

**NOT DESIGNATED FOR PUBLICATION**

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1565

PATRICIA W. FOX AND THE WISE FOX CORPORATION

VERSUS

FORTE HAYES AND ASSOCIATES, L.L.C. AND TONI FORTE  
HAYES

*JEH*  
*JMM*  
**DATE OF JUDGMENT:** OCT - 6 2011

ON APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT  
NUMBER C551, 936, DIV. 26, PARISH OF EAST BATON ROUGE  
STATE OF LOUISIANA

HONORABLE KAY BATES, JUDGE

*HIGGINBOTHAM, J. DISSENTS & ASSIGNS REASONS BY JKH*  
*PETTIGREW, J. CONCURS BY JKH*  
*PARRO, J. DISSENTS BY JKH*  
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Forte Hayes and Associates, LLC  
and Toni Forte Hayes

\*\*\*\*\*

BEFORE: PARRO, KUHN, PETTIGREW, MCDONALD, AND  
HIGGINBOTHAM, JJ.

Disposition: REVERSED.

KUHN, J.

Plaintiffs-appellants, Patricia Fox and the Wise Fox Corporation (Wise Fox), appeal the trial court's judgment notwithstanding the verdict (JNOV), decreeing that defendant-appellee, Toni Forte Hayes, was not personally liable and that damages in the amount of \$58,300.00 are due solely from the limited liability corporation, defendant-appellee, Forte Hayes and Associates, LLC (Forte Hayes), rendered subsequent to a jury's verdict, which concluded that Ms. Hayes personally breached an oral contract she made with Ms. Fox. For the reasons that follow, we reverse the JNOV and reinstate the judgment rendered in accordance with the jury's verdict.

### **BACKGROUND**

Ms. Fox and Wise Fox, a corporation for which she is the sole shareholder, filed this lawsuit against Ms. Hayes and Forte Hayes, the limited liability corporation for which Ms. Hayes is the sole shareholder. Plaintiffs averred that in conjunction with the sale of their interests in Chocollage-Fine Chocolates from Brussels, to Forte Hayes for \$75,000.00, Ms. Hayes had verbally agreed to pay Ms. Fox \$125,000.00, which was to be paid over a period of about twenty years at \$500 per month.

After a trial, the jury concluded that Ms. Hayes was personally liable to plaintiffs for breach of the oral contract and awarded \$58,300.00. Defendants filed a motion for JNOV on the issue of Ms. Hayes' personal liability, which the trial court granted, rendering judgment against Forte Hayes. Plaintiffs appealed.<sup>1</sup>

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<sup>1</sup> Although in their brief defendants raised assignments of error challenging the jury's conclusion that an oral contract existed, they neither filed a motion for an appeal nor answered the appeal filed by plaintiffs. Accordingly, their contentions are not properly before this court. *See* La. C.C.P. arts. 2121 and 2133.

## JNOV

A JNOV is a procedural device authorized by La. C.C.P. art. 1811 where the trial judge may correct a legally erroneous jury verdict by modifying the jury's finding of liability or damages or both. La. C.C.P. art. 1811F; *Doming v. K-Mart Corp.*, 540 So.2d 400, 402 (La. App. 1st Cir. 1989). Although Article 1811 controls the use of the JNOV procedure, it does not specify the grounds on which a trial judge may grant a JNOV. *Hoyt v. State Farm Mut. Auto. Ins. Co.*, 623 So.2d 651, 662 (La. App. 1st Cir.), *writ denied*, 629 So.2d 1179 (La. 1993). But the Louisiana Supreme Court explained those grounds in *Davis v. Wal-Mart Stores, Inc.*, 2000-0445, pp. 4-5 (La. 11/28/00), 774 So.2d 84, 89, as follows:

A JNOV is warranted when the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable jurors could not arrive at a contrary verdict. The motion should be granted only when the evidence points so strongly in favor of the moving party that reasonable men could not reach different conclusions, not merely when there is a preponderance of evidence for the mover. If there is evidence opposed to the motion which is of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motion should be denied. In making this determination, the court should not evaluate the credibility of the witnesses and all reasonable inferences or factual questions should be resolved in favor of the non-moving party.

The standard of review for a JNOV on appeal is a two part inquiry. In reviewing a JNOV, the appellate court must first determine if the trial [judge] erred in granting the JNOV. This is done by using the aforementioned criteria just as the trial judge does in deciding whether or not to grant the motion. After determining that the trial [judge] correctly applied its standard of review as to the jury verdict, the appellate court reviews the JNOV using the manifest error standard of review. (Citations omitted.)

The rigorous standard of a JNOV is based upon the principle that "when there is a jury, the jury is the trier of fact." *Trunk v. Med. Ctr. of Louisiana at*

*New Orleans*, 2004-0181, p. 5 (La. 10/19/04), 885 So.2d 534, 537 (quoting *Scott v. Hosp. Serv. Dist. No. 1*, 496 So.2d 270, 273 (La. 1986)). Simply stated, if reasonable persons could have arrived at the same verdict, given the evidence presented to the jury, then a JNOV is improper. *Cavalier v. State, Dept. of Transp. and Dev.*, 2008-0561, p. 14 (La. App. 1st Cir. 9/12/08), 994 So.2d 635, 644.

