THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

ALAN SOSKIN

Respondent

vs.

ANDREW WOLFSON, et al.

Appellants

No. 75113

Appeal From the Circuit Court of St. Louis County
The Honorable Kenneth M. Romines, Judge

BRIEF OF RESPONDENT

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JURISDICTIONAL STATEMENT

This is an appeal from the judgment entered in a civil action in the St. Louis County Circuit Court. The plaintiff in that action sought a declaratory judgment and other relief. The defendants filed a counterclaim seeking equitable relief. The case was tried without a jury.

The Circuit Court entered its judgment on May 7, 1998. On June 5, 1998, the plaintiff filed a motion seeking a nunc pro tunc corrective order, amendment of the judgment, or a new trial. The Circuit Court entered an order on August 24, 1998, correcting two clerical errors in the judgment pursuant to Mo.R.Civ.P. 74.06(a). The order did not rule expressly on the plaintiff's motion for a new trial. The Circuit Court did not enter any further orders. The defendants filed their notice of appeal on October 5, 1998.

This case does not involve the validity of a treaty or statute of the United States, a statute or provision of the Constitution of this state or title to any state office, nor is it a case in which the punishment of death has been imposed. As provided in Article 5, Sections 3 and 15 of the Missouri Constitution, as amended, the Missouri Court of Appeals, Eastern District, was the appellate court with jurisdiction to entertain this appeal.

The respondent has contended in a separate motion that the notice of appeal was not timely, that this Court is without jurisdiction to entertain the appeal for that reason, and that the appeal should be dismissed.

STATEMENT OF FACTS

A. Parties and Other Personnel

1. Andrew Wolfson

Andrew Wolfson is a principal of Almatterese Investments, L.L.C., which operates Feld Southpointe Toyota. (Exh. 8, Art. 6) He was one of the defendants in the Circuit Court and is an appellant in this Court. (L.F. 10, 104) Mr. Wolfson testified at trial that he was the owner of a Chevrolet dealership and had been an automobile dealer for 22 years. (T. II 1-2, 229) He summarized his experience in business as follows:

> "I have bought and sold dealerships, I have bought and sold radio stations, I have brought a company public on the stock exchange, I've been the vice chairman of a bank holding company, I've been involved in banking since 1988, I am involved in owning part of an advertising agency, and I have bought and sold commercial property."

(T. II 168)

Mr. Wolfson made repeated reference to one of his business practices: "I don't read documents." (T. II 54, 170, 232) He assured the trial court time and again that he had not read interim or final drafts of the operating and franchise agreements which established and defined the business of the Feld Southpointe Toyota dealership. (T. II 38, 46, 53-54, 99-100-02, 106, 119) Mr. Wolfson testified that he still had not read the operating agreement at the time of trial, although he acknowledged having filed a counterclaim alleging that his assent to the agreement had been procured by fraud. (T. II 124) The trial court eventually engaged him in the following colloquy on the subject:

> "THE COURT: You expect me to believe that?
>
> "THE WITNESS: It's the truth, sir. I'm a very avid reader, but not of documentation.

> "THE COURT: You have no curiosity about what the operative papers might be on a deal where we've heard anyplace from five to six million dollars of personal liability on yourself . . .
>
> "THE WITNESS: Yes, sir."

(T. II 232-33)

Mr. Wolfson met Alan Soskin, who was the plaintiff in the Circuit Court and is the respondent in this Court, during 1994. (T. II 2-3) Mr. Soskin had approached Mr. Wolfson's father, Robert Wolfson, to ascertain whether the elder Mr. Wolfson would be interested in investing in an automobile dealership. (T. I 9-10, II 3-4) The elder Mr. Wolfson suggested that Mr. Soskin contact his son regarding the investment. (T. I 9-10, II 3-4)

2. Robert Wolfson

Robert Wolfson had been in the automobile business for 50 years. (T. II 11) Andrew Wolfson described their business relationship as follows: "I discussed most every business deal that I'm involved in with him in one way or another . . . I have a father that's very knowledgeable and I pick his brain from time to time." (T. II 11)

When the younger Mr. Wolfson became interested in joining Mr. Soskin in the establishment of a Toyota dealership in St. Louis during 1995, he asked his father to assist him in structuring the transaction. (T. II 12, 180; R. Wolfson D.T. 18, 20) Andrew Wolfson explained at trial: "I'm not a detail man at all. My father is a stickler for detail. So I wanted him to be sure that the document reflected accurately what we had decided on. He's much more astute." (T. II 12)

3. Bruce Kupper

Bruce Kupper also is a principal of Almatterese Investments, L.L.C. (Exh. 8, Art. 6) Like Andrew Wolfson, Mr. Kupper was a defendant in the Circuit Court and is an appellant in this Court. (L.F. 10, 104) Mr. Kupper had been in the advertising business in St. Louis for 23 years

at the time of trial. (T. II 329) For the first "few years," he was employed by a firm at which he worked on the advertising accounts of major automobile manufacturers and automobile dealers. (T. II 329) Then he opened his own agency, in which his clientele has included as many as 174 automobile dealers at one time. (T. II 330) He testified at trial: "I worked with people in the automobile business a long time." (T. II 332-33)

Mr. Kupper's present agency, Kupper-Parker Advertising, was formed by the merger of two firms with combined annual revenues of $35,000,000.00. (T. II 360-61) He purchased substantial stakes in other businesses during 1988, 1992, and 1993. (T. II 354, 357-59) Mr. Kupper was an "advisory director" of Magna Bank in St. Louis during early 1995. (T. II 339) Mr. Kupper testified that he was invited to participate in the new Toyota dealership because of his banking connections: "I was brought in to raise capital." (T. II 334) He testified that he subsequently "introduced" Mr. Soskin to Magna Bank personnel and a loan guaranteed by the Small Business Administration was secured. (T. II 339)

Mr. Kupper also testified that he had never read any draft of the Feld Southpointe Toyota operating agreement until several months after his execution of the final draft. (T. II 337-40, 344-45, 379-81, 383-85, 388, 397, 407) He claimed that he had never received copies of interim drafts, despite evidence that each draft had been sent to him at his home or business address. (T. II 265, 290-94, 300-01, 384) Mr. Kupper first recalled having executed the final draft in his own office at the behest of Anthony Soukenik, the attorney who had drafted the agreement:

> "Tony Soukenik came to my office, told me that he needed me to sign it immediately, had some red tab places on various documents. I signed where he had them tabbed and he ran out the door."

(T. II 396-97) Mr. Kupper then was reminded of an interrogatory answer in which he gave the following description of having signed the same document at the Feld Southpointe Toyota offices:

> "I was summoned to the dealership for closing on the limited liability company and the dealership. All three members of the LLC and Soukenik were present personally or by phone at this meeting. At this meeting, I was told to sign the LLC operating agreement, even though I did not have a chance to review the document."

(T. 400-01; Exh. 12)

Mr. Kupper then remembered that he had signed the final operating agreement twice. (T. 401-02) He explained that "there was something wrong with--wrong with the documents that Tony Soukenik brought to my office . . . . [T]he first set, there was a problem with." (T. II 401-02) He elaborated in the following exchange with counsel for Mr. Soskin:

> "Q What was the problem?
>
> "A I have no idea.
>
> "Q Did you ask?
>
> "A Yes, I did.
>
> "Q What were you told the problem was?
>
> "A I was told they made some minor mistakes and needed to clean them up.
>
> "Q I'm sure you asked what those minor mistakes were?
>
> "A I think I asked them what it was, and my recollection was that there was some language that wasn't acceptable, but there was no substantive--it was all non-substantive material."

