IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

LYNN SCHIEVE, Individually and as a Member of the Carroll Meyer Family Limited Liability Company, LLC,	)	
Respondent,	)	**WD83700**
v.	)	**OPINION FILED: June 1, 2021**
JOHN MEYER,	)	
Appellant.	)	

Appeal from the Circuit Court of Clay County, Missouri
The Honorable David P. Chamberlain, Judge

Before Division Two: Mark D. Pfeiffer, Presiding Judge, and
Alok Ahuja and Karen King Mitchell, Judges

John Meyer appeals, following a bench trial, a judgment in the amount of $205,982.55 plus court costs entered against him in favor of Lynn Schieve on her claim that Meyer, as acting manager of the Carroll Meyer Family Limited Liability Company, breached his fiduciary duty to the members of the LLC by taking the LLC's money for his own personal use and failing to issue distributions required by the LLC's Operating Agreement. Meyer raises three points on appeal. He argues first that Schieve lacked standing to bring a direct claim against Meyer and that she could proceed only in a derivative action on behalf of the LLC, rather than as an individual

member. Second, he argues that there was no substantial evidence to support the trial court's finding that Meyer owed any duties for which he could be personally liable. And, finally, he argues that the court misapplied the law in awarding Schieve attorneys' fees. Finding no error, we affirm.

Background

On November 3, 2010, siblings John Meyer, Brad Meyer, and Lynn Schieve filed Articles of Organization with the Missouri Secretary of State to start the Carroll Meyer Family Limited Liability Company, LLC. Meyer, who was both a member and the manager of the LLC, owned 39.1666 percent of the LLC, and Brad and Schieve, both designated as members, owned 30.4166 percent each.[1]

On September 30, 2013, the LLC sold a tract of land in Iowa to Hy-Vee for $640,000, with net proceeds in the amount of $609,849.85; both the contract and the payments were written in the LLC's name. Meyer, Brad, and Schieve held discussions about how to distribute the funds, and Meyer initially suggested funneling 95% of the money through another business of his (The Classic Cup) to get a tax credit. Both Brad and Schieve were opposed, believing that Meyer's suggestion would constitute tax fraud; this opposition led to a rift in the family, and Meyer stopped communicating with Brad and Schieve. On November 7, 2013, Schieve sent an email to Meyer, demanding that he distribute the proceeds from the Hy-Vee land sale. Schieve and Brad, acting as members holding a majority interest, subsequently drafted a declaration in the LLC's name, directing Meyer—as the manager—to distribute the funds by December 31, 2013. Meyer never distributed the funds.

On December 31, 2013, Schieve and Brad, acting as members with a majority interest, issued a resolution freezing the LLC's bank account unless transactions were approved by a

[1] To avoid confusion, Brad Meyer will be referred to by his first name. No familiarity or disrespect is intended.

majority of the members. In response, Meyer began threatening Schieve with tax penalty payments if they did not unfreeze the account, so Schieve and Brad agreed to lift the freeze. On March 12, 2014, Meyer wrote a check for $50,000 from the LLC to The Classic Cup, designating the funds as a loan repayment. But the LLC had never taken a loan from The Classic Cup.

On October 14, 2014, Schieve and Brad sent Meyer a letter demanding an accounting from the LLC no later than October 31, 2014, as Meyer still had not disbursed the proceeds from the Hy-Vee sale. On October 15, 2014, Meyer wrote two checks from the LLC account; one went to the Treasurer for the State of Iowa in the amount of $8,603.00 and the other went to the United States Treasury in the amount of $20,204.00, both for payment of Meyer's personal taxes. On November 3, 2014, in response to the demand for an accounting, Meyer sent Schieve an email stating, "I recently returned from my annual camping trip to find your letter. It is apparent that you have yet to understand that all of the money that went into the LLC belongs to the Meyer Family Partnership."[2] Meyer further indicated that there was no money in the LLC and that the LLC had never purchased or been gifted any property (contrary to the multiple quitclaim deeds showing property transferred from the Meyer Family Partnership to the LLC before the Hy-Vee land sale).

