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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000370-MR

J & B ENERGY, INC.; AND
J & B ENERGY, INC., ON BEHALF
OF NOMINAL DEFENDANT
PBP ENERGY, LLC. APPELLANTS

APPEAL FROM MUHLENBERG CIRCUIT COURT
v. HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 09-CI-00727

PAUL M. CALDWELL; SMART
VACATIONS, L.C.; PROZ ENERGY, LLC;
ROBERT BROWN; GREEN ENERGY
HOLDINGS, INC.; S.I. ENERGY, INC.;
CALDWELL MANAGEMENT SERVICES,
LLC; CALDWELL & PAYNE, P.A.; AND
ROSS E. PAYNE APPELLEES

AND NO. 2012-CA-001776-MR

J & B ENERGY, INC.; AND
J & B ENERGY, INC., ON BEHALF
OF NOMINAL DEFENDANT
PBP ENERGY, LLC. APPELLANTS

APPEAL FROM MUHLENBERG CIRCUIT COURT
v. HONORABLE BRIAN WIGGINS, JUDGE
ACTION NO. 09-CI-00727

PAUL M. CALDWELL; SMART VACATIONS, L.C.; PROZ ENERGY, LLC; ROBERT BROWN; GREEN ENERGY HOLDINGS, INC.; S.I. ENERGY, INC.; CALDWELL MANAGEMENT SERVICES, LLC; CALDWELL & PAYNE, P.A.; ROSS E. PAYNE; AND PBP ENERGY, LLC APPELLEES

OPINION AND ORDER
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** ** ** **

BEFORE: CAPERTON, LAMBERT, AND MOORE, JUDGES.

CAPERTON, JUDGE: The Appellants, J & B Energy, Inc. (hereinafter J & B), appeal the January 23, 2012, memorandum of decision of the Muhlenberg Circuit Court, granting summary judgment in favor of Appellees, Paul Caldwell, Ross Payne, and Caldwell & Payne, P.A., concerning J & B's claims of legal negligence and breach of fiduciary duty; the December 10, 2010, partial summary judgment order pursuant to which the court found that the removal of J & B as a Manager in PBP Energy, LLC (hereinafter PBP) was proper under the operating agreement of that company; the January 23, 2012 order of the Muhlenberg Circuit Court granting summary judgment in favor of S.I. Energy, Inc. (hereinafter SIE), and Caldwell Management Services; the January 23, 2012 order of the Muhlenberg

Circuit Court granting the motion for partial summary judgment dismissing all derivative claims asserted by J & B against Smart Vacations, L.C., Proz Energy, LLC, Robert Brown,[1] Green Energy Holdings, Inc., S.I. Energy, Inc., and Caldwell Management Services, LLC; and the January 23, 2012 order of the Muhlenberg Circuit Court denying the motion of J & B for leave to file a third amended complaint. Upon review of the record, the arguments of the parties, and the applicable law, we affirm in part, reverse in part, and remand this matter for additional proceedings consistent with this opinion.

J & B is a family owned, closely held corporation. One of the principals of J & B is Phil Burden. In 2006, Phil Burden and Robert Brown began discussions about a business that would remove coal from slurry in strip mine pits, wash the coal, and then sell the coal to electrical generating plants in and around Muhlenberg County, Kentucky. J & B had the equipment for the project and Proz Energy, LLC ("Proz") through its principal, Brown, had contacts with Peabody Coal Company, the owner of the Gibraltar Property (the pits where the coal was located), that would allow it to obtain a lease for the removal of the slurry. Brown testified that he and Phil Burden initially orally agreed that J & B and Proz would each be 50% owners in the venture.

After these initial discussions between Phil Burden and Brown, Brown stated that he wanted to discuss this deal with Paul Caldwell, who was a personal friend of Brown's and who had also previously served as Brown's

[1] We note that Appellee Robert Brown is now deceased, having passed during the course of this litigation on November 20, 2013.

attorney.[2] In late 2006, Brown called Caldwell and advised Caldwell of the status of discussions between Phil Burden and Brown. Around this time, Brown informed Caldwell that he had scheduled a meeting with Phil Burden in Nashville, Tennessee, and requested that Caldwell accompany him to Nashville to represent his interests. Caldwell states that his initial impression was that Phil Burden was going to purchase the rights to remove the coal slurry from the Gibraltar site.

In January of 2007, Brown and Caldwell traveled to Nashville to meet with Phil Burden and his son, Brent Burden, who had been named president of J & B in 2006. Caldwell asserts that at that meeting, he informed the Burdens that he was representing Proz Energy, Brown's company. As the meeting progressed, the parties discussed creating a limited liability company for purposes of owning and managing the coal slurry business at the Gibraltar site. At the conclusion of the meeting, the parties agreed that Caldwell would begin the process of forming a limited liability company and preparing a private placement memorandum. Additionally, because Caldwell had previously engaged in this type of work for other entities, it was decided that Caldwell should provide similar services for the anticipated limited liability company.