(T. II 402-03) Mr. Kupper testified that he had not been afforded the opportunity to review the "corrected" final agreement prior to the second signing at the Feld Southpointe Toyota offices

and that he did not receive a copy of the document from Mr. Soukenik until December 26, 1995. (T. 400-01, 403-04. 407)

4. Alan Soskin

Alan Soskin is a principal of Almatterese Investments, L.L.C. (Exh. 8, Art. 6) He was the plaintiff in the Circuit Court and he is the respondent in this Court. (L.F. 10, 104) Mr. Soskin testified that he had been involved in sales, sales management, and training since "the early 80's," primarily as the employee of a succession of six automobile dealerships. (T. I 8-9) During 1993, he began looking for an automobile franchise which he might purchase with other investors. (T. I 9) Mr. Soskin testified that the establishment of Feld Southpointe Toyota was "the first deal that [he] had ever done." (T. 108)

Mr. Wolfson allowed at trial that Mr. Soskin has "done a good job" of managing the Feld Southpointe Toyota dealership. (T. II 227-28) According to Mr. Soskin, the dealership is one of 74 in Toyota's Kansas City Region. (T. I 92) Feld Southpointe Toyota, which opened for business on June 1, 1995, ranked eighth in sales among dealerships during 1996, sixth during 1997, and second during 1998 as of the time of trial. (T. I 92-94) In the two and one-half years that the business had been operating under Mr. Soskin's management, it had retired $677,281.00 of its long-term debt, paid dividends in excess of $430,000.00, and increased its net worth by $490,390.00. (T. I 91-92)

5. Anthony Soukenik

Anthony Soukenik was the attorney whom Mr. Soskin had engaged when he first began to search for an automobile franchise which he might purchase. (T. I 10-11) Mr. Soukenik represented the interests of Mr. Soskin, Mr. Wolfson, and Mr. Kupper in the acquisition of the assets of Jack King Toyota and in their dealings with Magna Bank, the Small Business

Administration, and Toyota Motor Sales. (T. II 263-67, 274, 290-91, 293) He worked with Robert Wolfson and the three investors in the drafting of the dealership's operating agreement. (T. II 255, 261-64, 282-85, 290-97)

Andrew Wolfson had become acquainted with Mr. Soukenik through "two or three private deals." (T. II 18) Mr. Wolfson acknowledged having told Mr. Soskin that he was pleased that Mr. Soukenik would be involved in their efforts to establish a Toyota dealership because of those prior experiences. (T. II 19-20) Mr. Wolfson also acknowledged that he employed Mr. Soukenik and his firm to represent him in other legal matters throughout 1995 and during 1996. (T. II 165-66) One of the partners in the firm which employed Mr. Soukenik was a "very close friend" of Mr. Wolfson's father. (T. II 19)[1]

B. Evolution of the Feld Southpointe Toyota Operating Agreement

Mr. Soukenik testified that the original plan of the three investors was to operate Feld Southpointe Toyota as a corporation. (T. II 242) It was his understanding that Mr. Soskin would be president of the corporation and that all three investors would be members of the board of directors. (T. 242-43) He said that Robert Wolfson had asked him to alter that plan and organize the entity as a limited liability company. (T. II 247) Mr. Soukenik testified that he then informed each of the investors that the elder Mr. Wolfson had recommended that the dealership be operated by a limited liability company rather than a corporation, and that "there were no objections." (T. II 248)

Mr. Soskin said that he had described his intentions to Andrew Wolfson as follows: "I told him what I was looking for. I was looking for a percentage of stock ownership. I was

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[1] Robert Wolfson testified in his deposition that the senior attorney was his "[v]ery dear friend" and that they had "opened" two banks together in St. Louis. (R. Wolfson D.T. 13-14)

looking for the ability to run the dealership . . . business entity on a day-to-day basis, and general discussions about what I was looking for in terms of compensation to run the dealership." (T. I 17) Mr. Soskin testified that he expressed his desire to own 30 per cent of the business and that "we discussed [a salary of] $150,000.00 to $175,000.00 a year." (T. I 23) He explained:

> "I kept saying . . . that I didn't want to negotiate this deal, put it together, and end up as a general manager. I wanted to put the deal together and end up as the guy that was going to run the deal. And I was looking for investors that would allow me the opportunity to do that based on my track record from the business."

(T. I 23-24)

Mr. Soskin also testified regarding Mr. Wolfson's position at the inception of the deal:

> "He reiterated that he was looking for a good investment. He was excited by the deal. He was talking about how much money we would make there. I don't know if he used the exact term, but it was a sleeper of a dealership and it was a good location, and just reiterated he was looking for a good return on his investment."

(T. I 23) According to Mr. Soskin, Mr. Wolfson specified "that he was basically looking for good passive business investments." (T. I 17) Mr. Soukenik testified that Mr. Kupper had specified that "he would be a passive investor in this deal" and that "[h]e never told me he wanted to be anything but that." (T. II 258, 310, 327) According to Mr. Soukenik, "one of the things [Mr. Kupper] wanted to be satisfied with was whether or not Mr. Soskin was satisfied with the arrangements that were being made." (T. II 261)[2]

Mr. Soukenik testified that even before the decision to change the form of business organization had been made, "it was . . . decided that Alan [Soskin] was going to be the general manager and he was going to run the deal." (T. II 255, 258) Mr. Soukenik stated the following

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[2] Mr. Soukenik testified that Mr. Kupper had entertained "an expectation that he might do some advertising [for Feld Southpointe Toyota] if Alan retained his services." (T. II 328)

regarding the investors' intention regarding the definition of Mr. Soskin's role in the dealership: "There was going to be some general terms of his position and . . . they would eventually be reflected in a document that eventually evolved into the limited liability company operating agreement." (T. II 246)

Mr. Soukenik testified that the terms of the operating agreement "were developed by input by the members and by Bob Wolfson." (T. II 255) Mr. Soukenik described the process by which he prepared the several interim drafts of the operating agreement:

> "I just sought to make sure that when changes were given to me in the document, that . . . when you saw the new draft of the document, you could see that the change was made as requested. And to the best of my ability, I pointed out to the members when a change was made."

(T. II 267) He testified that he had sent the successive drafts of the operating agreement to each of the investors and to Robert Wolfson "in order to get comments from them." (T. II 290-97)[3] Mr. Soukenik stated that he had"welcomed" and "looked forward" to input "to make sure that the documents reflected what they wanted in this deal." (T. II 290-91)

Mr. Soukenik testified that he had been in touch with Robert Wolfson "constantly" throughout the formation of the limited liability company and the establishment of Feld Southpointe Toyota. (T. II 285) Robert Wolfson testified in his deposition: "[I]t was my opinion that [Mr. Soukenik] was asking my advice on the fairness, the soundness of the deal on behalf of all the parties." (R. Wolfson D.T. 50)[4] Mr. Soukenik explained:

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[3] Although Mr. Kupper denied having received the interim drafts which Mr. Soukenik sent to him, Andrew Wolfson acknowledged having received those documents. (T. II 224)

[4] The elder Mr. Wolfson acknowledged that his review of the various dealership documents had been "primarily" for the benefit of his son. (R. Wolfson D.T. 50-51) Mr.

> "I had many discussions with Bob Wolfson as to . . . what he wanted to see in the . . . operating agreement. And any of his final requests that he gave to me, I put into that document for the other members to review and to consent to."

