Circuit Court for Howard County
Case No. 13-C-15-104369

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 109

September Term, 2017

JOSEPH A. TRASATTI, ET AL.

v.

VINCENT TRASATTI, JR., ET AL.

Eyler, Deborah S.,
Shaw Geter,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: June 7, 2018

In a first amended complaint filed in the Circuit Court for Howard County, five siblings in the Trasatti family—Joseph, Michael, Gabriel, Anthony, and Rose Trasatti Heim[1] ("the Limited Partners")—and Carmela Property, LLLP ("the Partnership"), the appellants, sued their other two siblings—Andrew and Vincent, Jr. ("the General Partners"), the appellees—and East West Lincoln Mercury, Inc. ("East West"), a car dealership owned and operated by the General Partners and their father, Vincent, Sr.[2] They made claims individually and derivatively, on behalf of the Partnership, for breach of the partnership agreement, breach of fiduciary duty, declaratory judgment, injunctive relief, and, as to East West, aiding and abetting the breaches. The circuit court dismissed the derivative claims on the basis that no demand had been made and futility had not been sufficiently pleaded; dismissed the aiding and abetting count for failure to state a claim for which relief could be granted; and dismissed the declaratory judgment count, in part, because the relief requested was not proper.

The Limited Partners and the Partnership filed a second amended complaint reasserting the derivative claims based on allegations that demand had been made and refused, but that complaint was stricken by the court.

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[1] For ease of discussion, we shall refer to the Trasatti siblings by their first names.

[2] One of the Limited Partners, Joseph, also owns a two percent interest in East West, but had no role in its operation or management.

The General Partners moved for summary judgment and the Limited Partners moved for partial summary judgment. Following a hearing, the court denied the Limited Partners' motion and granted the General Partners' motion.

The Limited Partners and the Partnership noted this appeal, presenting five questions, which we have reordered, condensed and rephrased as three:

> I. Did the circuit court err by dismissing the derivative claims set forth in the first amended complaint for lack of a demand or by striking the second amended complaint, which alleged that a demand had been made and refused and/or frustrated?
>
> II. Did the circuit court err by granting summary judgment to the General Partners on the basis that they had not breached the partnership agreement as a matter of law, and, even if they had, there was no designated expert witness to testify about damages and limitations had run as to some of those claims?
>
> III. Did the circuit court err by refusing to compel production of attorney communications from counsel paid for by the Partnership, which advice was cited by the General Partners as a defense for their actions which are challenged by the Limited Partners in this case?

For the reasons to follow, we answer the first question in the affirmative and the second question partly in the affirmative. The third question is moot given our resolution of the first question.[3] We shall reverse in part and affirm in part the judgment of the circuit court, and remand for further proceedings.

[3] After oral argument in this Court, the General Partners moved to supplement the record to include four documents relating to a derivative demand served on the General

(Continued…)

FACTS AND PROCEEDINGS

a. The Dealership

On July 2, 1969, the patriarch of the Trasatti family, Vincent, Sr., and a partner formed East West, a Maryland corporation, to operate an automotive dealership selling Mercury and Lincoln brand vehicles. From its inception, the dealership was located at 7591 Annapolis Road, New Carrolton, Prince George's County ("the Property"). For more than thirty years, East West leased the Property from the Ford Motor Company ("Ford").

In 1991, Vincent, Sr., bought out his partner and became owner of 100% of the stock in East West. By the time the instant litigation commenced, Andrew was the president of East West and Vincent, Jr., was the vice president. Vincent, Sr., was the majority shareholder, owning 58% of the stock, and Andrew and Vincent, Jr., each owned 20% of the stock. (Joseph, as mentioned, owned the remaining 2 percent interest.)

(…continued)
Partners by the Limited Partners and the response thereto. Two of the documents already appear in the record: the demand letter dated April 4, 2016, and the General Partners' preliminary response to that demand letter, dated April 21, 2016. The other two documents are a report and recommendations made by a special demand partner appointed by the General Partners and an email circulating that report to counsel for the Limited Partners. Appellants subsequently filed an objection to the motion to supplement, and the General Partners filed a reply. We shall deny the motion to supplement the record with the latter two documents as the special demand partner's report was filed more than eight months after the instant appeal was noted and, thus, is not appropriately a part of the record on appeal.

Vincent, Sr., chaired the Board of Directors, and Andrew and Vincent, Jr., were the other members of the Board.

By letter dated May 17, 2000, the leasing division of Ford advised its dealerships, including East West, that it would be "restructuring its dealership real estate portfolio" by offering some dealerships the opportunity to purchase their facilities and converting the leases for the other dealerships to "market level rent." The conversion was necessary because Ford set the rent it charged its dealerships by "multiplying [Ford's] gross investment in [the dealership]'s land and buildings by a rental factor, based upon [Ford's] cost of capital," a formula that did not take into account "the market value of the real estate or market capital rates." Rather, if Ford made a capital improvement to a dealership, it passed that cost onto the dealership by increasing the rent for the remainder of the lease term. Thus, when Ford replaced East West's roof, East West's rent increased from $11,000 per month to $14,600 per month. Subsequently, when Ford replaced East West's HVAC system (and made other improvements), East West's rent increased to $26,000 per month, the amount it was paying when Ford sent the May 17, 2000 letter.

b. The Partnership

Ford later informed East West that it was one of the dealerships that would be given the opportunity to purchase its facility. In consultation with East West's attorney, Milton Jernigan, Esq., and other lawyers from his firm, McNamee Hosea ("McNamee"), and with counsel for Ford, Vincent, Sr., Andrew, and Vincent, Jr., decided to form the

Partnership, a Maryland limited liability limited partnership, as a land holding company to purchase the Property from Ford.

In June 2001, the General Partners and the Limited Partners executed the Partnership Agreement ("the Agreement"). Vincent, Sr., was not a member of the Partnership. The following are the pertinent terms of the Agreement.

Section 2 governs the general parameters of the Partnership. It was formed for "the primary purpose to acquire, improve, develop, own and hold for investment, and to operate, manage, lease, expand, sell, or otherwise deal with commercial real estate in any location." ¶ 2.3.1. The "credit and assets of the Partnership shall be used solely for the benefit of the Partnership, except to the extent that other uses are approved . . . ." ¶ 2.3.3.

Subsection 2.5, "Disclosure, Conflicts and Waiver," provides that the partners are not restricted from "conduct[ing] any business or activity whatsoever...without any accountability to the Partnership...." ¶ 2.5.1. The partners "understand[] and acknowledge[] that the conduct of the business of the Partnership may involve business dealings with other businesses or undertakings of the Partners or their Affiliated Persons, *provided, however, that all dealings with a Partner or his Affiliated Persons shall be at* ***arm's length***." ¶ 2.5.2. (Emphasis added.)

Section III governs "Partnership Capital." By incorporation of Schedule A, it provides that the General Partners each own a 20% interest in the Partnership and made an initial capital contribution of $160. ¶ 3.1.1 & Schedule A. The Limited Partners each own a 12% interest in the Partnership and made an initial capital contribution of $96. *Id.* Section IV of the Agreement, "Profit, Loss and Distributions," provides that annual distributions will be made to the partners at the "sole and absolute discretion" of the General Partners. ¶¶ 4.1.1, 4.2.1, & 4.3. The General Partners also are granted complete discretion as to the timing and amount of any distributions. ¶ 4.5.1.

Section V sets forth the General Partners' "Rights, Powers, Duties, and Fees." It provides that in addition to rights accorded to them by law, the General Partners are granted "full, exclusive and complete discretion, power and authority, subject...to the other provisions of [the] Agreement and the requirements of applicable law to manage, control, administer, and operate the business and affairs of the Partnership...." ¶5.1. Those rights include, but are not limited to, the right to purchase or lease real or personal property, ¶¶ 5.1.1; to sell Partnership assets, ¶ 5.1.3; to enter into contracts on behalf of the Partnership, ¶ 5.1.4; to purchase insurance, ¶ 5.1.5; to borrow money for and on behalf of the Partnership, "including, without limitation, to acquire, develop, and improve the Partnership property," and to mortgage or grant deeds of trust to secure those loans, ¶ 5.1.6; to execute and modify leases, ¶ 5.1.7; to prepay, refinance, amend, or extend mortgages and deeds of trust on real property owned by the Partnership, ¶ 5.1.8; to make expenditures which the General Partners "deem necessary or appropriate," ¶ 5.1.14; to "employ and compensate the General Partner[s] in a capacity as designated at any time by the General Partners of the Partnership" ¶ 5.1.18; and to "compensate the General

Partner(s) for any services [they] render[] to the Partnership upon the terms and conditions agreed to by the General Partners. ¶ 5.1.20.

