

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2009-CA-002198-MR  
AND  
NO. 2009-CA-002284-MR

LI AN CHOU

APPELLANT/CROSS-APPELLEE

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE MITCHELL PERRY, JUDGE  
ACTION NO. 05-CI-000197

RICHARD C. CHILTON,  
MARK O. CHILTON AND  
WILLIAM W. CHILTON, III

APPELLEES/CROSS-APPELLANTS

OPINION  
REVERSING AND REMANDING

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BEFORE: ACREE, CHIEF JUDGE; STUMBO, JUDGES; LAMBERT,<sup>1</sup> SENIOR  
JUDGE.

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<sup>1</sup> Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580. Senior Judge Lambert authored this opinion prior to the completion of his senior judge service effective November 2, 2012. Release of the opinion was delayed by administrative handling.

LAMBERT, SENIOR JUDGE: Li An Chou seeks our review of the trial court's decision to dismiss, without prejudice, his claims against Richard, Mark and William Chilton. The Chiltons cross-appealed asserting that all claims should have been dismissed with prejudice. Upon our review, we hold that the trial court erred when it dismissed a portion of Chou's claims, and also erred when it failed to dismiss other claims with prejudice. We therefore reverse the decision of the Jefferson Circuit Court and remand to that trial court for further proceedings consistent with this opinion.

Li An Chou was born in China and raised in Taiwan. He came to the United States and operated several companies importing and exporting products between China, Taiwan and the United States. Because of his nationality of birth, Chou was familiar with and utilized the benefits of operating his business ventures as Minority Business Enterprises (MBE). One advantage of operating as an MBE is that certain preferences are given to those companies when bidding on public projects.

Richard C. Chilton and his brother Mark Chilton formed RAM Engineering and Construction, Inc. They were later joined by their nephew William W. Chilton, III and engaged in the business of large-scale public construction projects. The Chilton's owned all of the stock in RAM and each held a position on the board of directors.

Mark Chilton and Chou knew each other through their church. Mark approached Chou with a request to assist RAM in its attempts to import a certain

piece of construction equipment from South Korea to the United States. Although Chou did not normally do business in South Korea, he was able to introduce Mark to a business acquaintance in Chicago who regularly traded with South Korean companies. During this initial business contact, Mark Chilton introduced Chou to the methods RAM used during construction of a stadium at the University of Louisville and introduced Chou to Richard Chilton and William Chilton.

In 1998, Richard Chilton approached Chou with the proposition of forming a new construction company that would be able to secure MBE status. The Chiltons offered to teach Chou the construction business with Chou being responsible for obtaining MBE certification for the new company. In September 1998, Ram.Chou Construction was formed as a limited liability company. The “First Amended and Restated Operating Agreement” of Ram.Chou was signed by the parties on March 9, 1999. In order to qualify as an MBE, Chou was granted a fifty-one percent ownership stake in Ram.Chou and he was appointed as president/managing member of the corporation. He received a draw against future profits of \$4,000 per month as well as company-provided health insurance. The Chiltons owned the remaining forty-nine percent of the company among the three of them.

Initially, because of their experience in the construction business, the Chiltons were to guide the operation of the company but were supposed to teach Chou so that he could ultimately assume the role of being in charge of Ram.Chou’s operations. However, the reality was a much different story. RAM and Ram.Chou

both operated in the same construction business environment. Ram.Chou used RAM employees and equipment for its work. RAM's accounting department handled both RAM and Ram.Chou's finances, accounting and payroll. In turn, it was to reconcile all transactions between the two companies. However, the Chiltons wired funds or wrote checks between the two companies without authorization or documentation. The Chiltons professed they did this because Chou was not capable of running the business and did not want to learn. Chou argues that he was shut out of the operations of the company and existed only as a figurehead for the Chiltons to secure MBE-related contracts.

