

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1301

September Term, 2014

CHRISTOPHER KURZ, *et al.*

v.

AMCP-1, LLC, *et al.*

*Zarnoch,
Graeff,
Friedman,

JJ.

Opinion by Friedman, J.

Filed: February 10, 2016

*Zarnoch, Robert A., J., participated in the conference of this case while an active member of this Court; he participated in the adoption of this opinion as a retired, specially assigned member of this Court.

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Three developers bought a single parcel of land and set about developing three separate projects on it, a hotel and two office buildings. In some respects, the developers thought of themselves as working on one big development project. In other respects, they acted as if there were three separate projects. At some point, one of the partners, Christopher Kurz,¹ stopped contributing to the costs of the development. That was okay, at least conceptually, because the various partnership agreements permitted the other partners simply to dilute Kurz's ownership interests in proportion to his diminished capital contribution. In practice, however, it was not completely clear whether the dilution should be applied to the project overall or only to one of the three projects. The math, of course, works out differently, and this dispute ensued.

FACTUAL BACKGROUND

The trial judge made careful and complete findings of fact, none of which are challenged on appeal (although appellant does, of course, challenge the legal significance of these facts). Therefore we adopt the trial judge's finding of facts as our own:

In 2002, Linden Associates, Inc. ("Linden"), a development company wholly owned by Christopher Kurz, contracted to purchase (the "Purchase Contract") a 20-acre site for development into four separate parcels of unequal shape, size, location and value (the "Project Parcel"). Kurz intended that, after subdivision, Linden would sell two of the parcels, and use the proceeds from the sales of those parcels to develop the office buildings on each of the remaining parcels.

¹ The nominal plaintiff is Honey G-R, LLC a limited liability company of which Kurz is the sole member. For the reader's convenience, we have followed the trial court's convention of using Kurz's name whenever possible.

Shortly after the execution of the Purchase Contract, Kurz believed that the Johns Hopkins Medical System (“Hopkins”) was a prospective tenant for one or both of the office buildings that he planned to erect on portions of the Project Parcel. With Hopkins as a prospective tenant, Linden was able to obtain an expression of interest from Mercantile Bank for the financing [of] the purchase of the Project Parcel. However, Mercantile’s loan commitment was conditioned upon a Hopkins lease. When Hopkins failed to follow through on its commitment, Mercantile Bank required Kurz to find an equity partner. Kurz approached Roger Holland, and with Kurz’s consent, Holland brought JP Bolduc into the deal.

In October of 2003, Kurz created non-party Arundel HGR, LLC as part of a plan to acquire the Project Parcel, and then subdivide it. Then, on November 13, 2003, Kurz created and made himself managing member of AMCP-1, AMCP-2, AMCP-3 and AMCP-4, four other LLC’s as part of a plan to avoid transfer taxes when parts of the subdivision could be sold.^[2]

² A December 22, 2003 letter from Kurz’s attorney explains that the relevant provision of the Maryland Code at the time, Tax Property Section 12-108(q), provided that an instrument of writing that transfers real property from a limited liability company is exempt from Maryland’s substantial transfer and recordation tax charges if the transferee is “an original member of the limited liability company.” By making the four AMCP entities the owners of Arundel HGR from the start, at the time of subdivision of the property, the parties were able to liquidate Arundel HGR up into its “original owners,” the four AMCP entities, in the form of in-kind liquidating distributions of the four parcels. In this case, the relative percentage ownership of each AMCP entity in Arundel HGR was intended to roughly

(Continued...)

(...continued)

On November 23, 2003, Arundel HGR's Operating Agreement was signed, and the four AMCP entities became the members of Arundel HGR. AMCP-1, AMCP-2, AMCP-3, and AMCP-4 contributed no capital to become members of Arundel HGR and each received differing membership interests: AMCP-1 and AMCP-2 each received a 35% interest, AMCP-3 received a 25% interest, and AMCP-4 received a 5% interest.

On December 19, 2003, Kurz (through Honey [G-R]), Roger Holland, and JP Bolduc (through JPB Office, LLC) executed four virtually-identical AMCP operating agreements. It was agreed that each party would provide \$300,000 in initial capital and receive a 33.33% interest in each AMCP entity at inception. Thus, on December 19, 2003, Honey [G-R], Roger Holland and JPB Office, LLC became co-owners of the entire project and Kurz became the managing member of each of the AMCP entities.

Section 3.2.3 of the Operating Agreements identifies a missed capital call as an event that triggers a recalculation of the Interest Holders' Percentages:

“If an Interest Holder fails to pay when due all or any portion of any Capital Contribution, the General Manager shall request the nondefaulting Interest Holders, on a pro rata basis, to pay the unpaid amount of the defaulting Interest Holder's Capital Contribution (the “Unpaid Contribution”). To the extent the Unpaid Contribution is contributed by another Interest Holder, the defaulting Interest Holder's percentage shall be reduced and the Percentage of each Interest Holder who makes up the Unpaid Contribution shall be increased, so that each Interest Holder's

correspond to the relative estimated value of the four parcels of land, so that as each parcel was conveyed in liquidation of Arundel HGR, each of the AMCP entities received its “fair” distribution.

percentage is equal to a fraction, the numerator of which is that Interest Holder's total Capital Contribution and the denominator of which is the total Capital Contributions of all interest holders."

There are no other terms in the Operating Agreements that require, permit, allow, or otherwise envision a recalculation of Interest Holders' percentages.

With respect to transfers of interests, § 6 of the Operating Agreements states:

§ 6.1.1—"No Person may Transfer all or any portion of or any interest or rights in the Person's Membership Rights or Interest unless" certain conditions are met.

§ 6.1.2—"...The transfer of an Interest pursuant to Section 6.1 shall not result, however in the Transfer of any of the transferor's other Membership Rights, if any, and the transferee of the Interest shall have no right to: (i) become a Member; (ii) exercise any Membership Rights other than those specifically pertaining to the ownership of any Transfer of any Membership Rights or Interests or (iii) act as an agent of the Company."