Following this conference, Caldwell employed a company in Kentucky to set up the new limited liability company, which eventually became known as PBP Energy, LLC. After PBP was set up, Caldwell then prepared initial organizational documents such as the initial minutes and documents effectuating

[2] Caldwell lives in Florida, and is licensed to practice law in Florida, but not in Kentucky.

the transfer of the membership units from Caldwell to Burden and Brown. Caldwell also began preparing a private placement memorandum to present to potential investors. Caldwell acknowledges that during this period he was acting as an attorney for PBP for purposes of getting it formed and for purposes of preparing the private placement memorandum. However, he asserts that after those activities, he did not serve further as the attorney for PBP, but rather that his business colleague and eventual legal partner, Ross Payne,[3] began representing PBP. J & B asserts that by acting as attorney in these capacities, Caldwell became privy to confidential information regarding J & B, including the company's business opportunities, financial condition, operating capacity, and regulatory status with Kentucky's mining authorities.

Thereafter, on February 15, 2007, Caldwell, Brown, Phil Burden, and Brent Burden met at Caldwell's residence in Clermont, Florida. At that time, the organizational documents for PBP were executed and a rough draft of the private placement memorandum was reviewed. Caldwell asserts that the operating agreement for PBP was not prepared at that time, and was therefore not reviewed by the parties. J & B states that in the organization documents signed that day, Caldwell listed himself as chief financial officer for PBP and asserts that prior to the meeting neither Burden nor Brown knew that Caldwell intended to serve in that role.

[3] Payne was also an investor in at least one of Caldwell's other ventures, though not directly in PBP.

Caldwell also states that at the February 15, 2007, meeting, Caldwell informed Phil and Brent Burden that Payne had been engaged on behalf of PBP to prepare the operating agreement. While acknowledging that he and Payne later formed the law firm of Caldwell & Payne, P.A., Caldwell asserts that the firm was not created until January 1, 2008.

Over the course of the next two months, Payne prepared several drafts of the operating agreement, which were submitted to the prospective members of PBP for review. On April 26, 2007, Phil Burden; Brent Burden; Brown; Bernie Woody (an investor in PBP); Josephine Sullivan, the Burdens' accountant; and Caldwell met at Sullivan's office in Kentucky to review and sign the final draft of the operating agreement. Also, at this time, new organizational documents were executed to reflect a change in the number of Class A membership units since the organizational documents were originally drafted.

J & B states that sometime after the February 15, 2007, meeting, Phil Burden and Brown discussed granting Caldwell an assignment of income in PBP to compensate Caldwell for his services on behalf of J & B and Proz in forming PBP, for his future services as PBP's attorney, and for his efforts toward securing funding for PBP. That assignment was to be approximately 33% of PBP's eventual income and was to be held by Caldwell's company, Smart Vacations. J & B asserts that it was never contemplated that Caldwell or his company would have any ownership rights in PBP or control over the company's operations.

The initial operating agreement was ultimately drafted by Payne, and entered into by Smart Vacations, (a company controlled by Caldwell), J & B, and Proz.[4] The operating agreement provided that PBP would have two managers, Proz and J & B. Phil Burden asserts that prior to the April meeting at Sullivan's office, he had not been provided with a copy of the final draft of the operating agreement, and was not aware of its actual contents. Burden asserts that he did not realize that Caldwell's company was intended to be a 33% Class A voting member, and that he initially refused to sign the agreement. Burden asserts that when he attempted to refuse, Caldwell issued an ultimatum stating that if Burden did not consent there would be no deal among any of the individuals attending the meeting. Moreover, Burden alleges that at that time he was unaware of certain loan transactions whereby Caldwell had been loaning substantial sums of money to Brown, which he asserts effectively gave Caldwell control over Brown and that these loans were likely the impetus for Brown to agree that Caldwell would have a one-third ownership interest in PBP. Burden ultimately signed the operating agreement, which was the final document necessary to the formation of PBP. PBP was a manager-managed limited liability company, and J & B and Proz were designated as its first managers.

According to the terms of the Operating Agreement, PBP is a manager-managed limited liability company. The members are divided into two

[4] J & B asserts that Payne failed to disclose to J & B that Payne had a financial interest in Caldwell's company and co-manager Smart Vacations. Payne had invested $87,500 in Smart Vacations, of which $50,000 was a loan, and $37,500 was paid for an assignment of right to receive future income that Smart Vacations would receive from PBP and Green Energy, LLC, another Caldwell venture.

groups, "Class A" and "Class B." "Class A" members have voting rights and control of the company, including the appointment of managers, and may serve as managers themselves. "Class B" members are investors, with no voting rights or control of the operation of PBP.

