

**NOT DESIGNATED FOR PUBLICATION**

**RENEE' BREAU, AND** \* **NO. 2007-CA-1443**  
**RENEE' BREAU,** \* **COURT OF APPEAL**  
**DERIVATIVELY ON BEHALF** \* **FOURTH CIRCUIT**  
**OF VIEUX CARRE'**  
**MORTGAGE, L.L.C.** \*  
**VERSUS** \* **STATE OF LOUISIANA**

**VIEUX CARRE' MORTGAGE,** \* \* \* \* \*  
**L.L.C., KIRK J. LOCICERO,**  
**AND KIM L. AUTIN**

APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2002-10189, DIVISION "J-13"  
HONORABLE NADINE M. RAMSEY, JUDGE

\* \* \* \* \*

**JAMES F. MCKAY III**  
**JUDGE**

\* \* \* \* \*

(Court composed of Judge Charles R. Jones, Judge James F. McKay III, Judge David S. Gorbaty)

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**AFFIRMED**

On March 29, 2000, Renee Breaux, Kirk Locicero and Kim Autin-Pittman formed Vieux Carre Mortgage, L.L.C. to be in the business of mortgage lending. Mr. Locicero and Ms. Pittman are brother and sister and Ms. Breaux and Mr. Locicero were married at the time. The initial members and managers of the company were Ms. Pittman, Ms. Breaux and Mr. Locicero. Ms. Pittman owned 50% of Vieux Carre, while Ms. Breaux and Mr. Locicero each owned 25%. The company did not have a written operating agreement.

At Vieux Carre, Ms. Pittman's job was to originate loans, recruit employees and supervise employees. Mr. Locicero's job was to market and grow the business. Ms. Breaux's job was to assist Ms. Pittman in getting the business up and running, licensing, filling out broker packages, and bookkeeping. Both Ms. Breaux and Ms. Pittman received payments from Vieux Carre throughout 2000. The company also paid the expenses associated with Ms. Breaux's BMW as it did for Ms. Pittman's Lexus. Ms. Pittman and Mr. Locicero became dissatisfied with Ms. Breaux's contributions to the company and they ousted her as a manager on

September 26, 2000. On March 21, 2001, the company's articles of organization were amended so that co-management of the company was vested in Ms. Pittman and Mr. Locicero; Ms. Breaux signed these amended articles. After her removal as a manager, Ms. Breaux received no further payments from the company. Ms. Pittman continued to receive payments and Mr. Locicero began to receive payments because he had assumed a more active role in managing the company.

On June 28, 2002, Ms. Breaux, individually and on behalf of Vieux Carre Mortgage, filed suit against Ms. Pittman, Mr. Locicero and Vieux Carre Mortgage, seeking her share of the profits of the company.<sup>1</sup> At the most basic level, Ms. Breaux claims that after her removal as a manager, Mr. Locicero and Ms. Pittman overpaid themselves leaving no profits in the business to distribute to its members. Trial commenced on April 9, 2007. Ms. Breaux sought judgment (1) that she was improperly removed as a manager of Vieux Carre in 2001; (2) that, in the absence of a written operating agreement, her profit-sharing percentage is 33 1/3%; (3) that Mr. Locicero and Ms. Pittman had no authority to pay themselves guaranteed payments/administrative fees without her consent; (4) that Mr. Locicero and Ms. Pittman should be ordered to return all funds improperly taken from Vieux Carre during the period of January 1, 2001 through May 31, 2005; (5) that Vieux Carre should be treated as the *alter ego* of Mr. Locicero and Ms. Pittman and that they acted in concert with each other; (6) that she receive an equal share of the member distributions received by Mr. Locicero and Ms. Pittman; and (7) that she be

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<sup>1</sup> Mr Locicero, Ms. Pittman and Vieux Carre also brought a reconventional demand against Ms. Breaux for defamation. The trial court found in Ms. Breaux's favor on this issue. Mr. Locicero and Ms. Pittman have not appealed the trial court's judgment.

indemnified for her attorney's fees, expert fees and costs for recovering a fund on behalf of Vieux Carre. On August 3, 2007, the trial court rendered its judgment in favor of Mr. Locicero and Ms. Pittman and against Ms. Breaux. It is from this judgment that Ms. Breaux now appeals.

On appeal, Ms. Breaux raises the following assignments of error: (1) the trial court erred by applying the wrong standard of law and the wrong burden of proof; (2) the trial court erred in failing to judicially determine Ms. Breaux's ownership interest in Vieux Carre; (3) the trial court erred in determining that Ms. Breaux was not entitled to reimbursement of her attorney fees, and costs from Vieux Carre; (4) the trial court erred by ignoring the legislature's mandate to treat member distributions differently from other transactions with the LLC; (5) the trial court erred by failing to find that the company should be treated as the alter ego of Ms. Pittman and Mr. Locicero and by failing to order a distribution of the funds returned; and (6) the trial court erred by failing to hold Mr. Locicero and Ms. Pittman liable *in solido*.