On March 25, 2015, a $200,000 check issued from the LLC account to a holding company for CrossFirst Bank, where Meyer held accounts. On March 21, 2016, a cashier's check in the amount of $109,444.35, payable to Meyer, was issued from the LLC account, bringing its balance to zero and closing the account. Neither Schieve nor Brad knew anything about or authorized either of these payments. Schieve and Brad contacted CrossFirst Bank and explained to them that

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[2] The Meyer Family Partnership included Carroll Meyer (the patriarch), John Meyer, Brad Meyer, Lynn Schieve, and Scott Meyer (another sibling). At the time of Meyer's November 3, 2014 letter, Schieve owned 8.5% of the Meyer Family Partnership. The partnership predated the LLC.

Meyer had not been authorized to take the $200,000 from the LLC that he had deposited at CrossFirst. CrossFirst indicated they did not wish to be involved and insisted Meyer take the money out.

On November 3, 2017, Meyer created a new bank account at Country Club Bank in the LLC's name and deposited $224,500 in the new account.[3] On November 6, 2017, Meyer withdrew $224,480 from the LLC account and closed it. Schieve emailed back and forth with Meyer in various attempts to resolve the dispute without avail.

Schieve filed suit, individually and as a member of the LLC, against Meyer in Clay County on January 12, 2018. Schieve's petition alleged a breach of fiduciary duty, conversion, breach of contract, and unjust enrichment. Following a bench trial, the court entered judgment in favor of Schieve, finding that Meyer "breached his fiduciary duty to the two members of the LLC, including [Schieve], when he took the LLC's money for his own personal use and benefit while not issuing the required distributions per the LLC's Operating Agreement." The court awarded Schieve $165,982.55 in damages and $40,000 in attorneys' fees. Meyer appeals.

Analysis

Meyer raises three points on appeal. First, he argues that the trial court misapplied the law in entering judgment in favor of Schieve because Schieve lacked standing to bring her claims individually in a direct action rather than on behalf of the LLC in a derivative action. Second, he argues that the trial court lacked substantial evidence to support its finding that Meyer owed any duties to Schieve for which he could be personally liable. And, finally, Meyer argues that the court misapplied the law in awarding Schieve attorneys' fees because, he claims, they were not authorized by the Operating Agreement.

[3] This amount represented both the $200,000 Meyer initially deposited with CrossFirst, along with interest accrued on the CrossFirst account.

"Our review of a court-tried case is governed by *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)." *In Their Representative Capacity as Trs. for Indian Springs Owners Ass'n v. Greeves*, 277 S.W.3d 793, 797 (Mo. App. E.D. 2009). "We will affirm the trial court's judgment unless it is not supported by substantial evidence, it is against the weight of the evidence, it erroneously declares the law, or it erroneously applies the law." *Id.*

I. Meyer failed to preserve his challenge to Schieve's petition.

In his first point, Meyer argues that Schieve lacked standing to bring suit individually in a direct action insofar as the claims she raised could be brought only on behalf of the LLC in a shareholder's derivative action. His entire argument is based on the premise that Schieve failed to raise her claims on behalf of the LLC. There are two flaws in this argument, however. First, Schieve's petition plainly raised each of her claims both in her individual capacity *and* on behalf of the LLC in her capacity as a member; thus, Meyer's first point is based on a factual inaccuracy.[4] And, second, Meyer failed to identify any flaws in Schieve's petition below and, therefore, his claim is not reviewable.

To begin, Schieve's petition very plainly states in multiple places that she was seeking relief both individually and on behalf of the LLC. The caption itself identifies the Plaintiff as "LYNN SCHIEVE, Individually and as a Member of the Carroll Meyer Family Limited Liability Company, LLC." Paragraph 5 of the petition states, "Plaintiff has filed this lawsuit and submits the causes of action set forth below both individually and on behalf of the Carroll Meyer Family Limited Liability Company, LLC." Paragraphs 15, 25, 36, and 47 all allege that Schieve demanded that Meyer either return the money to the LLC or pay her as required under the Operating

[4] Meyer does not argue that raising both individual claims and those on behalf of the LLC in the same petition was improper. And we see no reason that it would be. *See, e.g., Dawson v. Dawson*, 645 S.W.2d 120, 125 (Mo. App. W.D. 1982) (plaintiff brought claims both individually and as a shareholder derivative action in a single petition).