§ 6.1.3—"Any attempted transfer of Membership in violation of the prohibition contained in Section 6.1 shall be deemed invalid, null and void, and of no force or effect. Any person to whom Membership rights are transferred in violation of this section shall not be entitled to vote on matters coming before the Members, participate in the management of the Company, act as an agent of the Company, receive distributions from the Company or have any other rights in or with respect to Membership Rights."

Section 9.4 of the Operating Agreement requires that the parties express modification of the Operating Agreements in writing and be executed by all parties. Although the Operating Agreements contain some provisions not followed by any of the parties, they did make clear that the AMCP companies could enter into commercially reasonable contracts with members and their affiliates.

Also on December 19, 2003, Kurz, acting as the manager of all of the AMCP entities and for Arundel HGR, signed the Loan Agreement with Mercantile. That agreement made clear that, despite the existence of the various separate AMCP entities, the entire property served as collateral for the original Project Parcel loan; that the sale of any parcel would be used to pay down the principal owed on the entire property; and that the proceeds of the loan would be used to purchase all of the land and to build AMCP-2's building.

On February 6, 2004, a conference call occurred wherein Bolduc and Holland asked Kurz to allow Holland to take over as manager, which had been requested by Mercantile as a prerequisite to obtaining financing. Kurz did not object to Holland's appointment, never contested the appointment, and has not demonstrated any impropriety in Holland's conduct following his appointment.

On May 31, 2004, Holland, JPB Office, LLC, and Honey [G-R] each provided their initial capital. Holland and JPB put \$300,000 of capital into the project, Honey [G-R] provided documentation that it spent over \$300,000 for the benefit of the entire project, which served to satisfy its initial required \$300,000 contribution.

On July 22, 2004, Holland assigned his individual interest in the Project to Holland Development, LLC and Holland Investments, LLC, the parties to this matter and other LLC's owned and controlled by Holland. Later, in December of 2006, JPB Office assigned its interests in the AMCP entities to JPB Office II, LLC, also a party to this matter and another LLC owned and controlled by JP Bolduc.

On August 6, 2004, Kurz executed the sale agreement for the future transfer of the membership interests in AMCP-3 to a hotel developer in order to further develop and fund the Project.

In September 2004, the first capital call was made to raise additional funds for the Project. The Holland entities, JPB Office, LLC, and Honey [G-R] each met the capital call and each paid an additional \$450,000 to AMCP-2. All parties agree that their respective shares remained at 33.33%.

During early December 2004, additional money was needed to pay for suppliers and contractors, including Holland's company, which served as the contractor for the Project. Holland calculated the need for a second capital call in anticipation of future projected payments. All capital calls had to be made well in advance of the need for capital. Thus, on December 7, 2004, the Holland entities and JPB Office, LLC executed an informal resolution approving a second capital call in amount of \$525,000 jointly for AMCP-1, AMCP-2[,] and AMCP-4. The resulting resolution made clear that Holland had assigned his interests to Holland Development and Holland Investments.

On December 29, 2004, Holland and JPB Office each answered the capital call, but Honey [G-R] did not. Holland and JPB Office each sent an additional \$262,500 to cover Honey [G-R]'s failure to participate, which the [Appellees] believe caused Honey [G-R]'s percentage interest to be diluted from 33.33% to 27.03%, and increased their stake to 36.49%. Kurz was told by Holland and Bolduc that he was diluted in both ACMP-1 and AMCP-2 for this failure to participate in this capital call. Kurz did not raise any objection concerning management of the companies or the capital call at that time or any other time prior to this litigation.

On January 7, 2005, the Holland entities and JPB Office executed an informal resolution approving a third capital call in the total amount of \$1,200,000 jointly for AMCP-1, AMCP-2[,] and AMCP-4. On January 10, 2005, Holland sent a fax to Kurz and Honey [G-R] and the other partners which indicated that it concerned the entire "Arundel Mills Project" and the need for

additional capital. On the final line of the fax, Holland instructed Honey [G-R] to send the check payable to AMCP-2. The fax clearly indicated that Holland Development and Holland Investment were members of the LLCs.

On January 10, 2005, Holland and JPB Office met the capital call, and again Honey [G-R] did not. Holland and JPB Office each sent an additional \$600,000. [Appellees] contend that Honey [G-R]’s failure to participate in this capital call resulted in its share being diluted further, from 27.03% to 18.87%. As a result, [Appellees] contend Holland and JPB’s stake each increased to 40.57%.

On February 2, 2005, Holland had a phone conversation with Kurz in which he advised Kurz that a fourth capital call was coming. Kurz stated that he was not going to fund the capital call because he had other projects that needed his capital at the time.

On February 8, 2005, Holland sent another fax to Kurz and Honey [G-R]. This document clearly indicated that it concerned the entire “Arundel Mills Project” and the need for additional capital. On the final line of this fax, Holland instructed Honey [G-R] to send the check payable to AMCP-2. The fax clearly indicated that Holland Development and Holland Investment were members. Holland and JPB Office each sent an additional \$240,000 to cover Honey [G-R]’s shortfall, which [Appellees] contend further diluted Honey [G-R] from 18.87% to 16.83%. With Honey [G-R]’s dilution, [Appellees] contend Holland and JPB Office’s stake each increased to 41.58%.

The Mercantile Loan allowed for additional capital becoming available, if and when, a large tenant signed a lease. A lease was, in fact, signed by Coldwell Banker and on March 31, 2005, as a result of the additional funds being available, management returned \$1,000,000 in capital to the members. Holland and JPB Office each received \$415,800, consistent with their claimed 41.58% shares in AMCP-2, and Honey [G-R] received \$168,400, consistent with a 16.83% interest in AMCP-2. There was no protest or objection from Kurz or Honey [G-R].