In February of 2008, PBP designated Payne as its attorney. On May 15, 2009, Caldwell and Proz voted to remove J & B as a manager of PBP. Caldwell asserts that this was because J & B had performed poorly as a manager for the previous two years,[5] [6] however J & B asserts that Caldwell orchestrated the removal of J & B in order to replace it with companies or entities that Caldwell controlled or in which he had a financial interest. J & B asserts that on May 15, 2009, Proz and Smart Vacations executed a "Written Consent of a Majority Interest – PBP Energy, LLC," wherein they removed J & B as a manager of PBP, and substituted Caldwell Management Services, LLC in his place. J & B states that on that same date, Proz and Smart Vacations executed the "First Amendment to Operating Agreement," wherein Proz and Smart Vacations represented that they owned 65% of the Class A units of PBP, and purported to amend the PBP

[5] Caldwell asserts that the removal of J & B as a manager was confirmed within the court's December 17, 2010, partial summary judgment decision.

[6] It is asserted by Appellees that with the passage of time, J & B failed to perform and Burden, who controlled J & B, became contentious with respect to its operations. The Appellees assert that it became clear to them that the slurry recovery operation could not be operated economically with J & B in control, and that J & B was not going to take the steps, to which it previously had committed, to enable PBP to sell sufficient coal to meet its contractual obligations. Caldwell testified that at that time, the removal of J & B's status as manager did nothing to change its status as a Class A Member of PBP, nor its status as an operator, although its operating agreement was eventually terminated effective July 1, 2009, due to what Caldwell asserted was a continually adversarial course of conduct. After J & B's contract was terminated, Green Energy contorted with PBP to mine slurry.

operating agreement to provide, among other things, that a majority in interest of the Class A members could remove the manager of the LLC.

The trial court held in its partial summary judgment entered on December 21, 2010, that before May 15, 2009, at least 65% of the Class A units were required to remove J & B as a manager. J & B asserts that it is of issue whether Proz and Smart Vacations held 65% of the voting Class A units on May 15, 2009, when they attempted to remove J & B as manager and amend the operating agreement. J & B has argued that this question arises from the fact that on or about February 1, 2008, before the attempted freeze-out, Proz transferred 500 Class A units to Ken Sentel, a Class B investor, for the sum of $100,000. This decreased Proz's total Class A units to 2,665, and decreased the total Class A units to 8,995, while the number of Class A units owned by Smart Vacations and J & B remained unchanged. J & B states that as a result of Proz's transfer of 500 of its Class A units, Proz only held 29.6% of the Class A units, while J & B held 35.1%. Thus, Proz and Smart Vacations, together, owned 64.7% of the Class A Units.

J & B states that in April of 2009, when Caldwell and Proz began conspiring to remove J & B as manager, they realized they did not have the 65% of the Class A units necessary to amend the operating agreement and remove J & B as manager. J & B states that at that point, Caldwell arranged for Sentel to "gift" back to Proz 80 of the 500 units that Sentel had previously purchased in February of 2008.

After removing J & B as manager, Caldwell Management Services, LLC (CMS) was designated by Smart Vacations and Proz as the new manager. Shortly thereafter, Caldwell learned that CMS was not eligible to serve as a manager of PBP under the operating agreement and was replaced by Smart Vacations. CMS served as a manager of PBP for approximately thirty days, but did not receive any funds from PBP.

J & B also asserts that beyond removing him as manager of PBP, Caldwell engaged in additional conduct that constituted a conflict of interest. J & B states that Caldwell owned interests in certain companies doing business with PBP, and that as J & B was in charge of PBP's plant operations, it was often Caldwell who negotiated with third-party entities. J & B asserts that instead of engaging in arms-length transactions with third-party entities, Caldwell, on behalf of PBP, dealt with companies such as S.I. Energy and Green Energy Holdings, LLC, both of which were either owned or controlled by Caldwell. J & B asserts that at no point did Caldwell provide J & B with a written disclosure acknowledging any conflicts of interest, nor did he seek to obtain any waiver of any potential conflicts. J & B asserts that instead, Caldwell used his knowledge of PBP's operating affairs to steer the company towards business relationships with entities that he either owned or controlled, and that he did so for his own financial benefit.