(T. II 262) Neither the younger Mr. Wolfson nor Mr. Kupper ever contacted Mr. Soukenik directly to request a change. (T. II 326)

The final draft of the operating agreement provided that Mr. Wolfson would own 49 per cent of the company, that Mr. Soskin would own 43.5 per cent, and that Mr. Kupper would own 7.5 per cent. (Exh. 8, Art. 6)[5] The agreement specified that Mr. Soskin would be the manager of the limited liability company, that he would be entitled to a salary of $120,000.00 per year, and that his salary never could be increased absent the approval of a majority of the company's members. (Exh. 8, Art. 10, §§ 10.2(a)(iii)(7) and 10.5)[6] The agreement also provided that Mr.

Soukenik testified that it had been "obvious" that the elder Mr. Wolfson sought "to protect the interest" of his son. (T. II 284)

[5] At the inception of the business, Mr. Soskin had used the proceeds of a $133,000.00 loan from Mr. Wolfson to purchase a portion of his interest. (T. I 46-47, 60-61) Several months later, Mr. Wolfson demanded that Mr. Soskin either repay the loan or convey the stock to him. (T. I 76-77) Mr. Soskin testified: "I didn't have the money to pay the note . . . so I had to sign the stock over to cancel the promissory note." (T. I 77) After the latter transaction, Mr. Wolfson owned 62.5 per cent of the limited liability company and Mr. Soskin owned 30 per cent. (T. I 77)

[6] Mr. Wolfson acknowledged in his trial testimony that he and Mr. Kupper had retained complete control of Mr. Soskin's income under the operating agreement, that the provision had been adverse to Mr. Soskin's personal interest, and that Mr. Soskin would not have wanted to cede that control. (T. II 220)

Soskin would serve as manager "until his death, dissolution, incompetency, refusal to act, resignation, or adjudicated disability," and that he could only be removed from his position "by unanimous consent of all of the Members." (Exh. 8, Art. 10, § 10.1)[7]

The operating agreement specified that a majority of the company's members could elect another member as co-manager of the business. (Exh. 8, Art. 10, § 10.1) The same section of the agreement contained the following proviso:

> "[T]he General Manager . . . as designated in any Franchise Agreement with any automobile manufacturer shall exercise the duties and responsibilities as specified in any such Franchise Agreement . . . until such time as said manufacturer authorizes a change in management."

(Exh. 8, Art. 10, § 10.1) Mr. Soukenik explained his inclusion of that sentence in a letter sent to each of the investors with a then-current version of the operating agreement on April 26, 1995:

> "I had a discussion with Patricia Britton, counsel for Toyota in Torrence, California. She only had a few questions regarding the Limited Liability Company Agreement . . . . Her concern was that in her business, she only deals with the 5 % of Toyota dealers that have problems. Her specific concern was a stalemate. She indicated that it is their intention to cure their concerns by providing in the Franchise Agreement that the General Manager would have the authority to continue running the day to day operations until such time that they have approved another General Manager or other arrangements . . . . [H]er concern was to avoid a stalemate that would [affect] the day to day operations of the dealership. She inquired whether or not I would make any modification to the Agreement consistent with this concern. I told her that I would do what was absolutely necessary in order to gain approval.
>
> "Accordingly, I have added a sentence to Section 10.1 which reads 'Notwithstanding the above, the General Manager . . . as designated in any Franchise Agreement with any automobile manufacturer shall exercise his duties and responsibilities as specified in any such Franchise Agreement . . . until such time [as] said manufacturer authorizes a change in management."

(T. II 293-94; Exh. 28)[8]

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[7] The agreement also provided that Mr. Soskin could be removed by unanimous vote of all of the members other than himself if he was charged with a felony. (Exh. 8, Art. 10, § 10.1)

[8] In addition to the modification of the operating agreement which Mr. Soukenik made at the behest of the Toyota franchising organization, the franchise agreement contains the following provision:

> "V. MANAGEMENT OF DEALERSHIP
>
> "Distributor and Dealer agree that the retention of qualified management is of critical importance to satisfy the commitments made by Dealer in this Agreement. Distributor, therefore, enters into this Agreement in reliance upon Dealer's representation that Alan Soskin, and no other person, will exercise the function of General Manager, be in complete charge of Dealer's operations, and will have authority to make all decisions on behalf of Dealer with respect to Dealer's operations. Dealer further agrees that the General Manager shall devote his or her full efforts to Dealer's operations."

(Exh. 10) In a section headed, "VI. CHANGE IN MANAGEMENT OR OWNERSHIP," the franchise agreement also provided that the dealership could not make "any changes in General Manager from the person specified herein" without the consent of the franchisor. (Exh. 10, ¶ VI)

Mr. Soskin testified that it is "standard operating procedure in the car business" for manufacturers to require that control of dealership franchises reside in one person. (T. I 139-40) He gave the following attribution for his belief: "I knew that through my experience working in the business. I knew that, I guess, as you said, through my friends at Toyota. I knew through

The operating agreement was signed by Mr. Soskin, Mr. Wolfson, and Mr. Kupper on April 30, 1995. (T. I 57-59) Almatterese Investments, L.L.C., entered into its Toyota dealership agreement on May 11, 1995. (T. I 57; Exh. 10) The company closed on its purchase of the assets of the Jack King Toyota dealership on May 31, 1995, and opened Feld Southpointe Toyota on the following day. (T. I 66, 69)

C. Mr. Wolfson's and Mr. Kupper's Plan
To Alter Management of Almatterese Investments, L.L.C.

All three members of Almatterese Investments, L.L.C., attended a meeting on January 3, 1996. (T. II 128-29) Mr. Wolfson and Mr. Kupper had requested the meeting. (T. I 82) At that meeting, Mr. Wolfson and Mr. Kupper voted to elect Mr. Wolfson co-manager of the limited liability company. (T. II 129-30) Mr. Soskin described the meeting as follows:

> "They informed me that now that Drew had more stock, and based on the preceding friction that we had had, that they were going to elect Drew as a co-managing member and petition Toyota to put him in charge of the dealership and to--I don't want to use the term kick me out, but that was the gist of what they were telling me."

(T. I 83)

Frederick Berger, an attorney acting at the behest of Mr. Wolfson and Mr. Kupper, sent a letter to the general manager of Toyota's Kansas City region on January 4, 1996, requesting approval of the proposed changed in management of Feld Southpointe Toyota. (T. II 443-44; Exh 43) Mr. Berger informed Toyota that Mr. Wolfson and Mr. Kupper together now owned 70 per cent of Almatterese Investments, L.L.C. (Exh. 44) He made the following incorrect representation to Toyota:

Bob Wolfson." (T. I 140) Mr. Soskin stated his belief that "that's why Toyota put the provisions [regarding approval of managerial changes] in there." (T. I 139-40)

> "The organizational papers of the Dealership provide that the decisions involving the running of the business of the Dealership are determined by the vote of owners ("Members") having in excess of 66 2/3% interest of the Dealership, and this management provision in the organizational documents has not been changed."

(T. II 450; Exh. 43)

At trial, Mr. Berger testified that he had reviewed the operating agreement before writing to Toyota on behalf of Mr. Wolfson and Mr. Kupper. (T. II 454) At trial, Mr. Berger first explained that his reference to the company's "organizational papers" actually was a reference to "[t]he oral agreement under the statute of the State of Missouri for operating agreement." (T. II 451-52) He elaborated:

> "And to the extent that a statutorily oral agreement may amend or modify or supersede a written agreement, that's all part of interaction under the state statute. It's very clear. Very. It's black and white letter law. I didn't write the statute."

