPress. Bunta did help with certain aspects of establishing the business. (Supp. 16, Appellant's Supp. 190-192, Tr. 83-84.) And Bunta and Mast had discussions about receiving payments from VacuPress if the cash flow eventually met projections. (Supp. 17, Appellant's Supp. 193-195, Tr. 121-122.) But VacuPress never did experience success sufficient to allow either Bunta or Mast to receive draws from the company. *Id*.

B. **VacuPress's Amended Operating Agreement**

In January 2016, an Amended and Restated Operating Agreement was executed for VacuPress. (Supp. 1.) Under the Amended Operating Agreement, Firman Mast remained manager, with the authority to make decisions regarding the company. (Supp. 1, Appellant's Supp. 7, Sect. 9.1.) Vasile Bunta and Mervin Mast were added as members, resulting in the following ownership makeup: Firman Mast, 459 units; Vasile Bunta, 300 units; Dennis Mast, 135 units; and Mervin Mast, 106 units. *Id*. The four members executed the Operating Agreement and agreed to be bound by its terms. (*Id*.; Supp. 18, Appellant's Supp. 196-197, Tr. 319.)

C. **VacuPress's Financial Struggles**

VacuPress encountered significant obstacles. Lumber was the lifeblood of VacuPress's business. However, VacuPress became unable to obtain this critical lumber supply from area Amish-owned sawmills after those businesses learned that Bunta had an ownership interest in VacuPress. (Supp. 19, Appellant's Supp. 198-201, Tr. 85, 94, 320.) The sawmills refused to supply to a company owned by Bunta, because Bunta owed large debts to these suppliers from his prior business ventures. *Id*. At trial, Bunta admitted that he knew these sawmill owners could not sue him for his debts, because of their Amish faith. (Supp. 20, Appellant's Supp. 202-203, Tr. 179.) But the sawmills could, and did, reject any further dealings with a Bunta-owned company. (Supp. 19, Appellant's Supp. 198-201, Tr. 85, 94, 320.) VacuPress's inability to obtain lumber from

the mills, on account of Bunta's outstanding debts, placed significant financial strain on VacuPress. *Id.* In March 2016, the members of VacuPress met, and the Masts implored Bunta to make amends with the sawmills. Bunta refused to do so and said he wanted an exit plan from VacuPress. (Supp. 21, Appellant's Supp. 204-205, Tr. 352.)

D. **The Dissolution of VacuPress**

Following the meeting in March 2016, Bunta ceased all work for, and association with, VacuPress. *Id.* The financial struggles continued and VacuPress struggled to pay its bills. (Supp. 22, Appellant's Supp. 206-209, Tr. 407, 453-454.) VacuPress owed substantial obligations to the bank, after borrowing more than $1,500,000:[5] first, in the amount of $165,000 to purchase materials to construct the building that would house the kilns;[6] second, in the amount of $603,000 for the purchase of business equipment;[7] third, in the amount of $200,000 for acquiring more equipment and machinery for the business;[8] fourth, in the amount of $465,000 for acquiring a second kiln;[9] and fifth, a line of credit of $200,000.[10]

[5] (Supp. 15, Appellant's Supp. 183-189, Tr. 520-523, 533-534.)

[6] (Supp. 15, Appellant's Supp. 183-189, Tr. 520-523, 533-534.)

[7] *Id.*

[8] (Supp. 15, Appellant's Supp. 186-187, Tr. 522-523.)

[9] (Supp. 15, Appellant's Supp. 187, Tr. 523.)

[10] (Supp. 23, Appellant's Supp. 210-211, Tr. 537.)

Using his authority as manager, Mast eventually decided to dissolve VacuPress and wind up its affairs. (Supp. 1, Appellant's Supp. 13, Sect. 15.1(b); Supp. 24, Appellant's Supp. 212-213, Tr. 414.) In August 2016, Mast, sent a letter to the members stating the company would be dissolved. (Supp. 25, Appellant's Supp. 214-216, Tr. 134-135.) Mast also informed the members that the company's assets, such as its kilns, were worth substantially less than what the company owed the bank. (Supp. 26, Appellant's Supp. 217-222, Tr. 137-141.) At trial, the bank's representative testified that there was no equity in the equipment and VacuPress was deeply in the hole. (Supp. 27, Appellant's Supp. 223-225, Tr. 531-532.)

VacuPress would cease operations as of December 31, 2016, and the Ohio Secretary of State's Office filed for record a "Certificate of Dissolution of Limited Liability Company." (Supp. 28, Appellant's Supp. 226-227, Tr. 142.)

Mast formed a new company, Superior Lumber, LLC, in which Bunta did not have an interest. It was Mast's hope that the new entity could assume VacuPress's overwhelming debt obligations to the bank and eventually resurrect the critical relationship with the Amish-owned sawmills that had spurned VacuPress over Bunta's involvement. (Supp. 29, Appellant's Supp. 228-229, Tr. 528.)

As the vacuum kiln is a rare product, used by only a handful of companies in the world, VacuPress could not sell the machines off separately. (Supp. 30, Appellant's Supp. 230-234, Tr. 137-138, 531-532.) So in order to discharge VacuPress's obligations to

the bank, VacuPress agreed to sell its assets to Superior Lumber in exchange for Superior Lumber's assumption of all VacuPress's responsibilities, debt, and liabilities to the bank. (Supp. 31, Appellant's Supp. 235-239, Tr. 140, 528-529, 537.) VacuPress's bank approved the assumption agreement. *Id*. This assumption of debt discharged VacuPress's substantial obligations to the bank.

Because VacuPress's obligations to the bank had exceeded its assets, its members did not receive compensation for their membership interest in VacuPress upon its dissolution. As explained below, VacuPress's Operating Agreement and Ohio's Limited Liability Company Act both required Mast to satisfy the company's creditors before making any payment to members for their membership interest.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

I. PROPOSITION OF LAW NO. I: Compensation for a membership interest in a dissolved limited liability company cannot be the subject of conversion.

A. The court of appeals greatly expanded the scope of conversion, and thereby ignored "wholly distinct legal principles" that govern the rights and obligations of a limited liability company's managers and members upon dissolution.

At common law, only tangible chattels could be the subject of an action for conversion. *See Zacchini v. Scripps-Howard Broad. Co.,* 47 Ohio St. 2d 224, 226–27, 351 N.E.2d 454 (1976), *rev'd and remanded on other grounds*, 433 U.S. 562, 97 S. Ct. 2849, 53 L. Ed. 2d 965 (1977). In *Zacchini*, this Court recognized an extension for "intangible rights

which are customarily merged in or identified with some document," such as "drafts, bank passbooks, and deeds." *Id*.

Even so, the Court recognized that if unrestrained, "judicial ingenuity" could go too far and characterize nearly any right as something that could be converted. *Id.* The Court warned that "**extend[ing] the ambit of conversion to rights . . . which are more appropriately considered under wholly distinct legal principles, is confusing, unnecessary, and improper."** (Emphasis added.) *Id*.

Before the Fifth District's decision below, no previous court had ever expanded the "ambit of conversion" to include compensation for a membership interest in a dissolved company. Here, the Fifth District held that the LLC's manager "converted" the plaintiff's 30% membership interest when he dissolved the company without compensating the plaintiff for that interest. In doing so, the court rendered moot "wholly distinct legal principles" that apply to the rights and obligations of members, managers, and creditors of a dissolving LLC: the operating agreement and the Act.

1. Compensation for a limited liability company's membership interest at dissolution is governed by Ohio's Limited Liability Company Act and the Revised Limited Liability Company Act.

The Act dictates the order of distribution of an LLC's assets at dissolution. It prioritizes the satisfaction of the company's obligations to creditors. A dissolving LLC must *first* distribute its assets to satisfy those obligations to the company's creditors. R.C. 1705.46(A)(1), (B).

Second, assets must be distributed, "[e]xcept as otherwise provided in the operating agreement, to members and former members in satisfaction of liabilities for distributions to members." R.C. 1705.46(A)(2). *Thereafter, if any assets remain*, the LLC distributes them to members: "*[f]irst*, for the return of their contributions . . . [and] *[s]econd*, with respect to their membership interests." (Emphasis added.) R.C. 1705.46(A)(3).

Succinctly, "the claims of creditors of the company must be satisfied first, before any assets of the company are paid to a member on account of their membership interest." *In re Liber*, Bankr. N.D.Ohio No. 08-37046, 2012 WL 1835164, *4 (May 18, 2012). This distribution hierarchy makes sense. Members are not subject to personal liability for the "debts, obligations and liabilities of a limited liability company, whether arising in contract, tort, or otherwise…" R.C. 1705.48. So, when the company dissolves, members should not receive payment for their membership interest unless the obligations to the company's creditors are discharged first.

Likewise, the Revised Limited Liability Act also mandates that a dissolving LLC must satisfy its creditors first:

> (A) Upon the winding up of a limited liability company, *payment or adequate provision for payment, shall be made to creditors*, including members who are creditors, in satisfaction of liabilities of the limited liability company.
>
> (B) After a limited liability company complies with division (A) of this section, any surplus shall be distributed as follows:

(1) First, to each person owning a membership interest that reflects contributions made on account of the membership interest and not previously returned, an amount equal to the value of the person's unreturned contributions;

(2) *Then to each person owning a membership interest* in the proportions in which the owners of membership interests share in distributions before dissolution.

(Emphasis added.) R.C. 1706.475.

Firman Mast, as manager of the dissolving LLC, responsibly made adequate provision to satisfy the company's obligations to its bank. As the obligations to creditors outweighed the assets, there were no funds available to pay members for their membership interest at dissolution.

2. Compensation for a member's membership interest at dissolution is also controlled by the parties' Operating Agreement.

Consistent with the Act, the VacuPress Operating Agreement provided that the company's assets must be applied and distributed to satisfy its liabilities to creditors prior to compensating any member for their membership interest. (Supp. 1, Appellant's Supp. 13, Sect. 15.3.)

An LLC's operating agreement controls, unless it conflicts with the Act. *See Holdeman v. Epperson*, 111 Ohio St.3d 551, 2006-Ohio-6209, 857 N.E.2d 583, ¶18. In fact, the Revised Limited Liability Company Act expressly provides that it "shall be construed to give maximum effect to the principles of freedom of contract and to the enforceability of operating agreements." R.C. 1706.06.

The Operating Agreement authorizes the manager to decide whether to dissolve the company. (Supp. 1, Appellant's Supp. 13, Sect. 15.1.) It also makes the manager responsible for overseeing the winding up and dissolution of the company. (Supp. 1, Appellant's Supp. 13, Sect. 15.3.) The Operating Agreement directs the manager to discharge the company's liabilities to creditors before making any payment to the members. *Id*.

Mast followed the order of distribution required by both the Operating Agreement and the Act, when he satisfied VacuPress's obligations to the bank. In fact, the jury found for Firman Mast on Bunta's claim of breach of fiduciary duty. (Supp. 4, Appellant's Supp. 107-108.) The jury answered interrogatories, finding that Firman Mast: (a) was manager of the LLC; (b) had the sole authority to manage, dissolve, and wind down the LLC; and (c) acted in good-faith in his management of the LLC, including the dissolution and winding down of the LLC. (Supp. 4, Appellant's Supp. 126-127.)

3. The Fifth District decision allows members to evade these "distinct legal principles" to avoid an unsatisfactory result and receive a windfall.

As the Fifth District recognized, the thrust of Vasile Bunta's complaint was that he did not receive payment for his membership interest when Firman Mast dissolved VacuPress. (Appx. 3, Appellant's Appx. 10, ¶ 21.) But since the Operating Agreement and the Act demanded that Mast first satisfy the company's substantial obligations to

the bank, the members were not entitled to receive payment for their membership interest.

Bunta understood this. Bunta's complaint originally sought declaratory judgment for an accounting of the LLC following its dissolution. (Supp. 2, Appellant's Supp. 28.) But when he realized an accounting would show there were no assets left to distribute to members following satisfaction of the LLC's creditors, Bunta dismissed his claims for declaratory judgment and an accounting and proceeded instead with claims for conversion, unjust enrichment, and breach of fiduciary duty. (Supp. 3, Appellant's Supp. 101-103.) The trial court erroneously denied Mast's motions for summary judgment and for directed verdict on Bunta's claims for conversion and unjust enrichment. (Supp. 32, Appellant's Supp. 240-243, Tr. 579-580, 582.)