The General Partners are granted the "exclusive right to manage the business of the Partnership" and "[n]o Limited Partner shall participate in, or have any control over, the Partnership business...." ¶ 5.4.1. In the exercise of their authority, the General Partners are "under a fiduciary duty to conduct the affairs of the Partnership in the best interest of the Partnership, including the safekeeping and use of all Partnership funds and assets for the benefit of the Partnership." ¶ 5.5. They retain sole and absolute discretion, however, to determine "how or when to accumulate assets and cash . . . as opposed to making distributions...." *Id*.

The General Partners are protected from liability "in damages or otherwise, to any Limited Partner for any act performed by the General Partner within the scope of the authority conferred on it by th[e] Agreement, except for acts of willful misconduct, or gross negligence or for damages arising from any material misrepresentation...or material breach of a material warranty...." ¶ 5.6.1.

c. Purchase of the Property and Leases to East West

On December 13, 2001, the Partnership purchased the Property from Ford for $2 million dollars, subject to Ford's right of first refusal should the Partnership decide to sell the Property. It financed the purchase with a $2.1 million loan, secured by a deed of trust on the Property. The particular terms of the loan transaction do not appear in the record, but we glean from deposition testimony that the term of the loan was 15 years.

About a month prior, on November 8, 2001, the Partnership executed a "Real Estate Lease Agreement" with East West ("the 2001 Lease") for a term of five years. The annual rent under the 2001 Lease was $282,000, payable in monthly installments of $23,500, which was $2,500 less than it had been paying to Ford at the time of sale. According to Andrew and Vincent, Jr., the rent figure was determined in consultation with Vincent, Sr.'s lawyers based upon his "estate planning" needs.

The 2001 Lease was in effect until October 31, 2006, when it expired. East West continued to lease the Property on a month-to-month basis for more than six years. In 2008, in the immediate aftermath of the global financial crisis, the General Partners reduced East West's rent to $18,500 per month ($222,000 annually).

In 2010, Ford terminated the Mercury brand, which comprised 52% of East West's sales. As a result, in 2012, Ford made a lump sum payment to East West. East West then made a $282,000 lump sum payment to the Partnership. That payment later was characterized by the General Partners as a prepayment of rent, although there was no written agreement memorializing it as such.

On June 24, 2013, East West entered into a new lease with the Partnership, effective on June 1, 2013 ("the 2013 Lease"). The 2013 Lease was for a term of 7 years, 4 months, with an annual rent of $180,000, payable in monthly installments of $15,000.

Despite a June 1, 2013 effective date, on July 24, 2013, the General Partners paid East West a "refund" of $21,000, for the difference between the new rent and the old rent for the first six months of the year.

d. The PNC Loan

Meanwhile, on September 30, 2004, the Partnership obtained a refinance loan for $2 million dollars from Riggs Bank N.A., predecessor in interest to PNC Bank ("the PNC Loan"), secured by a deed of trust against the Property. The loan was for a 15-year term, at a fixed interest rate of 5.25 percent per annum. It was payable in monthly installments of $16,077.55.

In late 2012, PNC claimed that the Partnership had violated a loan covenant pertaining to its debt service ratio and referred the loan to an asset resolution team.[4] The Partnership disputed that it was in violation of any loan covenant but, in light of PNC's "hostile position," sought to pay off the loan.[5] At that time, the outstanding principal on

[4] According to Andrew, the alleged violation related to the amount of rent the Partnership was receiving from East West (then $18,500 per month).

[5] According to the General Partners, if the Partnership had secured a traditional refinance loan to pay off the PNC Loan, it would have incurred a $147,000 prepayment penalty.

the PNC Loan was $1.1 million.[6] In 2013, the Partnership used $500,000 in reserved capital, $400,000 borrowed from East West, and $225,000 borrowed from Andrew and his wife to pay off the PNC Loan.

e. The Columbia Loan and the East West Loan

On July 11, 2013, the Partnership obtained a new loan from Columbia Bank ("the Columbia Loan"). This loan was for $1,650,000 million dollars, secured by a deed of trust against the Property, and was payable over seven years at 3.15 percent per annum in monthly installments of $9,313.99.

On July 12, 2013, the Partnership used the proceeds of the Columbia Loan to repay the short-term loans from East West and Andrew and his wife. Andrew and his wife were paid $1,200 in addition to the $225,000 in principal, comprising interest at a rate of 5.5 percent and fees. Andrew testified at deposition that he remembered executing a promissory note for that loan, but he had been unable to locate it. East West was paid $2,000 in interest and fees on its short-term loan.

Then, on August 1, 2013, the Partnership used the excess proceeds from the Columbia Loan to make a loan to East West, pursuant to a "Revolving Loan Promissory

[6] There is a discrepancy in the record as to the outstanding loan balance. The General Partners asserted in their motion for summary judgment and in their brief in this Court that the loan balance was just $625,000 when it was paid off. At oral argument, however, counsel for the General Partners stated that the loan balance was $1.1 million dollars when it was paid off and that the references to a $625,000 balance were mistaken.

Note" ("Revolving Note"). The terms of that note permitted the Partnership to make advances to East West of up to $1 million dollars. East West was obligated to make monthly payments of interest only on those advances at an interest rate of 2.25 percent. At the end of the "Initial Term" of the Revolving Note, July 31, 2014, East West was obligated to repay the principal balance (and any unpaid interest) in full unless the Partnership and East West agreed, in writing, to extend the Initial Term. At the time of an extension of the Initial Term, the Partnership had the right to renegotiate the interest rate and other terms of the Revolving Note.

Very soon before the Revolving Note was executed, on July 24, 2013, the Partnership advanced $800,000 to East West by check, deposited by East West on July 30, 2013. East West has made interest only payments on that advance; it has not repaid any principal. There was no agreement in writing to extend the Initial Term of the Revolving Note.

During the instant litigation**,** the General Partners testified in depositions that the $800,000 in monies loaned to East West was never spent and remains in a money market account earning interest. The interest that had accrued had been retained by East West. The General Partners explained that the money could be returned to the Partnership at any time.

f. Management Fees

Over the 16 years since the formation of the Partnership, the combined managements fees paid to the General Partners ($195,500) amount to 5.1 percent of the total rent revenue earned ($3,830,500). The fees paid did not follow a set formula, however.

No management fees were paid in 2001, 2002, or 2003. During that time, the Partnership earned $587,500 in rent revenue (the first year was a loss). In 2004 and 2005, the General Partners received annual management fees of $3,000, collectively amounting to 1.9 percent and 2.3 percent of the annual rent revenue. In 2006, the management fees were raised to $4,000, which was 2.8 percent of rent revenue, and in 2007 the fees increased to $5,000, which was 3.5 percent of rent revenue. In 2008, the management fees increased to $7,500, which amounted to 7 percent of rent revenue. From 2009–2011, the management fees were reduced to $5,000, amounting to about 4.5 percent of rent revenue annually.

In 2012, which as mentioned was the year East West made the $282,000 payment to the Partnership, the General Partners paid themselves $32,250 each in management fees, amounting to 12.7 percent of the total rent revenue.

In 2013 and 2014, the management fees were $9,000, amounting to 9.2 percent and 10 percent, respectively, of rent revenue. In 2015 and 2016, the management fees were reduced to $5,000, amounting to 5.5 percent of rent revenue.

g. Communication with and Disclosure to the Limited Partners

For approximately the first ten years after the Partnership was formed, the General Partners provided the Limited Partners with their Schedule K-1 tax form detailing their share of the income of the Partnership. No other disclosures were made or requested.