More specifically, J & B asserts that at some point it became apparent that it would be necessary to obtain a new wash plant to operate PBP's business

and that Caldwell arranged for PBP to purchase a wash plant from S.I. Energy, a company that he owned. J & B asserts that the wash plant that S.I. Energy sold to PBP had been purchased for $25,000 and was sold to PBP for $175,000. Brent Burden, the president of J & B testified concerning this issue below. He stated that the $175,000 price that SIE initially demanded was $50,000 too high, but that the ultimate price of $125,000 was appropriate.[7]

On December 23, 2009, J & B commenced the present litigation against Caldwell; Smart Vacations, LC; Proz Energy, LLC; Robert Brown; Green Energy Holdings, Inc.; S.I. Energy, Inc.; Caldwell Management Services, LLC; and PBP Energy, LLC. J & B asserted claims derivatively on PBP's behalf, and individually against Smart Vacations, Caldwell, Proz, and Brown. Central to the claims were allegations concerning which document was the controlling operating agreement, allegations that Smart Vacations was not a Class A Member, and allegations that J & B had been removed as manager in an unauthorized manner.

Subsequently, in May of 2010, J & B filed an amended complaint. Pursuant to the amended complaint, J & B asserted the same claims against Smart Vacations, Caldwell, Proz, and Brown as in the complaint. In addition, J & B added S.I. Energy, Caldwell Management Services, and Green Energy as defendants. In the amended complaint, the added claims were that Caldwell

[7] We note that the court addressed this issue and granted summary judgment to SIE and Caldwell Management Services. While it claimed below that the price PBP agreed to pay SIE for a wash plant was too high and that the sum should be disgorged, on appeal, J & B does not make any argument nor cite to any evidence of record to create a genuine issue of material fact warranting trial on this claim. Concerning its claim against CMS that it should disgorge any amounts paid to it by PBP, we find no reference to the record indicating that CMS received money from PBP nor any arguments on appeal to support reversal of the court's grant of summary judgment. Accordingly, we affirm, and decline to address these issues further herein.

breached one or more duties to PBP which resulted in unidentified leases, agreements, or contracts between PBP and SIE, Green Energy, or CMS that were unfair to PBP in a variety of ways. J & B further asserted that funds received by SIE and CMS as a result of the alleged breaches of duty by Caldwell constituted an unjust enrichment and should be paid by SIE and CMS to PBP or J & B.[8]

Thereafter, in September of 2010, J & B was granted leave to file a second amended complaint and J & B brought Payne and Caldwell & Payne, P.A. into the present litigation. The claims specifically asserted against Payne, Caldwell, and Caldwell & Payne, PA included: (1) Breach of fiduciary duty; (2) Failure to disclose a conflict of interest; (3) Failure to exercise reasonable care and skill in exercising legal representation; and (4) Gross negligence and intentional or willful misconduct.

On December 10, 2010, the circuit court declared that Smart Vacations was a Class A member of PBP and entered a partial summary judgment to that effect at that time. Simultaneously the court determined that Smart Vacations and Proz properly removed J & B as manager of PBP.

In July of 2011, SIE and CMS moved for summary judgment dismissing all claims asserted against them by J & B, individually and derivatively. The hearing on that motion was set for December 21, 2011. Appellees argued that at the time the motion was filed, J & B had submitted no evidence in response to discovery which created a genuine issue of material fact as to the fairness of the

[8] J & B alleged that SIE had received $114,000 in payments from PBP after J & B was removed as manager in May of 2009.

contract between SIE and PBP; had submitted no evidence of any leases, agreements, or contracts between CMS and PBP; and no evidence of any funds paid to CMS which should be disgorged. In a December 12, 2011, response to the motion filed by SIE and CMS for summary judgment, J & B contended for the first time that SIE was a co-conspirator, and that CMS had participated in the allegedly wrongful termination of the agreement between PBP and J & B pursuant to which J & B was to recover and process slurry. Following that response, SIE and CMS filed a December 19, 2011, reply in which they asserted that J & B had previously not alleged that SIE was part of any conspiratorial scheme for which liability could be imposed, and had not previously alleged that CMS had terminated J & B's slurry recovery agreement wrongfully.

On that same date, J & B served a motion for leave to file a third amended complaint, in which it asserted that SIE was a co-conspirator with Caldwell and that CMS had terminated J & B wrongfully. J & B moved to set the hearing on that motion for December 21, 2011, the same date set for the hearing on the motion of SIE and CMS for summary judgment.

The circuit court ultimately granted the motion of SIE and CMS for summary judgment and denied J & B's motion to amend the complaint for the third time. J & B now appeals those rulings to this Court.