Agreement. And Paragraphs 17, 30, 41, and 49 all allege injury and damages to both Schieve and the LLC from Meyer's alleged misconduct. In light of the plain language of Schieve's petition, Meyer's claim that Schieve failed to raise claims on behalf of the LLC is factually inaccurate.[5]

Because Schieve did, in fact, raise the claims on behalf of the LLC, it seems that Meyer's true complaint is that Schieve failed to raise the claims properly. But Meyer made no such complaint to the trial court.

In his brief, Meyer argues that Schieve's petition utterly fails to comply with the requirements of Rule 52.09, governing petitions for derivative actions by shareholders.[6] Though Meyer's answer generally asserted that Schieve's petition failed to state a claim, he neither mentioned Rule 52.09's requirements nor sought any relief for this alleged failure (e.g., a motion to dismiss). And no claim of error related to any deficiency in the petition was raised in his motion for new trial.

"It is well recognized that a party should not be entitled on appeal to claim error on the part of the trial court when the party did not call attention to the error at trial and did not give the court the opportunity to rule on the question." *Brown v. Brown*, 423 S.W.3d 784, 787 (Mo. banc 2014) (quoting *Niederkorn v. Niederkorn*, 616 S.W.2d 529, 535 (Mo. App. E.D. 1981)). "This requirement is intended to eliminate error by allowing the trial court to rule intelligently and to

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[5] At oral argument, Meyer suggested that Schieve abandoned the claims on behalf of the LLC at trial. We disagree. There is nothing in the transcript to support Meyer's suggestion.

[6] All rule references are to the Missouri Supreme Court Rules (2019) unless otherwise noted. Rule 52.09 addresses the requirements for derivative actions brought by one or more members "to enforce a right of a corporation" where the corporation fails "to enforce a right that may properly be asserted by it." There are four requirements for the petition: (1) it must be verified; (2) it must allege "that the plaintiff was a . . . member at the time of the transaction of which there is a complaint"; (3) it must allege "with particularity the efforts, if any, made by the plaintiff to obtain the action desired from the directors or comparable authority"; and (4) it must allege "the reasons for the failure to obtain the action." Rule 52.09. It appears that Schieve's petition made all the necessary allegations, though it was not verified. But "[t]he absence of verification is effectively cured by the judgment following the hearing." *In re Estate of Basler v. Delassus*, 690 S.W.2d 791, 795 (Mo. banc 1985) (evaluating a claim of error under the probate code based upon the lack of verification).

avoid 'the delay, expense, and hardship of an appeal and retrial.'" *Id*. at 787-88 (quoting *Pollard v. Whitener*, 965 S.W.2d 281, 288 (Mo. App. W.D. 1998)). This "purpose is defeated if the error receives its first review in the appellate court." *Pollard*, 965 S.W.2d at 288.[7]

Though Rule 78.07(b) says that a party is not required to file a motion for new trial in a bench-tried case, it also "clearly states, in order for a matter to be preserved for our review, it must have been presented to the trial court." *Carmack v. Carmack*, 603 S.W.3d 900, 909 n.7 (Mo. App. W.D. 2020). And "[c]ompliance is particularly essential for procedural claims that the trial court could have remedied if given the chance." *In re I.K.H.*, 566 S.W.3d 629, 632 (Mo. App. S.D. 2018). "We should not consider nonjurisdictional matters that might have been cured if raised in the trial court." *In re Horton's Estate*, 606 S.W.2d 792, 794 (Mo. App. S.D. 1980); *see also Hart v. Skeets*, 145 S.W.2d 143, 145 (Mo. 1940) ("It is an established general rule that an appellate court will not consider objections raised for the first time on appeal concerning matters which, if raised in the lower court, might have been cured by amendment." (quoting *Hartford Fire Ins. Co. v. Bleedorn*, 132 S.W.2d 1066, 1070 (Mo. App. 1939)). In this particular case, if Meyer had raised below the issue he argues in his brief, Schieve could have amended her petition to correct what Meyer now suggests are pleading deficiencies under Rule 52.09.