In August 2012, Gabriel requested copies of the Partnership tax returns for the prior three years. Andrew provided those documents, although initially the tax returns were incomplete.

On July 18, 2013, Andrew emailed the Limited Partners a "Partnership Update," attaching a letter that explained the payoff of the PNC Loan, the purchase of the Columbia Loan, and the justification for the East West Loan. He stated that paying off the PNC Loan was crucial because PNC had taken a position hostile to the Partnership and, had the loan not been paid off, PNC might have "call[ed] the mortgage" and held a "fire sale." Andrew represented that the balance on the PNC Loan when it was paid off was $1.1 million dollars. He then explained the East West Loan as follows:

> Our intention is to take the excess cash we borrowed over and above the mortgage balance and loan this money to the dealership to offset the floor plan cost. [East West] will pay [the Partnership] interest income on the money borrowed. Financial markets fluctuate and during the financial crisis it was the lack of access to financial funding that caused a lot of problems. Ford Motor Credit was pulling back on floor plans and their floor plan curtailment program was a contributing factor to many of our colleagues losing there [sic] businesses. The excess cash being loaned to the dealership for the purpose of floor plan will be collateralized by the

> vehicle inventory it is invested in.[7] The loan to the dealership is being prepared under the guidance of our legal and accounting team. We have evaluated the financial condition of our tenant and the loan plan and believe there is very little risk to the [P]artnership for the monies loaned.
>
> It is our opinion that this action is in the best interest of [the Partnership] and will ultimately strengthen both entities and in turn protect our investment in [the Partnership].

On March 22, 2014, Gabriel emailed the General Partners to ask if they were "paying [themselves] fees from the [Partnership]?" Although the record does not disclose a response to this email, the deposition testimony makes clear that Andrew responded in the affirmative.

By July 2014, the Limited Partners had hired counsel and were making demands for additional information.

On December 1, 2014, Andrew emailed the Limited Partners to suggest a family meeting to discuss the "[P]artnership issues."

Two days later, Gabriel responded on behalf of the Limited Partners. He explained that the Limited Partners had been demanding information about the management and financial condition of the Partnership, first in a letter from counsel dated July 22, 2014, and again in a letter from counsel dated September 5, 2014. The General

[7] Despite the representation that the loan to East West would be collateralized, the General Partners waited nearly two years before they executed a "Security Agreement" granting the Partnership a secured interest in certain of East West's property as collateral for the loan.

Partners had responded with "limited and selective documents." Gabriel stated that the Limited Partners believed a meeting would be a "waste of . . . time" unless the General Partners intended to provide all the requested documents before the meeting.

Andrew responded on December 12, 2014. He detailed the requests that had been made by the Limited Partners since 2001 and the responses that had been given. He recounted that, recently, the General Partners had provided numerous documents to the Limited Partners, including copies of all the tax returns for the Partnership; transaction registries showing all monies spent; the Columbia Loan documents; the East West Loan documents; and the 2013 Lease.

h. The Litigation

On July 24, 2015, the Limited Partners filed suit against the General Partners and East West asserting claims for an "accounting, removal of the [G]eneral [P]artners, and reimbursement for damages suffered [as a result of the General Partners'] breach of the [Agreement]." They alleged, generally, that the 2013 Lease and the East West Loan were not disclosed to them, were not "commercially reasonable," and were not arm's length transactions, as required by the Agreement. They further alleged that the General Partners had paid themselves "unapproved and erratic management fees." Count I sought an accounting and Count II sought damages of $1.2 million dollars for breach of the Agreement and breach of fiduciary duty.

The General Partners moved to dismiss the complaint for failure to state a claim for which relief could be granted. They argued that Count I should be dismissed because an accounting is a remedy, not a standalone claim, and that Count II should be dismissed because it was in the nature of a derivative action and the Limited Partners were not authorized to bring it because they had not made a demand on the Partnership, nor had they alleged facts excusing the need for a demand.

By order entered November 19, 2015, the circuit court dismissed the complaint without prejudice and with leave to amend within thirty days.

On December 10, 2015, the Limited Partners filed a first amended complaint against the General Partners and East West, stating five counts on behalf of the Limited Partners individually and derivatively on behalf of the Partnership. They alleged that since the formation of the Partnership, the General Partners had made no distributions to them of "actual profits" but only had made distributions sufficient to cover their tax liability arising from their ownership interest in the Partnership. At the same time, they alleged, the General Partners had enriched East West by negotiating the 2013 Lease and making the East West Loan, neither of which were arm's length transactions and both of which benefited East West, and the General Partners, indirectly, at the expense of the Partnership. The General Partners also enriched themselves directly through management fees.

In Count I and II, the Limited Partners set forth claims against the General Partners for breach of the Agreement and breach of fiduciary duty, individually on behalf of the Limited Partners (Count I) and derivatively on behalf of the Partnership (Count II). Among other things, they alleged that the General Partners had not ensured that "the credit and assets of the Partnership" were used "solely for the benefit of the Partnership," as required by Paragraph 2.3.3, or that "all dealings with a Partner or his Affiliated Persons shall be at arm's length," as required by Paragraph 2.5.2. In Count II, the Limited Partners alleged that it would be "an exercise in futility to request that the General Partners pursue [an] action on behalf of the Partnership which would result in a suit against themselves and East-West which they control." In each count, the Limited Partners sought damages of $1.2 million dollars, attorneys' fees, and costs.

Count III set forth a claim against East West for aiding and abetting the breaches of the Agreement and the breaches of fiduciary duty, seeking $1.2 million dollars in damages.

Count IV sought declaratory relief on behalf of the Limited Partners and the Partnership. Specifically, they asked the court to order the General Partners to fully disclose all information regarding the finances and operation of the Partnership; to declare that the General Partners had materially breached the Agreement; to determine the parties' rights and obligations under the Agreement; to remove the General Partners;

and to order the General Partners to reimburse the Limited Partners for their expenses in bringing the litigation.

Count V sought injunctive and equitable relief on behalf of the Limited Partners and the Partnership, specifically removal of the General Partners.

On December 31, 2015, the court appointed a special discovery master.

On January 14, 2016, the General Partners moved to dismiss, in part, the first amended complaint. They argued that all of the claims brought on behalf of the Partnership (Count II in its entirety and Counts IV and V in part) should be dismissed because the Limited Partners had not made a demand on the Partnership, nor had they sufficiently alleged futility; that Count III against East West should be dismissed because aiding and abetting breaches of contract and/or fiduciary duty is not a cause of action in Maryland; and that Count IV should be dismissed in part because much of the relief requested was not appropriate declaratory relief.

While that motion was pending, the Limited Partners caused a subpoena duces tecum to be served on the McNamee firm, seeking to depose the lawyers who had jointly represented the Partnership and East West and production of the entire Partnership file ("the McNamee subpoena"). On March 14, 2016, the General Partners moved to quash that subpoena and for a protective order, which the Limited Partners opposed.

On March 31, 2016, the court held a hearing on the motion to dismiss. At the end of the hearing, the court granted the motion to dismiss all the claims brought by the

Partnership because the Limited Partners had not made a demand on the General Partners and because the facts alleged did not support a finding of futility. The court granted the motion to dismiss Count III, which was the only claim against East West, for failure to state a claim because there was no underlying tort upon which an aiding and abetting count could be based.[8] The court dismissed parts (c), (d), (e), and (f) of the prayer for relief in Count IV, which sought a declaration that the General Partners had breached the Agreement and their fiduciary duties; an order removing the General Partners; and a declaration that the General Partners reimburse the Limited Partners for their attorneys' fees and other costs.[9]

An order to that effect was entered on April 7, 2016.

Discovery continued on the remaining claims and trial was scheduled for February 27, 2017. By order signed October 31, 2016, but not entered until January 5, 2017, the special discovery master granted the motion to quash the McNamee subpoena and for a protective order.