Caldwell, Payne, and the firm of Caldwell & Payne also filed for summary judgment on J & B's direct and derivative claims for legal malpractice and breach of fiduciary duty. The trial court subsequently granted Caldwell,

Payne, and Caldwell & Payne's motion for summary judgment. In doing so, the court found that Appellees were entitled to summary judgment on the legal malpractice claim because an attorney-client relationship did not exist between J & B and Caldwell, Payne, or Caldwell & Payne, P.A. Secondly, the court found that as a matter of law, the breach of fiduciary duty claim failed because J & B, as a third-party non-client and incidental beneficiary, had no right to sue Caldwell, Payne, or Caldwell & Payne, P.A. Finally, the court granted summary judgment as to J & B's derivative lawsuit, finding that as a member of PBP, J & B had no right to initiate a derivative action.[9]

J & B has not appealed the court's grant of summary judgment in favor of Appellees as to the derivative action claim. Instead, they frame the issues

[9] Relevant to the court's grant of derivative action claims is the court's December 21, 2010, opinion and order, wherein the court found that: (1) managers of PBP could only be removed through amendment of the operating agreement and thus, pursuant to Section 20.02 of the agreement, manager removal required 65% of the Class A ownership interest's consent; that (2) the status of a unit of ownership after being transferred from Class A member to Class B member is determined by the transferee's membership statue; and as a result of its two prior holdings, that; (3) J & B was properly removed as a manager of PBP.

Further, we note that in its summary judgment order, the trial court specifically found that Section 7.02 of the operating agreement specifically precluded members without managerial authority from instituting a derivative action on behalf of PBP.

We note that pursuant to Section 7.02:

> The Members shall have no power to participate in the management of the Company except as expressly authorized by this Agreement or the Articles of Organization and except as may be expressly required by the LLC Act. Unless expressly and duly authorized in writing to do so by a manager, no member shall have any power or authority to bind the Company in any way, to pledge its credit, to act on its behalf, or to render it liable for any purpose.

Based on this language in the operating agreement, the court below found that the PBP members have no authority to act on behalf of PBP without the express and duly authorized approval of the managers in writing. The court reasoned that this included derivative actions, and found that J & B had no authority to institute same because it was not a manager and did not have authorization from a manager to do so.

on appeal as: (1) Whether the trial court improperly granted Caldwell, Payne, and Caldwell & Payne's motion for summary judgment when there were many factual issues; and (2) Whether the trial court erred in its interpretation of the operating agreement governing the affairs of PBP. Specifically, in its brief to this Court, J & B argues: (1) That the trial court ignored genuine issues of material fact in granting summary judgment in favor of Caldwell, Payne, and Caldwell & Payne, P.A. on J & B's legal negligence claims; (2) That the trial court erred in holding that Class B units became Class A units when they were transferred to Proz; and (3) That the trial court abused its discretion in denying J & B's motion to file a third amended complaint. We address these arguments in turn.

Prior to reviewing the arguments of the parties, we note that our standard for reviewing a trial court's entry of summary judgment on appeal is well-established and was concisely summarized by this Court in *Lewis v. B & R Corp.,* 56 S.W.3d 432 (Ky. App. 2001):

> The standard of review on appeal when a trial court grants a motion for summary judgment is "whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law." The trial court must view the evidence in the light most favorable to the nonmoving party, and summary judgment should be granted only if it appears impossible that the nonmoving party will be able to produce evidence at trial warranting a judgment in his favor. The moving party bears the initial burden of showing that no genuine issue of material fact exists, and then the burden shifts to the party opposing summary judgment to present "at least some affirmative evidence showing that there is a genuine issue of material fact for trial."

Id. at 436 (internal footnotes omitted). Because summary judgments involve no fact-finding, we review the trial court's decision *de novo*. *3D Enters. Contr. Corp. v. Louisville & Jefferson County Metro. Sewer Dist.,* 174 S.W.3d 440, 445 (Ky.2005); *Blevins v. Moran,* 12 S.W.3d 698, 700 (Ky. App. 2000). We review the arguments of the parties with the foregoing in mind.

As its first basis for appeal, J & B argues that the trial court ignored genuine issues of material fact in granting summary judgment in favor of Caldwell, Payne, and Caldwell & Payne, P.A. on J & B's legal negligence claims. Prior to addressing the substantive arguments of the parties on this issue, we note that the Appellees filed a motion to strike Exhibits 1, 2, and 3 of J & B's reply brief, which motion was passed by the motions panel of the Court for consideration on the merits by this panel. We address each exhibit in turn.

Concerning the first exhibit attached to Appellants' Reply Brief, the affidavit of Phil Burden, we grant the Appellees' motion to strike same. A review of the record reveals that the trial court granted Appellees' motion to strike Burden's affidavit because it contradicted his deposition testimony. A review of the prehearing statement filed by P&B indicates that the "trial court's error in striking the Burden affidavit" is reserved as an issue. However, we also note that nowhere in the Appellants' initial brief to this Court was this issue discussed. Kentucky Rules of Civil Procedure (CR) 76.12 clearly requires Appellants to confine their reply brief to points raised in their initial brief, and nowhere in their initial brief did Appellants address the court's decision to strike Burden's

affidavit. Finding they cannot thus attach the affidavit for consideration by this Court for the first time in a reply brief, we grant Appellees' motion, and will not consider Burden's affidavit for purposes of this appeal. Finding the same reasoning to be applicable to the second exhibit attached to Appellants' reply brief, "Plaintiff's Response to Defendants' Motion to Strike the Affidavit of Appellant Burden," we grant the motion to strike, and shall also not consider that exhibit for purposes of this appeal.