In 2002 Ram.Chou attempted to renew its MBE certification but its application was denied and Ram.Chou was decertified as an MBE. One of the problems with certification involved the lack of documentation reflecting that Ram.Chou was a separate entity and not merely a conduit for RAM transactions. The Chiltons then had the RAM accounting office send Chou a notice of termination advising him of his COBRA rights to continue insurance coverage under the Ram.Chou insurance plan. After the decertification and Chou's termination, the Chiltons signed checks moving money from Ram.Chou to RAM. Chou asked for copies of the financial records related to Ram.Chou but was denied access.

Chou filed an action in 2005 naming himself individually as the plaintiff with the Chilton's named individually as defendants. He sought relief on grounds of fraud (misrepresentation), breach of loyalty, breach of fiduciary duty,

breach of the duty of good faith and fair dealing implied in the Operating Agreement, misappropriation of funds from Ram.Chou and a complete accounting of the financial aspects of Ram.Chou including funds owed by Ram.Chou to him along with a formal dissolution of Ram.Chou as a corporate entity. The Chiltons filed a motion to dismiss in June 2009 alleging among other arguments that Chou was not a real party in interest and lacked standing to file suit against the Chiltons and that only Ram.Chou was a proper party. The trial court denied Ram.Chou's motion to intervene and on August 18, 2009, dismissed Chou's complaint without prejudice. The trial court determined that Ram.Chou but not Chou individually was the real party in interest and that Chou as an individual lacked standing to seek relief. This appeal followed.

Pursuant to the trial court order, Chou then re-filed the action naming himself, the Chiltons, Ram.Chou and RAM as parties. That action has been stayed pending the outcome of this appeal. On cross-appeal, the Chiltons argue the original dismissal should have been with prejudice.

At issue is the amended complaint filed by Chou on April 25, 2005. In that pleading, Chou listed eight counts alleging that he personally had been harmed individually by the Chiltons in their individual capacity. That complaint first sought recovery for dissolution of the limited liability company Ram.Chou. It also sought an accounting determining Chou's share of the assets of the company. Chou then alleged a breach of loyalty, misappropriation of funds, breach of

fiduciary duty, breach of a covenant of good faith and fair dealing, and misrepresentation. Finally, there was a request for punitive damages.

While perhaps at some points ambiguous, the complaint was sufficient to provide notice of Chou's claims and requested relief. *See* Kentucky Rules of Civil Procedure (CR) 8.01(1). To clarify the issues, the trial court's pretrial order instructed Chou to provide a list of itemized damages. Chou there claimed damages of \$1,306,548 for breach of the operating agreement, fraud, misappropriation and breach of fiduciary duty and as gain taken by the defendants. He then claimed damages of \$312,000 for breach of the operating agreement caused by his improper termination. He also sought punitive damages in the amount of \$7,000,000.

Our review of the dismissal of Chou's claims is similar to appellate review of a granted motion for summary judgment. We must view the facts in a light most favorable to Chou and any doubt is to be resolved in his favor.

*Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 480 (Ky. 1991).

CR 17.01 provides, "Every action shall be prosecuted in the name of the real party in interest[.]" The trial court held that Chou was not the real party in interest for each claim. We disagree. "The real party in interest is the one who is entitled to the benefits of the action upon the successful termination thereof."

*Brandon v. Combs*, 666 S.W.2d 755, 759 (Ky.App. 1984). The real party in interest is the one "who has the right to control and receive the fruits of the litigation[.]" *Taylor v. Hurst*, 216 S.W. 95 (Ky. 1919). The question then becomes

whether Chou individually was a real party in interest as it relates to the claims made in the complaint. It is not our role to determine the merits of those claims but merely whether Chou has standing to bring them. *City of Louisville v. Stock Yards Bank & Trust Co.*, 843 S.W.2d 327, 328 (Ky. 1992).

Chou's first claim requests dissolution of the limited liability company Ram.Chou. One method of achieving that would be for all members of the company to agree and file appropriate documents for dissolution with the Secretary of State. Kentucky Revised Statutes (KRS) 275.285. Since he alleges the Chilton's continued operation of Ram.Chou, it appears that such an agreement was not an option. Another option would be for "a member" to seek a judicial dissolution of the company. KRS 275.290(1). That is exactly what Chou's complaint does. As a member of the company, he is entitled to seek dissolution in court. He has standing to seek that relief and he is a real party in interest. Dismissal of this claim was in error.