On December 8, 2016, the Limited Partners filed a second amended complaint in which Counts II, III, and the dismissed parts of Count IV were omitted, but a new Count VI was added. The new count reasserted the derivative claim of the Partnership against

[8] The Limited Partners do not challenge that ruling on appeal.

[9] The Limited Partners also do not challenge this ruling on appeal.

the General Partners, alleging that demand had been made and refused. We shall discuss the specific allegations in more detail, *infra*.

The General Partners moved to strike and/or dismiss the second amended complaint on the ground that it was filed without leave of court.[10] They further alleged that a special demand partner had been appointed to investigate the Limited Partners' allegations of wrongdoing and counsel had been hired to represent the special demand partner.

By order entered on February 9, 2017, the circuit court struck the second amended complaint.

On December 23, 2016, the Limited Partners filed a motion for partial summary judgment and the General Partners filed a motion for summary judgment. In their motion, the Limited Partners argued that they were entitled to partial summary judgment on Count I of the first amended complaint with respect to the General Partners' liability for breaches of the Agreement and their fiduciary duties relative to the 2013 Lease, the East West Loan, and the management fees.

The General Partners opposed the motion for partial summary judgment, taking the position that their decisions with respect to the 2013 Lease and the East West Loan

[10] Rule 2-322(c) permits the filing of an amended complaint after the court has ordered dismissal of claims "only if the court expressly grants leave to amend" and only within the time provided by the court, or within thirty days, whichever is later.

were authorized by the Agreement and insulated by the business judgment rule. They maintained that in any event the Limited Partners had not presented any admissible evidence that the 2013 Lease or the East West Loan were commercially unreasonable. Likewise, they argued that the management fees were specifically authorized in the Agreement and there was no evidence that the fees paid were unreasonable.

In their motion for summary judgment, the General Partners argued that the Limited Partners' claims all were barred by the business judgment rule, which they asserted precluded judicial review of their decisions absent fraud, bad faith, dishonesty, or incompetence. Alternatively, the Limited Partners' claims were barred, in whole or in part, by the statute of limitations. The General Partners maintained that because the Limited Partners alleged in the first amended complaint that they began demanding information about the Partnership's financial status from the General Partners in 2010, they were on inquiry notice then—which was more than three years before they filed suit. Moreover, to the extent that any of the Limited Partners' claims were cognizable, they were at most entitled to nominal damages because they had not proved their entitlement to damages for the reasons discussed, *supra*, and because "[a]ll of the alleged damages, if sustained at all, were suffered by the Partnership." Paragraph 5.6 of the Agreement also applied to the Limited Partners' claims and barred damages absent willful misconduct, gross negligence, or material misrepresentations or material breaches of warranty, none of which was alleged.

In opposing the motion, the Limited Partners argued that the business judgment rule does not protect managing partners in a Maryland limited partnership, particularly when they are interested in the transactions at issue. Because the General Partners were in a confidential relationship with the Limited Partners, the Limited Partners were relieved of any duty to inquire until they received documentation putting them on notice of the 2013 Lease, the East West Loan, and the management fees; and that did not occur until less than three years before they filed suit. The Limited Partners maintained that expert testimony is not necessary when, as here, the General Partners bear the burden to show that they acted in the interests of the Partnership and the General Partners did not present any evidence that the rent charged in the 2013 Lease or the terms of the East West Loan were arm's length or commercially reasonable. Moreover, the basis for the Limited Partners' calculations of damages was not "outside the ordinary layperson's knowledge."

i. Summary Judgment Ruling

On February 22, 2017, after hearing argument, the court entered an order denying the Limited Partners' motion for partial summary judgment and an order granting the General Partners' motion for summary judgment. The court's rulings were made on several alternative bases. As pertinent, the court reasoned that the Agreement authorized the General Partners to compensate themselves with management fees, to negotiate the 2013 Lease, and to extend the loan to East West; and there was no evidence that those transactions were commercially unreasonable or that the General Partners engaged in any misconduct given the "symbiotic" relationship between the Partnership and East West. In any event, the court determined that the Limited Partners' failure to designate an expert witness was fatal to their claims because expert testimony was necessary to establish the fair market rental value of the Property, an appropriate interest rate for the East West Loan, and the appropriate compensation for the General Partners. The court also ruled that some of the Limited Partners' claims were barred by the statute of limitations.

This timely appeal followed. We shall include additional facts in our discussion of the issues.

DISCUSSION

I.

Derivative Claims

Pursuant to Md. Code (1975, 2014 Repl. Vol.), section 10-1001 of the Corporations and Associations Article ("CA"), a "limited partner may bring a derivative action to enforce a right of a limited partnership to recover a judgment in its favor to the same extent that a stockholder may bring an action for a derivative suit under the corporation law of Maryland." A derivative action may be brought if 1) "general partners with authority to do so have refused to bring the action or [, 2)] if an effort to cause those general partners to bring the action is not likely to succeed." *Id.* The former scenario is known as "demand refused," *see Boland v. Boland*, 423 Md. 296, 331 n.25 (2011), whereas the latter scenario is known as "demand futility." *Oliveira v. Sugarman*, 451 Md. 208, 229 (2017).

In the case at bar, the first amended complaint alleged demand futility and the second amended complaint alleged demand refused. The Limited Partners contend the circuit court erred by dismissing the derivative claims asserted on behalf of the Partnership in the first amended complaint because they alleged facts sufficient to show futility. We agree.

The leading Maryland case on demand futility is *Werbowsky v. Collomb*, 362 Md. 581 (2001), which involved a stockholder derivative suit, not a limited partner derivative suit. Werbowsky, a minority stockholder in the Lafarge Corporation, sued the directors of the corporation, in its name, for "breach of fiduciary duty, waste, and gross negligence." *Id.* at 585. At issue was a transaction between Lafarge and its controlling stockholder, LSA, a French corporation, in which LSA sold assets to Lafarge for an amount that, in Werbowsky's view, exceeded their value. Before entering into the asset sale transaction, Lafarge appointed a "special committee of independent directors" to consider LSA's offer. *Id.* at 587. Five directors were chosen to sit on the special committee. They appointed Lafarge's outside counsel to advise the committee and, after interviews, selected an investment banking firm to provide financial counsel. After receipt of the offer from LSA, the special committee met numerous times over many months, negotiated a lower price, and, ultimately, recommended acceptance of the reduced offer to the Lafarge board.

The day after the board announced the transaction to shareholders, Werbowsky filed suit. In his amended complaint, Werbowsky alleged that no demand had been made because it would have been futile. Specifically, he alleged that "LSA controlled the Lafarge board"; that 12 of Lafarge's 16 directors were "conflicted by reason of either their employment or directorships with LSA or ongoing business relationships with Lafarge that could be terminated by LSA"; that the investment banking firm that advised the special committee was conflicted; and that 3 of the 5 members of the special committee had an "irreparable conflict of interest through their affiliation with companies that had significant business relationships with Lafarge." *Id.* at 591–92. He further alleged that Lafarge had overpaid LSA for the assets by more than $150 million; that a majority of the "allegedly independent directors actively participated in the wrongful conduct"; that the directors all received significant compensation from Lafarge and, in light of LSA's controlling interest, had an incentive to appease LSA; and that, given certain corporate insurance policies, none of the directors or the company could be expected to pursue legal action. *Id.* at 592.

Lafarge's motion to dismiss the amended complaint based upon the lack of a demand was denied. It subsequently moved for summary judgment on the same basis. The evidence showed that 6 of Lafarge's 16 directors were "inside" directors in that they were employees or directors of LSA. Of the remaining 10 directors, there was no dispute that 3—including one member of the special committee—were "outside" directors. The dispute over futility focused on the remaining 7 directors, none of whom "had any direct connection with LSA." *Id.* at 594. Werbowsky asserted that each of those directors was conflicted by reason of other business affiliations. The circuit court, applying the two-prong test adopted by the Delaware Supreme Court in *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984), determined that Werbowsky had not created a "reasonable doubt that (1) the [majority of] directors [weren't] disinterested and independent, and (2) the challenged transaction was [not] the product of a valid exercise of business judgment." *Id.* at 593. It thus entered summary judgment in favor of Lafarge.