In doing so, the court permitted Bunta to present these claims to the jury and seek damages for his membership interest without considering the company's obligations to creditors at the time of dissolution. Bunta's expert admittedly did not do a valuation of the company as of the date of dissolution. (Supp. 33, Appellant's Supp. 244-245, Tr. 258.) Further, Bunta's expert admittedly disregarded the amount of VacuPress's bank debt when he calculated what Bunta was allegedly owed for his membership interest. *Id.* Thus, Bunta's claimed damages — the value of his membership interest at dissolution — ignored VacuPress's massive obligation to the bank.

By ignoring the requirement of the Operating Agreement and the Act to pay the company's creditors first, Bunta could convince the jury that the value of his membership interest and damages was $231,854.50.

At trial, Bunta offered no evidence of the value of his 'converted property' at the time of dissolution when it was allegedly converted. Instead, Bunta's expert testified that he came up with an "estimate" of the value of Bunta's membership interest by "extrapolating" from a personal financial statement of Mast that was prepared and effective nearly a year after dissolution. (Appx. 3, Appellant's Appx. 21, ¶ 48.) Because Bunta and his expert could ignore the company's substantial debt to creditors at the time of dissolution, Bunta obtained a windfall recovery that he never would have received under the statutorily-mandated and contractually-required order of distribution.

4. It is "confusing, unnecessary, and improper" to subject a manager to a claim for conversion when the manager complied with the Operating Agreement, the Act, and his fiduciary duties.

Allowing a disgruntled member to pursue a conversion claim—when the manager has complied with the Operating Agreement, the Act, and his fiduciary duties—leads to inconsistent results and creates tremendous uncertainty.

Conversion is the wrongful exercise of dominion or control over property in denial of or under a claim inconsistent with the rights of another. *Zacchini*, 47 Ohio St.2d at 226. The elements of the conversion cause of action include: (1) the plaintiff's

ownership or right to possession at the time of conversion; (2) the defendant's wrongful act or disposition of the property; and (3) damages. *Dice v. White Fam. Cos.*, 173 Ohio App.3d 472, 2007-Ohio-5755, 878 N.E.2d 1105, ¶ 17 (2nd Dist.).

Unless we altogether ignore the requirements of the Operating Agreement and the Act, Bunta's conversion claim could have never prevailed. When the company's obligations to creditors exceeds it assets at dissolution, the members do not have any right to compensation for their membership interest. For that reason, the plaintiff member could not prove "right to possession" of any compensation for the membership interest in an insolvent, dissolved LLC, nor could the plaintiff prove damages. Because at dissolution, "membership interests in the company only have value to the extent assets exceed the liabilities." *In re Saunier*, Bankr. N.D. Ohio No. 11-60997, 2012 WL 5898601, *1 (Nov. 20, 2012).

And unless we ignore the requirements of the Operating Agreement and the Act, the defendant manager does not commit a "wrongful act" by following the required order of distribution and discharging the company's debt to creditors first.

B. A member's claimed right to compensation for its membership interest at dissolution — particularly where the company's debts exceed its assets — is not the type of intangible asset that is subject to conversion.

1. Members do not own the company's assets; instead, members have a right to share in the profits and losses.

Membership interest in a limited liability company does not provide a member with any specific interest in company property. R.C. 1705.34. Rather, a "membership

interest" is the member's right to a share of the profit and losses of the company and the right to receive distributions. R.C. 1705.01(H). Thus, a member, through his or her membership interest only has an interest in the net value of the company as long as the LLC is solvent at dissolution.

2. A member's purported right to compensation for its membership interest at dissolution does not establish a conversion claim.

Bunta did not claim, nor could he, that he had a membership interest in the new company—Superior Lumber. Instead, Bunta's complaint was that he did not receive payment for his membership interest when VacuPress dissolved. (Appx. 3, Appellant's Appx. 10, ¶ 21.)

Bunta's right was limited to a share in VacuPress's funds, *if any*, available after satisfaction of the company's obligations to creditors at dissolution. There were no funds available, because the company's bank debt exceeded the value of its assets.

Nor could Bunta establish that any funds were "earmarked" or sequestered for the payment of particular membership interests. Rather, any right to payment is merely for an alleged "obligation to pay a certain sum as a general debt" and cannot establish a claim for conversion. *See RAE Assocs., Inc. v. Nexus Communications, Inc.*, 10th Dist. Franklin No. 14AP-482, 2015-Ohio-2166, 36 N.E.3d 757, ¶ 31; citing *Haul Transport of Virginia, Inc., v. Morgan*, 2d Dist. Montgomery No. 14859, 1995 WL 328995 (June 2, 1995); *See also*, *Fairbanks Mobile Wash, Inc. v. Hubbell*, 12th Dist. Warren No. CA2007-05-062, 2009-Ohio-558, ¶ 54 ("[w]hen the claim is that the defendant should have delivered a

certain sum, rather than delivering specifically identifiable, sequestered money, no action for conversion can exist").

The case of *Landskroner v. Landskroner*, 154 Ohio App.3d 471, 2003-Ohio-4945, 797 N.E.2d 1002 (8th Dist.), involved the termination of a father-son law firm. After the son announced he was terminating the business relationship, he vacated the office space they shared and took the employees and business equipment with him. *Id*. ¶ 4. The father claimed that the son failed to compensate him for his share of the firm's profits, as required by their agreement. *Id*. He brought suit and claimed the son converted funds belonging to him. *Id.* The Eighth District properly held that the conversion claim failed, "[b]ecause the property subject to appellant's conversion claim is not identifiable, personal property but rather comprises monies appellant claims are due and owing him under an agreement." *Id*. ¶¶ 26-27.

Likewise, in *Kelley v. Ferraro*, 188 Ohio App.3d 734, 2010-Ohio-2771, 936 N.E.2d 986 (8th Dist.), the widow of a law firm partner filed suit against the partner and firm claiming that they converted her spouse's partnership property. The court of appeals held that the claim for conversion of partnership property failed, because the subject property was monies allegedly owing under an agreement rather than specifically identifiable personal property. *Id*. ¶ 70.

Bunta claimed that he was owed a certain sum of money for his membership interest, based on his expert's "extrapolations" and "estimations" of what that interest

was worth. (Appx. 3, Appellant's Appx. 21, ¶ 48.) He did not request or specifically identify any sequestered or earmarked funds, because there were none. And there never will be any when a limited liability company dissolves, particularly where the company's debts exceed its assets.

The Fifth District attempted to distinguish the *Landskroner* decision by stating "the problem with the father's conversion claim was not that money was the basis of the claim but that the father could not identify any money to which he was due . . . [and that] . . . [t]his stemmed from his failure to attach to the complaint any contract or agreement which might have specified the sums which he was due." (Appx. 3, Appellant's Appx. 19-20, ¶ 46.) Using this logic, every time a plaintiff claims that a sum of money is owed under a contract, the plaintiff could proceed under a conversion claim. Under the Fifth District's holding, as long as there is a contract that provides some method for attempting to determine the amount of compensation to pay a member for their membership interest at dissolution, then a conversion claim can exist.

The Fifth District also applied the enigmatic *I'll know it when I see it* test found in *Schafer v. RMS Realty*, 138 Ohio App.3d 244, 285, 741 N.E.2d 155 (2nd Dist.2000), which held: "[W]e believe that the correct approach is to analyze the particular type of intangible asset, to see if allowing a conversion claim makes sense."

Yet it does not make sense to allow members to bring a conversion claim when they are disappointed with the amount of compensation they receive for their

membership interest at dissolution. Rather, as we have seen, "distinct legal principles" apply and dictate the order of distribution that the manager must follow. If any company funds are available after satisfying the LLC's obligations to creditors, they are a general debt rather than a specifically identifiable and sequestered intangible asset.

Moreover, *Schafer* is distinguishable from the circumstances of this case for many reasons. *First*, *Schafer* did not involve the dissolution of a limited liability company. Nor did it involve considering whether the company's creditors should be paid before its membership interests at dissolution. Instead, *Schafer* involved a minority partner's claim that his partners wrongfully made a capital call that he could not meet, leading to a dilution of his partnership interest. *Id*. at 255. Prior to the Fifth District's decision below, no court had ever expanded the "ambit of conversion" to claims for compensation of a membership interest at dissolution.

Second, the jury in *Schafer* found that the defendant partners breached their fiduciary duties owing to the plaintiff partner. The court explained that the "breach of fiduciary duty and conversion claims" were "inseparable" and "intertwined." *Id*. at 300, 302. Here, in contrast, the jury found that Mast complied with his fiduciary duties.

Third, the court in *Schafer* believed that the amount owed to the plaintiff was sufficiently identifiable for purposes of conversion damages, because: (a) there was only "one discrete transaction" at issue; (b) "the amount of damages was not even disputed at trial"; and (c) the conversion and breach of fiduciary duty claims were so

"intertwined" that damages were not "unique to one claim as opposed to the other." *Id*. at 299.

The court in *Schafer* acknowledged that typically an accounting is required in a legal action between partners, otherwise it is "impossible to tell, based on the entire scope of the partnership transactions, who owe[s] what to whom." *Id*. quoting *Dunn v. Zimmerman*, 69 Ohio St.3d 304, 308, 631 N.E.2d 1040 (1993). However, the court determined an accounting was unnecessary to identify conversion damages, because "the dispute was limited both in time and number of transactions" so "no searching inquiry" was necessary. *Id.* In contrast, the dissolution of a limited liability company demands a "searching inquiry" before determining a proper order of distribution. Bunta voluntarily dismissed his accounting claim, knowing that it would only establish that he had no right to payment for his membership interest at dissolution. (Supp. 3, Appellant's Supp. 101-103.)

In summary, a member's claim that he should have been paid a certain sum for his membership interest in a dissolved LLC cannot give rise to a conversion claim. Instead, the operating agreement governs the parties' rights and obligations.

II. **PROPOSITION OF LAW NO. II: Limited liability company managers who comply with their duties under the operating agreement and their fiduciary duties in dissolving the company cannot be liable for conversion of a membership interest or unjust enrichment.**

A. The contract governs the managers and members' rights and obligations.

LLC operating agreements are multilateral contracts between the members and managers of the company. *See Holdeman v. Epperson*, 111 Ohio St. 3d 551, 2006-Ohio-6209, 857 N.E.2d 583, ¶ 12. Vasile Bunta claimed that the manager wrongfully failed to pay him for his membership interest when their LLC dissolved. (Appx. 3, Appellant's Appx. 10, ¶ 21.)

The operating agreement covers these issues. It dictates the members' rights and the manager's duties. It directs how the company's assets are distributed upon dissolution, the order in which they are distributed, and to whom they are distributed.

B. A member cannot prevail on a tort claim against the limited liability company's manager unless the manager violates a duty arising independently from the operating agreement.

A plaintiff cannot present a tort claim based on actions arising out of a contract, unless that plaintiff can show the breach of a duty owed separately from any duty created by contract, "that is, a duty owed even if no contract existed." *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App.3d 137, 151, 684 N.E.2d 1261 (9th Dist.1996); *see also*, *Kott v. Gleneagles Professional Builders & Remodelers, Inc.*, 197 Ohio App.3d 699, 2012-Ohio-287, 968 N.E.2d 593, ¶ 15 (6th Dist.) ("the existence of a contract precludes the

assertion of a tort claim based on the same conduct unless there is a duty owed separate from the contract").

Thus, when a member claims the manager failed to properly compensate that member upon dissolution, such claims arise out of the operating agreement. The member cannot pursue the manager in tort.

"To hold otherwise would be to convert every unfulfilled contractual promise, i.e., every alleged breach of a contract, into a tort claim." *Telxon Corp. v. Smart Media of Delaware, Inc.*, 9th Dist. Summit No. 22098, 2005-Ohio-4931, ¶ 34. Every plaintiff claiming to be owed money based on rights arising from a contract could claim that their payment has been 'converted.' Allowing a plaintiff to proceed in tort for an alleged right to payment that arose in a contract undermines contract law, sabotages the parties' allocation of rights and obligations, and undercuts their reliance on the agreed-upon rights and obligations.

Here, the manager followed the order of distribution set forth in the LLC's Operating Agreement and the Act when he prioritized satisfaction of the company's creditors at dissolution. And the jury determined that the manager acted in good-faith in the dissolution and winding up of the company's affairs. *See Saba v. Fifth Third Bank of NW Ohio, N.A.*, 6th Dist. Lucas No. L-01-1284, 2002-Ohio-4658, ¶ 50 (holding that the "jury's specific findings as to the [defendant's] non-breach of its fiduciary duties or actions . . . negate any establishment of the tort of conversion").

Bunta did not prove that Mast violated any contractual or fiduciary duty, nor did Bunta allege or identify—let alone prove—that Mast violated any duty existing independently from the Operating Agreement. When managers comply with their contractual and fiduciary duties in the dissolution of the LLC, members should not be permitted to proceed in tort when no separate duty exists.