Finally, we turn to the third exhibit attached to Appellants' brief, the report and curriculum vitae of J & B's expert, Lucian Pera. J & B provided the trial court with the report of attorney Lucian T. Pera, an expert retained by J & B, who expressed the opinion that an attorney-client relationship existed between Caldwell and J & B, and that Caldwell had an obligation, as counsel for PBP, to clearly communicate his true role to all constituents of PBP, including J & B, and that by failing to do so, he violated the applicable standard of care. Appellees argue that pursuant to CR 56.03, the court can consider pleadings, depositions, answers to interrogatories, stipulations, admissions, and affidavits to determine whether a party is entitled to summary judgment. They assert that Pera's report is none of the foregoing, and is, additionally, unsworn evidence. We find this latter contention determinative. As our Sixth Circuit courts have previously held, a court may not consider unsworn statements when ruling on a motion for summary judgment. *See Pollock v. Pollock*, 154 F.3d 601, 611, n. 20 (6th Cir. 1998)(citing

Dole v. Elliott Travel Tours, Inc., 942 F.2d 962, 968-69 (6th Cir. 1991). Accordingly, the motion to strike the third exhibit is granted.

Turning to the substantive arguments of the parties on this issue, we note that Burden asserts that there were numerous issues creating a conflict of interest – among them, his belief that he was entitled to know of the loan between Caldwell and Brown before entering into a business relationship with them; Caldwell's failure to provide J & B with any disclosure acknowledging his conflict of interest with respect to his involvement with companies such as SIE and Green Energy Holdings, LLC, both of which he either owned or controlled, and the manner in which Caldwell orchestrated the removal of J & B as manager for PBP. J & B asserts that the trial court's finding that there was no basis for an attorney-client relationship between J & B and Caldwell was in error, and that there was, at the very least, a question of material fact as to whether or not such a relationship existed and imposed fiduciary duties upon Caldwell to act in the best interest of J & B and PBP. J & B argues that it is clear, based on a review of the evidence submitted below, that Caldwell owed a duty to J & B.

In response, Caldwell and Payne assert that all of J & B's claims arise from an alleged breach of duties in their legal representation of PBP, but that J & B never entered into a contract for legal services with Caldwell, Payne, nor Caldwell & Payne, P.A., to perform legal services for J & B. Further, they assert that they have not entered into any course of conduct which would indicate that they represented J & B or the Burdens in their individual capacities, nor indicated or

accepted any sort of fiduciary duty to P&B. Caldwell and Payne argue that J & B, like all of the constituents, merely incidentally benefitted from the legal services provided and that an attorney who represents a corporation does not necessarily have an attorney-client relationship with the individual shareholders of that corporation. Payne and Caldwell assert that neither made any direct communication or contact with J & B that would indicate or give the impression that they intended to enter into an attorney-client relationship with J & B. Caldwell and Payne argue that the facts of this case are controlled by Kentucky's Organizational Client Rule, SCR 3.130(1.13) and that pursuant to that rule, Appellants simply do not have an attorney-client relationship with Payne, Caldwell, or Caldwell & Payne, P.A., which would support a claim of legal negligence.

Further, Caldwell and Payne argue that the court below correctly granted summary judgment in their favor on the issue of whether they owed a fiduciary duty to J & B. They assert that J & B has presented no evidence of any legal opinions given by Payne and/or Caldwell to J & B upon which J & B relied to its detriment, nor that they ever understood their role with relation to P&B to be fiduciary in nature.

Upon review of the record, we believe that a genuine issue of material fact exists with respect to the issues that surround the attorney-client relationship between Caldwell, Payne, and the Appellants in this matter. While Caldwell alleges that he only participated in the formation of PBP, this Court finds that the

record raises questions and issues of material fact as to the extent of his representation of the parties in other matters at other times. More specifically, and among other evidence of record, we note testimony from Brown that Caldwell was to provide legal services to both J & B and Proz, as well as Brown's testimony that Caldwell was invited to represent both Proz and J & B in negotiating and drafting agreements with Peabody Coal company. Further, Caldwell himself testified that he continued to represent PBP after it was formed. Thus, we believe there is at least some issue of genuine material fact as to the nature of the relationship between Caldwell, Payne, Caldwell & Payne, P.A., and P&B in this matter.