(T. II 452) He subsequently expanded upon his reference:

> "Q Are you telling us that when you sent this letter on January 4th, that when you were talking about the organizational papers of the dealership, that you were talking about the articles of incorporation?
>
> "A I swear to God on my life that, and the statutory oral agreement, was what I was talking about. On my life I say that. On my children's life I say that. Yes, I swear to God."

(T. II 468)

Toyota's regional manager wrote to Mr. Wolfson, Mr. Kupper, and Mr. Soskin on January 11, 1996. (T. II 455-56; Exh. 44) His letter declined to approve the change in management which had been proposed in Mr. Berger's letter of January 4, 1996. (T. I 139-40; Exh. 44) He explained that Toyota "cannot tolerate a situation where two equal controlling persons may deadlock on issues regarding the day to day operation of the dealership" and that "[t]hat is exactly why we included Section X(1) in your Toyota Dealer Agreement." (Exh. 44)

Mr. Wolfson and Mr. Kupper scheduled another meeting on January 31, 1996. (T. I 85-86) At that meeting, Mr. Kupper asked Mr. Soskin to resign as manager of the company. (T. I 85-86) Mr. Soskin declined. (T. I 86) Mr. Wolfson and Mr. Kupper then voted to elect Mr. Wolfson as the sole managing member. (T. I 86) At trial, Mr. Wolfson was questioned about his intentions:

> "Q And was it your plan to seek Toyota's approval to lock out or fire Alan Soskin?"
>
> "A I never said that, sir.
>
> "Q I'm asking you was that your plan?
>
> "A No, sir.
>
> * * * *
>
> "Q Was it your plan to get Toyota's approval to lock out or fire Alan Soskin because you felt if you did so without their approval you would get sued by Alan Soskin?
>
> "A Absolutely not.
>
> "Q Okay. And was it your plan to put Toyota in a situation where if they did not approve you as a sole managing member you would have a lawsuit, a good lawsuit, in your opinion, against Toyota under the Missouri franchise law?
>
> "A No, sir."

(T. II 138-39) Mr. Wolfson then was shown a letter dated January 23, 1996, which he acknowledged having sent to his father, and which provided:

> "Telefax to Dad
>
> "From: Andy
>
> "Dad, rather than get emotional, wouldn't you agree that we should first elect me "Sole Managing Member" and inform Toyota. I think that's what they are waiting to have happen (see attached letter).
>
> "At the same time, we should serve the lawsuits, Soukenick and Soskin for wrongfull acts and all the different things he has done to us without locking him

> out or firing him until we get Toyota's approval. In this way we can't be liable for counter claim or any consequences; and if Toyota turns me down, we have a fantastic case against them with Missouri Franchise laws as they are.
>
> "Berger has gone to the Prosecuting attorney as well as the U. S. District Attorney's office and is not confident about getting a warrant.
>
> "I don't know if I mentioned this to you but at the time I got my stock back from Alan, he made me sign a release that said all calls for capital must be unanimous. Soukenick let him do that without informing me that I would have to give up something to get my stock back . . . . stock that was rightfully mine.
>
> "I think Padberg and Soukenick are in big trouble."

(T. II 139; Exh. 85) Mr. Wolfson then acknowledged that he had sent the document and that it refreshed his recollection about what his plan had been. (T. II 139-42)

D. The Judgment of the Trial Court

The Circuit Court made the following factual findings, among others:

• "Soskin, Wolfson, and Kupper entered into the "Operating Agreement of Almatterese Investments, L.L.C. . . . , all of the provisions of which had been reviewed, agreed upon and knowingly and voluntarily approved and executed by Soskin, Wolfson, and Kupper." (L.F. 90)

• "The terms and provisions of the Toyota [Dealer] Agreement and the execution of said agreement by the L.L.C. were knowingly approved by Soskin, Wolfson and Kupper and the Toyota Agreement was executed on behalf of the L.L.C. by Soskin and Wolfson." (L.F. 90)

• "The testimony of Soskin and Soukenik was both consistent and highly credible." (L.F. 90)

• "The testimony of Wolfson [and] Kupper was inconsistent, was implausible, was fraught with fabrication and was unworthy of belief." (L.F. 90)

• "There was no credible evidence that there are any material inconsistencies between the Operating Agreement and the parties' prior oral agreements or understandings. Further, the

operating agreement is not unconscionable, is not in conflict with 'public policy,' is not in conflict with Missouri law and is valid and enforceable." (L.F. 91)

• "There was no credible evidence to support Defendants' contentions of mutual and/or unilateral mistake of fact and no such mistake was made." (L.F. 91)

• "The Defendants' contentions of fraud, conflict of interest, breach of fiduciary duty, breach of any duty of 'good faith and fair dealing,' 'undue influence,' or breach of 'trust and confidence' by either Soskin and/or Anthony Soukenik, Esq., are not supported by the credible evidence and therefore are without merit." (L.F. 91)

• "[A]t all times Anthony Soukenik acted in a professional and appropriate manner." (L.F. 91)

• "Soskin has served and is serving as the sole Managing Member of the L.L.C. and the General Manager of the Dealership and in that regard has fully, properly, and competently fulfilled all duties and responsibilities of those offices." (L.F. 91)

• "Wolfson and Kupper conspired to and did, in fact, initiate a course of action calculated . . . to usurp, diminish, and interfere with Soskin's appropriate exercise of his duties and responsibilities as Manager of the L.L.C. and as General Manager of the Dealership, all in violation of and contrary to the Operating Agreement and the Toyota Agreement." (T. 92)

• "The Operating Agreement allows the election of a Co-Managing member of the L.L.C. subject to the prior written consent of Toyota." (L.F. 92)

• "On or about January 31, 1996, Wolfson, with the concurring vote of Kupper, 'elected' himself 'Sole Managing Member' of the L.L.C. in disregard and violation of the Operating Agreement and the Toyota Agreement." (L.F. 92)

• "Wolfson improperly and inaccurately communicated to Toyota that he had been elected Sole Managing Member of the L.L.C. to replace Soskin." (L.F. 92)

• "The purported elections of Wolfson as either Co-Managing Member or Sole managing Member of the L.L.C. are unauthorized, void, improper and without any force or effect and are a nullity." (L.F. 92)

• "Pursuant to Section 11.2 of the Operating Agreement, Soskin is entitled to indemnification for all costs, expenses or damages, including his reasonable attorneys fees, incurred in this action to determine and enforce the validity of the Operating Agreement of Almatterese Investments, L.L.C., all of which is in furtherance of the L.L.C.'s interests." (L.F. 92)

• "[T]he unjustified actions of Wolfson and Kupper in initiating and pursuing a course of action calculated and intended to diminish and interfere with Soskin's rights and the exercise of his duties and responsibilities as Manager of the L.L.C., which necessitated this litigation, [constitute] special and unusual circumstances . . . justifying an award of costs (including reasonable attorneys fees) in favor of Soskin and against Wolfson and Kupper, both jointly and severally." (L.F. 93)

• "Soskin . . . incurred reasonable and necessary attorneys fees and litigation costs in the total amount of $107,580.00 to determine and enforce the validity of the Operating Agreement of Almatterese Investments, L.L.C. in furtherance of the L.L.C.'s interests." (L.F. 93)

The Circuit Court declared that the Almatterese Investments, L.L.C., operating agreement was valid, enforceable, and not unconscionable, and that it governed the management of the company. (L.F. 93) The judgment recited also that Mr. Soskin, as sole managing member of the company, had "sole operational and decision making authority with regard to the management

and operation of the L.L.C. and Feld Southpointe Toyota" subject to the terms of the operating agreement and the franchise agreement. (L.F. 94) The court barred Mr. Wolfson and Mr. Kupper from "countermanding or interfering with" Mr. Soskin's management of the business. (L.F. 94) And the court awarded Mr. Soskin attorney fees in the amount of $107,580.00, to be paid by Mr. Wolfson and Mr. Kupper because of the "special and unusual circumstances" of the case. (L.F. 94-95)

Mr. Wolfson and Mr. Kupper then appealed to this Court. (L.F. 104) They purported also to appeal on behalf of Almatterese Investments, L.L.C. (L.F. 104)

POINTS RELIED ON

I.

