IN THE COURT OF APPEALS OF IOWA

No. 3-128 / 12-0591
Filed April 10, 2013

THREE MINNOWS, LLC,
Plaintiff-Appellant,

vs.

CREAM, LLC,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Randy V. Hefner, Judge.

Plaintiff appeals the district court's grant of a directed verdict on its contract claims. **AFFIRMED.**

Kathryn Barnhill and Jonathan M. Barnhill of Barnhill & Associates, Iowa, P.L.L.C., West Des Moines, for appellant.

David L. Charles of Crowley Fleck, P.L.L.P., Des Moines, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

VOGEL, P.J.

Plaintiff, Three Minnows, LLC, filed suit against the defendant, CREAM, LLC, for breach of a management contract. At the close of the plaintiff's evidence, CREAM moved for a directed verdict, asserting there were not sufficient facts presented for the jury to find the person who signed the contract had the authority to bind CREAM to the agreement. The district court agreed and directed the verdict for CREAM. We affirm.

I. Background Facts and Proceedings

Looking at the evidence in the light most favorable to Three Minnows, the following occurred. Three Minnows was created in 2009 as a manager-managed, limited liability company (LLC),[1] and at the time of the events in question, Dean Quirk owned 99% of the company. Three Minnows owned a bar in Des Moines, called "Drink." CREAM, also an LLC, was formed in 2004 as a manager-managed LLC to purchase and operate "The Union Bar," located in Iowa City. At the time the relevant events transpired, the managing members of CREAM were George Wittgraf III and Jeff Maynes.[2] Martin Maynes, Jeff's brother, owned 30% of CREAM as a member, but he was only a manager of the company for a few months in late 2004 or early 2005.

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[1] A limited liability company is a business entity formed under Iowa Code chapter 489.102, or its predecessor chapter 490A, to shelter its members from personal financial liability. According to Iowa Code, a limited liability company is member-managed—where the management and the conduct of the company is vested in the members—unless there is a express provision that the company will be managed by its managers. Iowa Code § 489.407 (2011).

[2] Non-managing members of CREAM were Victoria Wittgraf and Martin Maynes. George Wittgraf II is the secretary and registered agent for CREAM and also owned thirty percent.

Quirk wanted to contract with an entity to manage the operations of Drink. In December 2009, Quirk met with Martin and Jeff Maynes, Mike Caudle, and David Clark at a restaurant to discuss Drink. Shortly thereafter, Drink was closed for remodeling. The first contract, dated January 3, 2010, proposed by Three Minnows for the management of its Des Moines bar was between Three Minnows and an entity known as GM Investments. The managers of GM are Martin and George Wittgraff III. However, this proposed management contract was never shown to George Wittgraff III nor was it shown to the other manager of CREAM, Jeff Maynes. Martin emailed a counter offer to Quirk and suggested he might use a different LLC Martin owned, EWM LLC, instead of GM Investments. This email stated Martin was "going to have a contract drawn up between CREAM LLC (The Union Bar in Iowa City) and Three Minnows/EWM LLC granting us the rights to use the name The Union Bar."

In addition to a management agreement, for Three Minnows to use the name "The Union Bar," a licensing agreement was needed between Three Minnows and CREAM. None was procured, and when the Des Moines bar was poised to open on St. Patrick's Day 2010 under the name "The Union Bar," members of CREAM objected because of the lack of a licensing agreement. George Wittgraf II then drafted a licensing agreement which allowed the use of The Union Bar name in Des Moines. Martin was given the authority to sign this agreement, and on March 16, Martin signed the agreement on behalf of CREAM as "Martin P. Maynes, Member." This agreement specifically stated if it were to be terminated, notice must be given to George Wittgraf II as the registered agent for CREAM.

On March 29, 2010, Quirk modified the proposed management contract with Martin and GM investments. It included a clause which stated, "This Agreement supersedes and completely replaces the agreement entered into by Three Minnows, L.L.C. and Cream L.L.C. on March 16, 2010. Cream, L.L.C. further waives any notice of termination required by aforesaid agreement." Martin signed the document on behalf of CREAM, though he told Quirk he had no authority to do so. A second management contract purporting to be between Three Minnows and CREAM was entered into on May 11, again, superseding all previous agreements. Martin also signed this contract on behalf of CREAM. Martin testified Quirk told him he needed these agreements signed but they were "strictly to be used to obtain financing [and] [t]hat it was not to be used to bind CREAM in any fashion." Quirk never inquired into Martin's authority to bind CREAM. He testified it had occurred to him to call some other people involved with CREAM to inquire as to what was going on with the management contract, but he never called anyone. Martin never gave the management agreements to any member of CREAM.