On December 20, 2006, AMCP-2 closed on the permanent (post-construction) financing of the partners' first building with Guardian Life Insurance Company. As part of that transaction, AMCP-2 funded, formed, and became the sole member of AMCP 7550, LLC, the "IDOT" borrower for AMCP-2's loan with Guardian. The members used the IDOT structure as a way to avoid recordation taxes.

Also in December of 2006, all members, including Honey [G-R], JPB Office II, LLC, Holland Investments and Holland Development signed an amendment to the AMCP-2 Operating Agreement making clear that JPB Office assigned its interests in AMCP-2 to JPB Office II. Kurz never contested that he signed this amendment and he admits signing the page of the agreement identifying JPB Office II, LLC as a member.

During July of 2007, AMCP-1 contracted with Baltimore Washington Medical Center ("BWMC") for the development of the project's second building, AMCP-1. Because of the success of AMCP-2 and the pre-construction guarantee commitment from BWMC, the AMCP-1 property was financed without requiring any additional capital calls to the members. With AMCP-2 financially stabilized, plans for AMCP-1's construction began.

A construction loan for AMCP-1 was obtained from Compass Bank on April 1, 2008 and construction on the AMCP-1 building commenced. The borrower for this loan benefiting AMCP-1 was AMCP 7550, the same entity that served as borrower for AMCP-2, and which was solely owned and controlled by AMCP-2.

At that time, the selected lender required no additional capital deposits due to:

- (1) Significant equity built up in the AMCP-2 and AMCP-1 parcels^[3];
- (2) The proceeds of the sale of AMCP-3 and AMCP-4 used to pay down the original loan on the entire Project Parcel;
- (3) The success of AMCP-2;
- (4) BWMC's commitment to lease portions of AMCP-1's building in the same "park" made so attractive by the existing relationship with the AMCP-2 building (in which BWMC had initially leased space);
- (5) The hotel and daycare in the project made possible by the cross collateralization and other agreements; and
- (6) The development costs (site work, engineering, marketing, legal, etc.) expended to benefit AMCP-1 by the partners through capital deposits made to the AMCP-2 operating account but used to benefit the entire project.

During this same time period, the members unanimously approved^[4] "that the Revised Exhibit A as of

³ This equity was confirmed by [Michael] Kalinock[, an employee of JPB Offices,] who stated that AMCP-1's undeveloped land appraised for \$6,700,000 after the infrastructure investment and the financial success of AMCP-2, while the entire 20-acre parcel was purchased for only \$7,000,000.

⁴ With regard to the resolution, it is important to note that the terms of AMCP-1's Operating Agreement actually allow for a
(Continued...)

December 31, 2006 attached to the Operating Agreement of AMCP-1, LLC is reaffirmed and ratified as accurate....” Thus, all of the members, including Honey [G-R], agreed that Honey [G-R] owned 16.83% of AMCP-1 as of April 1, 2008. Moreover, the AMCP-1 Members and Compass Bank relied on this document to confirm AMCP-1’s ownership structure for Compass Bank’s financing of AMCP-1.

On April 4, 2008, in furtherance of the Compass Bank/AMCP-1 financing process, Kurz, Holland[,] and Bolduc executed an inter-creditor agreement. Kurz, Holland, and Bolduc each personally guaranteed 100% of the loan obligations to Compass Bank. The inter-creditor agreement provided that, in the event that any of the guarantors paid more than his proportional share of AMCP-1’s debts, the other guarantors would provide indemnification up to the limit of their percentage of ownership. Honey [G-R] confirmed that it owned just 16.83% of AMCP-1.

On April 28, 2008, proceeds from the Compass Bank loan provided sufficient surplus to return money to the investors. Kurz was paid, and readily accepted, 16.83% of that distribution from the Compass Bank loan concerning AMCP-1. He did not object or complain in any manner.

On November 15, 2010, in support of AMCP-1’s application to the Anne Arundel Economic Development Corporation for a loan, Kurz, Holland, and Bolduc provided a written guaranty. In that Guaranty Agreement, Kurz once again agreed that his exposure was limited to 16.83% of AMCP-1’s obligations.

On March 3, 2012, Kurz contacted Kalinock via email and, for the very first time, objected to his dilution. He confirmed that his attorneys reviewed documents and stated that the dilution “did

(...continued)

majority of membership interests to act by written agreement. In this instance, however, Kurz’s partners did not act without his authority. They sought, and he provided, his confirmation of Honey [G-R]’s 16.83% ownership interest in AMCP-1.

not translate to AMCP-1.” Kurz’s ... attorney ... did not contest that Honey [G-R] was diluted in AMCP-2 to 16.83%, but demanded 33.33% of AMCP-1.

TRIAL COURT’S CONCLUSIONS OF LAW

Based on the facts, the trial court made several conclusions of law, which we have consolidated into four points:

- It found that Kurz was judicially estopped by his prior sworn deposition testimony in another case (concerning a mechanic’s lien and allegations of a fraudulent transfer) that his ownership interest in AMCP-1 and AMCP-2 had been diluted to “about 20%” from arguing in this litigation that his ownership interest in each was an undiluted 33.33%;
- It found that Kurz was equitably estopped from claiming an undiluted 33.33% ownership in AMCP-1 and AMCP-2, by his prior affirmative statements, by his acquiescence in the statements of others, and by the detrimental reliance upon those statement by others, that his ownership interest had been diluted;
- It found that Kurz’s course of conduct demonstrated that he had waived his contractual right to demand that all changes in the operating agreements be made in writing; and
- It found no evidence that Holland had breached his fiduciary duty as general manager of the project.

Ultimately, the trial court found that the parties acted as if this was all one, single project. The trial court found that the parties’ attempts to keep the three projects separate by having separate AMCP entities responsible for each was a tax minimization scheme and did not reflect reality. It specifically found Kurz’s testimony to the contrary not to be credible. As a result, the trial court found Kurz’s ownership interest in AMCP-1 and AMCP-2 to have been diluted from the 33.33% with which he started to 16.83%. To reflect

this, the trial court entered an order declaring the ownership interests in the two remaining AMCP entities, AMCP-1 and AMCP-2 as follows:

Honey G-R, LLC	16.83%
JPB Office, LLC	41.58%
Holland Developments, LLC	35.24%
Holland Investments, LLC	6.35%

In this appeal, Honey G-R finds fault with each of the trial judge’s legal conclusions.