The trial court did not err in declaring the operating agreement to be valid, enforceable, and conscionable, because the factual findings of that court were supported by substantial evidence and were not against the weight of the evidence and because that court correctly declared and applied the governing law, in that (a) sections 10.1, 10.2, and 11.5 of the operating agreement were portions of an overall agreement which included other portions favorable to the interests of the appellants and unfavorable to the respondent, (b) both appellants were businessmen of broad experience, including extensive experience in the formation and acquisition of commercial enterprises, and neither suffered from any disparity between his experience or bargaining position and that of the respondent, (c) the trial court's findings that the agreement had been reviewed, agreed upon, and knowingly and voluntarily approved and executed by each of the appellants and the respondent, and that Anthony Soukenik had behaved "in a professional and appropriate manner" were supported by the testimony of Mr. Soukenik and the respondent and by the documentary evidence, and (d) the trial court found the testimony of both Mr. Soukenik and the respondent "highly credible" and that of both appellants "not worthy of belief."

Murphy v. Carron
536 S.W.2d 30 (Mo. 1976)

Liberty Financial Management Corporation v. Beneficial Data Processing Corporation
870 S.W.2d 40 (Mo.App. 1984)

Ricks v. Missouri Local Government Employees' Retirement System
981 S.W.2d 585 (Mo.App. 1998)

Johnson v. Mobil Oil Corporation
415 F.Supp. 264 (E.D. Mich. 1976)

II.

The trial court did not err in awarding attorney fees to the respondent or in ordering the appellants to pay those fees because the court's finding of special and unusual circumstances warranting such an award was supported by substantial evidence, was not against the weight of the evidence, and did not reflect an incorrect declaration or application of the governing law, in that (a) there was substantial evidence that this action resulted from the calculated and wrongful conduct of the appellants and was maintained on the basis of their intentional distortions and misrepresentations of fact and (b) Missouri law provides for awards of attorney fees in declaratory judgment actions when necessary to balance equities and effect justice.

David Ranken Jr. Technical Institute v. Boykins
816 S.W.2d 189 (Mo. 1991)

Johnson v. Mercantile Trust Company
510 S.W.2d 33 (Mo. 1974)

Leone v. Leone
917 S.W.2d 608 (Mo.App. 1996)

Bernheimer v. First National Bank of Kansas City
225 S.W.2d 745 (Mo. 1949)

ARGUMENT

I.

The trial court did not err in declaring the operating agreement to be valid, enforceable, and conscionable, because the factual findings of that court were supported by substantial evidence and were not against the weight of the evidence and because that court correctly declared and applied the governing law, in that (a) sections 10.1, 10.2, and 11.5 of the operating agreement were portions of an overall agreement which included other portions favorable to the interests of the appellants and unfavorable to the respondent, (b) both appellants were businessmen of broad experience, including extensive experience in the formation and acquisition of commercial enterprises, and neither suffered from any disparity between his experience or bargaining position and that of the respondent, (c) the trial court's findings that the agreement had been reviewed, agreed upon, and knowingly and voluntarily approved and executed by each of the appellants and the respondent, and that Anthony Soukenik had behaved "in a professional and appropriate manner" were supported by the testimony of Mr. Soukenik and the respondent and by the documentary evidence, and (d) the trial court found the testimony of both Mr. Soukenik and the respondent "highly credible" and that of both appellants "not worthy of belief."

> **Standard of Review:** In an appeal from a case which was tried without a jury, an appellate court will affirm the judgment of the trial court unless the trial court's findings are not supported by substantial evidence or are against the weight of the evidence or unless the trial court erroneously declared or applied the law. Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. 1976). Any fact issue upon which no specific finding was made is presumed to have been found in accordance with the judgment. State ex rel. Heiserman v. Heiserman, 941 S.W.2d 768, 770 (Mo.App. 1997). An appellate court defers to the trial court's determinations of credibility, viewing the evidence and the inferences which may be drawn from the evidence in the light most favorable to the decree and disregarding all contrary evidence and inferences. In re Estate of Perry, 978 S.W.2d 28, 35 (Mo.App. 1998). An appellate court must uphold the judgment of the trial court under any reasonable theory pleaded and supported by the evidence. H. S. v. Board of Regents, Southeast Missouri State University, 967 S.W.2d 665, 668 (Mo.App. 1998).

The record tells a story of three businessmen who joined together to create a new enterprise, and of their success in that mission. Andrew Wolfson and Bruce Kupper, two established entrepreneurs, were looking for a good investment and got what appears to be a fine one. Alan Soskin, a talented and experienced manager and salesman, sought investment capital to fund his own entrepreneurial debut. He got an excellent opportunity to prove himself, although he had to sacrifice control over his salary.

The claims of sharp practice and business treachery advanced by Mr. Wolfson and Mr. Kupper--who were far more experienced in the acquisition and establishment of businesses than Mr. Soskin and who had ample opportunity to participate in the formation of Almatterese Investments, L.L.C.--were absurd when they were asserted in the trial court. The fact that these men are still attempting to peddle those claims in this Court does not alter the fundamental wrongness of their position. If the appellants were a sovereign and legitimate complaints were clothing, the emperor would be naked.

A. Introduction

After many years of working for others in the business of selling automobiles, Alan Soskin began to look for a dealership of his own. Believing that he had the business knowledge and sales ability to succeed but knowing that he lacked the money to purchase and operate a new car franchise by himself, he sought the right investors: "I wanted to put the deal together and end up as the guy that was going to run the deal. And I was looking for investors that would allow me the opportunity to do that based on my track record from the business." (T. I 23-24)

Mr. Soskin found two such investors in Andrew Wolfson and Bruce Kupper. According to the testimony of Mr. Soskin and Anthony Soukenik, the attorney who assisted in shepherding the dealership project from concept into reality, both Mr. Wolfson and Mr. Kupper were in the market for passive investment opportunities. (T. I 117, II 258, 310, 327) Neither was a neophyte: to the contrary, each by his own account was broadly experienced in the formation, acquisition, operation, and disposition of business enterprises of some consequence. (T. II 168, 329-30, 334, 354, 357-59) Mr. Wolfson had owned a Chevrolet dealership for the past 22 years. (T. II 168) Mr. Kupper, an advertising executive and entrepreneur, had extensive experience with automobile manufacturers and dealerships. (T. II 329-30, 354)

Mr. Soskin approached his negotiations with Mr. Wolfson and Mr. Kupper hoping to acquire a 30 per cent ownership interest in the automobile dealership that they would establish, to have a clear understanding between all members of the investment group that the dealership would be his to run day-to-day, and to receive a beginning salary of $150,000.00 to $175,000.00 per year for his services. (T. I 17, 23-24) He succeeded in obtaining 30 per cent ownership and a secure position as manager of the business. (Exh. 8) But in the end he made significant concessions regarding his salary, agreeing to work for $120,000.00 per year and granting absolute control over any salary increase--*ever*--to Mr. Wolfson and Mr. Kupper. (T. II 220)

There was ample evidence at trial that Mr. Wolfson and Mr. Kupper approached the negotiation interested in making a good investment. (T. I 117, II 258, 310, 327) They got that. In his first two and one-half years as manager of Feld Southpointe Toyota, Mr. Soskin retired $677,281.00 of the company's long-term debt, paid dividends of more than $430,000.00 to its members, and increased the net worth of the business by $490,390.00. (T. I 91-92)

But then Mr. Wolfson and Mr. Kupper decided to take more: they decided to wrest control of the business from Mr. Soskin and oust him from the position for which he had bargained. Their chicanery in that pursuit, out of court and in, has been both inept and outrageous. The trial court had abundant justification for finding their testimony incredible and rejecting their hollow lament of mistreatment at the hands of Mr. Soskin and Mr. Soukenik. Mr. Wolfson's and Mr. Kupper's claim of unconscionability should be rejected in this Court and the judgment of the Circuit Court affirmed.