C. A member cannot prevail on an unjust enrichment claim against the manager when an operating agreement controls.

Likewise, "Ohio law does not permit recovery under the theory of unjust enrichment when an express contract covers the same subject." *Padula v. Wagner*, 9th Dist. Summit No. 27509, 2015-Ohio-2374, 37 N.E.3d 799, ¶ 48 citing *Ullmann v. May,* 147 Ohio St. 468, 475, 478–79, 72 N.E.2d 63 and paragraph four of the syllabus (1947).

A valid, express operating agreement existed between the parties governing their respective rights and obligations. But in a continued proliferation of the manager's obligations beyond what the parties agreed upon, the lower courts held the manager liable for *quasi*-contractual obligations. (Appx. 3, Appellant's Appx. 23.) Again, to perform their roles with any sense of consistency and certainty, managers who comply with their duties under the operating agreement and their fiduciary duties should not be held liable for unjust enrichment or the tort of conversion.

D. The Operating Agreement authorized the manager's decision to dissolve the company and use the company's assets to discharge company debt.

VacuPress's Operating Agreement stated that, upon "[t]he decision of the Manager to dissolve the Company," VacuPress must wind up its affairs in an orderly manner to discharge the claims of its creditors and members consistent with the Act. (Supp. 1, Appellant's Supp. 13, Sect. 15.1, 15.3.) The Operating Agreement, the Act, and now the Revised Act, all direct the manager to satisfy the LLC's obligations to the company's creditors first. Mast did so in the manner he thought best, including entering an assumption agreement with Superior Lumber, which was approved by VacuPress's bank. Superior Lumber took over the obligation of VacuPress's massive bank debt.

Bunta suggested that Mast's decisions in the dissolution and winding up of VacuPress's affairs, including execution of the assumption agreement with Superior Lumber, were improper. But the jury found that Mast's decisions in the dissolution and winding up of VacuPress were made in good faith. In fact, the Operating Agreement expressly permitted any member or manager to engage in similar business activities as VacuPress without including the other members. (Supp. 1, Appellant's Supp. 9, Sect. 11.2.) It also provided that such activities will not give rise to any claim by VacuPress or the members for usurping an opportunity. It is therefore unsurprising that Bunta did not assert any lost opportunity claim.

A case from the United States District Court for the District of Delaware, applying the above-stated principles of breach of contract and conversion, is

informative. *Kyle v. Apollomax, LLC*, 987 F.Supp.2d 519 (D. Del.2013). Apollomax, LLC's manager and principals blamed the plaintiff-member for the company's disappointing sales, as the member had been responsible for the company's marketing efforts, or lack thereof. The manager and other principals formed a new LLC to supply the same product to the original LLC's only customer. *Id*. at 522-523. The plaintiff filed suit claiming that the manager and LLC had illegally frozen him out and converted his ownership interest without compensating the member. *Id*. at 525. The plaintiff also alleged that his conversion claim derived from the defendants' bad faith "in forming a new LLC and assigning all of [the original LLC's] interests to [the new] LLC without providing [him] any membership interest in the [the new LLC]." *Id*. The court disagreed.

The court held that "[i]f a plaintiff's conversion claim arises solely from a breach of contract, the general rule requires the plaintiff to sue in contract, not in tort." (Emphasis added.) *Id*. The court found that the member's conversion claim failed to allege a legal duty not already imposed by the operating agreement, which proffered the duties and permissible conduct of the LLC's members and how and when compensation was to be paid to members. *Id*. at 526. The court also held that the operating agreement did not contain any provision preventing the creation of a new LLC, "let alone a provision granting [the plaintiff] an ownership interest in any subsequently formed LLC by virtue of his role as a member of Apollomax." *Id.* As

another basis for dismissing the conversion claim, the court held that a debt claim that could be satisfied by "a general monetary payment"—rather than specifically identifiable chattel—could not be enforced as a conversion claim. *Id*.; *See also*, Proposition of Law No. I, discussed above.

This Court should follow the sound reasoning of the Ohio cases discussed above, including *Textron* and *Kott*, as well as the holding in the District of Delaware case. VacuPress's Operating Agreement set forth all rights and duties of VacuPress's members and its manager. When a member cannot prove the manager breached a legal duty not already imposed by the operating agreement, the member should be prevented from proceeding in tort.

E. The economic loss rule precludes a conversion action arising from the nonpayment of a membership interest at dissolution.

"The economic-loss rule generally prevents recovery in tort of damages for purely economic loss." *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 106 Ohio St. 3d 412, 414, 2005-Ohio-5409, 835 N.E.2d 701, ¶ 6. "This rule stems from the recognition of a balance between tort law, designed to redress losses suffered by breach of a duty imposed by law to protect societal interests, and contract law, which holds that parties to a commercial transaction should remain free to govern their own affairs." *Id*. "Tort law is not designed . . . to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement"; indeed, "[t]hat type of compensation necessitates an analysis of the damages which were within the contemplation of the

parties when framing their agreement. It remains the particular province of the law of contracts." *Floor Craft Floor Covering, Inc. v. Parma Cmty. Gen. Hosp. Assn.*, 54 Ohio St.3d 1, 3, 560 N.E.2d 206 (1990) quoting *Sensenbrenner v. Rust, Orling & Neale Architects, Inc*., 236 Va. 419, 425, 374 S.E.2d 55 (1988).

Thus, when a plaintiff suffers only economic losses, a court must determine the source of the duty that justifies the action. *Corporex* ¶ 10. Any duty to compensate a member for their membership interest in a dissolving LLC arises from the operating agreement. Bunta did not allege, identify, or prove the breach of any "discrete, preexisting duty in tort" that arose outside the operating agreement. *See id*. ¶ 9.

F. Holding managers liable for conversion subjects them to inconsistent and severe personal liability.

The Fifth District's decision threatens the orderly distribution of assets during which the LLC must first satisfy its obligations to creditors. For managers who distribute the LLC's assets in accordance with the mandated order of distribution, the appellate decision exposes them to conversion claims from members who are dissatisfied with that result.

Subjecting individuals winding up an LLC to personal liability for conversion of a membership interest is against public policy. At best, it inhibits the manager's orderly distribution at dissolution, thus delaying the satisfaction of the company's obligations to creditors. At worst, it encourages wrongful distributions to members before creditors, which is paradoxical to the operating agreement and the Act. And if the

managers distributed payment to members for their membership interest before discharging the company's obligations to creditors, those managers would then be subject to personal liability under Ohio's Uniform Fraudulent Transfer Act, codified as R.C. Chapter 1336.

By adhering to the "distribution hierarchy" set forth in the operating agreement and the Act upon dissolution of an LLC, "assets of the company are retained for the benefit of creditors of the company, not for the benefit of its members, who are not liable for the debts of the company." *In re Saunier*, Bankr. N.D. Ohio No. 11-60997, 2012 WL 5898601, *1 (Nov. 20, 2012) (explaining that disregarding the required order of distribution could harm the company's creditors by improperly diverting assets away from them).

Ohio managers responsible for the dissolution of insolvent LLCs cannot be placed in this dubious position. Instead, they must have the clarity and confidence that they do not expose themselves to personal liability when they fulfill their duties under the Operating Agreement, the Act, and their fiduciary duties in dissolving and winding up the affairs of the LLC.

G. Allowing members to circumvent the bargained-for rights and obligations of the operating agreement provides them with the opportunity for a windfall recovery.

The jury awarded Bunta $231,854.50 on his conversion claim against Mast. At trial, Bunta offered no evidence of the value of his 'converted property' at the time of

dissolution when it was allegedly converted. Instead, Bunta's expert testified that he came up with an "estimate" of the value of Bunta's membership interest by "extrapolating" from a personal financial statement of Firman Mast that was prepared and effective nearly a year after dissolution. (Appx. 3, Appellant's Appx. 16-17, ¶ 48.)

In arriving at this untimely, extrapolated estimate, Bunta's expert admitted that he did not include any of VacuPress's obligations to creditors in his calculation. (Supp. 33, Appellant's Supp. 244-245, Tr. 258.) In opining on what Bunta was owed for his membership interest at dissolution, Bunta's expert completely disregarded VacuPress's substantial debt to the bank. *Id*.

Mast, as manager, did not have the luxury of disregarding VacuPress's substantial bank debt. The Operating Agreement and the Act mandated that he make adequate provisions to discharge that obligation. When the lower courts allowed Bunta to proceed on his claims for conversion and unjust enrichment, the bargained-for rights and obligations of the Operating Agreement went out the window. As a result, Bunta obtained a windfall recovery of $276,845.50 (via conversion and unjust enrichment claims) that he never would have received under the statutorily-mandated and contractually-required distribution hierarchy. By ignoring the operating agreement's order of distribution, the plaintiff managed to obtain the purported value of his membership interest without any consideration of, or reduction for, the company's obligations to third-party creditors.

The decision provides disgruntled members with a windfall, while exposing managers to personal liability even when they comply with (1) the operating agreement, (2) the Act, and (3) all fiduciary duties.

CONCLUSION

The decision below creates uncertainty, at a time when managers, members, and the LLC's creditors most need certainty. It undermines well-established and wholly distinct legal principles that apply to an orderly dissolution of an LLC. It undercuts managers', members', and company creditors' reliance on the distribution hierarchy that the operating agreement and the Act established for dissolutions. And in doing so, it creates an opportunity for the plaintiff member to receive a windfall recovery that he never would have received under the operating agreement or the Act. It imposes severe personal liability on managers who comply with their fiduciary duties and their duties under the operating agreement and the Act.

The decision below must be reversed, as Firman Mast cannot be held liable for conversion or unjust enrichment.

Respectfully submitted,

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PROOF OF SERVICE

A copy of the foregoing was served on July 6, 2021, pursuant to App.R. 13(C)(6) by sending it by electronic means to the email addresses identified below, to:

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IN THE SUPREME COURT OF OHIO

VASILE BUNTA, Plaintiff-Appellee, vs. **FIRMAN D. MAST,** Defendant-Appellant.	Case No. _____ On Appeal from the Holmes County Court of Appeals, Fifth Appellate District Court of Appeals Case No. 20CA006

NOTICE OF APPEAL OF APPELLANT FIRMAN D. MAST

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Notice of Appeal of Appellant Firman D. Mast

Appellant Firman D. Mast hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Holmes County Court of Appeals, Fifth Appellate District, entered in Court of Appeals case No. 20CA006 on December 2, 2020. This case is one of public or great general interest.

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CERTIFICATE OF SERVICE

A copy of the foregoing was served on January 19, 2021, pursuant to App.R. 13(C)(6) by sending it by electronic means to the email address identified below, to:

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IN THE COURT OF APPEALS FOR HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

VASILE BUNTA Plaintiff-Appellee -vs- FIRMAN D. MAST Defendant-Appellant	JUDGMENT ENTRY Case No. 20CA006

For the reasons stated in our accompanying Opinion on file, the judgment of the Holmes County Court of Common Pleas is affirmed. Costs assessed to Appellant.

Patricia A. Delaney
HON. PATRICIA A. DELANEY

W. Scott Gwin
HON. W. SCOTT GWIN

William B. Hoffman
HON. WILLIAM B. HOFFMAN

COURT OF APPEALS
HOLMES COUNTY, OHIO
FIFTH APPELLATE DISTRICT

VASILE BUNTA	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 20CA006
	:	
FIRMAN D. MAST	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Holmes County Court of Common Pleas, Case No. 2017 CV 030

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY:

APPEARANCES:

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Delaney, J.

{¶1} Defendant-Appellant Firman D. Mast appeals the February 21, 2020 judgment entry of the Holmes County Court of Common Pleas journalizing the jury verdict in favor of Plaintiff-Appellee Vasile Bunta.

FACTS AND PROCEDURAL HISTORY

Creation of Superior VacuPress, LLC

{¶2} In December 2013, Plaintiff-Appellee Vasile Bunta and Defendant-Appellant Firman D. Mast were introduced during a long car trip to Kansas. Firman Mast owned a successful roofing business located in Holmes County, Ohio. Bunta, an electrical engineer, worked for Mt. Eaton Lumber company and operated his own lumber exporting business named Dim X-Port, LLC. Dim X-Port purchased lumber from companies in Ohio and sold the lumber to foreign markets. During the car ride, Bunta explained to Firman Mast the concept of drying lumber with vacuum kilns. When trees are cut for lumber, they are full of moisture. To prevent the cut lumber from splitting and warping, it is dried. The lumber can be air dried which can take months and can lead to increased splitting and warping. If the cut lumber is placed in a vacuum kiln, the heat and vacuum from the kiln pulls the moisture from the lumber, requiring less drying time and less warping or splitting.