Whether an attorney-client relationship exists is inherently a factual issue. As this Court previously held in *Daughtery v. Runner*, 581 S.W.2d 12 (Ky. App. 1978), the attorney-client relationship is contractual in nature and may be either an express contractual relationship, or a relationship implied by the conduct of the parties. If the relationship is one which is based on implication from the conduct of the parties, the issue becomes whether the client had a reasonable expectation or belief that the attorney has agreed to the representation. *Lovell v. Winchester*, 941 S.W.2d 466 (Ky. 1997). We believe there are genuine material facts at issue in this regard and, accordingly, do not believe that the grant of summary judgment was proper.

In so finding, we briefly note that while Caldwell and Payne contend that SCR 3.130(1.13) indicates that if a lawyer represents an entity, the lawyer

cannot be found to simultaneously represent the constituents of that entity. Indeed, that provision provides that:

> (g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of Rule 1.7 ["Conflict of interest: Current clients"]. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Our Kentucky Supreme Court illustrated the meaning of subsection (g) in the commentary to SCR 130 (1.13) when it stated:

> (12) Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder. If the organization is closely held it is possible that the owners of the organization will have an expectation that the lawyer represents the organization and the organization's owners. In this situation, when the lawyer reasonably should know that the owners have an expectation of dual representation, the lawyer should advise the owners and the representatives of the organization, preferably in writing, the identity of the lawyer's client and the ramifications of a client conflict.

Accordingly, we believe that genuine issues of material fact exist as to whether Caldwell and Payne had an attorney-client relationship with both J & B and PBP, and, further, whether such a relationship imposed fiduciary duties upon Caldwell to act in the best interests of J & B and PBP.

Having so found, we now turn to the second basis for appeal asserted by J & B, namely that the trial court erred in holding that Class B units became Class A units when they were transferred to Proz. J & B asserts that the operating

agreement is silent on the issue of whether Class B units that are transferred to a member holding Class A units become Class A units entitled to vote on management issues, or remain Class B units. Below, the trial court held that when Sentel transferred his Class B units to Proz in April of 2009, those shares became Class A units such that Proz and Smart Vacations held 65% of the Class A voting units and possessed the authority to remove J & B as manager.

In its brief to this Court, J & B argues that there is no dispute that when Proz initially transferred the Class A units to Sentel, they became Class B units. J & B asserts that with respect to the question of whether Class B units become Class A units when transferred back to a Class A member, the operating agreement is silent and that, accordingly, the prior practice of the parties in interpreting the operating agreement should be considered. J & B asserts that the prior practice of the parties was to treat such units as remaining Class B units when transferred to a Class A member.

In support of that argument, J & B directs our attention to a March 1, 2008, transaction in which Smart Vacations purchased 385 Class B shares. J & B asserts that as evidenced by Exhibit A to the operating agreement dated March 1, 2008, which reflects the members and respective ownership interests of those members, the 285 Class B shares purchased by Smart Vacations were listed as Class B shares, and did not become Class A shares because a Class A member had acquired them. J & B argues that Caldwell himself was instrumental in preparing those documents, and that the interpretation of the operating agreement previously

observed by the parties should have governed in this instance and was in contradiction to the manner in which the trial court interpreted the agreement. Accordingly, J & B argues that the trial court erred in holding that the 80 units transferred from Sentel to Proz then gave Proz and Caldwell the majority share necessary to remove J & B as a manager, and requests this court to reverse the decision of the trial court dismissing J & B's claims against Proz, Brown, Smart Vacations, and Caldwell.

In response, Appellees argue that the trial court correctly determined that Smart Vacations and Proz had the authority to remove J & B as manager of PBP, first, because they collectively owned more than a 65% member interest in PBP, and second, because they collectively owned a majority interest in PBP when the removal occurred, which is defined by the operating agreement as more than a 50% class A member interest. The Appellees assert that the operating agreement is the governing agreement among the parties, and that when Proz reacquired the 80 membership units in PBP, the member interest became a Class A interest under the operating agreement.

Our review of the record reveals that there is no dispute between the parties that as a matter of law, the trial court decided that Smart Vacations was a Class A member of PBP. There is likewise no dispute that the trial court reviewed the operating agreement and concluded that as of May 15, 2009, a 65% majority of the Class A units was required to remove J & B as manager.[10] Finally, the trial

[10]Appellees argued for a contrary conclusion below, but that argument was rejected by the trial court. Appellees did not appeal that portion of the trial court's ruling, but do voice continued disagreement with the court's finding in this regard in their briefs to this Court. We accept the

court's findings indicate that it found the operating agreement to unambiguously provide that the status of PBP units of ownership after transfer is determined by the transferee's status. We disagree with this latter conclusion and, accordingly, believe that reversal is appropriate.