"Apart from questions of jurisdiction of the trial court over the subject matter . . . , no allegations of error shall be considered in any civil appeal except such as have been presented to

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[7] Meyer contends that, because his claim is one of standing, it did not need to be raised below and can be raised at any time. For support, he cites *Chastain v. Geary*, 539 S.W.3d 841, 848 (Mo. App. W.D. 2017), where this court stated, "the court does not have subject matter jurisdiction to decide substantive issues if the party lacks standing." The most recent Missouri Supreme Court decision on standing indicates that it is "better understood as a matter of justiciability, that is, of a court's authority to address a particular issue when the party suing has no justiciable interest in the subject matter of the action." *Schweich v. Nixon*, 408 S.W.3d 769, 774 n.5 (Mo. banc 2013). And "[j]usticiability is a 'prudential' rather than a jurisdictional doctrine." *Id*. at 773. But we need not address Meyer's claim that he was not required to raise a standing claim below because the true nature of Meyer's challenge is not to Schieve's standing but to the sufficiency of her petition. And because he failed to raise this claim below, we do not address it here.

or expressly decided by the trial court." § 512.160.1, RSMo (2016).[8] Though Meyer couches his claim on appeal as a challenge to Schieve's standing, his true complaint is that her petition failed to comply with the dictates of Rule 52.09—an alleged error that could have been corrected by amendment if Meyer had raised the claim below. Because he failed to preserve that claim by not presenting it to, and getting a decision from, the trial court, we will not review it on appeal.

Point I is denied.

II. There was substantial evidence to support the court's finding that Meyer owed a fiduciary duty to Schieve.

In his second point on appeal, Meyer argues that there was not substantial evidence to support the trial court's determination that Meyer owed any duties to Schieve for which he could be personally liable. We disagree.

"Substantial evidence is evidence that, if believed, has some probative force on each fact that is necessary to sustain the circuit court's judgment." *Ivie v. Smith*, 439 S.W.3d 189, 199 (Mo. banc 2014). "Evidence has probative force if it has any tendency to make a material fact more or less likely." *Id.* "When reviewing whether the circuit court's judgment is supported by substantial evidence, appellate courts view the evidence in the light most favorable to the circuit court's judgment and defer to the circuit court's credibility determinations." *Id.* at 200. "To prevail on the substantial-evidence challenge, [the appellant] must demonstrate that there is no evidence in the record tending to prove a fact that is necessary to sustain the circuit court's judgment as a matter of law." *Id.*

[8] Section 512.160.1 also refers to "the sufficiency of pleadings to state a claim upon which relief can be granted" as a question that may be considered on appeal without having been presented to or decided by the trial court. This defense, however, "may no longer be raised for the first time on appeal, and must now be raised in any pleading permitted by Rule 55.01, or by a motion for judgment on the pleadings" before it may be considered on appeal. *Stephens Cemetery, Est. 1864, Inc. v. Tyler*, 579 S.W.3d 299, 305 (Mo. App. E.D. 2019) (analyzing a claim that the plaintiffs failed to state a claim insofar as they failed to allege adequate facts to support their standing to sue).

"When breach of fiduciary duty is asserted as a tort claim, as here, the proponent must [1] establish that a fiduciary duty existed between it and the defending party, [2] that the defending party breached the duty, and [3] that the breach caused the proponent to suffer harm." *Hibbs v. Berger*, 430 S.W.3d 296, 312 (Mo. App. E.D. 2014) (quoting *Zakibe v. Ahrens & McCarron, Inc.*, 28 S.W.3d 373, 381 (Mo. App. E.D. 2000)). Here, Meyer argues that the trial court's finding that Meyer owed Schieve a fiduciary duty was not supported by substantial evidence.

The trial court found that Meyer, "as Managing Member of the LLC, owed a fiduciary duty to the other two members of the LLC, including" Schieve. Meyer does not challenge the fact that he was the managing member of the LLC or that Schieve was a member of the LLC. He also acknowledges that, generally, "the manager of an LLC owes the members fiduciary duties."[9] He argues, however, that "the law of Missouri allows the LLC's articles and operating agreement to restrict those duties and limit or annul his liability to the members for their damages for actions he took as the LLC's manager."[10] He then argues that the LLC's Operating Agreement precluded the court from finding him liable "to any other member for a debt, obligation or liability of the LLC, or for any loss, damage, liability, or expense the members suffered on account of any action he took or failed to take as manager."