CREAM first became aware of the management contract in August 2010 when it—through George Witgraff II as registered agent—received a letter from Three Minnows's attorney claiming CREAM was in breach of the management agreement and owed Three Minnows and Quirk a large amount of money.

Three Minnows filed suit against CREAM for breach of the management contracts. Summary judgment was denied because the district court found there were fact questions regarding the extent of Martin's authority to enter into the management agreement. A jury trial began on January 9, 2012. On the third

day, Three Minnows rested its case and CREAM moved for a directed verdict. The district court granted the motion and found it did not "believe that any reasonable juror—there are no inferences that could be drawn from the granting of that authority [for the licensing agreement] that would lead a reasonable person to believe that Martin Maynes was authorized to execute the subsequent [management] agreements."

Three Minnows filed a motion for new trial and sanctions, which was resisted by CREAM, which also requested sanctions. The motion for a new trial alleged that under Iowa Rules of Civil procedure 1.1004(1) and 1.1004(2), a new trial should be granted based upon misconduct and irregularity by the prevailing party, the defendant, CREAM. Three Minnows claimed CREAM's attorney threatened criminal litigation in the civil matter and those actions caused prejudice to plaintiffs, necessitating a new trial. This motion was denied, and Three Minnows appealed challenging the denial of the motion for a new trial "and each and every other order and ruling incurring therein."[3]

II. Standard of Review and Issue Preservation

Our scope of review for all issues in this appeal challenging the trial court's grant of the motion for directed verdict is for correction of errors at law. *Rife v*. *D.T*. *Corner*, *Inc*., 641 N.W.2d 761, 766 (Iowa 2002). We consider the

[3] CREAM also argues we lack jurisdiction to decide this case because the motion for a new trial was untimely, therefore making the notice of appeal untimely. It argues the appropriate date to start the fifteen-day period is when the directed verdict was granted (January 12, 2012) rather than when the judgment was entered (January 13, 2012). The motion for a new trial was filed on January 27, 2012. This is within fifteen days "after filing of the verdict, report or decision with the clerk." Iowa R. Civ. P. 1.1007; *see also Milks v. Iowa OTO-Head & Neck Specialists, P.C.*, 519 N.W.2d 801, 805 ("[W]e conclude that the time for filing a motion for new trial commences upon the filing of the jury's verdict with the clerk of court.").

evidence in the light most favorable to the non-moving party. *Id.* "If there is substantial evidence in the record to support each element of the claim, we must overrule the motion." *Id.* If reasonable minds could reach different conclusions based upon the evidence presented, the issue must be submitted to the jury for determination. *Id.* [4]

CREAM argues Three Minnows failed to preserve error on this issue of the propriety of the directed verdict because its motion for a new trial dealt with a separate issue. Our supreme court has addressed that issue in *Lawrence v. Grinde*, 534 N.W.2d 414, 417-18 (Iowa 1995). Rejecting a near identical argument, it held

> The defendants' contention is in error. In order for a party to preserve error when challenging the grant of a motion for directed verdict, the party merely needs to challenge the motion and inform the trial court of the grounds for the challenge so that the trial court may pass on those grounds. . . . Our review is then limited to those grounds the challenger has raised.

Lawrence, 534 N.W.2d at 417-18 (Internal citations omitted)

The requirement that a party must file a motion requesting the trial court to enlarge or amend its findings in order to preserve an issue for appeal applies only when the court fails to resolve an issue, claim, defense, or legal theory the parties have properly submitted to it for adjudication. *Id.*, *see also* Iowa R. Civ. P. 1.904(2). In this case, the defendant moved for directed verdict on the ground

[4] The district court also granted a directed verdict on Three Minnow's claim of conversion and breach of fiduciary duty against CREAM. Three Minnows argues "the issue in this appeal is whether a juror could reasonably infer that CREAM had given authority to Martin Maynes to enter into agreements." It failed to brief or cite any authority in support of reversing the directed verdict on the conversion or breach of fiduciary duty. The issues are therefore waived. *See* Iowa Rs. App. P. 6 .903(2)(g) ("The argument section shall be structured so that each issue raised on appeal is addressed in a separately numbered division."); 6.903(2)(g)(3) ("Failure to cite authority in support of an issue may be deemed waiver of that issue.").

that Three Minnows had failed to provide evidence which demonstrated the elements of the three claims: breach of contract, breach of fiduciary duty, and conversion. The record indicates Three Minnows resisted this motion and raised the precise challenges to the motion it raises on appeal. The trial court therefore had the opportunity to consider the challenges Three Minnows now requests us to consider. The record demonstrates no error preservation problem exists with regard to this issue. *See Lawrence*, 534 N.W.2d at 418.

