

IN THE SUPREME COURT OF OHIO

EVERETT SCHAFFER, : CASE NO. 08-0327  
Plaintiff-Appellee, : On Appeal from the Montgomery  
v. : County Court of Appeals, Second  
RMS REALTY, et al., : Appellate District  
Defendants-Appellants. : Court of Appeals Case No. 21869

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MEMORANDUM OF APPELLEE EVERETT SCHAFFER IN RESPONSE TO AND  
OPPOSING MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS

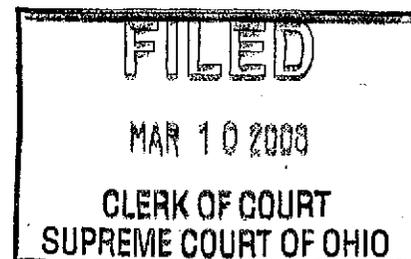
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James M. Hill (0030633)  
James M. Hill Co., L.P.A.  
2365 Lakeview Drive, Suite A  
Beavercreek, OH 45431-3639  
Tel: (937) 427-2000  
Fax: (937) 320-5393  
Attorney for Appellants, A. Rinzler  
H. Rinzler, Brenda Rinzler, Barrett Rinzler,  
R. Mayerson, Marc Mayerson,  
Michael Mayerson, and J. Mayerson

Robert A. Pitcairn, Jr. (0010293)  
Katz, Teller, Brant & Hild  
255 E. Fifth Street, Suite 2400  
Cincinnati, OH 45202  
Tel: (513) 977-3477  
Fax: (513) 762-0077  
Attorney for RMS Realty, Inc.

Wayne E. Waite (0008352)  
Counsel of Record  
Neil F. Freund (0012183)  
FREUND, FREEZE & ARNOLD  
One Dayton Centre, Ste. 1800  
One South Main Street  
Dayton, Ohio 45402  
Tel: (937) 222-2424  
Fax: (937) 222-5369  
e-mail: [wwaite@ffalaw.com](mailto:wwaite@ffalaw.com)

Attorney for Appellee,  
Everett Schaffer



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## **II. EXPLANATION OF WHY THIS CASE IS NOT A CASE OF PUBLIC AND GREAT GENERAL INTEREST**

This case does not involve issues of public or great general interest, but is instead of interest primarily to the parties involved in this litigation. This case involves a continued dispute between partners arising out of a disagreement with the consequences of a judgment entered against the majority partners in a prior tort action, over which this Court has previously declined jurisdiction. The majority partners seek to be compensated for their payment of a judgment to a minority partner because the partnership books are "out of balance" due to their own wrongful acts.

In 1997, a jury rendered a verdict of \$695,400.00 in damages in favor of Appellee Everett Schafer on a conversion claim against the appellant individual partners of RMS Realty, namely Allan Rinzler, Harley Rinzler, Barrett Rinzler, Marc Mayerson, Michael Mayerson, Richard Mayerson, Jerald Mayerson, and Brenda Rinzler. That action by Schafer against RMS and its partners was based upon an alleged wrongful capital call by the majority partners of RMS that was issued to reimburse Sun T.V. in the amount of \$2,000,000 for a building constructed by Sun on land owned by RMS. Schafer who at the time of the capital call, owned approximately a 25% interest in RMS, was therefore required to contribute approximately \$500,000. Schafer could not raise the money and the other partners contributed his share, which activated a provision in the partnership agreement that diluted the interest of any partner who did not meet the capital call, reducing Schafer's interest in RMS to about 19%. The jury found that the majority partners converted 19% of Schafer's partnership property interest, proximately causing damages to Schafer of \$695,400.00 and that both the majority partners and the partnership breached their fiduciary duty to Schafer due to the wrongful

capital call and a failure to disclose information. On appeal, the jury's verdict and judgment in Schafer's favor was affirmed. RMS satisfied the \$695,400.00 judgment.

In RMS's amended tax return for 2000 (the year in which the judgment was paid), RMS reported an increase in the capital accounts of the majority partners in the total judgment amount of \$695,400.00 and a reduction in the amount of \$119,244.00<sup>1</sup> of Schafer's capital account. RMS then sought payment from Schafer in the amount of \$119,242.00, arguing that payment was necessary for Schafer to retain his 5.9621% interest because their payment of the judgment created an imbalance in the partnership accounts.

Schafer disputed that he was required to make such payment, and brought this action, wherein both the trial court and appellate court found that Schafer is a 5.9621% owner of the partnership and is not required to pay \$119,242 to the partnership or its partners to enjoy the benefits of his 5.9621% ownership interest; that the partnership cannot reduce Schafer's capital account by \$119,244; and that upon partnership termination, Schafer is entitled to 5.9621% of profit allocation to his capital account, and after payment of debts, a payment to the extent of his respective final capital account.