{¶3} In January 2014, Bunta and Firman Mast entered into an oral agreement to purchase a vacuum kiln and start a wood drying business named Superior VacuPress, LLC ("VacuPress"). Bunta did most of the planning, which included the plant layout, electrical design, and business plan. Bunta introduced Firman Mast to Jim Parker, Bunta's contact at Vacutherm, where VacuPress was going to purchase the vacuum kiln. The

VacuPress building was going to be built on the property of Defendant Dennis Mast, Firman Mast's father.

{¶4} Firman Mast and Bunta consulted with Commercial and Savings Bank to obtain financing. The bank recommended that Bunta not be a partner in VacuPress due to his credit issues. Bunta was a Romanian immigrant, educated in the United States and a green card holder. As Bunta was working on establishing VacuPress, he did not focus on Dim X-Port. In 2015, Dim X-Port experienced financial difficulties due to foreign market instability in lumber. As a result, Dim X-Port was unable to fully pay its outstanding balances to the lumber companies. One company, DY Lumber, understood the basis for Dim X-Port's outstanding bills was market instability and allowed it make installments on the balance.

{¶5} To secure the bank financing for VacuPress, Dennis Mast co-signed the loans with Firman Mast. Commercial and Savings Bank made five loans totaling $1,433,000 and opened a $200,000 credit line to VacuPress.

{¶6} The original operating agreement for VacuPress was signed in April 2014. The initial members of VacuPress were Firman Mast at 85% interest and Dennis Mast for 15% interest (in exchange for his co-signing the loan and providing the land). Firman Mast was the manager of VacuPress.

{¶7} The vacuum kiln purchased from Vacutherm was installed from June 2014 to November 2014. The kiln went into operation in December 2014. Dennis Mast was hired by VacuPress to load the vacuum kiln. Mervin Mast, Firman's brother, was hired as the bookkeeper and salesperson. Both Dennis and Mervin earned a salary from VacuPress.

{¶8} In January 2015, Firman Mast and Bunta entered into an agreement that for the first six months of operation, he and Bunta would not be paid. At month 12 and if VacuPress was earning money, Firman Mast and Bunta would draw $2000 per month. At month 18, Firman Mast and Bunta would draw $4000 per month.

Operation of Superior VacuPress

{¶9} In February 2015, Bunta and Firman Mast formed the Ohio Vacupress Association, dba, Vacutherm Midwest, LLC ("Vacutherm"), based on their relationship with Jim Parker. Bunta was the 51% owner and Firman Mast was the 49% owner. The purpose of Vacutherm Midwest was to receive commissions from the sales of Vacutherm vacuum kilns.

{¶10} Firman Mast issued a capital call of $109,000 to the members of VacuPress in September 2015. Bunta was included in the capital call even though he was not a member of VacuPress. On October 19, 2015, Bunta used funds from Dim X-Port and paid VacuPress $10,000. On December 8, 2015, Bunta used his interest from Vacutherm to pay $22,175.90 to VacuPress.

{¶11} On January 1, 2016, the members executed an Amended and Restated Operating Agreement for VacuPress that included Bunta as a 30% member. Firman Mast was manager and 45.9% owner, Dennis owned 13.5%, and Mervin owned 10.6%. Based upon Bunta's 30% interest, he was responsible for 30% of the capital call.

{¶12} Bunta paid $3,060 to VacuPress from his interest in Vacutherm on March 2, 2016. Bunta overpaid his portion of the capital call by $1,882.00.

{¶13} Firman Mast called a member's meeting on March 22, 2016. The purpose of the meeting was to discuss the financial difficulties facing VacuPress. Firman Mast,

Dennis, and Mervin confronted Bunta about the inability of VacuPress to purchase lumber from local lumber mills. They argued that due to Bunta's outstanding debts to local lumber mills, the mills would not do business with VacuPress. The Masts encouraged Bunta to settle his debts with the lumber mills. Firman Mast and Bunta had not received any compensation from VacuPress. Prior to the meeting, Bunta told Firman Mast that he wanted to be paid for the work he performed in creating VacuPress in 2014 and 2015. Firman Mast told him to provide invoices so Bunta brought invoices from Dim X-Port totaling $26,000 to the meeting. Bunta issued the invoices from Dim X-Port for tax purposes. The members agreed that VacuPress should pay Bunta $6,000. Bunta admitted at the meeting that he wanted to exit VacuPress.

{¶14} After the meeting, Bunta stopped actively working for VacuPress. Firman, Dennis, and Mervin agreed that they needed to move forward with the business without Bunta.

{¶15} In June 2016, Firman Mast made a first attempt to remove Bunta from VacuPress when he sent him a letter demanding payment of Bunta's share of the capital call with a penalty of a 24.9% interest rate.

{¶16} Firman Mast and Bunta dissolved Vacutherm Midwest. Firman Mast created FM, LLC to receive commissions from the sales of Vacutherm vacuum kilns. Firman Mast and his wife were the owners of FM, LLC.

{¶17} In July 2016, Firman Mast offered Bunta $20,000 as a buyout option. Bunta did not accept.

Creation of Superior Lumber

{¶18} On August 15, 2016, Firman Mast sent the members of VacuPress a notice of dissolution. On November 1, 2016, Firman Mast created Defendant Superior Lumber, LLC with Firman Mast owning 51% interest, Dennis 15% interest, and Mervin 34% interest. Firman Mast transferred the assets and debts from VacuPress to Superior Lumber. In December 2016, Firman Mast wrote a letter to the shareholders of VacuPress stating that due to financial difficulties, VacuPress would cease operations. On January 19, 2017, the Ohio Secretary of State received notification that VacuPress had been dissolved. Superior Lumber began operations on January 1, 2017.

{¶19} The 2017 tax return for Superior Lumber showed its gross receipts were $1,735,752.00 and its gross profits were $347,153.

Civil Action

{¶20} On June 15, 2017, Bunta filed a complaint against VacuPress, Firman Mast, Mervin, Dennis, and Superior Lumber ("Mast defendants"). Bunta also named Commercial and Savings Bank ("CSB") as a defendant to the complaint.

{¶21} The thrust of Bunta's argument was that he was not compensated when Firman Mast dissolved VacuPress. Bunta asserted the following counts in his complaint: (1) declaratory judgment against the Mast defendants and Superior Lumber determining the Mast defendants abandoned VacuPress in favor of Superior Lumber with a determination that the parties are no longer bound to the operating agreement of VacuPress; (2) a declaration that VacuPress is dissolved and requiring the Mast defendants to fully account for VacuPress; (3) accounting by VacuPress and the Mast defendants for all monies received and disbursed by them; (4) breach of fiduciary duty by

the Mast defendants; (5) civil conspiracy by VacuPress, Superior Lumber, and the Mast defendants to breach the fiduciary duty owed to appellee and/or conversion of appellee's property; (6) conversion by VacuPress, Superior Lumber, and the Mast defendants; and (7) unjust enrichment by VacuPress, Superior Lumber, and the Mast defendants. Bunta requested the following relief: a declaratory judgment that the Mast defendants abandoned VacuPress and the parties are no longer bound by the operating agreement, judicial dissolution, accounting, and winding up of VacuPress, and an award of compensatory damages. Bunta did not name CSB in any of the counts, nor did he request relief from CSB. Rather, Bunta only asserted that CSB "may have an interest in the subject matter of this case."

{¶22} The Mast defendants filed an answer denying the allegations in the complaint and asserting as their first affirmative defense that the Amended and Reinstated Operating Agreement contained a binding arbitration clause. On July 27, 2017, the Mast defendants filed a motion to stay proceedings and refer the matter to arbitration. On November 17, 2017, the trial court issued a judgment entry denying the motion to stay the proceedings and arbitration request. The Mast defendants appealed the matter to this Court in *Vasile Bunta v. Superior VacuPress LLC*, 2018-Ohio-2823, 117 N.E.3d 51 (5th Dist.). On July 13, 2018, we affirmed the trial court's decision to deny the motion to stay.

{¶23} On October 4, 2019, the Mast defendants filed motions for summary judgment. Bunta responded. The trial court held an oral hearing on the motions.

{¶24} On November 14, 2019, Bunta dismissed three counts of his complaint: (1) declaratory judgment against the Mast defendants and Superior Lumber determining the

Mast defendants abandoned VacuPress in favor of Superior Lumber with a determination that the parties are no longer bound to the operating agreement of VacuPress; (2) a declaration that VacuPress is dissolved and requiring the Mast defendants to fully account for VacuPress; and (3) accounting by VacuPress and the Mast defendants for all monies received and disbursed by them.

{¶25} On December 5, 2019, the trial court denied the motions for summary judgment. Bunta voluntarily dismissed VacuPress as a defendant.

{¶26} The remaining Mast defendants filed a Motion in Limine on February 4, 2020. The Mast defendants argued Bunta's expert witness, Michael Oesch should be excluded. Oesch, a certified public account, was to testify as to the financials of VacuPress and Superior Lumber. The trial court held a hearing on the motion on February 10, 2020 and denied the motion.

{¶27} The matter proceeded to a three-day jury trial. During the trial, Firman Mast made multiple motions for directed verdict, which the trial court denied. Mervin Mast was dismissed as a defendant. The matter was submitted to the jury with interrogatories. The jury returned verdicts against only Firman Mast on (1) Count Six, Conversion and awarded damages in the amount of $231,854.50 and (2) Count Seven, Unjust Enrichment and awarded damages in the amount of $45,000. The trial court journalized the verdict on February 21, 2020. It is from this judgment Firman Mast now appeals.

ASSIGNMENTS OF ERROR

{¶28} Firman Mast raises three Assignments of Error:

{¶29} "I. THE TRIAL COURT ERRED BY DENYING APPELLANT FIRMAN MAST'S MOTION FOR SUMMARY JUDGMENT AND SUBSEQUENT MOTIONS FOR DIRECTED VERDICT ON APPELLEE'S CLAIM FOR CONVERSION.

{¶30} "II. THE TRIAL COURT ERRED BY DENYING APPELLANT FIRMAN MAST'S MOTION FOR SUMMARY JUDGMENT AND SUBSEQUENT MOTIONS FOR DIRECTED VERDICT ON APPELLEE'S CLAIM FOR UNJUST ENRICHMENT.

{¶31} "III. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION BY PERMITTING APPELLEE'S EXPERT WITNESS TO TESTIFY AND SUBMIT HIS DAMAGES VALUATION REPORT TO THE JURY."

ANALYSIS

I. CONVERSION

{¶32} Bunta claimed that Firman Mast committed the tort of conversion over Bunta's 30% interest in VacuPress when Firman Mast dissolved VacuPress and created Superior Lumber. Firman Mast contends in his first Assignment of Error that the trial court erred when it failed to find as a matter of law, through summary judgment or directed verdict, that Bunta had no claim for conversion. We disagree.

Standard of Review

{¶33} Firman Mast challenged Bunta's claim for conversion on two fronts: summary judgment and directed verdict. Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.*, 30 Ohio St.3d 35, 36, 506 N.E.2d

212 (1987). As such, this Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996).

{¶34} Civ.R. 56 provides summary judgment may be granted only after the trial court determines: 1) no genuine issues as to any material fact remain to be litigated; 2) the moving party is entitled to judgment as a matter of law; and 3) it appears from the evidence that reasonable minds can come to but one conclusion and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 364 N.E.2d 267 (1977).

{¶35} Similar to a Civ.R. 56 motion for summary judgment, a motion for a directed verdict can only be granted if, after construing the evidence most favorably to the nonmoving party, reasonable minds could come to but one conclusion upon the evidence submitted. Civ.R. 50(A)(4); *Ohio Cas. Ins. Co. v. D&J Distrib. & Mfg., Inc.*, 6th Dist. Lucas No. L-08-1104, 2009-Ohio-3806, ¶ 29.

The Tort of Conversion

{¶36} The tort of conversion is defined as "the wrongful exercise of dominion over property to the exclusion of the rights of the owner, or withholding it from his possession under a claim inconsistent with his rights." *Heflin v. Ossman*, 5th Dist. Fairfield No. 05CA17, 2005–Ohio–6876, ¶ 20, quoting *Joyce v. General Motors Corp.*, 49 Ohio St.3d 93, 96, 551 N.E.2d 172 (1990). Thus, the elements required for conversion are: (1) a defendant's exercise of dominion or control; (2) over a plaintiff's property; and (3) in a manner inconsistent with the plaintiff's rights of ownership. *Id.*, citing *Cozmyk Ent., Inc. v. Hoy*, Franklin App. No. 96APE10–1380, 1997 WL 358816 (June 30, 1997).