III. Directed Verdict

Three Minnows claims the district court erred in granting the motion for a directed verdict in general, and more specifically, granting it after its case in chief rather than after CREAM presented evidence. Our supreme court has discussed the timeliness of granting a motion for directed verdict in *Royal Indem*. *Co*. *v*. *Factory Mut*. *Ins*. *Co*., 786 N.W.2d 839, 844-45 (Iowa 2010):

> Neither . . . our rules of civil procedure, nor previous cases provide any definitive guidance on when a motion for directed verdict must be made. Nothing in the rules requires a motion for directed verdict occur at the close of plaintiff's case. Iowa Rule of Civil Procedure 1.945 provides that "[a]fter a party has rested, the adverse party may move for dismissal because no right to relief has been shown, under the law or facts, without waiving the right to offer evidence thereafter." This rule is permissive rather than mandatory. *Christensen v*. *Sheldon*, [63 N.W.2d 892, 900–01] (1954). Iowa Rule of Civil Procedure 1.1003(2), on the other hand, provides: ["]If the movant was entitled to a directed verdict *at the close of all the evidence*, and moved therefor, and the jury did not return such verdict, the court may then either grant a new trial or enter judgment as though it had directed a verdict for the movant.["] (Emphasis added.) This rule contemplates that the motion for a directed verdict is to be made at the close of all evidence.
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> In *Christensen*, we approved the procedure of not granting motions for directed verdict until the completion of all evidence except in the most obvious cases. *Christensen*, [63 N.W.2d at 901]. We continue to believe this to be the best course of action. Even the weakest cases may gain strength during the defendant's

> presentation of the case. *Id*. [at 900]. ("'There is . . . a failure of justice, where the evidence for the defense discloses a case against a defendant already prematurely acquitted, that such acquittal ought never to take place until there is the strongest reason to believe that such a consequence cannot follow.'") (quoting *Castle v*. *Bullard*, [64 U.S. 172, 185] (1859)).

Three Minnows, however, fails to argue how the holding in *Royal Indemnity*, affects its case. In addition, Three Minnows never objected to the court directing a verdict at the close of Three Minnows's case in chief rather than at the end of all the evidence, either during the motion for directed verdict or in its motion for new trial. *See Meier v*. *Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."). We therefore will not address the issue of whether the district court erred in not waiting until after CREAM's presentation of evidence to grant the motion, but rather focus our attention on what is presented before us, whether there was sufficient evidence to create a jury question on the issue of Martin's authority to bind CREAM.

Generally, only managers can bind an LLC unless another party, such as a member, is given authorization to do so by a manger as a principal. *See* Iowa Code § 489.301 ("A member is not an agent of a limited liability company solely by reason of being a member."). The party asserting an agency relationship must prove its existence by a preponderance of the evidence. *Chariton Feed & Grain*, *Inc*. *v*. *Harder*, 369 N.W.2d 777, 789 (Iowa 1985). "Agency . . . results from (1) manifestation of consent by one person, the principal, that another, the agent, shall act on the former's behalf and subject to the former's control and,

(2) consent by the latter to so act." *Pillsbury Co*. *v*. *Ward*, 250 N.W.2d 35, 38 (Iowa 1977). An agency relationship can be established through the agent's actual or apparent authority to act on behalf of the principal. *Fed*. *Land Bank of Omaha v*. *Union Bank & Trust Co*. *of Ottumwa*, 290 N.W. 512, 514-15 (Iowa 1940).

Actual authority exits if the principal has either expressly or by implication granted the agent the authority to act on the principal's behalf. *Grismore v*. *Consol*. *Prods*. *Co*., 5 N.W.2d 646, 651 (Iowa 1942). Actual authority is composed of two authority classifications, one known as "express authority" and the other known as "implied authority." *Id.* Express authority exists where there is direct evidence the principal granted authority to the agent to act on its behalf. *Frontier Leasing Corp*. *v*. *Links Eng'g*, *LLC*, 781 N.W.2d 772, 776 (Iowa 2010). Where circumstantial evidence proves the agent's authority, however, the authority is implied. *Id.*

CREAM's articles of organization specifically provided

> ARTICLE VI
> MEMBERS NOT AGENTS
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> Unless authorized to do so by the operating agreement, or by a manager or managers of the Company, no member, agent or employee of the Company shall have any power or authority to bind the Company in any way, to pledge its credit or to render it liable pecuniarily for any purpose.