The appeal from that judgment reached the Court of Appeals. The Court discussed the history of shareholder derivative actions, "an extraordinary equitable device to enable shareholders to enforce a corporate right that the corporation failed to assert on its own behalf." *Id*. at 599. In a derivative action, the corporation is "'the real party in interest and the shareholder is only a nominal plaintiff.'" *Id*. (quoting 13 William Meade Fletcher et al., *Cyclopedia of the Law of Private Corporations* § 5941.10 (1995 Rev. Vol.)). To protect corporations from "mischief and abuse on the part of disgruntled [minority] shareholders," almost all states modified their common law to require that, before a derivative action may be brought, a shareholder first must "make a good faith effort to have the corporation act directly and explain to the court why such an effort either was not made or did not succeed." *Id*. at 600.

Tracing the futility exception over time, the *Werbowsky* Court noted that "the trend since [1968] has been to enforce more strictly the requirement of pre-suit demand and at least to circumscribe, if not effectively eliminate, the futility exception." *Id*. at 607. In *Aronson*, the Delaware Supreme Court explained how and when the "business judgment rule" could affect "the determination of demand futility." *Id*. at 609 (quoting *Aronson*, 473 A.2d at 812). The protection of the business judgment rule could

> be claimed only by "disinterested directors whose conduct otherwise meets the tests of business judgment." From the standpoint of interest, "this means that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally." Accordingly, if that kind of director interest is present and the transaction is not approved by a majority consisting of disinterested directors, the business judgment rule has no application.

Id. (quoting *Aronson*, 473 A.2d at 812) (internal citations omitted).

In the context of the "demand futility issue," if "'officers and directors are under an influence which sterilizes their discretion, they cannot be considered proper persons to conduct litigation on behalf of the corporation[.]'" *Id.* (quoting *Aronson*, 473 A.2d at 814). With that in mind, the *Aronson* court had adopted the two-prong test applied by the circuit court. As applied, that test amounted to an "exacting requirement." 362 Md. at 610. Cases applying the test "made clear that interest or dependence may not be found merely from the fact that directors are paid for their services or on speculative, non-specific allegations that they acted in order to secure their retention as directors." *Id*.

Meanwhile, within the American Bar Association Section of Business Law, and the American Law Institute, there was movement toward a "universal demand" requirement, absent a showing that irreparable injury would result from the delay caused by demand. *Id.* at 611. These bodies reasoned that the *Aronson* "reasonable doubt" standard was too subjective and that requiring demand in all cases would not place a great burden on minority shareholders. Since then, numerous states had adopted the universal demand rule, but Maryland had not yet passed on the issue (although the Seventh Circuit Court of Appeals had "attempted to predict how Maryland would react to these developments," in *Kamen v. Kemper Fin. Servs., Inc.*, 939 F.2d 458 (7th Cir. 1991)). *Id*. at 616.

The *Werbowsky* Court held that Maryland would take a middle road. It declined to "adopt the ABA/ALI approach of eliminating altogether the futility exception." *Id*. at 618. Nor would it "adopt in full the Delaware approach" applied by the circuit court. *Id*. The Court explained that it was

> not willing to excuse the failure to make demand simply because a majority of the directors approved or participated in some way in the challenged transaction or decision, or on the basis of generalized or speculative allegations that they are conflicted or are controlled by other conflicted persons, or because they are paid well for their services as directors, were chosen as directors at the behest of controlling stockholders, or would be hostile to the action.

Id. The Court emphasized that the "demand requirement *is* important" and that directors enjoy the presumption, under the business judgment rule, that they are acting in the best interest of the corporation. *Id.* (emphasis in original). The Court held that Maryland would continue to

> adhere, for the time being, to the futility exception, but, consistent with what appears to be the prevailing philosophy throughout the country, regard it as a very limited exception, to be applied only when the allegations or evidence clearly demonstrate, in a very particular manner, either that (1) a demand, or a delay in awaiting a response to a demand, would cause irreparable harm to the corporation, or (2) ***a majority of the directors are so personally and directly conflicted or committed to the decision in dispute that they cannot reasonably be expected to respond to a demand in good faith and within the ambit of the business judgment rule***.

Id. at 620 (emphasis added). This strict rule "focuses the court's attention on the real, limited, issue – the futility of a pre-suit demand – and avoids injecting into a preliminary proceeding issues that go more to the merits of the complaint – whether there was, in fact, self-dealing, corporate waste, or a lack of business judgment with respect to the decision or transaction under attack." *Id*. Applying that strict test to the undisputed facts before it, the *Werbowsky* Court affirmed the grant of summary judgment in favor of Lafarge.

We return to the case at bar. In the first amended complaint, the Limited Partners alleged that it would be "an exercise in futility to request that the General Partners pursue such action on behalf of the Partnership which would result in suit against themselves[.]" They alleged that "[a]s a result of [the General Partners'] ownership, officer and employment positions with East-West," in each of the challenged transactions, they had acted in the best interest of East West, "not those of the Partnership." Consequently, East West, and by extension, the General Partners, "received an enhanced financial position by[,] among other things, not paying fair market rent, unauthorized loans of the Partnership's assets, payment of expenses and supplementing the personal income of Andrew and Vincent[, Jr.]." Thus, while the Partnership made no distributions beyond the amount necessary to cover the partners' tax liability for over 15 years, the General Partners received annual management fees directly from the Partnership and the financial benefits derived from their interest in East West, benefits that did not flow to any of the Limited Partners.

The General Partners urge that Maryland's strict futility test was not satisfied by these allegations and, therefore, the derivative claims in the first amended complaint properly were dismissed. We disagree. In *Werbowsky*, the Court declined to eliminate the futility exception entirely, recognizing that there can be scenarios in which the directors or, as in this case, the controlling members, are so "personally and directly conflicted . . . that they cannot reasonably be expected to respond to a demand in good faith and within the ambit of the business judgment rule." 362 Md. at 620. This case presents such a scenario. Unlike in *Werbowsky* (and many shareholder derivative actions), where there is a corporate board comprised of interested and disinterested directors, here the Partnership was controlled entirely by Andrew and

Vincent, Jr., the sole General Partners. Their role in negotiating and carrying out the challenged transactions is undisputed. They alone among the partners stood to benefit if, as the Limited Partners alleged, the General Partners were acting in the interest of the tenant and not the landlord. If the suit were successful and damages were due the Partnership, the General Partners alone would suffer the consequences. Under those circumstances, demand was futile and the Limited Partners were not obligated to make a demand in order to bring their derivative claims.[11]

[11] In light of our holding that the circuit court erred by dismissing the derivative claims in the first amended complaint, we need not consider the Limited Partners' argument that the court also erred by striking the second amended complaint, which reasserted the derivative claims as a demand refused action. It is worth noting, however, that the allegations of the second amended complaint bear out the futility of a demand.

The General Partners represented to the circuit court during argument on the motions to dismiss the original complaint and the first amended complaint that it would take approximately 120 days for them to investigate a demand. In the second amended complaint, filed December 8, 2016, the Limited Partners alleged that demand was made on April 4, 2016, three days before the entry of the order dismissing the derivative claims in the first amended complaint. Counsel for the General Partners sent a "preliminary response" on April 21, 2016, stating that the General Partners would investigate the claims they deemed to be proper subjects of a demand. In the intervening seven months, no further action was taken.

In their motion to strike the second amended complaint, the General Partners did not dispute these allegations. Rather, they alleged that a "special demand partner" had been appointed sometime *after* the filing of the second amended complaint (but before a copy of the second amended complaint was served on the General Partners) and had hired counsel. He would begin investigating the allegations of wrongdoing more than 200 days after demand was made.

During oral argument in this Court, counsel for the General Partners stated that the special demand partner's report of his investigation was sent to the Limited Partners on

(Continued…)

II.