DISCUSSION

We review the trial court’s factual decisions for clear error and review the trial court’s legal decisions *de novo*. Md. Rule 8-131; *Clickner v. Magothy River Ass’n Inc.*, 424 Md. 253, 266-67 (2012).

I. Creation of a Series LLC

Honey G-R’s first complaint is that the trial court’s order creates an impermissible corporate structure.⁵ Honey G-R’s theory proceeds in three steps: *first*, that the structure that the trial court’s order creates is not a traditional Maryland LLC; *second*, that the trial court must instead have created a “series LLC”; and *third*, that a Maryland court is

⁵ AMCP argues that Kurz never questioned below whether there had been an illegal merger of AMCP-1 and AMCP-2 and advises that this court not decide the issue pursuant to Rule 8-131(a). Kurz believes the issue of whether the trial court illegally created a series LLC was preserved as that issue underlies the entire dispute. We agree with Kurz. The question of how the different entities related to each other was the overarching question at trial. Kurz could not have anticipated the trial court’s decision, which he characterizes as the creation of a series LLC, and thus before the issuance of the order, he could not have directly argued that the creation of a series LLC was error.

prohibited from creating a series LLC. In our view, this argument is wrong for three independent reasons.

First, we are not clear—at least in the abstract—that the distinctions between a family of traditional LLCs and a series LLC are as stark as Honey G-R would have us believe. The series LLC is a relatively new innovation:

Like its asset-segregating ancestors, [a series] LLC partitions its assets, debts, obligations, liabilities, and rights among separate series, or “cells.” In 1996, Delaware became the first state to enable the formation of [series] LLCs through the Delaware Limited Liability Company Act (DLLCA). Delaware’s [series] LLC legislation has since served as a model for other states. Under Delaware law, [a series] LLC is formed by: (1) allocating the LLC’s property, obligations, or assets among its series; (2) setting forth in the operating agreement a method to maintain separate and distinct records for each series; and (3) including a notice of the limitation of series liability in the master LLC’s certificate of formation. Furthermore, each series may designate its own class of members or managers, and each may set its own business purpose or investment objective.

Amanda J. Bahena, Note, *Series LLCs: The Asset Protection Dream Machines?*, 35 J. Corp. L. 799, 801-2 (Summer 2010). Only a handful of states have adopted the series LLC. Doug Batey, *NCCUSL Starts Work on a Uniform LLC Act—Many Questions Remain*, LLC Law Monitor (Nov. 25, 2014), perma.cc/V2BJ-ZYHU. Many of the benefits of a series LLC can be obtained by creating a family of traditional LLCs, with one master traditional LLC of which the members are, in turn, other traditional LLCs. The only differences that we perceive—at least in the abstract—are differences of nomenclature and the requirement for filing fees.

Second, we think Honey G-R puts far too much stock in the fact that the Maryland General Assembly has not adopted legislation authorizing the use of the series LLC form. While certainly true, to the best of our knowledge, the legislature hasn't even considered whether to adopt such legislation. It certainly hasn't done anything to suggest that adoption of the series LLC form will violate an important public policy of the State. We also do not know how the Maryland State Department of Assessment and Taxation (SDAT) treats applications for registration of foreign (non-Maryland) series LLCs. Md. Corps. & Assoc. Ann. Code, §§ 10-902 (requiring registration of foreign limited liability partnerships); 10-901(a)(2) (prohibiting denial of registration "by reason of any difference between [foreign] laws and the laws of this State."). "Series LLCs have not yet been very popular, because it is unclear whether the series liability shield will be respected by nonseries states or in bankruptcy. It is also unclear how series will be treated for regulatory, licensing, and nontax purposes generally." Mark A. Sargent & Walter D. Schwidetzky, Limited Liability Company Handbook § 2:12, "Chapter 2. Entity Classification for Federal and State Purposes, Including Classification of Series LLCs, III. Series LLCs, § 2:12. Introduction" (September 2015). Thus, we think the third step in Honey G-R's argument, that a Maryland court is prohibited from ordering the creation of a series LLC (if that is what happened here), assumes a prohibition that simply does not exist.

But *third*, and most fundamentally, Honey G-R's argument misperceives the trial court's task. The trial court was not creating corporate structures. Rather, its function was to understand and explain the corporate structures that the parties themselves had created,

both in their written documents and by their actions. The trial court did not conclude as a matter of law what the validity of a series LLC in Maryland would be. The trial court made findings of fact regarding what the parties had done in their dealings. The trial court's findings of fact explained precisely what it found:

- 1. The evidence and conduct of the parties indicate that despite the creation of four separate AMCP entities that kept separate books, all of the parties considered the Project entities to be [part] [of] a single venture.*

The evidence shows that prior to December 2002, *Pro Forma* Spreadsheets and early plans indicate that Kurz used a “template” spreadsheet to analyze the benefits of purchasing the Project Parcel. The spreadsheet reveals that, from the beginning, Kurz considered ... AMCP as a single venture. For example, the spreadsheet references, in its first page, the financials, budgets, and *pro formas* for the entire project, and initially, the spreadsheet referenced “Project Name: Arundel Mills Corporate Park” and noted over 300,000 ft² of leasable space. This amount of leasable space was later confirmed by other documents and testimony to be the amount of space in both AMCP buildings. Kurz's spreadsheet also expressly references the “entire project.” The spreadsheet then, on multiple occasions, references the two AMCP buildings as Building A and Building B (or Phase I and Phase II), and not as separate entities or LLCs.