Next, Chou sought an accounting concerning the limited liability company Ram.Chou. On a request for dissolution, the assets and liabilities of the company must be accounted for prior to distribution. *See* KRS 275.300(2). As this would be the natural next required step in the dissolution of the company, Chou as a member of the company seeking the dissolution is a real party in interest to request an accounting. Dismissal of this claim was error.

We next examine Chou's aggregated claims of \$1,306,548 for breach of the operating agreement, fraud, misappropriation and breach of fiduciary duty

and as gain taken by the defendants. Chou had a certified public accountant examine the records that were available. It was his expert opinion that RAM would owe Ram.Chou \$1,306,548 after settlement of the accounts.

Ram.Chou and not Chou himself would benefit from any recovery for breach of the operating agreement, fraud, misappropriation, breach of fiduciary duty or gains taken by the defendants. While Chou may or may not receive funds from Ram.Chou on dissolution of that company, any wrongs for breach of the operating agreement, fraud, misappropriation, breach of fiduciary duty or gains taken by the defendants perpetrated by any of the Chiltons or possibly RAM would be wrongs against Ram.Chou and not Chou individually.

In a similar case where a company owner filed suit individually it was found that “[i]n the event of a successful termination of this litigation it is not Alton Miller who would succeed, but it is the Yellow Cab U-Drive-It Company, Inc., that would reap the benefits.” *Miller v. Paducah Airport Corp.*, 551 S.W.2d 241, 243-44 (Ky. 1977). The trial court was correct when it held Chou was not the real party in interest as it regards these claims.

We next review Chou’s claim of \$312,000 for breach of the operating agreement caused by his improper termination. This claim stems from a letter Chou received that notified him of his rights to continue his company-provided health insurance at his own expense. That letter originated from the human resources department of RAM, presumably at the behest of one or more of the Chiltons.



Chou appears to couch his argument in a form that suggests his employment with Ram.Chou was terminated. Actually, he was never an employee of Ram.Chou. He was entitled to take a draw against any future profits but he was not paid a salary or wage. He was a controlling member of Ram.Chou owning fifty-one percent of that company. That ownership percentage provided him the power to make decisions for Ram.Chou that could not be overridden by the other members. If any employment was terminated by Ram.Chou, it was Chou himself who alone held that power. There was no termination of employment and any claim for damages related to that must fail.

There remains however, an issue concerning the termination of Chou's insurance benefits. The record does not disclose precisely who or what entity terminated those benefits. Chou should be able to proceed in a claim against the offending party and attempt to prove that benefits were terminated inappropriately. If successful, he would be entitled to recovery for damages. His allegation that it was the Chiltons and not RAM who caused the termination of those benefits would cause any recovery to inure directly to him. As it regards the termination of benefits, he remains a real party in interest and dismissal of that claim was error.

Chou appears to have abandoned his claims of breach of loyalty and breach of covenant of good faith and fair dealing. "The rule is well established that courts will not settle abstract or academic questions and will dismiss a case when it becomes moot." *Board of Ed. of Berea v. Muncy*, 239 S.W.2d 471, 473

(Ky. 1951). Although the trial court dismissed these claims, they should have been dismissed with prejudice.

Finally, we examine Chou's claim for punitive damages. A claim for punitive damages cannot survive when an underlying claim for compensatory damages is absent. *Ammon v. Welty*, 113 S.W.3d 185, 188 (Ky.App. 2002). We have held that Chou's claim for the improper termination of his health care benefits should not have been dismissed. That claim does seek compensatory damages and should Chou be successful, he is entitled to seek punitive damages as it relates to that tort claim. Dismissal of the claim for punitive damages was error.

The judgment of the Jefferson Circuit Court is reversed and this matter is remanded to that court for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

R. Kenyon Meyer  
Joseph N. Tucker  
Louisville, Kentucky

BRIEF FOR APPELLEES:

Donald J. Kelly  
Christopher W. Brooker  
Louisville, Kentucky