Summary Judgment

Under Maryland Rule 2–501(f), a circuit court may grant a motion for summary judgment "if the motion and response show that there is no genuine dispute as to any material fact and that the party in whose favor judgment is entered is entitled to judgment as a matter of law." We review the grant of a motion for summary judgment *de novo*. *See, e.g., Muse-Ariyoh v. Bd. of Educ. of Prince George's Cnty.*, 235 Md. App. 221, 235 (2017) (in reviewing the grant of summary judgment, we ask "whether it was legally correct, without deference to the trial court"). Because the circuit court retains discretion to deny a motion for summary judgment, even if a party has met his or her burden, we shall confine our analysis to the propriety of the grant of the General Partners' motion for summary judgment. *See Dashiell v. Meeks*, 396 Md. 149, 164 (2006) ("Although, ordinarily, when there is no dispute of material fact, a trial court does not have any discretionary power when granting summary judgment it does, nonetheless, exercise discretion when affirmatively denying a motion for summary judgment or denying summary judgment in favor of a full hearing on the merits.").

(…continued)
December 20, 2017, more than 20 months (600 days) after demand was made. As noted, *supra*, we are denying the General Partners' motion to supplement the record with that report.

Count I of the first amended complaint asserts claims for breach of contract and for breach of fiduciary duty. To prove a breach of contractual or fiduciary duties, the Limited Partners must show (1) the existence of a contractual/fiduciary relationship, (2) a breach of the contractual/fiduciary obligations, and (3) resulting harm or damages. *See Alleco Inc. v. Harry & Jeanette Weinberg Found.*, 340 Md. 176, 192 (1995) (breach of fiduciary duty); *Kumar v. Dhanda*, 198 Md. App. 337, 345 (2011) (breach of contract).

The existence of a contractual and a fiduciary relationship is clear in this case. "A partnership is, of course, a contractual relation to which the principles of contract law are fully applicable." *Klein v. Weiss*, 284 Md. 36, 63 (1978). "[T]he partnership relationship [also] is a fiduciary one, a relation of trust." *Allen v. Steinberg*, 244 Md. 119, 128 (1966). "Managing or general partners particularly owe a fiduciary duty to inactive partners." *Della Ratta v. Larkin*, 382 Md. 553, 578 (2004). "The burden rests on the fiduciary to prove that his or her exercise of power under the terms governing the business relationship was in good faith." *Alloy v. Wills Family Trust*, 179 Md. App. 255, 307 (2008).

The Limited Partners allege that the General Partners breached their contractual duties under the Agreement to ensure that the "credit and assets of the Partnership . . . be used solely for [its] benefit," ¶ 2.3.3; that transactions between the General Partners and "other businesses" affiliated with them be "at arm's length," ¶ 2.5.2; that "compensat[ion] . . . for any services . . . render[ed] [by the General Partners] to the

Partnership" be made subject to "terms and conditions agreed to by the General Partners," ¶ 5.1.20; and that the General Partners manage the Partnership in its "best interest . . ., including the safekeeping and use of all Partnership funds and assets for the benefit of the Partnership," ¶ 5.5. Allegedly, the General Partners' conduct was outside "the scope of the authority conferred on [them] by [the] Agreement" and/or amounted to "willful misconduct or gross negligence," giving rise to liability for damages under the Agreement. ¶ 5.6.1. The Limited Partners also allege that this conduct violated the fiduciary duties the General Partners owed to the Limited Partners to act in good faith and in the best interests of the Partnership.

The Limited Partners further assert that the General Partners violated their duties of loyalty and care under provisions of Maryland's Revised Uniform Partnership Act ("MRUPA"), codified at Md. Code (1975, 2014 Repl. Vol.), Title 9A of the CA Article, and incorporated into the Agreement. The MRUPA governs all partnerships formed after July 1, 1998. It provides that "relations among the partners and between the partners and the partnership are governed by the partnership agreement," except that a partnership agreement may not modify certain mandatory obligations. CA § 9A-103(a). As pertinent, a partnership agreement may not "unreasonably restrict" the right of a partner to receive, "[w]ithout demand, any information concerning the partnership's business and affairs reasonably required for the proper exercise of the partner's rights and duties under the partnership agreement or [Title 9A]," CA §§ 9A-103(b)(1) & 9A-403(c); may not "[e]liminate the duty of loyalty" set forth at CA §§ 9A-404(b) or 9A-603(b)(3), though it may "identify specific types or categories of activities that do not violate the duty of loyalty," CA § 9A-103(b)(3); "[u]nreasonably reduce the duty of care under § 9A-404(c) or §9A-603(b)(3)," CA § 9A-103(b)(4); or "[e]liminate the obligation of good faith and fair dealing under § 9A-404(d)," CA § 9A-103(b)(5).

Specifically, the Limited Partners allege improper conduct by the General Partners in three transactions: the 2013 Lease transaction (and the related "refund" of $21,000 in rent paid to East West); the East West Loan transaction (and the related Columbia Loan transaction and the short-term loan to the Partnership by Andrew and his wife made in connection with the payoff of the PNC Loan); and the terms and payment of management fees.

The General Partners argue that all those transactions were expressly authorized by the Agreement, which empowers them to execute leases (¶ 5.1.7), to secure loans (¶ 5.1.6), to enter into any other contracts or agreements in connection with a Partnership purpose (¶ 5.1.15), and to compensate the General Partners for "any services [they] render[ed] to the Partnership upon the terms and conditions agreed to by the General Partners" (§ 5.1.20). They further assert that their authorized decisions may not be judicially scrutinized because they are subject to the business judgment rule, which "insulates business decisions made by those lawfully in charge of corporate decision-making from judicial review, absent a showing that the officers or directors acted fraudulently or in bad faith." *Della Ratta*, 382 Md. at 579.[12]

The General Partners' authority under the Agreement, while broad, was "subject . . . to the other provisions of [the] Agreement," including the arm's length provision, the duty to use Partnership credit and assets for the benefit of the Partnership, and the duties of loyalty and care under MRUPA. Thus, to the extent the Limited Partners can prove that the General Partners violated those provisions in the exercise of their authority, the actions are not authorized. The General Partners' decisions relative to transactions with East West and the payment of compensation to themselves also are not subject to the business judgment rule. The Court of Appeals has expressly declined to decide whether the business judgment rule applies to decisions by the managers of non-corporate entities, such as a limited partnership. *See id*. ("We need not decide here whether the business judgment rule applies to partnerships."). Even if the business judgment rule does apply, however, it would not insulate the decisions challenged by the Limited Partners because

[12] The General Partners also argue that the parties, by their past conduct, modified the terms of the Agreement to eliminate the arm's length requirement and/or, waived compliance with that provision of the Agreement. Modification and waiver, however, are quintessential questions of fact not appropriate for summary judgment. *See Hovnanian Land Inv. Group, LLC v. Annapolis Towne Centre at Parole, LLC*, 421 Md. 94, 122 (2011) ("whether subsequent conduct of the parties amounts to a modification or waiver of their contract is generally a question of fact to be decided by the trier of fact") (citations omitted).

the General Partners were on both sides of all the transactions in question. *See Werbowsky*, 362 Md. at 609 (business judgment rule does not apply when directors "appear on both sides of a transaction []or expect to derive any personal financial benefit from [a corporate decision] in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally"). With these principles in mind, we turn to the specific conduct challenged by the Limited Partners to determine whether summary judgment properly was granted.

a.

2013 Lease and Rent Refund

The evidence in the summary judgment record established as a matter of law that the 2013 Lease was *not* an arm's length transaction, *i.e.*, a transaction in which the negotiating parties are "'each seeking for himself [or herself] the best advantage to be derived from a transaction[.]'"[13] *Brass Metal Prod., Inc. v. E-J Enters., Inc.*, 189 Md. App. 310, 358 (2009) (quoting *Nifty Foods Corp. v. Great Atl. & Pac. Tea Co.*, 614 F.2d

[13] Andrew testified at deposition that he understood "arm's length" in the Agreement to mean that if a third party read the written agreements between the Partnership and East West, it would appear on the face of the agreements that the "entities are independent of each other." Vincent, Jr., testified that he did not know what the "arm's length" provision of the Agreement meant. They both testified that they had not engaged in any analysis of the fair market rent for the Property prior to entering into the 2001 or the 2013 Lease. They took the position that East West never had paid fair market rent for the Property before or after the Property was sold to the Partnership.