{¶37} Firman Mast raises two arguments as to why Bunta's claim for conversion must fail. First, he contends existing Ohio law does not recognize a claim of conversion over intangible assets. Second, assuming arguendo the claim of conversion over intangible assets is not barred as a matter of law, Firman Mast states that Bunta failed in meeting his evidentiary burden to demonstrate his damages.

Can Bunta's Membership Interest be Converted?

{¶38} In this case, Bunta claimed that Firman Mast converted his 30% membership interest in VacuPress when Firman created Superior Lumber, dissolved VacuPress, and transferred the VacuPress assets and debts to Superior Lumber. The uncontroverted evidence at trial showed that Bunta was a 30% member of VacuPress, Firman Mast dissolved VacuPress and transferred all the assets and debts from VacuPress to Superior Lumber, and Bunta was not a member of Superior Lumber. In closing arguments, Bunta requested damages in the amount of $516,097.00 for the totality of his claims. Interrogatories were submitted to the jury. On Interrogatory 11, the jury found by a preponderance of the evidence that Firman Mast converted property that was owned by Bunta for which he had the right to possess and Bunta suffered damages in the amount of $231,854.50.

{¶39} Firman Mast argues Bunta's claim for conversion is barred as a matter of law because Ohio law unilaterally limits conversion claims to those based on the taking of tangible, personal property. He states the property allegedly converted by Firman Mast was monies due under the Amended and Restated Operating Agreement, which is not identifiable and tangible personal property. The issue before the Court is whether Bunta's

30% membership interest in VacuPress can be converted. We examine the case law addressing the conversion of intangible assets.

{¶40} The Ohio Supreme Court addressed the issue of conversion and intangible property in *Zacchini v. Scripps–Howard Broadcasting Co.*, 47 Ohio St.2d 224, 227, 351 N.E.2d 454 (1976). The intangible asset at issue in *Zacchini* was the plaintiff's image. Zacchini was a "human cannonball" and had been filmed by a television station, which showed the clip during a news program. Zacchini sued, alleging as part of his claims the invasion of privacy by appropriating his professional talents. The trial court granted summary judgment and the appellate court reversed, finding Zacchini stated a claim for conversion. The matter was appealed to the Ohio Supreme Court where it rejected Zacchini's claims. The Court stated as to conversion:

> Conversion is a wrongful exercise of dominion over property in exclusion of the right of the owner, or withholding it from his possession under a claim inconsistent with his rights. *Railroad Co. v. O'Donnell* (1892), 49 Ohio St. 489, 497, 32 N.E. 476. Although the original rule at common law was that only tangible chattels could be converted, it is now generally held that intangible rights which are customarily merged in or identified with some document may also be converted. Examples include drafts, bank passbooks, and deeds. See Prosser, The Law of Torts (4th ed. 1971), at pages 81-82. See, generally, Annotation, 44 A.L.R.2d 927. But conversion does not apply to any intangible right, and certainly it has never been held that one's countenance or image is 'converted' by being photographed. The difficulties with any such holding are apparent. 'Taking' a photograph of

> someone does not in fact take anything from that person. If the photograph or film is only a conversion when shown to others, we may well ask to how many others it must be shown, and how often, before it becomes actionable. The distinguishing characteristic of conversion is the forced judicial sale of the chattel or right of which the owner has been wrongfully deprived. In the case of such intangible quasi-proprietary rights as are involved here, a forced sale would be largely absurd, because of the doubtfulness of determining what has been 'taken.' Is it the right to perform the act, to view it, to present it on television, to license its filming, or some other right? Judicial ingenuity could perhaps award damages and find a res said to be sold. But to extend the ambit of conversion to rights such as those claimed by plaintiff, which are more appropriately considered under wholly distinct legal principles, is confusing, unnecessary, and improper.

(Citations omitted.) *Zacchini* at 226–27.

{¶41} The Second District Court of Appeals reviewed a conversion claim regarding intangible property in *Schafer v. RMS Realty*, 138 Ohio App.3d 244, 283, 741 N.E.2d 155 (2000). *Schafer* involved a partnership wherein a majority of partners had issued a capital call, which they were entitled to do under the terms of the partnership agreement. However, the majority partners had issued the capital call for a wrongful purpose, to reduce the minority partner's partnership interest and squeeze the him out of the partnership. The minority partner sued the majority partners, claiming in part conversion of his partnership interests. The majority partners argued the claim for conversion was barred because Ohio law did not recognize conversion of intangible

assets. The *Schafer* court concluded the minority partner was entitled to make a claim for conversion of his partnership interest:

> [C]onversion was an appropriate basis for recovery in the present case. Specifically, Schafer had an undisputed interest of twenty-five percent in [the partnership] before the capital call. * * * Based on the alleged wrongful acts of the defendants, Schafer lost nineteen percent of his property interest and the defendants' asserted control over the property, in opposition to Schafer's claim.

Id. at 285, 741 N.E.2d 155.

{¶42} In its analysis of the case law regarding conversion, the Second District did not find any cases unilaterally prohibiting conversion claims based on intangible assets. *Id.* at 285. "[T]he Ohio Supreme Court has not rejected conversion as a potential cause of action for all intangible assets." *Id.* at 284. The Second District believed "the correct approach is to analyze the particular type of intangible asset, to see if allowing a conversion claim makes sense." *Id.* at 285.

{¶43} In support of his argument that Bunta's claim for conversion is barred as a matter of law, Firman Mast cites this Court to *Landskroner v. Landskroner*, 154 Ohio App.3d 471, 2003–Ohio–4945, 797 N.E.2d 1002 (8th Dist.). In *Landskroner*, father and son attorneys had entered into practice together but there was no written agreement between the parties. The father stated he transferred his interest in the law firm to the son contingent upon his receiving fair distributions from the law firm. Subsequently, the son advised the father that he was ending their business relationship and vacated the office space they shared, taking with him all the employees and business equipment. The father

filed a lawsuit against the son which included a claim for conversion. The trial court dismissed the case and the Eighth District Court of Appeals affirmed.

{¶44} The father claimed the law firm "obtained possession of monies" belonging to him and converted those funds for its own use in contravention of the parties' agreement. *Id.* at ¶ 26. The Eighth District noted that " 'existing law generally allows actions for conversion to be based only upon the taking of identifiable, tangible personal property.' " *Id.* at ¶ 27, citing *Wiltberger v. Davis*, 110 Ohio App.3d 46, 55, 673 N.E.2d 628 (10th Dist.1996). The court then went on to find the father's conversion claim was "not identifiable, personal property but rather comprise[d] monies" the father claims were due and owing him under an agreement. *Id.* at ¶ 27.

{¶45} Upon examination of *Zacchini*, *Schafer*, and *Landskroner*, we do not agree with Firman Mast's argument that Ohio law unilaterally prohibits conversion claims based on intangible assets. Determining whether the property can be the subject of a conversion action is not a bright line test – the determination is nuanced and to be decided based upon the characteristics of the alleged converted property. *Schafer, supra* at 285. The appropriate questions to ask are is the property intangible and if so, is the intangible property identifiable?

{¶46} In *Landskroner*, the problem with the father's conversion claim was not that money was the basis of the claim but that the father could not identify any money to which he was due. *Heartland Fed. Credit Union v. Horton*, 2nd Dist. Montgomery No. 25412, 2013-Ohio-2931, ¶ 31. This stemmed from his failure to attach to the complaint any contract or agreement which might have specified the sums which he was due. In

contrast, the partnership interest that was converted in *Schafer* was specifically identifiable.

{¶47} A conversion claim based on intangible property was permitted in *Fifth Third Bank v. Cooker Rest. Corp.*, 137 Ohio App.3d 329, 738 N.E.2d 817 (1st Dist.2000). Cooker entered into a Bank Card Merchant Agreement with Fifth Third Bank for it to provide credit-card processing services for its restaurants. Cooker relocated its headquarters and returned the credit-card processing equipment to Fifth Third. Meanwhile, one of Cooker's restaurants accidentally reprogrammed its processing equipment and transmitted over $50,000 in payments to Fifth Third. Fifth Third kept those funds and demanded more as liquidated damages for what it perceived as a breach of the Bank Card Merchant Agreement. Fifth Third sued Cooker for breach of contract and Cooker counterclaimed for conversion. The First District Court of Appeals affirmed a verdict in favor of Cooker on its claim for conversion. The claim was permitted because the money converted was specifically identifiable. *Heartland Fed. Credit Union, supra* at ¶ 31.

{¶48} In the present case, Bunta claims the conversion of his 30% membership interest in VacuPress when Firman Mast dissolved VacuPress and transferred the assets and debts to Superior Lumber. There is no dispute the property Bunta claims is intangible; therefore, the next question is the property identifiable? Bunta's expert at trial, Michael Oesch testified that based on the financial records he examined, the assets and debts of VacuPress were transferred to Superior Lumber. John Cook, expert for Firman Mast, testified that Firman did not liquidate VacuPress, he rolled the assets into Superior Lumber. On a personal financial statement prepared by Firman Mast in August 2017 for

the Home Loan Savings Bank, Firman Mast stated the value of his share of Superior Lumber was $850,000. Oesch extrapolated from the personal financial statement that the total value of Superior Lumber was $1,670,000. From the value of Superior Lumber as stated in Firman's personal financial statement, Oesch testified Bunta's 30% interest would be $500,000. Oesch testified he also conducted an analysis of different financial records and estimated the company value was $1,720,322, wherein the value of Bunta's portion was $516,097. The jury ultimately awarded Bunta $231,854.50 on his claim for conversion. Firman Mast has not raised an Assignment of Error contesting the amount the jury awarded Bunta on his claim for conversion.

{¶49} In this case, we find that Bunta's claim for conversion is not unilaterally barred as a matter of law. The facts of the case are comparable to *Schafer* wherein the property claimed, while intangible, was identifiable.

Did Bunta Prove All Elements of Conversion?

{¶50} Firman Mast next contends that Bunta failed to produce evidence on all elements of conversion. Specifically, Firman argues that Bunta did not produce evidence of damages at the time of the alleged conversion. Firman Mast requested a directed verdict in his favor on this issue at trial.

{¶51} A judgment for conversion generally imposes the fiction of a "forced judicial sale" and requires the defendant to pay the full value of the converted property. *Schafer v. RMS Realty, Inc.*, 2nd Dist. Montgomery No. 21869, 2007-Ohio-7155, ¶ 67 citing *Acheson v. Miller*, 2 Ohio St. 203 (1853); *Conley v. Caudill*, 4th Dist. Pike No. 02CA697, 2003-Ohio-2854, ¶ 8 n. 2. As stated in *Acheson:* "The party [plaintiff] in effect abandons his property, as of that time, to the wrong-doer, and proceeds for its value; so that, when

judgment is obtained and satisfaction made, the property is vested in the defendants, by relation, as of the time of the taking or conversion." *Schafer, supra* at ¶ 67. The measure of damages in a conversion action are thus determined by the value of the property at the time of the conversion. *Kademian v. Marger*, 2nd Dist. Montgomery No. 24256, 2012-Ohio-962, 2012 WL 762316, ¶ 84 citing *Brumm v. McDonald & Co. Securities, Inc.*, 78 Ohio App.3d 96, 104, 603 N.E.2d 1141 (4th Dist.1992).

{¶52} Firman Mast notified the members that VacuPress was ceasing operations in 2016. Superior Lumber was formed on November 1, 2016 and the operating agreement signed on December 31, 2016. The dissolution paperwork for VacuPress was filed with the Ohio Secretary of State on January 19, 2017. Firman Mast argues that if acts constituting conversion took place, they took place at the time the Superior Lumber began operating and the transfer of assets and liabilities took place. He states that no valuation of VacuPress as of December 31, 2016 took place.

{¶53} Bunta responds that the uncontroverted evidence demonstrated that Firman Mast transferred the assets and liabilities of VacuPress to Superior Lumber. He dissolved VacuPress but he according to Firman's expert, he did not liquidate VacuPress. Bunta was not claiming a 30% ownership interest in Superior Lumber but argued to the jury that because Firman Mast transferred VacuPress assets to Superior Lumber, Superior Lumber was fundamentally VacuPress. The measure of his conversion damages, therefore, was 30% of the value of Superior Lumber.

{¶54} A motion for a directed verdict and summary judgment can only be granted if, after construing the evidence most favorably to the nonmoving party, reasonable minds could come to but one conclusion upon the evidence submitted. Reviewing the facts of

this case in a light most favorable to Bunta, the nonmoving party, we find that reasonable minds could come to differing conclusions as to the damages for conversion. Bunta presented evidence at trial demonstrating that Firman Mast transferred the assets and liabilities of VacuPress to Superior Lumber for the purpose of squeezing out Bunta as a member. The only difference between VacuPress and Superior Lumber was that Bunta was not a member.