Kentucky law concerning the analysis of signed, written agreements between parties is as follows:

> The primary object in construing a contract or compromise settlement agreement is to effectuate the intentions of the parties…"Any contract or agreement must be construed as a whole, giving effect to all parts and every word in it if possible." Where a contract is ambiguous or silent on a vital matter, a court may consider parol and extrinsic evidence involving the circumstances surrounding execution of the contract, the subject matter of the contract, the objects to be accomplished, and the conduct of the parties.
>
> Absent an ambiguity in the contract, the parties' intentions must be discerned from the four corners of the instrument without resort to extrinsic evidence … A contract is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations … The fact that one party may have intended different results, however, is insufficient to construe a contract at variance with its plain and unambiguous terms … Generally the interpretation of a contract, including determining whether a contract is ambiguous, is a question of law for the courts and is subject to de novo review … However, once a court determines that a contract is ambiguous, areas of dispute concerning the extrinsic evidence are factual issues and construction of the contract becomes subject to resolution by the fact-finder.

Cantrell Supply, Inc. v. Liberty Mut. Ins. Co., 94 S.W.3d 381, 384-85 (Ky. App. 2002)(internal citations omitted).

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trial court's conclusion that a 65% vote of Class A managing members was required for manager removal, and agree with its interpretation of the agreement on that issue.

In reviewing the operating agreement, we note that Section 1.12 of the operating agreement at issue provides that:

> "Class A Interest" shall mean the member interest of a Class A Member in the Company at any particular time, including the right of such Class A Member to any and all benefits to which a Class A Member may be entitled as provided in this Agreement, and the obligations of such Class A Member to comply with the terms of this Agreement.
> Further, Section 1.13, entitled "Class B Interest" provides that: "Class B Interest" shall mean the Member Interest of a Class B member in the Company at any particular time, including the right of such Class B Member to any and all benefits to which a Class B Member may be entitled as provided in this Agreement, and the obligations of such Class B Member to comply with the terms of this Agreement.

An agreement is ambiguous if a reasonable person would find it susceptible to different or inconsistent interpretations. *Cantrell* at 385. The trial court found this provision to be unambiguous in making its determination that the status of the stock depended on the status of the transferee. We disagree. We believe the provision is susceptible to differing or inconsistent interpretations. Thus, parol evidence is admissible to assist in defining the agreement of the parties.

Accordingly, we believe that the conduct of the parties becomes of significant import to the issue of interpretation. *See Cantrell, supra*. *Sub judice,* the managers themselves voted on this issue in at least one prior instance, wherein they determined that units which were deemed to be Class B units did not revert back to being Class A units merely because they were transferred to Caldwell, a Class A member. Indeed, we believe this course of action seems logical and the

most rational interpretation of the parties' agreement, particularly when contrasted to the contrary interpretation now urged by the Appellees that Class A and Class B shares may continually and repeatedly shift back and forth depending on no other factor than who is currently in ownership of them. We decline to adopt this latter interpretation and instead interpret the contract between the parties in light of their past actions. Having so found, we conclude that Caldwell and Brown did not possess the requisite percentage of Class A shares at the time they voted to remove J & B. Accordingly, we reverse.

As its third and final basis for appeal, J & B argues that the trial court abused its discretion in denying J & B's motion to file a third amended complaint to assert additional causes of action against SIE and Caldwell Management for civil conspiracy and wrongful termination of the agreement between PBP and J & B. While acknowledging that these claims were not originally asserted in the pleadings, J & B argues that discovery had been conducted regarding those claims and that both SIE and Caldwell knew that J & B intended to assert them. Accordingly, J & B argues that the court abused its discretion in denying its motion for leave to file a third amended complaint, particularly as the filing of such a complaint would not have prejudiced any of the parties. In response, the Appellees argue that the trial court properly denied the filing of the late amended complaint, and that such a decision was well within the discretion of the court.

Upon review of this issue, we note that normally after a motion for summary judgment has been made, a motion to amend pleadings rests in the sound

discretion of the trial court and its ruling will not be disturbed unless an abuse of discretion is clearly shown. *Johnson v. Staples*, 408 S.W. 2d 206, 207 (Ky. 1966). *Sub judice*, however, in light of the issues upon which this Court has found basis for reversal and in light of substantive changes which will be effected as a result thereof, we believe it appropriate for the trial court to review this matter anew on remand. Accordingly, we vacate the trial court's order denying leave to the Appellants to file their third amended complaint, and remand this matter for additional consideration in light of this opinion.

Wherefore, for the foregoing reasons, we hereby reverse in part, affirm in part, and remand this matter for additional proceedings consistent with this opinion.

ALL CONCUR.

ENTERED: August 15, 2014

Michael O. Caperton
JUDGE, COURT OF APPEALS

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