This was a proper limitation of the authority of non-manager members at all times

relevant to this proceeding.[5] CREAM's articles of organization are public, and Quirk was aware he could access the articles to learn the extent of authority a member of CREAM had to bind CREAM. He made no effort to do so, or inquire in any way as to who had authority to bind CREAM to the management contract.

Martin was not a manager of CREAM when he negotiated this contract so it is clear under its organizational terms and the law he did not have express authority to bind CREAM. *See Frontier Leasing*, 781 N.W.2d at 777 ("actual authority examines the principal's communications to the agent"). We must therefore determine whether he had apparent authority.

Apparent authority is authority the principal has knowingly permitted or held the agent out as possessing. *Magnusson Agency v*. *Pub*. *Entity Nat'l Co*.-*Midwest*, 560 N.W.2d 20, 25-26 (Iowa 1997). Apparent authority focuses on the principal's communications to the third party. *Frontier Leasing*, 781 N.W.2d at 777. In other words, "[a]pparent authority must be determined by what the principal does, rather than by any acts of the agent." *Magnusson Agency*, 560 N.W.2d at 26. The court explained in *Frontier Leasing*:

> A principal may also be liable under the doctrines of estoppel and ratification. Under the doctrine of estoppel, the principal is liable if he (1) causes a third party to believe an agent has the authority to

[5] The law regarding limited liability companies in Iowa has evolved. In 2004, when CREAM filed its articles of organization Iowa Code section 490A.702(3)(a) (2003) provided in a manager-managed limited liability company, "A member, acting solely in the capacity as a member is not an agent of the limited liability company." Chapter 490A was repealed on January 1, 2011, and the revised uniform limited liability company act was enacted in its place. That act provides "A member is not an agent of a limited liability company solely by reason of being a member." Iowa Code § 489.301(1) (2011). The current version of the code also allows for a limited liability company to file with the secretary of state a statement of authority stating who can enter into transactions on behalf of the company or otherwise bind the company. *Id.* § 489.301. Neither party argues this change in the law had any effect on this case, and we will therefore not address it.

> act, or (2) has notice that a third party believes an agent has the authority and does not take steps to notify the third party of the lack of authority. Restatement (Third) of Agency § 2.05, at 145-46. Moreover, based on principles of ratification, a principal may be liable when he knowingly accepts the benefits of a transaction entered into by one of his agents. *Mayrath Co*. *v*. *Helgeson*, 258 Iowa 543, 551, 139 N.W.2d 303, 308 (1966).

781 N.W.2d at 777.

The district court, in granting the motion for a directed verdict found a finder of fact could find CREAM authorized Martin to execute the March 16 licensing contract, but there was nothing a juror could

> reasonably infer from CREAM's authorization of Martin Maynes to execute that [licensing] contract that any reasonable person could infer that Martin Maynes was authorized to execute any and all other contracts relating in general to the same subject matter. The scope of the authority granted by CREAM to Martin Maynes was clearly limited by the terms of [the March 16 licensing contract], and [the March 16 licensing contract] by its terms, required and provided that the agreement may be terminated at any time by either party, by mutual consent, or may be terminated by either party alone upon notice to the other party at least ninety days prior to the effective date of that termination. . . . The scope of Martin Maynes's authority to act on behalf of CREAM was limited to execution of that document, and that document only.

We agree. There was no representation from the principal, CREAM, to Quirk that Martin had any authority beyond signing the initial licensing agreement. Moreover, the licensing agreement was clear that if it was to be terminated, notice must be given to CREAM's registered agent. While the subsequent management agreements stated they superseded and thereby terminated the licensing agreement, the termination notice provision was never complied with. In fact, the subsequent agreements even purported to nullify the need for any service on CREAM's registered agent to terminate the prior licensing agreement. Any negotiating and contracting beyond the licensing

agreement was clearly in excess of Martin's authority. There is nothing in the record that a reasonable juror could find any indication from CREAM to Quirk/Three Minnows that Martin had authority. Moreover, Martin told Quirk that as a member he had no authority to bind CREAM, but Quirk responded that the contract was only for financial reasons, to gain funding for the operation. Three Minnows failed to satisfy its burden of proving an agency relationship existed regarding the management agreements and therefore the grant of a directed verdict was proper.

IV. Conclusion

Martin, as a non-managing member of this limited liability company, did not have the authority to bind the company because he was not granted the authority to do so. The district court was correct in granting the directed verdict, because even looking at the evidence in the light most favorable to Three Minnows, a reasonable juror could not find CREAM ever communicated to Three Minnows that Martin had any authority to bind CREAM by entering into a management contract. We therefore affirm the district court.

AFFIRMED.