{¶55} Upon our de novo review, we find that Bunta's claim for conversion was not barred as a matter of law and he presented genuine issues for the finders of fact to consider. The jury found Bunta's arguments persuasive that Firman Mast exercised dominion or control over Bunta's 30% membership interest in a manner inconsistent with the Bunta's rights of ownership, for which he suffered damages.

{¶56} Firman Mast's first Assignment of Error is overruled.

II. UNJUST ENRICHMENT

{¶57} Prior to trial, Firman Mast moved for summary judgment on Bunta's claim for unjust enrichment, which the trial court denied. Firman Mast renewed his argument at trial and moved for directed verdict on the claim, which was likewise denied. The jury found in favor of Bunta on his claim for unjust enrichment and awarded damages in the amount of $45,000.

{¶58} Firman Mast contends in his second Assignment of Error that the trial court erred by denying his motions for summary judgment and directed verdict on Bunta's claim for unjust enrichment. In our analysis of the first Assignment of Error, we outlined the standard of review for considering a motion for summary judgment and directed verdict and we use the same criteria when considering his arguments as to unjust enrichment.

Tort of Unjust Enrichment

{¶59} To establish an unjust enrichment claim, the plaintiff must demonstrate: (1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment. *Mun. Services Corp. v. Hall Community Dev. LLC*, 5th Dist. Tuscarawas No. 2018 AP 12 0042, 2019-Ohio-3079, 2019 WL 3458731, ¶ 25 citing *Robinette v. PNC Bank*, 5th Dist. Licking No. 15-CA-47, 2016-Ohio-767, 2016 WL 771319, ¶ 23 citing Hambleton v. R.G. Barry Corp., 12 Ohio St.3d 179, 183, 465 N.E.2d 1298 (1984). Under Ohio law, unjust enrichment is a claim under quasi-contract law that arises out of the obligation cast by law upon a person in receipt of benefits that he is not justly entitled to retain. *FedEx Corp. Services, Inc. v. Heat Surge*, LLC, 5th Dist. Stark, 2019-Ohio-217, 131 N.E.3d 397, ¶ 1 citing *Beatley v. Beatley*, 160 Ohio App.3d 600, 2005-Ohio-1846, 828 N.E.2d 180.

{¶60} A plaintiff may not recover under the theory of unjust enrichment or quasi-contract when an express contract covers the same subject. *Lehmkuhl v. ECR Corp.*, 5th Dist. Knox No. 06 CA 039, 2008-Ohio-6295, 2008 WL 5104747, ¶ 55 citing *Ullmann v. May* 147 Ohio St. 468, 72 N.E.2d 63 (1947), syllabus four; *City of Cincinnati v. Cincinnati Reds* 19 Ohio App.3d 227, 483 N.E.2d 1181 (1984). However, while a party "may not recover for the same services under both a contractual claim and a claim for quantum meruit, a party is not barred from seeking alternative theories and recovering under a quantum meruit theory if his contractual claim fails." *Mun. Services Corp. v. Hall*

Community Dev. LLC, 5th Dist. Tuscarawas No. 2018 AP 12 0042, 2019-Ohio-3079, 2019 WL 3458731, ¶ 22 quoting *FedEx Corp. Services, Inc. v. Heat Surge, LLC*, 5th Dist. Stark No. 2018CA00026, 2019-Ohio-217, 2019 WL 328599, ¶ 19 citing *Building Industry Consultants, Inc. v. 3M Parkway, Inc.*, 182 Ohio App.3d 39, 2009-Ohio-1910, 911 N.E.2d 356, ¶ 17 (9th Dist.).

{¶61} We consider Firman Mast's assigned errors as to summary judgment and directed verdict together because they are premised on the same argument that he is entitled to judgment as a matter of law on Bunta's claim for unjust enrichment because Bunta could not set forth any facts entitling him to relief.

What were the Alleged Benefits Conferred?

{¶62} First, Firman Mast contends Bunta failed to identify any benefits that he conferred upon Firman Mast, VacuPress, or Superior Lumber. Bunta responds that the record shows that Bunta conferred benefits upon Firman Mast in the creation and establishment of VacuPress and later, the creation of Superior Lumber. Reviewing the evidence in a light most favorable to Bunta, we find the jury could conclude that Bunta conferred benefits upon Firman Mast. Before the start of VacuPress, Firman Mast was a roofer and Bunta was an engineer in the lumber business, with his own lumber exporting company. The genesis of VacuPress was a long car trip, where Bunta told Firman about the business of drying lumber with vacuum drying kilns. Prior to Bunta's introduction, Firman Mast had no knowledge of the vacuum kiln. Bunta introduced Firman to Jim Parker, Bunta's vacuum drying kiln contact. After deciding to go into business together, Bunta drew up the business plan and the plant layout. VacuPress was formed, which Firman Mast used to create Superior Lumber.

{¶63} Prior to the March 22, 2016 meeting, Bunta told Firman Mast that he wanted to be paid for the work he performed for VacuPress in 2014 and 2015. Firman Mast told him to provide invoices, so Bunta brought invoices from Dim X-Port totaling $26,000 to the meeting. Bunta issued the invoices from Dim X-Port for tax purposes. The Mast defendants agreed to pay Bunta $6,000.

{¶64} The record in this case shows that Bunta used his technological knowledge and business expertise to assist Firman Mast in the creation of VacuPress, for which Bunta expected future compensation as a member of VacuPress, but received nothing when he was squeezed out of VacuPress.

When were the Alleged Benefits Conferred?

{¶65} Firman Mast next argues that regardless of the benefits allegedly conferred upon Firman Mast, Bunta's claims for unjust enrichment are barred because the relationship between the parties was governed by the terms of the Amended and Restated Operating Agreement.

{¶66} Bunta and Firman Mast met in December 2013 and they first discussed the concept of vacuum drying lumber and in January 2014, Bunta and Firman Mast began the purchase of a vacuum kiln and start a wood drying business named Superior VacuPress, LLC. The original operating agreement for VacuPress was signed in April 2014 and Bunta was not a member. On January 1, 2016, the members executed an Amended and Restated Operating Agreement for VacuPress and Bunta was a member.

{¶67} The evidence in this case could have caused reasonable minds to come to differing conclusions as to whether Bunta conferred some benefits upon Firman Mast before they entered the Amended and Restated Operating Agreement. The jury found in

favor of Bunta on his claim for unjust enrichment and valued the benefits conferred upon Firman Mast by Bunta in the amount of $45,000. Firman Mast did not contest the amount of the jury verdict on appeal.

{¶68} Firman Mast's second Assignment of Error is overruled.

III. EXPERT WITNESS

{¶69} In his third Assignment of Error, Firman Mast argues the trial court abused its discretion when it overruled his motion in limine and objection at trial to exclude the testimony of Bunta's expert witness, Michael Oesch. We disagree.

{¶70} Oesch, an accountant with Veritas Solutions, had a masters degree in accounting and was a certified public account, certified fraud examiner, and private investigator. At trial he testified that he was in the process of applying to be a certified valuation analyst. In preparation for trial, he wrote an expert report (Exhibit KK) and damages summary (Exhibit KK-1) based on the financial documents released in discovery. Firman Mast objected to Oesch's entire report being admitted into evidence. The trial court sustained the objection in part and allowed only the damages summary to be submitted to the jury.

Standards of Review

{¶71} "A motion in limine is a motion directed to the inherent discretion of the trial court judge to prevent the injection of prejudicial, irrelevant, inadmissible matters into trial." *State v. Strait*, 5th Dist. Delaware No. 14 CAA 12 0081, 2015-Ohio-4264, 2015 WL 5968655, ¶ 24 quoting *Mason v. Swartz*, 76 Ohio App.3d 43, 55, 600 N.E.2d 1121 (6th Dist.1991). "Generally, the grant or denial of such a motion is not a ruling on the evidence." *Mason, supra* at 55. It is a preliminary interlocutory order and the party's

objection must be raised again at trial in order to permit the court to consider the admissibility of the evidence in its actual context. *Id.*

{¶72} The granting or denying a motion in limine are reviewed under an abuse of discretion standard of review. *Estate of Johnson v. Randall Smith, Inc.*, 135 Ohio St.3d 440, 2013–Ohio–1507. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary, or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217 (1983). "[A] trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *Huth v. Kus*, 5th Dist. No. 2017 AP 06 0015, 2018-Ohio-1931, 113 N.E.3d 140, 2018 WL 2230727, ¶ 30 quoting Rigby v. Lake Cty., 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991).

{¶73} Firman Mast contended at the hearing on the motion in limine and during trial that the expert report was inadmissible because Oesch was not qualified to conduct a valuation of VacuPress or Superior Lumber. He further contended that the expert report contained impermissible legal conclusions and extraneous information that would confuse the jury. The trial court overruled the motion in limine. He renewed his objections to Oesch's testimony at trial as to the other companies.

Businesses Not Named as Parties

{¶74} Within his expert report, Oesch referred to the multiple businesses owned and operated by Bunta and Firman Mast including Ohio Vacupress Association, dba, Vacutherm Midwest, LLC; FM, LLC; Dim X-Port, LLC; Amish Exteriors, Deutsche Roofing Systems, Deutsche Roofing ComAg. The entities were not parties to the litigation.

{¶75} We find no abuse of discretion for the trial court to overrule any objections to Oesch's mention of these entities because their identification was part of the narrative of the relationship between Bunta, Firman Mast, VacuPress, and Superior Lumber. Prior to Oesch's testimony, Bunta and Firman Mast testified and clearly identified the companies and their ownership interests. For example, Dim X-Port, LLC, was not a party to the action but was a limited liability corporation owned and operated by Bunta for the purpose of lumber exporting. Bunta testified he invoiced VacuPress for his services through Dim X-Port for tax purposes. As for Ohio Vacupress, Bunta and Firman Mast created the corporation to accept commissions for the sale of vacuum kilns, which came about because of Bunta's prior relationship with Jim Parker. Bunta used his interest in Ohio VacuPress to fund his portion of the capital call from VacuPress. When analyzing the financial records from VacuPress, the mention of these companies was necessary to explain the flow of funds. The incorporation of the corporations during Oesch's testimony was not an abuse of discretion.

Valuation

{¶76} Firman Mast next argues the trial court abused its discretion when it permitted Oesch's testimony because he performed a valuation of Superior Lumber when Oesch was not qualified to complete a valuation. Oesch was not a certified valuation analyst and Firman alleges that Oesch failed to follow the accounting industry standards for performing a valuation.

{¶77} Oesch testified on direct examination there are different methods of conducting a valuation of a business, such as asset-based, income-based, or market-based. He stated he did not and could not conduct a valuation of VacuPress or Superior

Lumber because he did not have the financial data to conduct a valuation. He instead conducted an EBITA analysis on VacuPress and Superior Lumber, which he testified was a way to look at a company's value by adding back interest, taxes, depreciation, and amortization. It gave an economic picture of cash flow and the company's economic value. He testified that an EBITA analysis was not a valuation but a reasonableness calculation.

{¶78} During cross examination, Oesch testified he was a member of the American Institute of Certified Public Accountants and he was aware of the AICPA standards for conducting valuations but he had never read the standards. He stated that he did not perform a valuation in this engagement. He performed an evaluation, which was an estimate of value calculated with a reasonable degree of accounting certainty.

{¶79} John Cook, Firman Mast's expert, testified he conducted a valuation of VacuPress and Superior Lumber using the net asset value method. On December 2, 2016, he testified Bunta's 30% interest in VacuPress was valued at $2,000. On October 3, 2019, Bunta's alleged 30% interest in Superior Lumber would be valued at $11,000.

{¶80} We find through direct and cross examination, Oesch's methods for determining Bunta's damages were clarified for the jury's scrutiny. Firman Mast's expert conducted a valuation of VacuPress and Superior Lumber, resulting in an opinion of damages much less than Oesch's. In this case, we find the trial court did not abuse its discretion in finding Firman Mast's arguments went to the weight of the evidence, not admissibility.

{¶81} The third Assignment of Error is overruled.

CONCLUSION

{¶82} The judgment of the Holmes County Court of Common Pleas is affirmed.

By: Delaney, J.,

Gwin, P.J. and

Hoffman, J., concur.