Section 5.12(a) of the Operating Agreement addresses the limits of liability, and it states in relevant part:

> No Person shall be liable to the . . . Members for any loss, damage, liability or expense suffered by the Company or its Members on account of any action taken or omitted to be taken by such Person as a Manager of the Company . . . , *if such Person discharges such person's duties in good faith, exercising the same degree*

[9] Indeed, the law in Missouri is that "managers (member or nonmember managers)[] owe members of the LLC fiduciary duties[] as a matter of law by virtue of the manager and member relationship." *Hibbs v. Berger*, 430 S.W.3d 296, 316 (Mo. App. E.D. 2014).

[10] This assertion is also legally accurate: "Missouri's Limited Liability Company Act grants limited liability companies the power to effectively limit or define the scope of the fiduciary duties imposed upon an LLC's members and managers." *Hibbs*, 430 S.W.3d at 316.

> *of care and skill that a prudent person would have exercised under the circumstances in the conduct of such prudent person's own affairs, and in a manner such person reasonably believes to be in the best interest of the Company*.

(Emphasis added.) Notably, Meyer's argument glosses over the italicized portion of the Operating Agreement. Meyer argues that, because the Operating Agreement incorporated the LLC's Articles of Organization, which did not include a "carve-out for acts that 'constitute bad faith, fraud, gross negligence, willful misconduct or breach of fiduciary duty,'" Meyer was not liable for actions taken as Manager, even if done in bad faith or constituting a breach of fiduciary duty. The Articles of Organization provide:

> No . . . Manager, solely by reason of being a . . . Manager, . . . shall be liable, under a judgment, decree or order of a court, or in any manner, . . . for the acts or omissions of any other Member, Manager, agent or employee of the Company.

(Pl. Ex. 1).

This provision of the Articles of Organization tracks the language of § 347.057, which has been held to preclude individual liability for a manager of an LLC based on *the acts of the LLC*. *See JB Contracting, Inc. v. Bierman*, 147 S.W.3d 814, 819 (Mo. App. S.D. 2004) (holding that § 347.057 precluded relief where "Respondents failed to allege and prove facts necessary to hold Bierman individually liable for the acts of the limited liability company owned by him" insofar as "they fail[ed] to show how Bierman was benefited individually, and not as a member of a limited liability company."); *see also Allstate Ins. Co. v. Head*, 2:17-CV-04169-NKL, 2018 WL 454586, at *2 (W.D. Mo. Jan. 17, 2018) (holding that, under § 347.057, where a breach of contract claim against the manager of an LLC was "not based solely on the grounds that he is a member or manager of [the] LLC, . . . [it] may be brought against [the manager] individually, notwithstanding the Missouri Limited Liability Company Act."). Thus, contrary to Meyer's suggestion, the

Articles of Organization do not preclude individual liability for a manager where liability is premised on acts of the manager benefiting himself, rather than the LLC.

Meyer insists that, even setting aside the Articles of Organization, there is no carve-out for "bad faith" in the Operating Agreement. Though he is correct that there is no mention of the phrase "bad faith" in the Operating Agreement, he glosses over the fact that it affirmatively requires the Manager to act in "good faith" to avoid liability. And, here, the trial court found that Meyer "took the LLC's money for his own personal use and benefit while not issuing the required distributions per the LLC's Operating Agreement." This conduct evidences a lack of good faith. And the Operating Agreement limits a manager's liability only insofar as he acts in good faith.

Section 347.088.3 provides that the manager of an LLC holds funds as a trustee "from any personal use by [the manager] of the property of the [LLC] . . . entrusted to him as a result of his status as manager." "This provision codifies for Missouri LLCs the duty of loyalty, with its attendant prohibition against self-dealing, which is one of the pillars of American corporate governance." *In re Tri-River Trading, LLC*, 329 B.R. 252, 264 (B.A.P. 8th Cir. 2005), *aff'd sub nom. DeBold v. Case*, 452 F.3d 756 (8th Cir. 2006). "[I]t is certain that, as a general proposition, neither the executive officers nor the directors of an incorporated company have a right to convert its assets to their own use, or give them away, or make any self-serving disposition of them against the interest of the company." *Zakibe*, 28 S.W.3d at 383 (quoting *Emergency Patient Servs., Inc. v. Crisp*, 602 S.W.2d 26, 28 (Mo. App. W.D. 1980)).