B. Claim of Unconscionability

Mr. Wolfson and Mr. Kupper claim that the operating agreement of Almatterese Investments, L.L.C. , is unconscionable. As they note, Missouri courts lately have tended to look

for a coalescence of procedural and substantive unfairness in the adjudication of such claims. See Liberty Financial Management Corporation v. Beneficial Data Processing Corporation, 870 S.W.2d 40, 50 (Mo.App. 1984) (citing Funding Systems Leasing Corporation v. King Louie International, Inc., 597 S.W.2d 624, 634 (Mo.App. 1979)). "Procedural unconscionability arises during the contracting process and involves fine print, misrepresentation, and unequal bargaining positions." World Enterprises, Inc. v. Midcoast Aviation Services, Inc., 713 S.W.2d 606, 610-11 (Mo.App. 1986) (citing Funding Systems Leasing Corporation v. King Louie International, Inc., supra)). "Substantive unconscionability involves undue harshness in the contract terms themselves." Id.

When the presence of procedural and substantive inequities is so overwhelming that a particular agreement clearly is one which "no man in his senses and not under delusion would make, on the one hand, and as no honest and fair man would accept, on the other," then that contract is unconscionable. Liberty Financial Management Corporation v. Beneficial Data Processing Corporation, supra, 670 S.W.2d at 49-50. Or: "An agreement is unconscionable if it involves 'an inequality so strong, gross, and manifest that it must be impossible to state it to one with common sense without producing an exclamation at the inequality of it." Ricks v. Missouri Local Government Employees' Retirement System, 981 S.W.2d 585, 594 (Mo.App. 1998) (quoting Peirick v. Peirick, 641 S.W.2d 195, 197 (Mo.App. 1982)). Who are Mr. Wolfson and Mr. Kupper trying to kid?

1. Procedural Unconscionability

The factors which come under the "procedural rubric" in conscionability analysis include the business acumen, experience, and relative bargaining power of the parties, as well as the identity of the drafter, and whether the terms were explained to the weaker party. Johnson v.

Mobil Oil Corporation, 415 F.Supp. 264, 268 (E.D. Mich. 1976).[9] The trial court was presented with a plethora of evidence which was categorically opposed to the notion that Mr. Wolfson or Mr. Kupper suffered from any such procedural inequality in this case.

a. Business acumen and experience. Both of the appellants provided the trial court with substantial evidence of their broad business backgrounds. Mr. Wolfson described his background in business as follows:

> "I have bought and sold dealerships, I have bought and sold radio stations, I have brought a company public on the stock exchange, I've been the vice chairman of a bank holding company, I've been involved in banking since 1988, I am involved in owning part of an advertising agency, and I have bought and sold commercial property."

(T. II 168)[10] Mr. Kupper had founded his own business, merged it to form a new firm which boasted annual sales of $35,000,000.00 at its inception, acquired significant interests in other businesses (reviewing documentation on his own and working with attorneys all the while), worked extensively with automobile manufacturers and dealers, and developed strong ties to bankers. (T. 329-30, 332-34, 339, 354, 357-61)

While Mr. Soskin was no babe in the woods, having enjoyed success as a salesman and as a manager while employed by others, this was his first business acquisition and his debut as an entrepreneur. (T. I 18-19, 108) Any suggestion that Mr. Wolfson or Mr. Kupper could have

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9 The Johnson opinion was cited for its "good discussion of the unconscionability doctrine" in Phillips v. Atlantic Richfield Co., Inc., 605 S.W.2d 139, 141 (Mo.App. 1979).

10 Mr. Wolfson also sought and obtained the benefit of his father's considerable experience in the automobile dealership and banking businesses. (T. II 12, 180; R. Wolfson D.T. 18, 20) The elder Mr. Wolfson had been an automobile dealer for more than 50 years and was described by his son as "a stickler for detail." (T. II 11-12)

suffered from any procedural inequity based upon business experience or acumen would be a rank insult to common sense.

b. Relative bargaining power. There was a disparity in bargaining power, but it favored Mr. Wolfson and Mr. Kupper. Mr. Soskin brought to the table his experience and skill in getting cars sold profitably and managing an enterprise. Nothing compelled Mr. Wolfson or Mr. Kupper to acquiesce in any demand which Mr. Soskin might have made, nor does either of them suggest otherwise. Mr. Wolfson and Mr. Kupper brought the financial wherewithal without which Mr. Soskin could not hope to achieve his objective.

Mr. Wolfson and Mr. Kupper premise much of their argument for unconscionability upon a premise which seems to be related to relative bargaining power. They claim: "[I]t is apparent from the evidence at trial that although Soukenik was acting as the attorney for all of the parties, his primary loyalty was to just one of the parties, Soskin." Brief for Appellants at 20. Their position is singularly without merit.

First, and most importantly, the trial court found that Mr. Soukenik had acted appropriately at all times and rejected Mr. Wolfson's and Mr. Kupper's various gripes as "fraught with fabrication and unworthy of belief." (L.F. 90-91) The record is larded with the inconsistencies and the impeachment of both men and indelibly colored by the unreasonableness of their testimony. Even if it was not, the trial court's credibility findings are entitled to deference on appeal. H. S. v. Board of Regents, Southeast Missouri State University, 967 S.W.2d 665, 671 (Mo.App. 1998). And there is an abundance of evidence to support the finding regarding Mr. Soukenik's professionalism: Mr. Soukenik testified that he repeatedly solicited the input of each of the investors and of Robert Wolfson as the operating agreement evolved (T. II 255, 262, 267, 290-97, 306), Mr. Soskin and both Wolfsons provided corroboration of that

testimony (T. I 37, II 161; R. Wolfson D.T. 50), the elder Mr. Wolfson testified that Mr. Soukenik's inquiries of him reflected an ongoing concern that the operating agreement be fair to all of the investors (R. Wolfson D.T. 50), and Mr. Soukenik testified that he had reviewed the document "to see that [it] contained the terms that were given to [him] . . . from any party that was involved in the transaction." (T. II 266-67, 306)

Because there was substantial evidentiary support for the findings regarding Mr. Soukenik's professionalism and regarding Mr. Wolfson's and Mr. Kupper's claims of his impropriety, those findings ought not to be disturbed on appeal. Estate of Bean v. Hazel 972 S.W.2d 290, 291 (Mo. 1998); Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. 1976). And the claim that Mr. Wolfson and Mr. Kupper were slighted by Mr. Soukenik's "favoritism" toward Mr. Soskin--in support of which the appellants point to nothing except the operating agreement provisions which frustrated their plan, made mere months after the business had opened its doors, to oust Mr. Soskin from the position he had been promised (T. II 139-42; Exh. 85)--should be rejected out of hand.