Because plaintiffs challenge the trial court's grant of a JNOV, we must examine defendants' contention that the imposition of personal liability was not supported by the evidence adduced at trial. If the evidence does not support the imposition of personal liability, then the trial court did not err in granting JNOV and we review whether the imposition of liability against Forte Hayes (i.e., against Ms. Hayes in her capacity as a corporate representative) is manifestly erroneous. If, however, reasonable jurors in the exercise of their impartial judgment could reach the conclusion that Ms. Hayes was liable in her personal capacity, then the trial judge erred in granting the JNOV and modifying the jury's verdict and the jury's verdict should be reinstated. We perform our appellate review under the same rigorous standards that governed the trial judge's determination of whether a JNOV was warranted, without evaluating the credibility of witnesses; resolving all reasonable inferences or factual questions in favor of the non-moving parties, Ms. Fox and Wise Fox.

No member, manager, employee, or agent of a limited liability company is liable in such capacity for a debt, obligation, or liability of the limited liability company, except as otherwise provided by law. La. R.S. 12:1320B. This provision shall not be construed as being in derogation of any rights which a

person may by law have against a member, manager, employee, or agent of a limited liability company because of any breach of professional duty or other negligent act by such person. La. R.S. 12:1320D.

A mandate is a contract by which a person, the principal, confers authority on another person, the mandatary, to transact one or more affairs for the principal. La. C.C. art. 2989. A mandatary who contracts in his own name without disclosing his status as a mandatary binds himself personally for the performance of the contract. La. C.C. art. 3017.

The evidence adduced at trial clearly supports the jury's conclusion that Ms. Hayes personally, and not in her capacity as a representative or mandatary for Forte Hayes, breached the oral contract entered into with Ms. Fox. Even as of the time that she testified, Ms. Fox was unaware that the written contract she had signed selling her interest to Ms. Hayes had been done by Ms. Hayes' in her capacity as the sole shareholder of Forte Hayes. Ms. Fox explained that she and Ms. Hayes were friends and that she leaned heavily on the friendship in confecting the oral agreement.

Ms. Fox detailed that after Ms. Hayes stopped paying her and while the parties were "mediating," she (Ms. Fox) ultimately set forth a written draft of her appreciation of the oral agreement in May 2006. According to Ms. Fox, those written terms reflected her understanding of the parties' oral agreement as of December 2004. Ms. Fox repeatedly told the jury that a total price of \$200,000.00 was her "magic number" and that she would not have been agreeable to a transfer of the business for any lesser amount. Explaining that she agreed to sell to Ms. Hayes all the assets of the business for \$75,000.00 to retire a credit line, Ms. Fox

indicated that she was willing to allow Ms. Hayes to run the business without overwhelming her cash flow with a large debt. Ms. Fox stated that she was content to accept the remaining \$125,000.00 for her consulting services at a rate of \$500 per month over a period of about twenty years. She did not expect to have to consult the entire period of time that Ms. Hayes was paying her the remaining \$125,000.00, but she would make herself available for as long as it took Ms. Hayes to become comfortable running the business. Ms. Fox saw the payoff of \$125,000.00, for which she agreed to provide consulting services as long as Ms. Hayes needed, as a sort of retirement pension that would allow her to have a regular and predictable monthly sum of money to tend to her needs. According to Ms. Fox's testimony, the terms of the oral agreement had been finalized between the parties before March 24, 2005, when the written contract was signed. Additionally, she clarified for the jury that in her opinion the obligation of the oral contract to pay for consulting services was undertaken by Ms. Hayes rather than the limited liability corporation that Ms. Hayes subsequently established.

In her testimony, Ms. Hayes stated that she did not know whether she had informed Ms. Fox that she was acting as a representative for Forte Hayes, but that was what she was doing for her records. She acknowledged that she had assumed Ms. Fox would know that. Ms. Hayes conceded that the corporation was not in existence at the time that she and Ms. Fox began negotiating for the sale of the business.

Ms. Hayes told the jury that in April 2006, when the parties realized that their respective understandings of the terms of the oral contract were different, she sent Ms. Fox an email suggesting they meet at her attorney's office to discuss their

differences. In that April 28, 2006 email, Ms. Hayes indicated to Ms. Fox that her attorney had a draft of Ms. Hayes' appreciation of the terms. But on the witness stand, Ms. Hayes apprised the jury that she never really had the draft she had indicated in her email, stating that she was probably "trying to pacify" Ms. Fox.

In another instance, Ms. Hayes told the jury that when she and Ms. Fox met on May 2, 2006, at her attorney's office, she stormed out of the office when Ms. Fox suggested that their agreement was that she be paid \$500.00 per month regardless of whether she rendered consulting services. But Ms. Hayes' attorney testified that when Ms. Hayes exited her office, Ms. Hayes' demeanor was business-like, expressly denying that Ms. Hayes was upset.

From these two instances, it was the jury's prerogative to question Ms. Hayes' credibility in general. And the jury was free to disregard as unreliable or contriving Ms. Hayes' testimony on any issue.