In her first assignment of error, Ms. Breaux contends that the trial court erred by applying the wrong standard of law and the wrong burden of proof. When the issue at hand is whether a member or manager of an LLC shall be personally liable to the LLC or its members for monetary damages, personal liability cannot be imposed:

... unless the member or manager acted in a grossly negligent manner as defined in Subsection C of this Section, or engaged in conduct which demonstrates a greater disregard of the duty of care than gross

negligence, including but not limited to intentional tortious conduct or intentional breach of his duty of loyalty.

La. R.S. 12:1314 (B). In determining whether a member of a member-managed LLC or a manager-managed LLC has breached a fiduciary duty to the LLC and its members, the courts employ, at a minimum, a gross negligence standard and the business judgment rule. In Re Provenza, 316 B.R. 225, 230 (Bankr. E.D. La. 2003). Based on La. R.S. 12:1314 (B) & (C) and In Re Provenza, the trial court applied the proper legal standard in this case.

According to La. R.S. 12:1314 (E):

A person alleging a breach of the duty of diligence, care, judgment, and skill owed by a member or manager under Subsection A has the burden of proving the alleged breach of duty, including the inapplicability of the provisions as to the fulfillment of the duty under Paragraph A (2) and Subsection D, and, in a damage action, the burden of proving that the breach was the legal cause of damage suffered by the limited liability company.

Ms. Breaux, as the person alleging a breach of duty, bore the burden of proof. The trial court found that Ms. Breaux failed to meet her burden of proof to show that any duty to her or the company had been breached. The trial court heard the testimony of nine witnesses over three days, and considered two depositions as well as a number of exhibits entered into by the parties. The trial court's conclusion that Mr. Locicero and Ms. Pittman did not breach their duties to Vieux Carre or Ms. Breaux was well grounded in the evidence. Accordingly, we find no merit in Ms. Breaux's first assignment of error.

In her second assignment of error, Ms. Breaux contends that the trial court erred in failing to judicially determine Ms. Breaux's ownership interest in Vieux

Carre. This assignment of error is without merit. Ms. Breaux would have liked to have had the trial court determine that her ownership interest in the company was 33 1/3 %. Although the trial court did not address the ownership interest in its judgment, the trial court did rule against Ms. Breaux. Furthermore, in its reasons for judgment, the trial court stated: “From the testimonies of Ms. Breaux, Ms. Pittman and Mr. Locicero, Ms. Pittman owned 50% of Vieux Carre while Ms. Breaux and Mr. Locicero each owned 25% of the company.” In civil cases, the appropriate standard for appellate review of factual determinations is the manifest error-clearly wrong standard which precludes the setting aside of a trial court’s finding of fact unless those findings are clearly wrong in light of the record reviewed in its entirety. Cross v. Louisiana Coca-Cola Bottling Co., Ltd., 2004-0993 (La.App. 4 Cir. 3/16/05), 899 So.2d 621.

In her third assignment of error, Ms. Breaux contends that the trial court erred in determining she was not entitled to reimbursement of her attorney fees and costs from Vieux Carre. It is well settled under Louisiana law that attorney’s fees may only be awarded if provided for by contract or statute. Huddleston v. Bossier Bank & Trust Co., 475 So.2d 1082 (La. 1985). In the instant case, there is no contract or statute authorizing payment, reimbursement or indemnification of attorney’s fees. Even if Ms. Breaux were able to analogize her case to one involving corporate law, Ms. Breaux was not a successful litigant entitled to fees and costs. Accordingly, the trial court properly denied Ms. Breaux’s claim for attorney’s fees and costs.

In her fourth assignment of error, Ms. Breaux contends that the trial court erred by ignoring the legislature’s mandate to treat member distributions differently from other transactions with the LLC. In essence, Ms. Breaux argues

that she is entitled to 1/3 of all “distributions” made by Vieux Carre from 2000 through 2002. However, the testimony and other evidence at trial showed that these “distributions” were actually payment for services rendered. Based on the evidence before this Court, we find no error in the trial court’s rejection of Ms. Breaux’s claim.

In her fifth assignment of error, Ms. Breaux contends that the trial court erred by failing to find that the company should be treated as the alter ego of Ms. Pittman and Mr. Locicero and by failing to order a distribution of the funds returned. This assignment of error is without merit because this Court has already rejected Ms. Breaux’s earlier assignments of error. In any event, Louisiana’s LLC laws do not recognize the “alter ego” doctrine. An LLC need not follow the formalities required of corporations in order to maintain its separate legal existence. Unless the LLC’s articles of organization or a written operating agreement provides otherwise, the members or managers take action by a majority vote. La. R.S. 12:1316; La. R.S. 12:1318. Furthermore, Louisiana LLC law specifically prohibits imposing membership liability for failure to follow corporate formalities. *See* La. R.S. 12:1320; *See also* In Re Provenza.

In her sixth and final assignment of error, Ms. Breaux contends that the trial court erred by failing to hold Mr. Locicero and Ms. Pittman liable *in solido*. In order to impose solidary liability under Louisiana Civil Code Article 2324, the finder of fact must conclude not simply that the defendants were aware of each other’s conduct, but that they caused, assisted or encouraged one another to do an unlawful act. Because it has already been rejected that either Mr. Locicero or Ms. Pittman breached their fiduciary duties to the company, it cannot be established

that they are liable *in solido*. Accordingly, this assignment of error is without merit.

For the above and foregoing reasons, the judgment of the trial court is affirmed.

**AFFIRMED**