

**COURT OF APPEALS
DECISION
DATED AND FILED**

April 10, 2018

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2017AP893

Cir. Ct. No. 2015CV856

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

JASON SCHAEFER,

PLAINTIFF-APPELLANT,

V.

RANDY W. ORTH,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Outagamie County: MARK J. MCGINNIS, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Jason Schaefer appeals a judgment dismissing his claims against his former business partner, Randy Orth, following a jury trial.

Schaefer contends the circuit court erred by directing a verdict in favor of Orth on Schaefer's breach of contract claim. Schaefer also argues the court erred by denying his request for attorney fees. We reject these arguments and affirm.

BACKGROUND

¶2 Schaefer and Orth met in 2007, when Orth began frequenting the Sandtrap, a bar and grill Schaefer owned and operated. Over the next few years, Schaefer and Orth became friends. In December 2013, Orth contacted Schaefer about a franchise opportunity for "Tom and Chee," a fast casual restaurant specializing in grilled cheese sandwiches and soups. In January 2014, Schaefer and Orth submitted a request to the franchisor for consideration to open a Tom and Chee franchise. Their request was accepted, and on June 16, 2014, Tom and Chee Worldwide entered into a franchise agreement with Grilled Cheese LLC (hereinafter, "the LLC"), a limited liability company Schaefer and Orth had created to own and operate their Tom and Chee franchise.

¶3 Schaefer and Orth entered into an operating agreement regarding the LLC. The operating agreement provided the LLC would be manager-managed, rather than member-managed, and Orth would serve as its manager. Schaefer, in turn, would serve as the LLC's "COO." The parties understood that, in that role, Schaefer would be responsible for the restaurant's day-to-day operations, while Orth would be responsible for the LLC's business and financial decisions. The operating agreement provided that Orth would not receive any compensation for his services as manager of the LLC, but Schaefer would receive a "monthly fee of \$3,333" as compensation for his work as COO, along with various bonuses. The operating agreement required Schaefer and Orth to devote their "best efforts" to

the LLC and stated they were subject to the fiduciary duties set forth in Wisconsin's LLC statutes.

¶4 Schaefer and Orth each made an initial capital contribution of \$187,500 to the LLC. Their Tom and Chee franchise opened on March 27, 2015, and earned a net income of \$27,000 during April 2015, its first full month of operations. However, during the next month—May 2015—the restaurant reported a net income of only \$1,279. Thereafter, the restaurant never again reported a monthly profit. It lost \$8,000 in June 2015, \$20,000 in July 2015, \$12,000 in August 2015, and \$10,000 in September 2015. During this time period, Orth made additional monetary contributions to the LLC, totaling just over \$100,000. In their trial testimony, both Orth and Schaefer referred to these contributions as loans. Orth asked Schaefer to contribute additional money to the LLC, but Schaefer refused to do so.

¶5 In August 2015, Schaefer was not paid the monthly salary to which he was entitled under the LLC's operating agreement. In addition, Schaefer apparently did not receive at least one of the bonuses described in the operating agreement. On September 3, 2015, Schaefer notified Orth that he was resigning as the LLC's COO. The parties' restaurant ultimately closed in February 2016. After the restaurant closed, Orth worked to "wind ... up" the business by selling equipment and food, clearing out the restaurant premises, and negotiating a release from the LLC's five-year lease. Schaefer did not aid Orth in these efforts. Orth ultimately lost the entire amount he had invested in the LLC—approximately \$287,000. Schaefer lost his \$187,500 investment.

¶6 Schaefer filed the instant lawsuit against Orth on September 4, 2015. He did not name the LLC as a party. His complaint asserted claims against Orth

for fraudulent representation, fraud in the inducement, breach of contract, and breach of fiduciary duty. Among other things, Schaefer alleged Orth had breached the LLC's operating agreement by exceeding the parties' agreed-upon budget, by demanding capital contributions in excess of that budget, by using company funds to pay personal expenses, and by failing to pay Schaefer wages and bonuses to which he was entitled under the operating agreement. Orth answered Schaefer's complaint and asserted counterclaims for breach of fiduciary duty, breach of the implied duty of good faith and fair dealing, breach of contract, judicial dissolution of the LLC under WIS. STAT. § 183.0902 (2015-16),¹ and injunctive relief.