The Montgomery County Court of Appeals applied the terms of the RMS partnership agreement, specifically §4, and found that the judgment did not override the partnership agreement and that the partnership agreement does not require a partner to make a capital contribution in the amount of his decreased interest.

This case, therefore, does not threaten this Court's previous pronouncements in *Spayd v. Turner, Granzow & Hollenkamp* (1983), 19 Ohio St.3d 55, 59, namely that partnership rights and

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<sup>1</sup>\$119,244 is the tax basis of \$119,242. \$119,242 is the amount RMS and the individual partners believe Schafer was required to contribute to the original capital call.

interests must be determined by the provisions of the partnership agreement. In this case, both the trial court and the appellate court applied the provisions of the partnership agreement, §4, to find that a partner's partnership interest decreases when that partner fails to make a capital contribution. These courts refused to require a capital contribution in the amount of the partner's decreased ownership interest be made by that partner when the partnership agreement did not require it.

Appellants are not challenging a failure of the courts to apply the provisions of a partnership agreement. Instead, Appellants asked the lower courts, and now ask this Court, to disregard the partnership agreement. The lower courts refused to do so and in so doing, refused to allow the majority partners to benefit from a judgment which was the consequence of their own wrongful acts. The lower courts acted consistently with existing Ohio law and determined the challenged partnership rights and interests by application of the provisions of the particular partnership agreement involved in this case. This Court should, therefore, decline jurisdiction because this case involves only a private dispute over application of a particular partnership agreement and does not implicate broader public or great general interests.

### III. ARGUMENT

#### A. Appellants' Proposition of Law No. I:

A partner that previously obtained a judgment for the decrease in his partnership interest resulting from a capital adjustment provision may be required to contribute capital based upon his adjusted ownership interest.

#### Appellee responds:

**Where the partnership agreement does not so provide, a partner whose ownership interest has been decreased due to his failure to make a capital contribution may not be required to contribute capital based upon his adjusted ownership interest.**

As this Court noted in *Spayd v. Turner, Granzow & Hollenkamp* (1985), 19 Ohio St.3d 55, 59, "[i]t is of utmost importance to be reminded that the respective rights of partnership members depend primarily on the specific provisions contained within the partnership contract." *Id.*

Section 4 of the RMS Realty Partnership Agreement provides:

#### 4. CAPITAL CONTRIBUTION

The Partners shall make capital contributions from time to time in such amounts as may be required to carry out the purposes of the Partnership. Each Partner shall contribute in cash a percentage of the total contribution required, equivalent to his percentage interest in the Partnership profits and losses.

In the event that any Partner is unable to make his required contribution, the necessary funds may be raised by the Partnership from one or more of the remaining Partners. In that event the capital accounts, as adjusted, shall be the basis for adjusting the profit and loss percentages in Paragraph 5.

*Id.* While the RMS partnership agreement does provide for a reduction in a partner's interest for a failure to contribute toward a capital call, the RMS partnership agreement does not require that partner make a capital contribution in the amount of his decreased interest. *See id.* Applying the

RMS partnership agreement does not result in the conclusion that Schafer is required to pay \$119,242 to retain his 5.9621% ownership interest. The appellate court correctly applied the RMS partnership agreement to so conclude. *See* Dec. 28, 2007 Opinion.

B. Appellants' Proposition of Law No. II:

The payment of a money judgment for conversion results in a judicial sale of the converted property.

**Appellee responds:**

**Payment of a judgment in favor of a minority partner on a conversion claim that resulted in the relinquishment of a substantial ownership interest previously held by that minority partner does not override the partnership agreement or result in an actual sale of the minority partners relinquished ownership interest.**

Appellants argue that they purchased 76.1516% or \$119,244 of the Schafer's ownership interest in the partnership when they paid a judgment against them for conversion and breach of fiduciary duty. They claim that when they allegedly purchased 19.0379% of Schafer's 25 % interest, Schafer agreed to be a 5.9621% requiring him to contribute \$119,242 of the original \$2 million capital call, but because he did not, his capital balance is out of balance with his ownership interest and can only be remedied by his Schafer's payment of \$119,242,

Such an argument ignores the express language of the RMS partnership agreement. As the lower courts recognized and as the testimony supported at trial, while a judgment in Schafer's favor on his conversion claim resulted in a relinquishment of his right to the 19.0379% interest in the partnership he had previously held, the judgment did not override §4 of the RMS partnership agreement nor did it result in an actual sale of Schafer's interest to his partners. *See* Dec. 28, 2007 Opinion, p.24. Instead, applying the RMS partnership agreement, Schafer's decrease from a 25%

interest to a 5.9621% interest pursuant to §4 remained effective. Section 4 contemplates this decrease when a partner failed to make a capital contribution. The RMS partnership agreement does not require the partners to make a capital contribution in the amount of their decreased interest after application of §4. Applying the provisions of the partnership agreement to determine the respective rights of the partnership members, as legally favored, cannot result in the conclusion Appellants assert. *See Spayd, supra.*