c. Identity of the drafter. Again, the drafter of the operating agreement was Mr. Soukenik, but the method of his drafting was to solicit and incorporate the desires of each party and then to circulate successive drafts until a final agreement had evolved. (T. II 255, 262, 267, 290-97, 306) Particularly in view of the trial court findings just considered, it is apparent that neither Mr. Wolfson nor Mr. Kupper suffered procedural unconscionability on account of the identity of the drafter.

d. Whether terms were explained to the weaker party. It is outrageous that Mr. Wolfson and Mr. Kupper have endeavored to present themselves to two courts as the weaker parties in the formation of Almatterese Investments, L.L.C. But even if these remarkably experienced and

well-established businessmen could have qualified for the roles of economic underdogs as the company was being organized, there was a profusion of evidence that they had access to and experience in securing the advice of their own counselors (T. II 54, 170, 232, 354, 357-59; R. Wolfson D.T. 18, 20, 50) and that Mr. Soukenik in fact was available for and sought exchanges with all three investors regarding the terms of the operating agreement throughout its development. (T. II 255, 262, 267, 290-97, 306)

2. Substantive Unconscionability

The determination of whether a contract is substantively unconscionable depends upon a consideration of "the contractual terms themselves" and an assessment of whether they exceed the bounds of reason. Johnson v. Mobil Oil Corporation, supra, 415 F.Supp. at 268. Mr. Wolfson and Mr. Kupper premise their argument for substantive unconscionability upon the proposition that Mr. Soskin has

> "gained permanent and exclusive control over a business which he completely lacked the financial resources to buy or finance on his own, while the individuals whose wealth made the deal possible . . . are placed entirely at [his] mercy and discretion."

Brief for Appellant at 20. That is not an apt description of the contract or the positions of the parties. Nor does a fair view of the actual agreement tend to produce "an exclamation at the inequality of it." See Ricks v. Missouri Local Government Employees' Retirement System, supra, 981 S.W.2d at 594.

The operating agreement of Almatterese Investments, L.L.C. , neither affords Mr. Soskin "permanent and exclusive control" over the company nor puts Mr. Wolfson and Mr. Kupper at his mercy. The operating agreement does afford Mr. Soskin the right to retain his position as manager, but it provides Mr. Wolfson and Mr. Kupper with remarkable economic authority as well:

• Mr. Soskin sought a salary of $150,000.00 to $175,000.00 per year, but accepted the salary of $120,000.00 per year specified in the operating agreement. He is without authority to increase his salary or his benefits at any time without the assent of both Mr. Wolfson and Mr. Kupper. (T. II 220; Exh. 8, Art. 10, §§ 10.2(a)(iii)(7) and 10.5) On its surface, Mr. Wolfson's and Mr. Kupper's lament that Mr. Soskin can choose to keep his position "for the balance of [his] life" benefits from their failure to mention that they can keep him from ever getting a raise or any new or better perquisite of employment. Brief for Appellants at 16.

• Although the operating agreement authorizes Mr. Soskin to make recommendations regarding the amount of cash to be retained by the company for its reserves, Mr. Wolfson and Mr. Kupper are afforded complete control of cash reserves. (Exh. 8, Art. 8, § 8.2) By virtue of that control, the operating agreement vests Mr. Wolfson and Mr. Kupper with the power to preclude profit distributions and limit Mr. Soskin's income to his fixed salary. (Exh. 8, Art. 8, § 8.3)

Perhaps more to the point, the operating agreement reflects the achievement by each company member of much of what he sought. Mr. Wolfson and Mr. Kupper were looking for a good investment and clearly found it. (T. I 117, 91-92, II 258, 310, 327) Mr. Soskin got the entrepreneurial opportunity and job security that he requested, but had to compromise on his salary and accept an arrangement in which could be denied any increase in compensation for the duration of his employment. Whether the balance of interest and power struck in this contract is conventional or unique, it is hardly the flagrantly one-sided arrangement for which Mr. Wolfson and Mr. Kupper contend.

Further, the fact that Mr. Wolfson and Mr. Kupper are vastly experienced businessmen is central to and inevitably undermines their claim of substantive unconscionability. As another

court has observed, such veterans of commerce are "hardly the sheep keeping company with wolves that [they] would have us believe." Johnson v. Mobil Oil Corporation, supra, 415 F.Supp. at 269 (quoting K & C, Inc. v. Westinghouse Electric Corporation, 263 A.2d 390, 393 (Pa. 1970)). Mr. Wolfson's and Mr. Kupper's claims of naivete did not ring true to the trial court. (L.F. 90-91) Those claims should find no purchase either in this Court. See Taylor & Martin, Inc. v. Hiland Dairy, Inc., 676 S.W.2d 859, 871-72 (Mo.App. 1984).

C. Purported Failure to Read Operating Agreement

Mr. Wolfson and Mr. Kupper insist that the operating agreement--which was nursed through several drafts, each of which was distributed to them, and that they eventually signed--somehow is not the agreement which they meant to enter. Brief for Appellants at 19-20. That argument depends upon the claim of each that he did not read any draft of the operating agreement, including the final draft, before the agreement was executed by all members of the company and took effect.

Mr. Wolfson fairly boasted of his business practice of not reading documents. (T. II 54, 232) Mr. Kupper acknowledged his practice of reading the documentation attending his prior business acquisitions (T. II 355-61), but alleged an astonishing failure to receive any of the drafts which Mr. Soukenik had sent to him and which he knew that his fellow investors had received. (T. II 337, 379-80, 383-84, 386, 388) The trial court found his testimony "inconsistent" and "implausible," considered his claims disingenuous, and refused to believe him. (L.F. 90-91)

The trial court's finding that all of the investors in Almatterese Investments, L.L.C., had reviewed, agreed upon and knowingly and voluntarily approved" the terms of the operating agreement, and that court's credibility determinations, should not be disturbed by this Court. Murphy v. Carron, supra, 536 S.W.2d at 32; H. S. v. Board of Regents, Southeast Missouri State

University, supra, 967 S.W.2d at 671. But even if Mr. Wolfson's and Mr. Kupper's claims that they had not read the operating agreement had been believed, that failure could hardly have afforded them entitlement to the extraordinary equitable relief which they continue to seek.

One of the basic rules of contract law is that "a person is bound by the terms of a contract he signs" and "will not be heard to say he was ignorant of its contents." Heartland Health Systems, Inc. v. Chamberlin, 871 S.W.2d 8, 10 (Mo. App. 1993). The rationale of that rule is that "the law . . . is not an indulgent guardian which can go to the romantic length of giving protection against the consequences of indolence, folly or careless indifference to the ordinary and accessible means of information." Dickinson v. Banker's Life & Casualty Company, 283 S.W.2d 658, 663 (Mo.App. 1955). Mr. Wolfson and Mr. Kupper failed to establish any fraud or other misconduct which might warrant equitable relief from a contract. See Heartland Health Systems, Inc. v. Chamberlin, supra. They were hardly entitled to parlay their insistence that they had executed the operating agreement without ever having read it into an escape from its provisions.