¶7 The parties ultimately stipulated to the dismissal of Schaefer's fraudulent misrepresentation and fraud in the inducement claims, as well as Orth's counterclaims for breach of fiduciary duty, breach of the implied duty of good faith and fair dealing, breach of contract, and injunctive relief. A jury trial was held on parties' remaining claims in February 2017.

¶8 After Schaefer presented his case at trial, Orth moved for a directed verdict on the issue of Schaefer's claim for unpaid wages and bonuses. Orth contended both Schaefer and his expert witness had testified "it would be a company obligation, not Randy Orth individually[,] to pay the wages." Orth therefore argued Schaefer had "named the wrong party" by naming Orth, rather than the LLC, as a defendant. The circuit court took Orth's motion under advisement.

¹ All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶9 After the close of evidence, the jury returned a verdict finding that Orth had breached the LLC’s operating agreement, and Schaefer had suffered \$11,649 in damages as a result of that breach. The jury also found that Orth had breached his fiduciary duties to Schaefer, but that breach did not cause Schaefer any damages. After the jury rendered its verdict, the circuit court asked the jury—over Schaefer’s objection—to clarify its damages award on the breach of contract claim by “itemiz[ing] what that stands for.” In response, the jury clarified that it had awarded Schaefer damages only for the unpaid wages and bonuses to which he was entitled under the operating agreement.

¶10 The circuit court then asked the parties to submit written arguments addressing Orth’s motion for a directed verdict. After reviewing those submissions, the court granted Orth’s motion. The court concluded Orth was entitled to a directed verdict on Schaefer’s breach of contract claim because the only damages the jury had awarded for the breach—i.e., Schaefer’s unpaid wages and bonuses—were “a lawful obligation and liability of” the LLC, not Orth individually. The court reasoned that, under Wisconsin law, Orth was not “individually responsible or liable for that debt of the LLC.”

¶11 Schaefer subsequently asserted the operating agreement permitted him to recover his attorney fees from Orth, even though the circuit court had granted Orth’s motion for a directed verdict. He submitted a proposed judgment that would have awarded him attorney fees and costs totaling just over \$91,000. The circuit court did not sign that judgment. Instead, it entered a judgment dismissing Schaefer’s claims against Orth with prejudice, awarding Orth statutory costs, and granting Orth’s claim for judicial dissolution of the LLC. Schaefer now appeals, arguing the court erred by granting Orth’s motion for a directed verdict and by refusing to award him attorney fees.

DISCUSSION

I. Directed verdict

¶12 A motion for a directed verdict ordinarily focuses on the sufficiency of the evidence. *Anthony Gagliano & Co. v. Openfirst, LLC*, 2014 WI 65, ¶32, 355 Wis. 2d 258, 850 N.W.2d 845. A court may grant such a motion when it is satisfied that, “considering all credible evidence and reasonable inferences therefrom in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party.” WIS. STAT. § 805.14(1). We will reverse a circuit court’s decision to grant a directed verdict based on insufficiency of the evidence only where the court’s decision was “clearly wrong”—that is, where there was credible evidence to support the nonmoving party’s position. *Anthony Gagliano*, 355 Wis. 2d 258, ¶30. A motion for a directed verdict may also involve the application of undisputed facts to legal principles. *Id.*, ¶31. Under those circumstances, we review “the legal basis for the circuit court’s directed verdict independently.” *Id.*, ¶32.

¶13 Here, the circuit court granted Orth’s motion for a directed verdict because it determined there was no credible evidence to support a conclusion that Orth was personally liable to Schaefer for the unpaid wages and bonuses to which Schaefer was entitled under the operating agreement. We agree with the court that the evidence presented at trial does not permit a legal conclusion that Orth was personally liable to Schaefer for those amounts.

¶14 At trial, both Orth and Schaefer testified it was the LLC’s responsibility to pay Schaefer the wages and bonuses set forth in the operating agreement, and Orth was not personally required to pay Schaefer those amounts.

Schaefer's expert witness similarly conceded on cross-examination that the compensation set forth in the operating agreement was "the responsibility of [the LLC] to pay."