Patricia A. Delaney
HON. PATRICIA A. DELANEY

W. Scott Gwin
HON. W. SCOTT GWIN

William B. Hoffman
HON. WILLIAM B. HOFFMAN

IN THE COURT OF COMMON PLEAS
HOLMES COUNTY, OHIO

Vasile Bunta, Plaintiff, v. Superior VacuPress LLC, et al Defendants.	Case No. 2017 CV 030 Judge Robert Rinfret JUDGMENT ENTRY (FINAL ORDER)

This case came on for trial to a jury of eight on February 10, 2020. Plaintiff Vasile Bunta appeared in open court represented by Attorneys Thomas White and Matthew Kearney. Defendants Superior Lumber, LLC and Firman D. Mast appeared in open court represented by Attorney Grant Mason. Defendants Dennis Mast, Sr., and Mervin Mast appeared in open court represented by Attorney Cari Fusco-Evans.

A jury of eight was duly seated. The jury heard the opening statements of counsel, the evidence of the parties, the closing arguments of counsel and the instructions of the Court.

At the conclusion of Defendants' case, Defendant Mervin Mast renewed his motion pursuant to Civ.R 50(A) for a directed verdict. For the reasons stated on the record, the Court directed a verdict in favor of Defendant Mervin Mast and against Plaintiff on Plaintiff's complaint.

After instructing the jury on the law, the Court submitted jury interrogatories and verdicts. After deliberation, the jury returned the following verdicts which were

accepted by the Court:

1. The jury found for Defendant Superior Lumber, LLC on all of Plaintiff's claims.

2. The jury found for Defendant Dennis Mast, Sr., on all of Plaintiff's claims.

3. Regarding Defendant Firman D. Mast, the jury found as follows:

   a. For Defendant Firman D. Mast on Plaintiff's claim of Breach of Fiduciary Duty and Civil Conspiracy.

   b. For Plaintiff and against Defendant Firman D. Mast on Plaintiff's claim of Conversion. The jury further found compensatory damages in the amount of $231,854.50. The jury did not award Plaintiff's demand for punitive damage or attorney's fees.

   c. The jury found for Plaintiff and against Defendant Firman D. Mast on Plaintiff's claim of Unjust Enrichment in the amount of $45,000.00.

WHEREFORE, it is hereby ORDERED, ADJUDGED and DECREED that:

1. Judgment is hereby entered against Plaintiff and in favor of Defendants Superior Lumber, LLC, Mervin Mast and Dennis Mast, Sr., on all of Plaintiff's claims.

2. Judgment is hereby entered in favor of Plaintiff and against Defendant Firman D. Mast for $276,854.50, together with interest at the rate of 5% per annum.

3. The costs of this action are hereby taxed against Defendant Firman D.

Mast.

4. This is a final, appealable order. The Clerk shall comply with Civ.R 58(B).

SO ORDERED,

DATE

JUDGE ROBERT RINFRET

Approval as to form by:

Thomas D. White
Attorney for Vasile Bunta

Grant A. Mason
Attorney for Defendants Superior Lumber, LLC and Firman D. Mast

Cari Fusco Evans
Attorney for Dennis Mast, Sr. and Mervin Mast

Copies to: Attorney White
Attorney Mason
Attorney Fusco Evans

Baldwin's Ohio Revised Code Annotated
Title XVII. Corporations--Partnerships (Refs & Annos)
Chapter 1705. Limited Liability Companies (Refs & Annos)
General Provisions

R.C. § 1705.01

1705.01 Definitions

Effective: May 4, 2012

Currentness

<Repealed by 2020 S 276, § 3, eff. 1-1-22.>

As used in this chapter:

(A) "Business" means every trade, occupation, or profession.

(B) "Contribution" means any cash, property, services rendered, promissory note, or other binding obligation to contribute cash or property or to perform services that a member contributes to a limited liability company in the capacity as a member.

(C) "Conveyance" means every assignment, lease, mortgage, or encumbrance.

(D) "Entity" means any of the following:

(1) A corporation existing under the laws of this state or any other state;

(2) Any of the following organizations existing under the laws of this state, the United States, or any other state:

(a) A business trust or association;

(b) A real estate investment trust;

(c) A common law trust;

(d) An unincorporated business or for profit organization, including a general or limited partnership;

(e) A limited liability company.

(E) “Incompetent” has the same meaning as in section 2111.01 of the Revised Code.

(F) “Knowledge,” of a fact, means actual knowledge of that fact and knowledge of other facts that under the circumstances shows bad faith.

(G) “Member” means a person whose name appears on the records of the limited liability company as the owner of a membership interest in that company.

(H) “Membership interest” means a member’s share of the profits and losses of a limited liability company and the right to receive distributions from that company.

(I) “Notice” means that the person who claims the benefit of the notice has done one of the following:

(1) Stated the fact to the person entitled to notice;

(2) Delivered through the mail or by other means of communication a written statement of the fact to the person entitled to notice or to a proper person at the place of business or residence of the person entitled to receive a notice.

(J) “Operating agreement” means all of the valid written or oral agreements of the members or, in the case of a limited liability company consisting of one member, a written declaration of that member, as to the affairs of a limited liability company and the conduct of its business.

(K) “Person” means any natural person; partnership, limited partnership, trust, estate, association, limited liability company, or corporation; any custodian, nominee, trustee, executor, administrator, or other fiduciary; or any other individual or entity in its own or any representative capacity.

(L) “Professional association” and “professional service” have the same meanings as in section 1785.01 of the Revised Code.

(M) “State” has the same meaning as in section 1.59 of the Revised Code and additionally includes a foreign country and any province, territory, or other political subdivision of a foreign country.

(N) “Tribunal” means a court or, if provided in the operating agreement or otherwise agreed, an arbitrator, arbitration panel, or other tribunal.

CREDIT(S)

(2012 H 48, eff. 5-4-12; 2011 H 153, eff. 9-29-11; 1997 H 170, eff. 11-21-97; 1994 S 74, eff. 7-1-94)

R.C. § 1705.01, OH ST § 1705.01
Current through Files 27 and 29 of the 134th General Assembly (2021-2022).

End of Document

Baldwin's Ohio Revised Code Annotated
Title XVII. Corporations--Partnerships (Refs & Annos)
Chapter 1705. Limited Liability Companies (Refs & Annos)
Management

R.C. § 1705.29

1705.29 Managers; standard of care

Effective: May 4, 2012

Currentness

<Repealed by 2020 S 276, § 3, eff. 1-1-22.>

(A) If the operating agreement of a limited liability company provides for managers, then the business of the company shall be exercised by or under the direction of its managers, except to the extent applicable law or the operating agreement provides otherwise.

(B) If a manager's duties are not governed by division (B) of section 1705. 282 of the Revised Code, then the only fiduciary duties a manager owes to the limited liability company are the duties to act in good faith, in a manner the manager reasonably believes to be in or not opposed to the best interests of the company, and with the care that an ordinarily prudent person in a similar position would use under similar circumstances.

(C) For purposes of division (B) of this section:

(1) A manager of a limited liability company shall not be found to have violated division (B) of this section unless it is proved, by clear and convincing evidence, in any action brought against the manager, including, but not limited to, an action involving or affecting a termination or potential termination of service to the company as a manager or service in any other position or relationship with the company, that the manager has not acted in good faith, in a manner the manager reasonably believes to be in or not opposed to the best interests of the company, or with the care that an ordinarily prudent person in a similar position would use under similar circumstances.

(2) A manager shall not be considered to be acting in good faith if the manager has knowledge concerning a particular matter that would cause reliance on information, opinions, reports, or statements that are prepared or presented by the persons described in section 1705.30 of the Revised Code to be unwarranted.

(3) Nothing in division (C) of this section limits relief available under section 1705.31 of the Revised Code.

(D) A manager of a limited liability company is liable in damages for any action that the manager takes or fails to take as a manager only if it is proved, by clear and convincing evidence, in a court with jurisdiction that the manager's action or failure to act involved an act or omission undertaken with deliberate intent to cause injury to the company or undertaken with reckless disregard for the best interests of the company. Nothing contained in this division limits the relief available under section 1705.31 of the Revised Code. This division does not apply if and only to the extent that, at the time of the act or omission of a manager that is the subject of complaint, the articles of organization or the operating agreement of the company state by specific reference to this division that its provisions do not apply to the company.

CREDIT(S)

(2012 H 48, eff. 5-4-12; 1994 S 74, eff. 7-1-94)

R.C. § 1705.29, OH ST § 1705.29
Current through Files 27 and 29 of the 134th General Assembly (2021-2022).

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Management

R.C. § 1705.34

1705.34 Property of company

Currentness

<Repealed by 2020 S 276, § 3, eff. 1-1-22.>

Real and personal property owned or purchased by a limited liability company shall be held and owned in the name of the company. Conveyance of that property shall be made in the name of the company.

CREDIT(S)

(1994 S 74, eff. 7-1-94)

R.C. § 1705.34, OH ST § 1705.34
Current through File 29 of the 134th General Assembly (2021-2022).

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Baldwin's Ohio Revised Code Annotated
Title XVII. Corporations--Partnerships (Refs & Annos)
Chapter 1705. Limited Liability Companies (Refs & Annos)
Dissolution and Winding up

R.C. § 1705.45

1705.45 Powers upon and effect of dissolution and winding up

Currentness

<Repealed by 2020 S 276, § 3, eff. 1-1-22.>

(A) A dissolved limited liability company continues its existence until the winding up of its affairs is completed. In the name of and on behalf of the company, the persons winding up its affairs may do any of the following:

(1) If authorized by the operating agreement, continue the business of the company in order to maximize its value as a going concern for eventual sale;

(2) Collect the assets of the company and gradually settle and close its business;

(3) Dispose of and convey the property of the company that will not be distributed in kind to its members;

(4) Discharge or make reasonable provision for the liabilities of the company;

(5) Distribute to the members any remaining assets of the company;

(6) Do every other act necessary to wind up and liquidate the business and affairs of the company.

(B) Dissolution of a limited liability company does not do any of the following:

(1) Transfer title to the assets of the company;

(2) Prevent commencement of a proceeding by or against the company in its name;

(3) Abate or suspend a proceeding pending by or against the company on the date of dissolution;

(4) Terminate the authority of the statutory agent of the company;

(5) Unless otherwise provided in the operating agreement, terminate the authority of any manager, officer, or other agent of the company;

(6) Unless the terms of the contract otherwise provide, terminate any contractual rights or obligations of the company.

CREDIT(S)

(1994 S 74, eff. 7-1-94)

R.C. § 1705.45, OH ST § 1705.45
Current through Files 27 and 29 of the 134th General Assembly (2021-2022).

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Dissolution and Winding up

R.C. § 1705.46

1705.46 Distribution of assets; payment of claims and obligations

Currentness

<Repealed by 2020 S 276, § 3, eff. 1-1-22.>

(A) Upon the winding up of a limited liability company and the liquidation of its assets, the assets shall be distributed in the following order:

(1) To the extent permitted by law, to members who are creditors and other creditors in satisfaction of liabilities of the company other than liabilities for distributions to members;

(2) Except as otherwise provided in the operating agreement, to members and former members in satisfaction of liabilities for distributions to members;

(3) Except as otherwise provided in the operating agreement, to members as follows:

(a) First, for the return of their contributions;

(b) Second, with respect to their membership interests.

(B) A limited liability company that is winding up its affairs and liquidating its assets shall pay or make reasonable provision to pay all claims and obligations, including all contingent, conditional, or unmatured claims and obligations that are known to the company and all claims and obligations that are known to the company but with respect to which the claimant or obligee is unknown. If there are sufficient assets, the claims and obligations shall be paid in full or any provision to pay them shall be made in full. If there are insufficient assets, the claims and obligations shall be paid or provided for according to their priority, and claims and obligations of equal priority shall be paid ratably to the extent of the assets available for their payment. Unless otherwise provided in the operating agreement, any remaining assets shall be distributed as provided in division (A) of this section.

CREDIT(S)

(1994 S 74, eff. 7-1-94)

R.C. § 1705.46, OH ST § 1705.46
Current through Files 27 and 29 of the 134th General Assembly (2021-2022).

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Chapter 1705. Limited Liability Companies (Refs & Annos)
Dissolution and Winding up

R.C. § 1705.48

1705.48 Personal liability of members, managers, and officers

Effective: July 6, 2016

Currentness

<Repealed by 2020 S 276, § 3, eff. 1-1-22.>

Except as otherwise provided by this chapter or any other provision of the Revised Code, including, but not limited to, sections 3734.908, 5739.33, 5743.57, 5747.07, and 5753.02 of the Revised Code, all of the following apply:

(A) The debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the limited liability company.

(B) No member, manager, or officer of a limited liability company is personally liable to satisfy any judgment, decree, or order of a court for, or is personally liable to satisfy in any other manner, a debt, obligation, or liability of the company solely by reason of being a member, manager, or officer of the limited liability company.

