

**SUCCESSION OF LEON
IMPASTATO A/K/A LEON J.
IMPASTATO**

*** NO. 2001-CA-1987
* COURT OF APPEAL
* FOURTH CIRCUIT
* STATE OF LOUISIANA**

*** * * * ***

**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 98-17439, DIVISION "H-12"
Honorable Michael G. Bagneris, Judge**

*** * * * ***

JOAN BERNARD ARMSTRONG

JUDGE

*** * * * ***

(Court composed of Judge Joan Bernard Armstrong, Judge Terri F. Love and Judge Max N. Tobias, Jr.)

TOBIAS, J., DISSENTS.

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L.L.C.)

AFFIRMED.

This action involves an attack, by relatives of the decedent, upon certain business transactions of the decedent. The trial court found that those transactions were legally valid. The relatives appeal. Because we find that the trial court was not clearly wrong-manifestly erroneous, we will affirm.

Leon Impastato, the decedent, and his business colleague of over 30 years, Clyde Abercrombie, executed Articles of Organization of Buccaneer Properties, L.L.C. on July 7, 1998. The Articles were in authentic form as they were signed before a notary and two witnesses. Also on July 7, 1998, Mr. Impastato and Mr. Abercrombie executed, before two witnesses, an Initial Report for Buccaneer Properties, L.L.C. These instruments provided that Mr. Impastato and Mr. Abercrombie each had a 50% interest in Buccaneer Properties, L.L.C.

Just about two months later, on September 2, 1998, Mr. Impastato and Mr. Abercrombie executed several further instruments in authentic form. The most pertinent of them is a “Transfer of property by Clyde Abercrombie and Leon Impastato to Buccaneer Properties, L.L.C.”. The Transfer of Property provided that certain items of real estate, titled in the name of Mr. Impastato, and certain securities, also titled in the name of Mr. Impastato, were transferred to Buccaneer Properties, L.L.C. The Transfer of Property also stated that a corporation, Buccaneer Industries, Inc., was owned 70% by Mr. Abercrombie and 30% by Mr. Impastato, and provided that all of the ownership of Buccaneer Industries, Inc. was transferred to Buccaneer

Properties, L.L.C. The Transfer of Property constituted the only capitalization of Bucaneer Properties, L.L.C.

Also on September 2, 1998, Mr. Impastato executed his Last Will and Testament and the Leon Impastato Educational Trust. The Will left the bulk of Mr. Impastato's estate, including his 50% interest in Bucaneer Properties, L.L.C., to the Trust. The Trust provided that Mr. Impastato would be the income beneficiary for the remainder of his life and that, after his death, the Trust income would be used for education of his great nieces and great nephews.

The defendants-appellants, Gary M. Impastato, Sr. and Nancy LoNigro are relatives of Mr. Impastato. They contend that the transfer of real estate and securities, titled in the name of Mr. Impastato, to Bucaneer Properties, L.L.C., done by the Transfer of Property, should be set aside with the result that all of the real estate and securities would then be owned by Mr. Impastato's estate and left to the Trust. In order to resolve this controversy, Mr. Abercrombie and Bucaneer Properties, L.L.C. filed the present declaratory judgment action. By the petition for declaratory judgment, Mr. Abercrombie and Bucaneer Properties, L.L.C. sought a

declaratory judgment that: (1) on July 7, 1998, Mr. Impastato and Mr. Abercrombie were of sound mind and had the requisite legal capacity to form, and did form, Bucaneer Properties, L.L.C.; (2) that the July 7, 1998 formation of Bucaneer Properties, L.L.C. was valid; (3) that Mr. Abercrombie was and is 50% owner of Bucaneer Properties, L.L.C.; (4) that on September 2, 1998, Mr. Impastato was of sound mind and had the requisite legal capacity to execute the Transfer of Property; and that (5) Mr. Abercrombie has the legal authority to act on behalf of Bucaneer Properties, L.L.C. Defendants Gary M. Impastato, Sr. and Nancy LoNigro answered and reconvened and contended that the Transfer of Property should be set aside. After a bench trial, the trial court ruled in favor of Mr. Abercrombie and Bucaneer Properties, L.L.C., granting the declaratory relief they sought, and rejecting the claims of Gary M. Impastato, Sr. and Nancy LoNigro. The present appeal is brought by Gary M. Impastato, Sr. and Nancy LoNigro.

In addition to the several instruments executed by Mr. Impastato and Mr. Abercrombie, the evidence at trial consisted of the testimony of Mr. Abercrombie, Randy Opotowski, the attorney who drafted all of the various documents, and Linda Cross, CPA, the accountant who gave tax advice.