¶15 The operating agreement's unambiguous language confirms that the LLC, not Orth, was responsible for paying Schaefer's wages and bonuses. The section of the agreement pertaining to "Distributions" specifically lists Schaefer's wages and bonuses as distributions to be paid to Schaefer before other distributions to the LLC's members. The agreement specifies that distributions are made from *the LLC's* available funds. The section of the agreement pertaining to "Profits" similarly states that, in the case of any profit resulting from the LLC's operations, "[the LLC] shall, as the first priority, allocate Profit to [Schaefer] to the extent, if any, that (A) all service compensation accruing in his favor through the date of the relevant allocation, exceeds (B) all prior allocations under this Clause." The agreement defines the term profit as *the LLC's* profit.

¶16 The language cited above plainly demonstrates that the LLC was responsible for paying Schaefer's wages and bonuses. Wisconsin's LLC statutes provide that "[t]he debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company." WIS. STAT. § 183.0304(1). With certain exceptions not applicable here, "a member or manager of a limited liability company is not personally liable for any debt, obligation or liability of the limited liability company, except that a member or manager may become personally liable by his or her acts or conduct other than as a member or manager." *Id.* There is no evidence Orth was acting outside his capacity as a member or manager of the LLC

when he failed to pay Schaefer's wages and bonuses. As a result, Orth is not personally liable to Schaefer for the payment of those amounts.²

¶17 Schaefer argues the circuit court erred by granting Orth's motion for a directed verdict because "the jury found that Orth was personally liable for damages to Schaefer." The jury made no such finding. It instead found that: (1) Orth breached the operating agreement; and (2) the only damages Schaefer suffered as a result of that breach were his unpaid wages and bonuses. The jury was not asked to determine the identity of the party who was legally responsible for the payment of those wages and bonuses. That was a question of law for the circuit court to resolve.

¶18 Schaefer next argues the circuit court's conclusion that Orth was not personally liable for the wages and bonuses was erroneous for three reasons. First, Schaefer contends Orth was personally liable by virtue of his role as manager of the LLC. However, as explained above, it was the LLC's responsibility to pay

² Schaefer notes in his reply brief that WIS. STAT. § 183.0304 is entitled "Liability of members to 3rd parties." He apparently intends to suggest the statute is inapplicable to this case because he is not a third party, in relation to the LLC. However, titles "are not part of the statutes." WIS. STAT. § 990.001(6). Moreover, Schaefer does not develop a convincing argument as to why, under the circumstances of this case, his claim for the unpaid wages and bonuses the LLC owes him should be treated any differently from a third party's claim to recover debts owed to it by the LLC.

Schaefer also observes in his reply brief that WIS. STAT. § 183.0304(2) states nothing in WIS. STAT. ch. 183 "shall preclude a court from ignoring the limited liability company entity under principles of common law of this state that are similar to those applicable to business corporations and shareholders in this state and under circumstances that are not inconsistent with the purposes of this chapter." This language appears to be a reference to the common law doctrine of piercing the corporate veil—that is, "[t]he judicial act of imposing personal liability on otherwise immune corporate officers, directors, or shareholders for the corporation's wrongful acts." *Piercing the corporate veil*, BLACK'S LAW DICTIONARY (10th ed. 2014). Schaefer does not develop any argument that the requirements for piercing the corporate veil were met in the instant case.

Schaefer the wages and bonuses he was owed under the operating agreement, and WIS. STAT. § 183.0304 limits a manager's liability for the LLC's debts and obligations.

¶19 Second, Schaefer argues Orth is personally liable for the unpaid wages and bonuses because Orth breached his fiduciary duties to Schaefer by failing to make those payments, which in turn constituted a breach of the operating agreement. Specifically, Schaefer contends Orth breached his fiduciary duties by “willfully convert[ing] capital contributions to [the LLC] into a promissory note in order to avoid having to pay Schaefer’s salary and bonuses.” Schaefer is correct that the jury concluded Orth breached his fiduciary duties to Schaefer. However, the jury also concluded Orth’s breach of his fiduciary duties did not cause Schaefer any damages. Consequently, the damages the jury awarded Schaefer on his breach of contract claim for his unpaid wages and bonuses must have been for a breach of the contract separate from any breach of Orth’s fiduciary duties. As explained above, under the operating agreement, it was the LLC’s responsibility to pay Schaefer’s wages and bonuses, not Orth’s personal responsibility. Under these circumstances, we agree with the circuit court that Orth’s breach of the operating agreement cannot render him personally liable for those amounts.