In granting the JNOV, the trial court concluded that the "law and evidence ... clearly supports that the judgment should be against [Forte Hayes] and not [Ms. Hayes] personally." We disagree and find this to be error on the part of the trial judge. The evidence before the jury did not establish that the only conclusion it could reach was that the parties' oral agreement was confected in their respective corporate capacities. The trial judge is not entitled to interfere with the jury's verdict simply because she believes another result would be correct. *Law v. State, Dep't of Transp. and Dev.*, 2003-1925, p. 4 (La. App. 1st Cir. 11/17/04), 909 So.2d 1000, 1004, *writs denied*, 2004-3154, 2004-3224 (La. 4/29/05), 901 So.2d 1062.

In this case, it was the role of the jury, not the trial judge, to accept or reject the testimony of the various witnesses. *See Law*, 2003-1925 at p. 6, 909 So.2d at 1005. By giving weight and credibility to Ms. Fox's testimony, reasonable and fair-minded jurors exercising impartial judgment could have found that, although the written agreement for the sale of the assets of the business was entered into between the parties described in their corporate capacities and signed by Ms. Hayes as representative of Forte Hayes on March 24, 2005, the terms of the oral agreement were established by the parties in their respective personal capacities before they signed the written agreement. When Ms. Fox's testimony that the terms of the oral agreement were reached before the written contract was signed is considered along with her testimony that she was unaware that Ms. Hayes was acting in a corporate capacity when they were negotiating and Ms. Hayes' testimony failing to establish that she clearly informed Ms. Fox of her corporate representation, in light of the undisputed underlying context of the parties' close friendship, construing the evidence and making inferences in favor of Ms. Fox and Wise Fox who opposed the JNOV, we conclude there was substantial evidence that reasonable jurors in the exercise of impartial judgment could have arrived at the verdict that Ms. Hayes is liable in her personal capacity. Thus, the jury could reasonably have concluded that Ms. Hayes -- having failed to disclose to Ms. Fox that she was acting in her capacity as a mandatary for Forte Hayes when the parties agreed that Ms. Fox would be paid the additional sum of \$125,000.00 at a rate of \$500.00 per month until it was paid off -- had contracted in her own name and, therefore, had bound herself personally for the performance of the oral contract. *See* La. C.C. art. 3017. Accordingly, we cannot say that the jury's



verdict is one that reasonable people could not have rendered. And because we find the trial judge erred in granting the JNOV, we reverse that finding and reinstate the judgment rendered in accordance with the jury's verdict, which concluded that Ms. Hayes is personally liable for the damages resulting from her breach of the oral agreement she and Ms. Fox entered into for consulting services.

### **DECREE**

For these reasons, the trial court's JNOV on the issue of Ms. Hayes' personal liability is reversed, and the judgment rendered in accordance with the jury's verdict is reinstated. Appeal costs are assessed against defendants-appellants, Toni Forte Hayes and Forte Hayes and Associates, LLC.

**REVERSED.**

PATRICIA W. FOX AND  
THE WISE FOX CORPORATION

VERSUS

FORTE HAYES AND ASSOCIATES,  
L.L.C. AND TONI FORTE HAYES

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HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J., DISSENTS AND ASSIGNS REASONS.

HIGGINBOTHAM, J., dissenting.

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JFH

I respectfully disagree with the majority opinion, because I believe the trial court correctly granted the JNOV to modify the jury's verdict imposing personal liability against Ms. Hayes. A limited liability company ("LLC") offers, among other benefits, a company's members the benefit of limited liability. **Hamilton v. AAI Ventures, L.L.C.**, 99-1849 (La. App. 1st Cir. 9/22/00), 768 So.2d 298, 302. Under LSA-R.S. 12:1320, members of an LLC generally may not be assessed with personal liability for the debts and obligations of their LLC to third parties absent proof of fraud, negligence, or wrongful conduct on the part of that member. See LSA-R.S. 12:1320D; **Petch v. Humble**, 41,301 (La. App. 2d Cir. 8/23/06), 939 So.2d 499, 504, writ denied, 06-2482 (La. 12/15/06), 945 So.2d 692. Furthermore, the involvement of a sole shareholder in a corporation is insufficient alone to establish a basis for disregarding the corporate entity. **Prasad v. Bullard**, 10-291 (La. App. 5th Cir. 10/12/10), 51 So.3d 35, 41.

The evidence in this case does not reveal any fraud, negligence, or wrongful conduct on the part of Ms. Hayes; nor is there any evidence of acts that were done outside of Ms. Hayes' known capacity as a member, manager, employee, or agent of Forte Hayes and Associates, L.L.C. Thus, I do not find that the majority's discussion on the law of mandate overcomes the statutory limitations on liability

for members of an LLC, absent some personal act of negligence, wrongful conduct, or fraud against Ms. Fox by Ms. Hayes. Therefore, Ms. Hayes was insulated from personal liability for the debts and obligations of the LLC, and in my opinion, the trial court did not err in granting the JNOV on that issue.

For these reasons, I respectfully dissent.