832, 838 (2d Cir. 1980)). Mr. Jernigan from the McNamee firm drafted the 2013 Lease as counsel for East West *and* for the Partnership. In other words, there was no separate representation. Andrew negotiated the 2013 Lease on behalf of the Partnership despite his role as president, 20% shareholder, and director for East West. Andrew and Vincent, Jr., testified that they conducted no evaluation of the fair market rental value of the Property prior to executing the lease on June 24, 2013. Rather, they determined the rent based upon what East West could afford to pay. The General Partners were not negotiating the 2013 Lease with the aim of maximizing rent for the landlord, the Partnership. They were negotiating the 2013 Lease with the opposite aim, of minimizing rent for the tenant, East West.

There were disputes of fact over the General Partners' knowledge of the fair market rental value of the Property when the 2013 Lease was executed. When they executed the 2013 Lease, the General Partners were in possession of at least one, possibly two, appraisals of the Property. One appraisal was prepared for PNC in April 2012 and valued the Property at over $6 million dollars but did not analyze the fair market rental value. A second appraisal, prepared by Columbia Bank in May 2013, assigned a much lower value to the Property, but even at that lower value calculated a fair market value rental value for the Property of $12 per square foot, which translates into $28,379 per month, nearly double the rent charged under the 2013 Lease. These disputed facts are material to the issue of the General Partners' intent.

While there plainly was evidence in the summary judgment record generating a genuine dispute of material fact on the issue of the General Partners' liability for breach of the Agreement and of their fiduciary duties to the Limited Partners relative to the 2013 Lease, we conclude that the lack of a designated expert witness to testify as to the damages incurred by the Limited Partners is fatal to their claim. Assuming that the General Partners negotiated the 2013 Lease with East West on terms that were significantly below fair market rental value and that they did so with knowledge that those terms inured to the benefit of East West and to the detriment of the Partnership, the Limited Partners still would need to present evidence of the fair market rental value of the Property as of June 24, 2013, in order to prove damages, *i.e.*, the difference between a fair market rent and the $15,000 rent charged under the terms of the 2013 Lease.[14]

[14] The Limited Partners produced a damages worksheet to the General Partners in discovery. The worksheet reflects $1,767,502 in damages for underpayment of rent, plus interest, from January 2013 through June 2016. (The worksheet calculates damages for underpayment of rent under the 2001 Lease as well, but during briefing on summary judgment and on appeal, the Limited Partners focused solely on the 2013 Lease.) The Limited Partners arrived at the damages amount by using the value of the Property as assessed during the purchase negotiations with Ford ($4,484,194), assuming a 3 percent annual growth rate, and applying a 10 percent gross rent ratio. With those assumptions, the Limited Partners calculated the fair market rent to be $19.31 per square foot in 2013 ($639,339 annually), $19.89 per square foot in 2014 ($658,519 annually), and $20.48 per square foot in 2015 ($678,275 annually). Under the 2013 Lease, East West was paying just $180,000 annually during that three-year period. The Limited Partners calculated interest on the underpaid amount at a rate of 5.5 percent, which was the interest rate charged by Andrew for his short-term loan to the Partnership.

The Limited Partners assert that expert testimony is unnecessary on this issue because their damages calculations are "based on documents provided and used by the [General Partners] including three different appraisals." We disagree. To the extent the appraisals are being used to establish the fair market rental value of the Property, they are hearsay.[15] *See* Md. Rules 5-801(c) (defining hearsay) & 5-802 (hearsay inadmissible unless subject to an exception). Further, the appraisals do not, as the Limited Partners suggest, fall within the adopted admissions exception. Md. Rule 5-803(a)(2). Two of the appraisals were prepared at the behest of banks (PNC and Columbia) in connection with loans, and the third was prepared in November 2014 in connection with Vincent, Jr.'s divorce case. There was no evidence presented that the General Partners expressly or tacitly adopted a fair market rental value based upon the valuations in any of the three appraisals, which varied widely.

Alternatively, the Limited Partners maintain that they can offer lay opinion testimony on the fair market rental value of the Property. Rule 5-701 provides that a lay witness may offer an opinion about matters "rationally based on [his or her] perception . . . and . . . helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Citing cases in which property owners were permitted to testify about

[15] As discussed, the appraisals would be admissible for non-hearsay purposes, such as to show the General Partners' knowledge of a higher fair market rental value at the time they entered into the 2013 Lease.

the value of their real property, the Limited Partners argue that at trial they can opine on the value of the Property. Those cases hold, largely in the context of condemnation proceedings, that the owner of real property may opine about the fair market value of his or her property to the extent that "the owner's reasons for assigning a particular value to his property are derived from his familiarity with the property," and not from other sources. *Brannon v. State Roads Comm'n of State Highway Admin.*, 305 Md. 793, 803 (1986); *see also Greater Baltimore Consol. Wholesale Food Market Auth. v. Duvall*, 255 Md. 90, 93 (1969) ("The owner of land is at least presumptively competent to testify to his estimate of its value, however unreasonable that estimate may sometimes be.").

In the case at bar, the Partnership, not the Limited Partners, owns the Property and the evidence did not show that the Limited Partners, who, except for Joseph, had no interest in East West, were intimately familiar with the Property. Even if they were familiar with the Property, however, they also would need to have personal knowledge and familiarity with the fair market rental value of the Property, which necessarily would require knowledge of comparable rates charged to other car dealerships or other businesses. The evidence did not show that the Limited Partners had any such familiarity.

The federal cases cited by the Limited Partners are similarly unhelpful. Those cases construe Federal Rule of Evidence 701 to permit owners, officers, and employees of a business to offer lay opinion testimony about the value of the business or its assets.[16] For example, in *Lord & Taylor, LLC v. White Flint, L.P.*, 849 F.3d 567 (4th Cir. 2017), the Fourth Circuit held that in a breach of contract action brought by Lord & Taylor against the operator of a shopping center, the district court did not err by admitting lay opinion testimony by a Lord & Taylor company executive on damages "for the cost of reconfiguring and renovating [the] store to accommodate [a] new site plan and, in particular, the loss of several entrances that had connected it to [an enclosed mall]." *Id.* at 574. That testimony was based upon the executive's "first-hand experience on the job." *Id*. at 575. The executive had worked in the industry for 38 years and had personally "overseen" "more than 50 redesign projects" as Lord & Taylor's supervisor of "store design and construction." *Id*. at 575–76. Thus, the district court "reasonably could conclude" that the executive's opinion testimony was based upon personal knowledge. *Id.* at 576.

In the instant case, as already discussed, there was no evidence that the Limited Partners had any specialized knowledge about leases for a commercial car dealership or

[16] Federal cases interpreting FRE 701 are "persuasive authority for the interpretation of Md. Rule 5-701." *Ragland v. State*, 385 Md. 706, 720 (2005).

any other business. The Agreement prohibited the Limited Partners from involvement in the management of the Partnership. In the first amended complaint, the Limited Partners allege that they were kept in the dark as to the business of the Partnership. Their only basis for knowledge of the fair market rental value of the Property are the appraisals, which are not a source within the personal knowledge of the Limited Partners and, as already explained, are not admissible to prove the value of the Property. Having failed to present any admissible evidence to prove damages caused by the General Partners' alleged breaches relative to the 2013 Lease, the circuit court did not err by granting summary judgment in favor of the General Partners for the claim of loss of rental value due to the 2013 Lease.[17]

The propriety of the $21,000 "refund" to East West, however, was not appropriate for summary judgment. There is a genuine dispute of material fact as to why East West was given a "refund" for the difference between the month-to-month rent it had been paying for the first six months of 2013 and the lower rent charged under the 2013 Lease, with a commencement date of June 1, 2013. In their deposition testimony, Andrew and

[17] We note that evidence about the negotiation of the 2013 Lease still may be relevant and admissible at trial, even though the Limited Partners may not recover damages as stated above. Evidence that the General Partners entered into the lease without any investigation of a fair market rental value and with knowledge of some of the appraisals could go to whether the General Partners engaged in willful misconduct in the nature of self-dealing, permitting an inference that they also acted in bad faith in the refund of the rent, the loan transactions, and in the payment of management fees.