¶20 Third, Schaefer argues that, because the LLC was not a party to the operating agreement, he could not have sued the LLC to recover his unpaid wages and bonuses. He therefore contends Orth must have been personally liable for those amounts. We disagree. As discussed above, the operating agreement expressly made the LLC responsible for the payment of Schaefer’s wages and bonuses. Both Schaefer and Orth testified it was the LLC’s responsibility to pay those amounts. It is undisputed that Schaefer performed work for the LLC and was therefore entitled to compensation. It is further undisputed the LLC failed to

pay him for some of his services. Under these circumstances, Schaefer clearly had a claim against the LLC for his unpaid wages and bonuses, despite the fact that the LLC was not a party to the operating agreement. Schaefer could have, for instance, sued the LLC for unjust enrichment or quantum meruit, neither of which require the existence of a formal, written contract between the plaintiff and the defendant. *See Murray v. City of Milwaukee*, 2002 WI App 62, ¶¶16-17, 252 Wis. 2d 613, 642 N.W.2d 541.

¶21 For all the foregoing reasons, we agree with the circuit court that Orth was not personally liable for the only damages the jury awarded Schaefer on his breach of contract claim—namely, his unpaid wages and bonuses. We therefore reject Schaefer’s argument that the circuit court erred by directing a verdict in favor of Orth on that claim.

II. Attorney fees

¶22 Schaefer next argues the circuit court erred by denying his request for attorney fees. Whether a party is entitled to attorney fees under a particular factual scenario is a question of law that we review independently. *Estate of Krieffall v. Sizzler USA Franchise, Inc.*, 2012 WI 70, ¶16, 342 Wis. 2d 29, 816 N.W.2d 853. Under the American Rule, parties to litigation are typically responsible for their own attorney fees. *Id.*, ¶72. An exception to the American Rule exists, however, where one party has a contractual right to recover attorney fees from another. *Id.* Interpretation of a contract presents a question of law for our independent review. *Chapman v. B.C. Ziegler & Co.*, 2013 WI App 127, ¶2, 351 Wis. 2d 123, 839 N.W.2d 425.

¶23 Schaefer argues he is entitled to recover his attorney fees from Orth under § 1.3(a) of the operating agreement, which provides, “Upon a breach of this

Agreement, [the LLC] and each aggrieved Party may pursue all redress permitted at law (and seek damages and a reimbursement of legal fees).” We do not agree that this provision entitles Schaefer to recover attorney fees from Orth, under the circumstances of this case. With respect to Schaefer’s breach of fiduciary duty claim, although the jury concluded Orth breached his fiduciary duties to Schaefer, it did not award Schaefer any damages for that breach. Schaefer was therefore not “aggrieved” by Orth’s breach of his fiduciary duties. Because the breach was harmless, under the plain language of § 1.3(a), Schaefer is not entitled to recover any attorney fees he incurred due to Orth’s breach of his fiduciary duties.

¶24 With respect to Schaefer’s breach of contract claim, the jury concluded both that Orth breached the operating agreement and that Schaefer suffered damages as a result of that breach. Schaefer was therefore “aggrieved” by Orth’s breach of the operating agreement. However, § 1.3(a) states an aggrieved party may pursue “all redress *permitted by law*,” including damages and attorney fees. (Emphasis added.) We have concluded Schaefer has no redress at law *against Orth* for the only damages the jury awarded on the breach of contract claim—i.e., Schaefer’s unpaid wages and bonuses—because Orth is not personally liable for those amounts. Under these circumstances, it would be absurd to conclude that, even though Orth has no personal responsibility to pay the only damages the jury awarded, § 1.3(a) nevertheless makes him personally liable to pay the attorney fees Schaefer incurred in unsuccessfully suing him. “[W]e must interpret contracts to avoid absurd results.” *Id.* We therefore conclude Schaefer is not entitled to an award of attorney fees under the circumstances of this case.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE
809.23(1)(b)5.