D. Conclusion

Mr. Wolfson and Mr. Kupper failed to persuade the trial court that they had been duped by Mr. Soskin and Mr. Soukenik, or that the operating agreement that they had signed somehow was not the agreement that they had made, or that the operating agreement was unconscionable. The record supports the findings of the trial court pertaining to conscionability. The conclusions of the trial court are premised upon sound apprehension and application of the law. Mr. Wolfson's and Mr. Kupper's claim that the operating agreement is unconscionable should be rejected by this Court.

II.

The trial court did not err in awarding attorney fees to the respondent or in ordering the appellants to pay those fees because the court's finding of special and unusual circumstances warranting such an award was supported by substantial evidence, was not against the weight of the evidence, and did not reflect an incorrect declaration or application of the governing law, in that (a) there was substantial evidence that this action resulted from the calculated and wrongful conduct of the appellants and was maintained on the basis of their intentional distortions and misrepresentations of fact and (b) Missouri law provides for awards of attorney fees in declaratory judgment actions when necessary to balance equities and effect justice.

> **Standard of Review:** Claims of error in the awarding of attorney fees are reviewed for abuse of discretion. Leone v. Leone, 917 S.W.2d 608, 616 (Mo.App. 1996). An abuse of discretion occurs "only when the award is so 'clearly against the logic of the circumstances and so arbitrary and unreasonable as to shock one's sense of justice.'" Id. (quoting Meservey v. Meservey, 841 S.W.2d 240, 248 (Mo.App. 1992)).

Mr. Wolfson and Mr. Kupper complain of the trial court's requirement that they reimburse Mr. Soskin for the attorney fees he incurred in this litigation. The essence of their claim is that "there is nothing unusual about this case which would authorize the award." Brief for Appellants at 25. Maybe Mr. Wolfson and Mr. Kupper actually subscribe to the notion that ignoring contractual promises, jeopardizing business relations and reputations, and fabricating testimony are routine commercial behavior, or maybe they are just joshing with another Court. The fact is that their conduct was atrocious and, thankfully, very unusual, and the attorney fee award imposed upon them was quite proper.

The trial court found that Mr. Wolfson and Mr. Kupper had flouted the Almatterese Investments, L.L.C., operating agreement when they voted to oust Mr. Soskin as the company's managing member. (L.F. 92) The court also found that their communication of that action to the Toyota franchising organization had been improper. (L.F. 92) The trial court concluded that Mr. Wolfson and Mr. Kupper had attempted to legitimize their position with testimony that was "fraught with fabrication and unworthy of belief." (L.F. 90) Based on those findings and its

conclusion that Mr. Soskin had been compelled to carry on this litigation in furtherance of the company's interests, the court awarded Mr. Soskin his attorney fees and ordered Mr. Wolfson and Mr. Kupper to pay that award. (L.F. 92, 94-95)

Mr. Soskin readily acknowledges Missouri's adherence to the "American rule" regarding the payment of attorney fees for litigation: "[A]bsent statutory authorization or contractual agreement, with few exceptions, each litigant must bear his own attorney's fees." David Ranken Jr. Technical Institute v. Boykins, 816 S.W.2d 189, 193 (Mo. 1991). But among the exceptions to that rule are "cases involving 'very unusual circumstances' or where the natural and proximate result of a breach of duty is to involve the wronged party in collateral litigation." Id. (quoting Johnson v. Mercantile Trust Company, 510 S.W.2d 33, 40 (Mo. 1974)).

In declaratory judgment actions in particular, "several cases have recognized that attorneys' fees may be awarded as costs under section 527.100 . . . where very unusual circumstances have been shown." David Ranken Jr. Technical Institute v. Boykins, supra; see also Labor's Educational and Political Club-Independent v. Danforth, 561 S.W.2d 339, 350 (Mo. 1977); Bernheimer v. First National Bank of Kansas City, 225 S.W.2d 745, 755 (Mo. 1949). Besides being unusual, what Mr. Wolfson and Mr. Kupper did compelled Mr. Soskin to initiate this litigation and incur its cost: their whacky conduct threatened immediate and incalculable harm to the company's relationship with its automobile franchisor and its day-to-day operation, as well as to the reputations and credibility of the company and its managing member.

Attorney fee awards are reviewed to determine whether there has been an abuse of the trial court's discretion. Leone v. Leone, 917 S.W.2d 608, 616 (Mo.App. 1996). An abuse of discretion occurs only when the trial court's action is so odd that it defies the logic of the circumstances and would shock the conscience of the ordinary man. Id. The trial court's

decision to make Mr. Wolfson and Mr. Kupper reimburse Mr. Soskin for fees paid to his attorney was eminently logical and surely will shock the conscience of no one.

Mr. Wolfson and Mr. Kupper complain also that Mr. Soskin's petition was inadequate to warrant the attorney fee award against them. Brief for Appellants at 22-23. The petition contained a complete recitation of the improper conduct by Mr. Wolfson and Mr. Kupper which had precipitated the commencement of judicial proceedings. (L.F. 10-20) It also contained the following allegations:

> "33. This is a Declaratory Judgment action brought pursuant to Section 527.040 R.S.Mo. 1994, and Missouri Supreme Court Rule 87.02.
>
> "34. Plaintiff Soskin is entitled to an award of his costs incurred herein from Defendants Wolfson and/or Kupper."

(L.F. 17) The prayer of the petition did not express a demand for a cost award against Mr. Wolfson and Mr. Kupper, but did include a request "for such other and further relief as this Court may deem necessary and proper under the circumstances." (L.F. 19)

Mr. Wolfson and Mr. Kupper offer no authority for their contention that the absence of explicit demand for an attorney fee award against them in the prayer clause of the petition precluded the trial court from making such an award. In fact, Mo.R.Civ.P. 55.24 requires trial courts to give all pleadings a construction which will effect "substantial justice." The Supreme Court has held that a petition containing "an open-ended prayer for relief, such as ' . . . and for such other relief as the Court deems just and proper,'" is a sufficient basis for an award of statutorily authorized prejudgment interest. Call v. Heard, 925 S.W.2d 840, 853-54 (Mo. 1996). This Court has applied that rationale to cost awards: "Court costs are analogous to prejudgment interest and are covered by the general prayer for relief." Picou v. Picou, 800 S.W.2d 754, 755 (Mo.App. 1990). Mr. Soskin suggests that there was no pleading omission in this case and that,

even if there had been, the interest of "substantial justice" would have required a construction of his petition enabling the attorney fee award.

Finally, Mr. Wolfson and Mr. Kupper suggest that the trial court abused its discretion in awarding attorney fees against them personally because "[a]s the majority owners of Almatterese, Wolfson and Kupper are already indirectly paying the bulk of these fees." Brief for Appellants at 25. The attorney fee award was in the amount of $107,580.00. Because Mr. Soskin is the owner of 30 per cent of Almatterese Investments, L.L.C., an award of attorney fees against the company only would have required him "indirectly" to pay $32,274.00 of those fees. The obvious intent of the trial court's award was to avoid that result.

CONCLUSION

This appeal should be dismissed for want of jurisdiction pursuant to the separate motion of the respondent. Alternatively, for all of the reasons set forth in this brief, the judgment of the Circuit Court should be affirmed. Because of the special circumstances of this case, and in particular because the wrongful conduct of the appellants compelled the respondent to initiate this litigation and to participate in these appellate proceedings, this Court either should make an award of attorney fees in favor of the respondent and against each of the individual appellants as a part of the cost of this proceeding, or remand the case to the Circuit Court for the determination and entry of an appropriate award.

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CERTIFICATE OF SERVICE

Two copies of the respondent's brief were sent by courier on May 18, 1999, to the following:

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