Vincent, Jr., failed to cogently explain why East West was entitled to this "refund." No expert testimony would be necessary to calculate damages if a jury were to find that the General Partners breached the Agreement or their fiduciary duties to the Limited Partners by making this payment to East West.

***b*.**

East West Loan

There were numerous genuine disputes of material fact relating to the genesis and the terms of the East West Loan. To make that loan to East West, the Partnership borrowed $550,000 over and above the outstanding principal balance on the PNC Loan ($1.1 million). As a threshold issue, the parties dispute the benefit to the Partnership of borrowing that excess money. The parties likewise dispute whether there was any benefit to the Partnership derived from extending a loan to East West at a rate of 2.25 percent interest using money the Partnership borrowed from Columbia Bank at a rate of 3.15 percent interest. Andrew testified that the $800,000 loan was intended as an "insurance policy" for the dealership if the Lincoln brand were to be terminated. He also testified, seemingly in direct contradiction, that East West would not have needed to spend that money if the Lincoln brand had been terminated. Thus, the very basis for extending the loan and whether the loan put Partnership assets at risk are disputed facts.

The terms of the Revolving Note required East West to pay all outstanding principal and interest at the end of the Initial Term absent a written agreement extending it. The record does not reflect a written agreement extending the Initial Term, nor does it reflect repayment of the loan balance. Andrew's July 2013 letter to the Limited Partners advised that the Revolving Note was collateralized, but the security agreement was not executed for 2 years. These discrepancies generated disputes of fact material to the issue of intent.

The Limited Partners would not need to present expert testimony to show damages incurred as a result of the East West Loan. Damages may be established mathematically based upon the disparity between the interest rate being paid by the Partnership to Columbia Bank on the Columbia Loan and the interest rate being paid by East West to the Partnership on the East West Loan. The claims for breach of contract and breach of fiduciary duty relating to the East West Loan were not appropriate for summary judgment.

c.

Management Fees

As discussed, Andrew and Vincent, Jr., paid themselves annual management fees beginning in 2004 and continuing through 2016. The amount of the fees varied dramatically from year to year depending on the rental income earned by the Partnership. Andrew testified in deposition that he received advice from a certified professional accountant that the "industry standard" for management fees of a land holding partnership was "up to" 10 percent of rent revenue, but that he aimed to keep the percentage at 5 percent. The actual management fees paid do not bear out this testimony, however. The General Partners paid themselves more than 5 percent of rent revenue in 2008 and from 2013 to 2016, and more than 10 percent of rent revenue in 2012. The lack of consistency in fees from year to year generated a genuine factual dispute as to whether the General Partners applied any formula in calculating management fees. A finder of fact also could disbelieve Andrew's testimony that he received advice about the industry standard given the lack of any documentation of the compensation structure.

The Agreement permits compensation of the General Partners for "any services [they] render[] to the Partnership upon the terms and conditions agreed to by the General Partners." Consequently, the dispute of fact as to the existence, *vel non*, of any "terms and conditions" for the payment of fees to the General Partners is material to whether they breached the Agreement by paying themselves annual fees. Andrew and Vincent, Jr.'s, deposition testimony also generated material disputes of fact relative to what services they provided to the Partnership year to year and whether the higher fees were justified by additional services rendered. Because the Limited Partners seek the return of all the management fees, plus interest, they would not need expert testimony on damages pertaining to the fees.

d.

Statute of Limitations

We also agree with the Limited Partners that the statute of limitations was not an appropriate basis upon which summary judgment could have been entered, to the extent that the circuit court ruled on that basis. The Limited Partners' claims are governed by the general three-year statute of limitations codified at Md. Code (1974, 2013 Repl. Vol.), section 5-101 of the Courts and Judicial Proceedings Article, which provides that "[a] civil action at law shall be filed within three years from the date it accrues unless another provision of the Code provides a different period of time within which an action shall be commenced." Ordinarily, the accrual date is determined by the judicially developed discovery rule. *Poffenberger v. Risser*, 290 Md. 631, 636 (1981). That rule provides that a cause of action accrues when the plaintiff knows, or in the exercise of ordinary diligence should know, of the nature and cause of her injury. *See Mathews v. Cassidy Turley Md., Inc.*, 435 Md. 584, 611 (2013).

Beyond the discovery rule, there are other circumstances that may affect the accrual date of a cause of action, and therefore the time when the limitations period begins to run. Under the "continuation of events" doctrine, a plaintiff who was in a continuing confidential or fiduciary relationship with the adverse party is entitled to relax his or her guard and rely upon the good faith of the fiduciary during the continuation of the relationship. Until such time as he or she is placed on actual notice of facts that would cause an ordinary person to suspect an abuse of that relationship, his or her cause of action does not accrue and limitations does not begin to run. *Frederick Road Ltd.*

P'ship v. Brown & Sturm, 360 Md. 76, 97–98 (2000). The "continuation of events" doctrine is founded upon the "equitable principle of detrimental reliance." *Supik v. Bodie, Nagle, Dolina, Smith & Hobbs, P.A.*, 152 Md. App. 698, 714 (2003).

In the case at bar, the General Partners and the Limited Partners were in a continuing fiduciary relationship. There plainly was a dispute of fact as to when the Limited Partners were placed on actual notice of facts that would have caused an ordinary person to suspect an abuse of that relationship. The Limited Partners testified at deposition that they did not begin to suspect any abuse of the fiduciary relationship until mid-2014, when they learned about the terms of the 2013 Lease, the terms of the East West Loan, and the payment of management fees. This was less than three years before they filed suit.

For all these reasons, the court erred by granting summary judgment in favor of the General Partners on Count I of the first amended complaint, with the exception of the claim arising from the 2013 Lease.[18]

[18] The court also granted summary judgment to the General Partners on Count IV (Declaratory Judgment), which sought an order "determin[ing], declar[ing], and adjudicate[ing] the rights and liabilities of the parties with respect to the [Agreement]," and Count V (Injunctive/Equitable Relief), which sought an order removing the General Partners. The circuit court's summary judgment ruling makes clear that judgment was granted on these counts on the same grounds as with respect to Count I. Thus, we shall reverse the grant of summary judgment on those counts as well and remand for further proceedings not inconsistent with this opinion. If Count IV is not somehow resolved on

(Continued…)

III.

McNamee Subpoena

The Limited Partners contend that discovery of "information provided to and received from counsel retained by [the Partnership] were undeniably discoverable" by the Limited Partners under a fiduciary exception to the attorney-client privilege and, alternatively, because the Limited Partners were the clients of McNamee. The General Partners respond that Maryland never has recognized a fiduciary exception to the attorney-client privilege. They contend, moreover, that Maryland law is clear that the Partnership is legally distinct from the individual partners and, as such, the Partnership, not the Limited Partners, was McNamee's client.

In light of our holding that the Limited Partners may pursue their derivative claims on behalf of the Partnership, we conclude that this issue is moot. On remand, the Partnership, which the General Partners concede was the client of McNamee, may seek discovery of these documents.

CONCLUSION

For the reasons explained, we reverse the judgment dismissing the derivative claims set forth in Count II and in parts of Counts IV and V of the first amended

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(…continued)
remand prior to a trial, the court shall enter an order declaring the rights and obligations of the parties under the Agreement.

complaint and remand for further proceedings. We reverse the summary judgment entered on the individual claims in Count I, except the claims for damages based on allegations that the 2013 Lease was for an amount below fair market rental value of the Property; and we reverse the summary judgment entered in parts of Count IV and Count V. We remand for further proceedings not inconsistent with this opinion.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART. CASE REMANDED TO THE CIRCUIT COURT FOR HOWARD COUNTY FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS TO BE DIVIDED EQUALLY BETWEEN THE APPELLANTS AND THE APPELLEES.