Also, at various locations on the spreadsheet, Kurz used the same underlying assumptions for both buildings and the entire project, including CAP rates (two scenarios at 9.25% and 9%), amortization (10%), sales costs, debt service ratios (50%), interest rates (10%), development costs (5%), loan to value (50%), etc. The spreadsheet also notes that the Project Parcel was to be divided into four parcels, with one Hotel Site. Notably, Kurz indicated that the proceeds from the sale of the Hotel Site would generate \$230,000 that “should be usable in the job.” Thus, the evidence indicates that early on, Kurz intended the project to be developed as one project or “job,”

with the proceeds from the sale of sub-parcels being used to fund the buildings on the other parcels. Kurz's own plans are totally inconsistent with the notion of four, independent LLCs acting autonomously, as he claims.

Additionally, in December 2002, non-party Linden Associates, Inc. ("Linden"), which Kurz controlled, executed a contract to purchase the Project Parcel. Kurz testified that, upon Linden's execution of the Purchase Contract, Kurz began to expend "Pre-Development" costs which he agrees included subdivision prep work, engineering work, plans, obtaining entitlements and permits, legal fees (for the AMCP entities and Arundel HGR), and other typical predevelopment work. What is clear is that Kurz's Pre-Development costs were related to the development of the entire Project, including AMCP-1, AMCP-3[,] and AMCP-4—not just AMCP-2.

The evidence also shows that a year later, on December 22, 2003, three days after signing the Mercantile loan, Kurz's personal attorney sent a letter to Kurz, Holland, and Bolduc explaining the "Arundel Mills Ownership Structure." In that letter, which was prepared after the operating agreements were signed, the attorney clearly alluded to the fact that Kurz considered the properties to be one project: he stated that the purpose of the creation of the AMCP entities and their joint ownership of Arundel HGR, was the "search for tax exemptions"; he confirmed that each of the AMCP entity's operating agreements is a "clone" of the others; he referred to the entire "Arundel Project" making it clear that each of the partners agreed to put in \$300,000 of initial capital into the "project" as a whole; and he further confirmed that Kurz's preferential distribution applied across the entire project, and not just to one or more AMCP entities.^[1] Notably, the attorney also confirmed that AMCP-1, AMCP-2, AMCP-3, and AMCP-4 contributed no capital to become members of Arundel HGR, yet each received differing membership interests.

* * *

Thus, the evidence establishes that as early as January 2004, Kurz advertised the entire project jointly and was sharing costs

and leasing opportunities between the same AMCP entities he now claims are separate and unrelated. Furthermore, the Court notes that Holland Properties and JPB Enterprises did not own, nor have they ever owned, any interest in the Project. However, at this early point in time, Kurz did not object to the involvement of Holland or JP Bolduc related entities. This is a direct contradiction of Kurz’s current claim that he has never agreed to any other Holland or Bolduc affiliate having an ownership stake in the Project in lieu of an original owner.

The trial court did not, as Honey G-R complains, create a series LLC, nor did it merge any of the AMCP entities together. Rather, as demonstrated by the excerpt above, the trial court explained that although the AMCP entities were established as separate LLCs for transfer and recording taxation purposes, all parties intended for there to be a broader “project,” of which each of the AMCP entities were a part. Under the clearly erroneous standard, there is substantial evidence to support the trial court’s finding that the different AMCP entities were involved in an overall broader project. We, therefore, conclude the trial court did not err.⁶

⁶ Honey G-R’s final argument is that the trial court granted the extraordinary remedy of reformation without the necessary evidence to support that remedy. This argument recycles Honey G-R’s first argument that the trial court created a series LLC. Honey G-R argues that the trial court, in effect, merged two entities – AMCP-1 and AMCP-2 – into one entity, through reformation, without the power to do so. AMCP counters that the court did not reform the contracts to create one entity. (Continued...)

(...continued)

Rather, AMCP argues that the trial court found that the parties had already modified the operating agreements and fixed any mistake that might have existed.

II. Modification of Operating Agreement

Among other findings, the trial court determined that the parties had modified the operating agreements for the AMCP entities in two important ways. *First*, the trial court held that the parties' course of conduct demonstrated that they had agreed to disregard some of the formalities found in the operating agreements. This included waiving the contractual right to enforce § 9.4 of the agreements, which requires that the parties make modifications to the operating agreements in writing and that all parties execute those

The remedy of reformation involves a court changing a writing after it has been executed by the parties:

The request for the reformation of a written instrument is one for unusual relief, and when granted, it differs from rescission, cancellation[,], or annulment of the document. Unlike these, the instrument remains in force and effect, but in a modified, or changed form; hence, before granting the high remedy of reformation, the proof must not only establish that the written agreement was not the agreement intended by the parties, but also what was the agreement contemplated by them at the time it was executed.

Higgins v. Barnes, 310 Md. 532, 538 (1987) (quoting *Moyer v. Title Guarantee Co.*, 227 Md. 499, 504 (1962)).

We hold that the trial court did not reform the contract. The trial court did not combine AMCP-1 and AMCP-2 into one larger series LLC. Rather, the trial court explained how the two entities relate to each other, how Kurz intended the entities to work together, and how the process of developing the greater project played out through the different entities. Nothing about the trial court's decision reformed the agreements by combining AMCP-1 and AMCP-2 into a series LLC. The trial court did not dictate how the operating agreements should be changed to match the intent of the parties. Rather, the trial court recapped how the parties *had already* changed the operating agreement to match their intent. We, therefore, reject Honey G-R's argument.

modifications (the “non-waiver” provision). The trial court determined that, as a result of waiving the requirement to make modifications in writing, the modifications to the operating agreement, which were not in writing, were, nonetheless valid. *Second*, the trial court held that, despite provisions in the operating agreements prohibiting it, the parties had agreed that failure to meet capital calls would result in dilution across the entire project.

Honey G-R argues that the trial court erred in both respects, because, it claims, there was no showing of a clear intent to deviate from the written terms of the operating agreements. AMCP counters that there was ample evidence for the trial court to conclude that the parties waived both the “non-waiver” provision and the capital contribution provision. We will address the two facets individually.