Most telling was the testimony of Mr. Abercrombie. He testified that he and Mr. Impastato had been in business together for over 30 years, beginning with three buildings in 1964, and that they shared an office and worked together investing in and managing real estate and securities through that period. He testified that the real estate and securities transferred to Buccaneer Properties, L.L.C., although titled solely in the name of Mr. Impastato, were in fact owned jointly, 50% each, by Mr. Impastato and Mr. Abercrombie. He explained this arrangement as based upon the fact that he, Mr. Abercrombie, was the primary risk-taker in their business transactions. Mr. Abercrombie also testified that, when the corporation Buccaneer Industries, Inc. was formed, Mr. Impastato and Mr. Abercrombie owned it 50% each but, subsequently, pursuant to an option, Mr. Abercrombie acquired an additional 20% interest in that corporation. The appellants introduced into evidence, in conjunction with the testimony of Mr. Opotowski and Ms. Cross, certain unsigned documents which reflected that Mr. Impastato was the sole owner of Buccaneer Industries, Inc. (The trial court made clear on the record that it was not impressed by these unsigned documents.) Also, the appellants pointed out to the trial court the undisputed fact that all of the

real estate and securities transferred to Buccaneer Properties, L.L.C. were titled in the name of Mr. Impastato alone. It is a fair characterization of all of the evidence to say that, while, on paper, (including bank financial statements and tax returns), Mr. Impastato was presented as the sole owner of the real estate and securities, and perhaps even as the sole owner of the corporation Buccaneer Industries, Inc., he and Mr. Abercrombie understood that, in fact, they owned the real estate and securities jointly, 50% each, and the corporation 50% each (and the corporation later 70% Mr. Abercrombie and 30% Mr. Impastato). The trial court's findings, declining to set aside the transfer of property, so that Mr. Abercrombie received an ultimate (through Buccaneer Properties, L.L.C.) 50% interest in the real estate and securities, while the Educational Trust received an ultimate (through the estate) 50% interest in the real estate and securities, is in accord with Mr. Abercrombie's testimony that he and Mr. Impastato owned the real estate and securities 50% each.

The appellants presented below an assortment of theories in support of their attack on the Transfer of Property including lesion, simulation and fraud. (The appellants specifically do not contest Mr. Impastato's mental

capacity as to the Transfer of Property.) We find that two factual points are dispositive of all the plaintiff's theories. First, it is undisputed that Mr. Impastato, and Mr. Abercrombie, by authentic acts, created Buccaneer Properties, L.L.C., provided that each of them would have a 50% interest in Buccaneer Properties, L.L.C., and transferred real estate, securities and their interests in a corporation to Buccaneer Properties, L.L.C. to capitalize that L.L.C. The various documents, including the Transfer of Property, are perfectly clear and there is no reason to doubt that Mr. Impastato, a Tulane University educated architect and extremely experienced businessman, conceded to be of sound mind, understood exactly what he was doing. In fact, the trial court noted on the record that Mr. Impastato was a "shrewd" businessman. Also, an attorney, Mr. Optowski, who had advised both Mr. Impastato and Mr. Abercrombie for many years in connection with their business transactions, advised them as to the formation and capitalization of Buccaneer Properties, L.L.C. and prepared and notarized the necessary instruments. Attorney Opotowski testified that he always took his instructions from Mr. Impastato. Second, Mr. Abercrombie's testimony that he and Mr. Impastato titled real estate and securities in the name of Mr.

Impastato alone, because Mr. Abercrombie was the primary risk-taker, but that Mr. Impastato and Mr. Abercrombie in fact owned those investments equally, was completely un rebutted. While Mr. Abercrombie's testimony is self-serving, a critical point is that the undisputed nature of the Transfer of Property, and Mr. Abercrombie's testimony, are completely consistent.

There is no reason to think that Mr. Impastato, an educated, experienced shrewd businessman, of sound mind, would transfer 100% interests in real estate and securities to an L.L.C. in which he owned a 50% interest. In contrast, there would be nothing unusual about Mr. Impastato transferring 50% interests in real estate and securities to a L.L.C. in which he owned a 50% interest, because he would continue to have the same 50% ultimate interest he had always had, but through his 50% ownership of Buccaneer Properties, L.L.C. rather than in direct ownership of the real estate and securities. Furthermore, because Mr. Impastato's 50% ultimate financial interest was not affected, there necessarily was no lesion, simulation or fraud. Further, because Mr. Impastato's 50% interest in Buccaneer Properties, L.L.C. is owned by Mr. Impastato's estate, the Leon Impastato Educational Trust, for the education of Mr. Impastato's grand nieces and

nephews, can also receive the same ultimate 50% economic benefit in the real estate and securities. We understand from the appellants' brief that there are other legal proceedings pending as to the Trust. Nothing in this opinion is intended to affect those proceedings.

The appellees have answered the appeal to request sanctions or attorney's fees for a frivolous appeal. We do not find that this appeal is frivolous so as to warrant imposition of sanctions or an award of attorney's fees.

For the foregoing reason, the judgment of the trial court is affirmed.

AFFIRMED.