Second, Appellants ignore that the \$695,400 in damages the individual partners paid were tort damages. As supported by the evidence at trial, tort damages could and should not be treated as a contribution of capital to the partnership. *See id.* at 25. By paying the judgment, the partners compensated Schafer for the 19.0379% interest that he lost due to the wrongful capital call. These damages were paid to Schafer, and not to the partnership. *Id.*

Thus, as the lower courts recognized, by paying the judgment, the individual partners compensated Schafer for the 19.0379% interest that he lost due to the wrongful capital contribution call, which the jury found constituted a breach of the other partners' fiduciary duty to Schafer. In return, the individual partners were entitled to retain their portion of the 19.0379% interest that Schafer lost due to the wrongful capital call. The payment of the judgment should have had no effect on the capital accounts of the partners.

To construe the damages payment as a sale, not only would allow the Appellants to engage in wrongful conduct with near impunity, but also would permit the Appellants to reap an additional benefit from their wrongful conduct. *Id.* at 26. For example, payment of value for 19.0379% of Schafer's partnership interest would leave Schafer with a 1.4219% partnership interest rather than the 5.9621% interest to which he was entitled after the judgment. *Id.* As the lower courts

recognized, Schafer should not be worse off after receiving a judgment in his favor, and Appellants should not reap an additional 4.47% benefit from their wrongful conduct. *Id.*

C. Appellants' Proposition of Law No. III:

A partner is not entitled to both the proceeds of a conversion judgment for the decrease in his partnership interest resulting from a capital adjustment provision and the full amount reflected in his capital account prior to the payment of such judgment.

**Appellee responds:**

**Majority partners who pay tort damages to a minority partner should not be rewarded for their wrongful conduct by labeling their payment as a capital contribution to the partnership.**

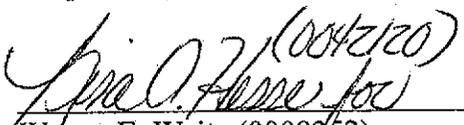
As stated previously, the RMS partnership agreement does not require the partners to make a capital contribution in the amount of their decreased interest after application of §4 nor should the payment of the judgment have had any effect on the capital accounts of the partners. Appellants treated the payment of the judgment as a capital contribution in order to further penalize Schafer and to reap additional benefits for themselves resulting from their own wrongful acts. Allowing the judgment payment to be treated as a capital contribution would result in Schafer receiving less than that to which he was entitled after the jury verdict in his favor, and would instead reward Appellants for their wrongful conduct. *See* Dec. 28, 2007 Opinion, p. 26. The partnership and partners fail to recognize that it was their unlawful actions resulting in the verdict of conversion and breach of fiduciary duties that led to the judgment and their improper acts in treating the judgment payment as a capital contribution that resulted in the "imbalance" they now seek to remedy at the detriment of Appellee Schafer.

#### IV. CONCLUSION

This case involves a dispute among business partners over application of a particular partnership agreement to the respective rights of its partners and a disagreement about the consequences of a particular jury verdict awarding tort damages to a minority partner for the wrongful conduct of the majority partners. Despite the final judgment, the majority partners disagreed with the court and jury, and continued to take action inconsistent with that judgment, including improperly treating the payment of the judgment as a capital contribution to create an imbalance in the partnership accounts for which they could continue to try to seek payment from the minority partner. The lower courts, applying the provisions of the particular partnership agreement, refused to allow the majority partners to benefit from their wrongful conduct.

This case does not involve issues of public or great general interest. Appellee Everett Schafer, therefore, respectfully asks this Court to decline jurisdiction.

Respectfully submitted,

  
Wayne E. Waite (0008352)

Primary Counsel

Neil F. Freund (0012183)

FREUND, FREEZE & ARNOLD

One Dayton Centre, Ste. 1800

One South Main Street

Dayton, Ohio 45402

Tel: (937) 222-2424

Fax: (937) 222-5369

e-mail: [wwaite@ffalaw.com](mailto:wwaite@ffalaw.com)

Attorneys for Appellee, Everett Schafer

## V. CERTIFICATE OF SERVICE

This certifies that a copy of the foregoing Memorandum in Response and Opposing Jurisdiction was served by ordinary U.S. Mail upon James M. Hill, Attorney for Appellants A. Rinzler, H. Rinzler, Barrett Rinzler, Brenda Rinzler, Marc Mayerson, Michael Mayerson, R. Mayerson, and J. Mayerson, James M. Hill Co., L.P.A., 2365 Lakeview Drive, Suite A, Beavercreek, Ohio 45431-3639 and Robert A. Pitcairn, Attorney for Appellant RMS Realty, Inc., Katz, Teller, Brant & Hild, 225E. Fifth Street, Suite 2400, Cincinnati, Ohio 45202, this 5th day of March 2008.

  
Wayne E. Waite (0008332)