A. *Waiver of the Non-Waiver Provision*

Under § 9.4 of the operating agreements, modifications to the operating agreement were to be written and executed by all parties. Honey G-R argues that there was no clear intent to waive § 9.4 and allow oral modifications, and, in fact, some modifications to the agreement were done in writing. Because there were some written amendments, Honey G-R concludes that no oral modification of the non-waiver provision could be valid. AMCP, however, argues that simply because other modifications were in writing, the parties were not foreclosed from modifying the operating agreement orally. AMCP contends that the trial court had more than sufficient evidence to conclude that the non-waiver provision was orally modified and, therefore, that the trial court’s decision is not clearly erroneous.

In laying out the rules for when an operating agreement may be modified, the trial court focused on the principle that the parties may waive the requirements of a written contract through their conduct. The trial court concluded, based on the totality of the circumstances, that Honey G-R waived its right to enforce the terms of § 9.4:

The general rule is that a partnership agreement governs the relations among the partners and between the partners and the partnership. *Della Ratta v. Larkin*, 382 Md. 553, 564 (2004) (internal citations omitted). The AMCP-2 and AMCP-1 Operating Agreements are contracts where the terms apply respectively to the members of each LLC. *George Wasserman v. Kay*, 197 Md. App. 586, 14 A.3d 1193 (2011) (“The agreement of the members concerning the affairs of an LLC and the conduct of its business is called an ‘operating agreement,’ which is much like a partnership agreement. The operating agreement may determine how the LLC is managed.”).

Because an operating agreement is a contract, Maryland principles of contract law apply to its interpretation. *Klein v. Weiss*, 284 Md. 36, 62 (1978). Maryland Law generally requires giving legal effect to the clear terms of a contract. *Calomiris v. Woods*, 353 Md. 425, 432 (1999). However, it is a “well settled rule that the parties by their conduct may waive the requirements of a written contract.” *Universal Nat’l Bank v. Wolfe*, 279 Md. 512, 522 (1977); *see also Hovnanian Land Inv. Group, LLC v. Annapolis Towne Centre at Parole, LLC*, 421 Md. 94, 120 (2011) (“[O]ur case law shows a persistent unwillingness to give dispositive and preclusive effect to contractual limitations on future changes to that contract.”).

“Waiver is the intentional relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right, and may result from an express agreement or be inferred from circumstances.” *Food Fair Stores, Inc. v. Blumberg*, 234 Md. 521, 531, 200 A.2d 166, 172 (1964). “Maryland courts have consistently reaffirmed that a party can modify or waive contractual provisions despite a provision

purporting to limit those abilities.” *Hovnanian*, 421 Md. at 118; *see also 600 N. Frederick Rd., LLC v. Burlington Coat Factory of MD., LLC*, 419 Md. 413 (2011) (modification valid even though it did not comply with contractual writing and signature requirement).

* * *

“In this inquiry, the court looks at the party’s actions both *before* and *after* the alleged breach. A party can waive a condition precedent by agreeing, in advance, to a course of action which would not otherwise comply with a contractual requirement.” *Id.* at 123. “A party may also waive a condition precedent *after a breach* by failing to assert its remedies for that breach. *Id.* A party’s inaction or silence is relevant, especially when that party is silent in response to a breach. *Id.* Finally, “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.” *Hovnanian*, 421 Md. at 122 (quoting *University Nat’l Bank v. Wolfe*, 279 Md. 512, 523 (1977)).

This Court is not bound solely by the “four corners” of the subject Operating Agreements. As set forth below in detail, facts and testimony indicate that Honey [G-R]’s actions and inactions were consistent with a post-contract agreement that altered the written provisions of the four AMCP operating agreements. This course of conduct, occurring after the operating agreements were made, is evidence of subsequent agreements to disregard some of the more formal parts of the operating agreements and demonstrate that the parties agreed all along to treat the entire project as “one” endeavor to be financed and operated jointly.

The trial court concluded that Honey G-R waived its contractual right to enforce the writing requirement of § 9.4 of the operating agreement.

After reviewing the trial court’s clear explanation of the law and application of the law to the facts of this case, we are persuaded that there was ample support for the trial

court's decision. Parties may, by their actions, orally waive a provision that requires changes to be made in writing. *Hovnanian Land Inv. Group, LLC v. Annapolis Towne Centre at Parole, LLC*, 421 Md. 94, 118 (2011). Honey G-R's actions, through Kurz, after the operating agreements were in place, evidences an intent to modify the non-waiver term by allowing non-written modifications. Kurz did not object to the change of the non-waiver provision until it became beneficial and convenient to him. We hold, therefore, that the trial court did not err in finding that the non-waiver provision was waived.

B. Waiver of Capital Contribution Provision

The operating agreements generally state that if one of the partners fails to meet a capital contribution the other partners could contribute the unpaid amount. As a result, the non-contributing partner's ownership interest would be reduced proportionately and the partners who made up the deficit would have their ownership interest increased proportionately. There are no other terms in the operating agreements that require a recalculation of the ownership interests. Specifically, the operating agreements state:

3.1. *Initial Capital Contributions.* Upon the execution of this Agreement, the Members shall contribute to the Company cash in the amounts respectively set forth on Exhibit A.

3.2. *Additional Capital Contributions.*

3.2.1. If the Members at any time or from time to time determine that the Company requires additional Capital Contributions, then the General Manager shall give notice to each Interest Holder of (i) the total amount of additional Capital Contributions required, (ii) the reason for the additional Capital Contribution is required, (iii) each Interest Holder's proportionate share of the total additional Capital

Contribution ... and (iv) the outside date each Interest Holder's additional Capital Contribution is due and payable ...