(C) The failure of a limited liability company or any of its members, managers, or officers to observe any formalities relating to the exercise of the limited liability company's powers or the management of its activities is not a factor to consider in, or a ground for, imposing liability on the members, managers, or officers for the debts, obligations, or other liabilities of the company.

(D) Nothing in this chapter affects any personal liability of any member, any manager, or any officer of a limited liability company for the member's, manager's, or officer's own actions or omissions.

(E) This chapter does not affect any statutory or common law of this or another state that pertains to the relationship between an individual who renders a professional service and a recipient of that service, including, but not limited to, any contract or tort liability arising out of acts or omissions committed or omitted during the course of rendering the professional service.

CREDIT(S)

(2016 S 181, eff. 7-6-16; 2010 H 519, eff. 9-10-10; 1994 S 74, eff. 7-1-94)

R.C. § 1705.48, OH ST § 1705.48
Current through Files 27 and 29 of the 134th General Assembly (2021-2022).

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Title XVII. Corporations--Partnerships (Refs & Annos)
Chapter 1706. Ohio Revised Limited Liability Company Act (Refs & Annos)
Preliminary Provisions

R.C. § 1706.01

1706.01 Definitions

Effective: April 12, 2021

Currentness

As used in this chapter:

(A) "Articles of organization" means the articles of organization described in section 1706.16 of the Revised Code, and those articles of organization as amended or restated.

(B) "Assignment" means a transfer, conveyance, deed, bill of sale, lease, mortgage, security interest, encumbrance, gift, or transfer by operation of law.

(C) "Constituent limited liability company" means a constituent entity that is a limited liability company.

(D) "Constituent entity" means an entity that is party to a merger.

(E) "Contribution" means anything of value including cash, property, or services rendered, or a promissory note or other binding obligation to contribute cash or property or to perform services, that a person contributes to a limited liability company, or a series thereof, in the person's capacity as a member.

(F) "Converted entity" means the entity into which a converting entity converts pursuant to sections 1706.72 to 1706.723 of the Revised Code.

(G) "Converting limited liability company" means a converting entity that is a limited liability company.

(H) "Converting entity" means an entity that converts into a converted entity pursuant to sections 1706.72 to 1706.723 of the

Revised Code.

(I) “Debtor in bankruptcy” means a person who is the subject of an order for relief under Title 11 of the United States Code, a comparable order under a successor statute of general application, or a comparable order under any federal, state, or foreign law governing insolvency.

(J) “Distribution” means a transfer of money or other property from a limited liability company, or a series thereof, to another person on account of a membership interest.

(K) “Entity” means a general partnership, limited partnership, limited liability partnership, limited liability company, association, corporation, professional corporation, professional association, nonprofit corporation, business trust, real estate investment trust, common law trust, statutory trust, cooperative association, or any similar organization that has a governing statute, in each case, whether foreign or domestic.

(L) “Foreign limited liability company” means an entity that is all of the following:

(1) An unincorporated association;

(2) Organized under the laws of a state other than this state or under the laws of a foreign country;

(3) Organized under a statute pursuant to which an association may be formed that affords to each of its members limited liability with respect to the liabilities of the entity;

(4) Not required to be registered, qualified, or organized under any statute of this state other than this chapter.

(M) “Governing statute” means the law that governs an entity’s internal affairs.

(N) “Limited liability company,” except in the phrase “foreign limited liability company” means an entity formed or existing under this project.

(O) “Manager” means any person designated by the limited liability company or its members with the authority to manage all or part of the activities or affairs of the limited liability company on behalf of the limited liability company, which person has agreed to serve in such capacity, whether such person is designated as a manager, director, officer, or otherwise.

(P) “Member” means a person that has been admitted as a member of a limited liability company under section 1706.27 of the Revised Code and that has not dissociated as a member.

(Q) “Membership interest” means a member’s right to receive distributions from a limited liability company or series thereof.

(R) “Operating agreement” means any valid agreement, written or oral, of the members, or any written declaration of the sole member, as to the affairs and activities of a limited liability company and any series thereof. “Operating agreement” includes any amendments to the operating agreement.

(S) “Organizational documents” means any of the following:

(1) For a general partnership or foreign general partnership, its partnership agreement;

(2) For a limited partnership or foreign limited partnership, its certificate of limited partnership and partnership agreement;

(3) For a limited liability limited partnership or foreign limited liability limited partnership, its certificate of limited partnership and partnership agreement;

(4) For a limited liability company or foreign limited liability company, its articles of organization and operating agreement, or comparable records as provided in its governing statute;

(5) For a business or statutory trust or foreign business or statutory trust, its trust instrument, or comparable records as provided in its governing statute;

(6) For a for-profit corporation or foreign for-profit corporation, its articles of incorporation, regulations, and other agreements among its shareholders that are authorized by its governing statute, or comparable records as provided in its governing statute;

(7) For a nonprofit corporation or foreign nonprofit corporation, its articles of incorporation, regulations, and other agreements that are authorized by its governing statute or comparable records as provided in its governing statute;

(8) For a professional association, its articles of incorporation, regulations, and other agreements among its shareholders that

are authorized by its governing statute, or comparable records as provided in its governing statute;

(9) For any other entity, the basic records that create the entity, determine its internal governance, and determine the relations among the persons that own it, are members of it, or govern it.

(T) “Organizer” means a person executing the initial articles of organization filed by the secretary of state in accordance with section 1706.16 of the Revised Code.

(U) “Person” means an individual, entity, trust, estate, government, custodian, nominee, trustee, personal representative, fiduciary, or any other individual, entity, or series thereof in its own or any representative capacity, in each case, whether foreign or domestic. As used in this division, “government” includes a country, state, county, or other political subdivision, agency, or instrumentality.

(V) “Principal office” means the location specified by a limited liability company, foreign limited liability company, or other entity as its principal office in the last filed record in which the limited liability company, foreign limited liability company, or other entity specified its principal office on the records of the secretary of state. If no such location has previously been specified, then “principal office” means the location reasonably apparent to an unaffiliated person as the principal executive office of the limited liability company, foreign limited liability company, or other entity.

(W) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in written or paper form through an automated process.

(X) “Sign” means, with the present intent to authenticate or adopt a record, either of the following:

(1) To execute or adopt a tangible symbol;

(2) To attach to or logically associate with the record an electronic symbol, sound, or process.

(Y) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(Z) “Surviving entity” means an entity into which one or more other entities are merged, whether the entity pre-existed the merger or was created pursuant to the merger.

(AA) “Tribunal” means a court or, if provided in the operating agreement or otherwise agreed, an arbitrator, arbitration panel, or other tribunal.

CREDIT(S)

(2020 S 276, eff. 4-12-21)

R.C. § 1706.01, OH ST § 1706.01
Current through File 29 of the 134th General Assembly (2021-2022).

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Preliminary Provisions

R.C. § 1706.02

1706.02 Chapter citation

Effective: April 12, 2021

Currentness

This chapter may be cited as the "Ohio Revised Limited Liability Company Act."

CREDIT(S)

(2020 S 276, eff. 4-12-21)

R.C. § 1706.02, OH ST § 1706.02
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R.C. § 1706.06

1706.06 Chapter construction; application; effect on other laws

Effective: April 12, 2021

Currentness

(A) This chapter shall be construed to give maximum effect to the principles of freedom of contract and to the enforceability of operating agreements.

(B) Unless displaced by particular provisions of this chapter, principles of law and equity supplement this chapter.

(C) Rules that statutes in derogation of the common law are to be strictly construed shall have no application to this chapter.

(D) Sections 1309.406 and 1309.408 of the Revised Code do not apply to any interest in a limited liability company, including all rights, powers, and interests arising under an operating agreement or this chapter. This division prevails over those sections, and is expressly intended to permit the enforcement of the provisions of an operating agreement that would otherwise be ineffective under those sections.

(E) This chapter applies to all limited liability companies equally regardless of whether the limited liability company has one or more members or whether it is formed by a filing under section 1706.16 of the Revised Code or by merger, consolidation, conversion, or otherwise.

CREDIT(S)

(2020 S 276, eff. 4-12-21)

R.C. § 1706.06, OH ST § 1706.06
Current through File 29 of the 134th General Assembly (2021-2022).

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Members

R.C. § 1706.311

1706.311 Standards of conduct for manager

Effective: April 12, 2021

Currentness

(A) Unless either a written operating agreement for the limited liability company or a written agreement with a manager establishes additional fiduciary duties or the duties of the manager have been modified, waived, or eliminated as contemplated by section 1706.08 of the Revised Code, the only fiduciary duties of a manager to the limited liability company or its members are the duty of loyalty and the duty of care set forth in divisions (B) and (C) of this section.

(B) A manager's duty of loyalty to the limited liability company and its members is limited to the following:

(1) To account to the limited liability company and hold for it any property, profit, or benefit derived by the manager in the conduct and winding up of the limited liability company business or derived from a use by the manager of limited liability company property or from the appropriation of a limited liability company opportunity;

(2) To refrain from dealing with the limited liability company in the conduct or winding up of the limited liability company business as or on behalf of a party having an interest adverse to the limited liability company.

(C) A manager's duty of care to the limited liability company in the conduct and winding up of the limited liability company activities is limited to acting in good faith, in a manner the manager reasonably believes to be in or not opposed to the best interests of the limited liability company.

(D) For purposes of division (C) of this section, both of the following apply:

(1) A manager of a limited liability company shall not be determined to have violated the manager's duties under division (C) of this section unless it is proved that the manager has not acted in good faith, in a manner the manager reasonably believes to be in or not opposed to the best interests of the limited liability company.

(2) A manager shall not be considered to be acting in good faith if the manager has knowledge concerning the matter in question that would cause reliance on information, opinions, reports, or statements that are prepared or presented by any of the persons described in section 1706.331 of the Revised Code to be unwarranted.

(E) A manager shall be liable for monetary relief for a violation of the manager's duties under division (C) of this section only if it is proved that the manager's action or failure to act involved an act or omission undertaken with deliberate intent to cause injury to the limited liability company or undertaken with reckless disregard for the best interests of the company. This division does not apply if, and only to the extent that, at the time of a manager's act or omission that is the subject of complaint, either of the following is true:

(1) The articles or the operating agreement of the limited liability company state by specific reference to division (E) of this section that the provisions of this division do not apply to the limited liability company.

(2) A written agreement between the manager and the limited liability company states by specific reference to division (E) of this section that the provisions of this division do not apply to the manager.

(F) All the members of a limited liability company may authorize or ratify, after full disclosure of all material facts, a specific act or transaction that would otherwise violate the duty of loyalty. It is a defense to a claim under division (B)(2) of this section and any comparable claim in equity or at common law that the transaction was fair to the limited liability company. If, as permitted by this division or the operating agreement, a manager enters into a transaction with the limited liability company that otherwise would be prohibited by division (B)(2) of this section, the manager's rights and obligations arising from the transaction are the same as those of a person that is not a manager.

(G) A manager shall discharge the duties to the limited liability company and the members under this chapter and under the operating agreement and exercise any rights consistently with the implied covenant of good faith and fair dealing.

(H) Nothing in this section affects the duties of a manager who acts in any capacity other than the manager's capacity as a manager. If a manager of a limited liability company also is a member of the limited liability company, the actions taken in the capacity as a member of the limited liability company shall be subject to section 1706.31 of the Revised Code. Nothing in this section affects any contractual obligations of a manager to the limited liability company.

CREDIT(S)

(2020 S 276, eff. 4-12-21)

R.C. § 1706.311, OH ST § 1706.311
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Dissolution

R.C. § 1706.475

1706.475 Application of assets in winding up

Effective: April 12, 2021

Currentness

(A) Upon the winding up of a limited liability company, payment or adequate provision for payment, shall be made to creditors, including members who are creditors, in satisfaction of liabilities of the limited liability company.

(B) After a limited liability company complies with division (A) of this section, any surplus shall be distributed as follows:

(1) First, to each person owning a membership interest that reflects contributions made on account of the membership interest and not previously returned, an amount equal to the value of the person's unreturned contributions;

(2) Then to each person owning a membership interest in the proportions in which the owners of membership interests share in distributions before dissolution.

(C) If the limited liability company does not have sufficient surplus to comply with division (B)(1) of this section, any surplus shall be distributed among the owners of membership interests in proportion to the value of their respective unreturned contributions.

CREDIT(S)

(2020 S 276, eff. 4-12-21)

R.C. § 1706.475, OH ST § 1706.475
Current through Files 27 and 29 of the 134th General Assembly (2021-2022).

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