Here, the Operating Agreement shielded Meyer from liability only if he acted in good faith. Because he did not act in good faith, he is not shielded from liability, and the ordinary fiduciary duties attendant to his position as manager apply. In short, there was substantial evidence to

support the trial court's finding that Meyer, acting as manager of the LLC, owed a fiduciary duty for which he could be personally liable to Schieve, a member of the LLC.

Point II is denied.

III. The attorneys' fees awarded to Schieve were authorized by the LLC Operating Agreement.

In his final point, Meyer argues that the trial court misapplied the law in granting Schieve $40,000 in attorneys' fees because the Operating Agreement did not provide for them under the facts of this case.

"Whether a trial court has authority to award attorneys' fees is a question of law which we review *de novo*." *St. Louis Title, LLC v. Talent Plus Consultants, LLC*, 414 S.W.3d 24, 26 (Mo. App. E.D. 2013). "Under the 'American Rule,' orders requiring one party to pay another party's attorney's fees or other expenses ordinarily are not permitted unless the parties' contract or a statute authorizes the court to make such an award." *Garland v. Ruhl*, 455 S.W.3d 442, 446 (Mo. banc 2015). "If a contract provides for the payment of attorneys' fees and expenses incurred in the enforcement of a contract provision, the trial court must comply with the terms of the contract and award them to the prevailing party." *WingHaven Residential Owners Ass'n, Inc. v. Bridges*, 457 S.W.3d 383, 385 (Mo. App. E.D. 2015).

Here, section 9.15 of the LLC's Operating Agreement provided the following with respect to "Remedies":

> In the event that any dispute arises with respect to the enforcement . . . of this Agreement and court proceedings are instituted to resolve such dispute, the prevailing party in such court proceedings shall be entitled to recover from the non-prevailing party all costs and expenses, *including, but not limited to, reasonable attorneys' fees*, incurred by the prevailing party in such court proceedings.

Meyer argues that this section does not allow for attorneys' fees because "the only 'parties' to the Agreement were [Meyer], Brad, and [Schieve] *as members*," and, because Schieve sued Meyer as an individual, rather than as either a member or manager, he was not a "party" as contemplated by § 9.15. We disagree.

There are two provisions for attorneys' fees in § 9.15: the one identified above and the following:

> In the event of a default by any party in the performance of any obligation undertaken in this Agreement, in addition to any other remedy available to the non-defaulting parties, the defaulting party shall pay to each of the non-defaulting parties all costs, damages, and expenses, including reasonable attorneys' fees, incurred by the non-defaulting parties as a result of such default.

Though Meyer's argument (that "party" as used in § 9.15 refers only to parties to the Operating Agreement) might be plausible for the provision dealing with defaulting parties, it does not appear so limited with respect to the "prevailing party" provision.[11] "A prevailing party is one that succeeds on any significant issue in the litigation which achieved some of the benefit the parties sought in bringing suit." *Dixson v. Mo. Dep't of Corr.*, 586 S.W.3d 816, 831 (Mo. App. W.D. 2019) (quoting *Mignone v. Mo. Dep't of Corr.*, 546 S.W.3d 23, 45 (Mo. App. W.D. 2018)). And, here, Schieve plainly was the prevailing party in the suit. As such, she was entitled to attorneys' fees under the plain language of § 9.15 of the LLC's Operating Agreement, and the trial court was required to award them.[12]

Point III is denied.

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[11] There is no special definition for "party" as used in the LLC's Operating Agreement.

[12] Schieve has filed a motion for attorneys' fees on appeal under the same provision of the LLC's Operating Agreement. We hold that she is entitled to attorneys' fees under the Operating Agreement and remand for the limited purpose of allowing the trial court to calculate an appropriate amount for the award.

Conclusion

The trial court did not err in entering judgment, including attorneys' fees, in favor of Schieve. Its judgment is affirmed. The matter is, however, remanded to the trial court for the limited purpose of entering a judgment for attorneys' fees on appeal pursuant to Schieve's motion.

Karen King Mitchell, Judge

Mark D. Pfeiffer, Presiding Judge, and Alok Ahuja, Judge, concur.