* * *

3.2.3. If an Interest Holder fails to pay when due all or any portion of any Capital Contribution, the General Manager shall request the nondefaulting Interest Holders, on a pro rata basis, to pay the unpaid amount of the defaulting Interest Holder's Capital Contribution (the "Unpaid Contribution"). To the extent the Unpaid Contribution is contributed by any other Interest Holder, the defaulting Interest Holder's Percentage shall be reduced and the Percentage of each Interest Holder who makes up the Unpaid Contribution shall be increased, so that each Interest Holder's Percentage is equal to a fraction, the numerator of which is that Interest Holder's total Capital Contribution and the denominator of which is the total Capital Contributions of all Interest Holders.

Thus, §§ 3.1 et seq., the "Capital Contribution Term," together call for each partner's ownership interest to be the amount of capital contribution made by that partner, divided by the total capital contributions made by all partners. There is no term specifying that capital contributions to one AMCP entity will affect the ownership interest percentage in the other AMCP entities.

Honey G-R contends that there was not a clear intent shown to waive the capital contribution term. As a result, Honey G-R argues, failure to meet the capital calls should only have resulted in a reduction of ownership interest in the specific AMCP entity for which the capital call was made, not a reduction of ownership interest across all of the AMCP entities. Honey G-R claims that if there was any course of conduct shown to the contrary, it was only because Holland breached his fiduciary duty. AMCP agrees with the

trial court that the partners, through their conduct, agreed to waive the capital contribution term as written and to apply the capital contributions across all of the AMCP entities. AMCP also argues that there was no breach of fiduciary duty by Holland and no evidence that Holland acted improperly.

The trial court addressed both arguments and concluded (1) that the parties agreed to waive the capital contribution term and (2) that Holland did not breach his duty. The trial court found that “all the parties agreed that, despite the terms of the identical operating agreements, the effect of the capital calls from the owners, and the resultant dilution, would be made and considered across the entire Project, and not for each AMCP entity separately.” The trial court found that there was no evidence that Holland breached a fiduciary duty, writing:

C. There is no evidence to indicate a breach of fiduciary duty with respect to Holland’s position as general manager of the Project.

* * *

Kurz claims he was not provided the financial reports required by the subject Operating Agreements. All parties agree that Kurz’s level of knowledge has no effect on finding his proper dilution level. However, even if it were relevant, Kalinock and Holland testified that they regularly shared financial and operational information with Kurz. Furthermore, there is no evidence that Kurz ever requested information that he was later denied. In fact, Kalinock testified that Kurz and Holland, via joint emails, received monthly updates. The Court finds that Kurz[’s] argument, that the failure to inform him kept him in the dark as to the basis for his dilution, so he could not contest it, is disingenuous and ignores the fact that the dilution of his

ownership interest was caused by his intentional failure to meet the capital calls.

Finally, the Court notes Kurz produced no evidence that he objected to Holland's appointment on February 18, 2004, that he contested it at any time, or that Holland acted improperly after his appointment. Kurz offered no evidence that he objected to any failure to provide information, or that he demanded that the financial reporting requirements of the operating agreements be met. It can only be inferred that this is because he understood that the agreements were form documents and he was satisfied with Holland and Kalinock's management efforts. In fact, Kurz testified that he was, in fact, satisfied with the management efforts and demonstrated this by consenting to a bonus for Kalinock.

Although not pursued with vigor at trial, Kurz alleged during his opening statement that Holland practiced and benefited from self-dealing. Kurz alleges that Holland was the "big winner" on the AMCP deal and insinuates that there was some impropriety resulting in a financial windfall for Holland and his companies. It is true Holland served as general contractor for the project and derived significant revenue as a result. However, there is nothing inherently improper about one of the principals of a development project serving as a contractor. In particular, there was no evidence of impropriety here.

For example, Holland testified that his company actually bid \$1,000,000 less for the first building than did the contractor (Whiting Turner) that Kurz had planned to use. Additionally, Bolduc's entities had some limited assignments as real estate broker, and shared with Holland in the 4% management fee for managing the entire project. Kurz alleged that the 4% fee taken by Bolduc and Holland was above-market. However, Kurz testified that he and Holland shared a higher, 5% fee, on another similar project. Kurz offered no expert witness as to the proper market-rate fees for all of these services, or the proper costs of construction, and provided no evidence of overcharges. Therefore, the Court finds there is no basis to find that there was any self-dealing as alleged, or that AMCP-1,

AMCP-2[,] or Honey [G-R] have been damaged in any way by the alleged self-dealing.

As a result the trial court found, and we agree, that it was Kurz's intentional failure to meet the capital calls that caused the dilution of his ownership interest, not some, after-the-fact imagined breach of duty by Holland. It was also Kurz who first envisioned the project as one large project made up of smaller pieces. Any attempt to now say that he was surprised that the capital contributions and resulting dilution were considered across the entire project, is, as the trial court said, disingenuous. Having reviewed the trial court's opinion, we are persuaded that the trial court did not abuse its discretion by finding that the capital contribution term of the partnership agreements was waived and that Holland did not breach his duty.

III. Mutual Mistake vs. Mutual Modification

Honey G-R alleges that disagreement between the parties as to who owned how much of each entity was the result of a mutual mistake. Honey G-R argues that the parties did not mutually modify their agreements, but instead, made a mutual mistake because of their differing understandings of what would happen when a capital call was missed. Moreover, Honey G-R believes that the trial court failed to address its contention that there was a mutual mistake. AMCP, however, argues that the trial court did not need to address the claim of mutual mistake because the parties had already agreed to modify the operating agreements and had corrected any mistake that may have existed.

Our review of the trial court’s decision, which has already been quoted at length above, confirms that the trial court did not fail to address Honey G-R’s mutual mistake argument. Rather, by finding that the parties had mutually modified the operating agreements, the trial court implicitly found that there was no mutual mistake to be corrected. Given the trial court’s in-depth analysis of the parties’ course of dealings, we are persuaded that there was sufficient evidence to support the conclusion that the parties had mutually modified the operating agreements and that there was no mutual mistake to correct.

IV. Estoppel

Judicial and equitable estoppel were important issues at trial and the court found in essence that:

- Kurz’s current position, that Honey G-R’s interests were not diluted in AMCP-1, was inconsistent with Kurz’s prior testimony in an unrelated mechanic’s lien and fraudulent transfer matter;
- Kurz would derive an unfair advantage if the trial court allowed him to assert an inconsistent position;
- The other partners would suffer an unfair detriment if the trial court allowed Kurz to assert his inconsistent position.

Honey G-R argues that the trial court erred in concluding that Honey G-R is both judicially and equitably estopped from asserting that its ownership interest is not diluted across the entire project, including AMCP-1. *First*, Honey G-R argues that the trial court ignored the legal requirement for equitable estoppel that there be actual injury. *Second*, Honey G-R argues that the trial court incorrectly failed to follow the required factors for

judicial estoppel. Honey G-R states that there was no evidence admitted at this trial that Kurz's deposition in the unrelated mechanic's lien case was ever admitted at that trial, much less that it influenced the outcome of the mechanic's lien case. *Finally*, Honey G-R argues that it was Holland who originally misled Kurz into believing that cross-dilution was even a possibility, and, therefore, there was no possible way that Holland and the other partners had been misled to their detriment.

AMCP counters that both equitable estoppel and judicial estoppel are applicable to this case and that the trial court did not abuse its discretion in finding both. First, AMCP contends that equitable estoppel constitutes a valid defense in this case because the other partners increased their exposure to liability, repeatedly, based on Kurz's representations that Honey G-R's ownership in all the AMCP entities was diluted. AMCP argues that the trial court properly considered each instance in which the partners increased their liability exposure and Kurz accepted reduced liability or a reduced payout as instances of detrimental reliance. AMCP contends that the trial court correctly determined that it was irrelevant that the potential harm to the other partners hadn't yet come to fruition because the partners had been misled and changed their position for the worse in reliance on Kurz's representations. Second, AMCP contends that judicial estoppel was a valid defense because, as the trial court correctly stated, although there are standard markers of judicial estoppel, there is no inflexible prerequisite or exhaustive formula. Therefore, according to AMCP, it is irrelevant that there is no evidence in the record of whether Kurz's deposition was relied upon by the court in the mechanic's lien action. It is sufficient that there could

be a perception that either the mechanic's lien court or the court in this case was misled. For the reasons that follow, we conclude that the trial court did not err.

A. *Equitable Estoppel*

Honey G-R argues that the trial court erred by concluding that Honey G-R was equitably estopped from asserting its position that its interest in AMCP-1 was not diluted. Honey G-R contends there was no evidence that the other AMCP partners sufficiently established the detrimental reliance element of equitable estoppel.⁷

In its written opinion, the trial court accurately described the law of equitable estoppel and listed its three elements—(1) voluntary conduct or representation; (2) reliance; and (3) detriment:

“Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded both at law and in equity, from asserting rights which might perhaps have otherwise existed ... as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse and who on his part acquires some corresponding right, either of property, of contract, or of remedy.” *Lipitz v. Hurwitz*, 435 Md. 273, 291-92 (2013) (citations omitted). Equitable estoppel “essentially consists of three elements: ‘voluntary conduct or

⁷ Honey G-R also attempts to obtain a more favorable standard of review by turning this from a factual challenge into a legal one. Honey G-R states that the trial court “committed a legal error in concluding that plaintiffs did not have to show an actual injury to demonstrate equitable estoppel.” Although the trial court did state that actual injury is not a required element of equitable estoppel, it clearly did not base its conclusion on that statement. The trial court made this observation only in passing and went on to conclude that there was sufficient evidence of actual injury in the record. We conclude that there was no legal error and review the remaining contentions on the abuse of discretion standard.

representation, reliance, and detriment.” *Hill v. Cross Country Settlements, LLC*, 402 Md. 281, 310 (2007) (quoting *Mona Elec Co. v. Shelton*, 377 Md. 320, 334 (2003)). “It is essential for the application of the doctrine of equitable estoppel that the party claiming the benefit of the estoppel must have been misled to his injury and changed his position for the worse, having believed and relied on the representations of the party sought to be estopped.” *Savonis v. Burke*, 241 Md. 316, 321 (1966).

In summary, the trial court concluded:

- **Voluntary Conduct or Representation:** Kurz voluntarily accepted the lower percentage of the distribution multiple times when distributions were made. Kurz also represented his lower interest to investment banks when providing a guarantee with Holland and Bolduc.
- **Reliance:** Multiple parties, in addition to Holland and Bolduc relied upon Kurz’s representations. The Anne Arundel Economic Development Corporation relied upon Kurz’s representation of how much of an interest Kurz had in the project when determining whether to loan money to the AMCP projects and how to arrange the guarantee made by Holland, Bolduc, and Kurz.
- **Detriment:** Holland and Bolduc relied upon Kurz’s representations to their detriment. Holland and Bolduc both faced higher financial liabilities.

Specifically the trial court found:

The facts in this case indicate that Honey [G-R], through Kurz, testified in a mechanic’s lien and fraudulent transfer matter, that it was diluted in AMCP-1 and AMCP-2. Additionally, Honey [G-R] and the AMCP-1 and AMCP-2 members conducted their business and financial transactions based on Honey [G-R]’s representations.

First, on June 7, 2005, just a few months after Honey [G-R] received its March 2005 distribution from the Mercantile loan consistent with its 16.83% interest in AMCP-2, Kurz testified under oath that he had been diluted to “about 20%” of the entire project and of the individual AMCP entities[.] ... Thus, as of

June of 2005, and after all capital calls had been made, Kurz clearly acknowledged, under penalty of perjury, that Honey [G-R]’s ownership in the entire project, and more specifically in AMCP-1, was diluted simultaneously across both entities. Kurz confirmed this statement at the current trial.

* * *

Second, on April 1, 2008, the members, including Honey [G-R], agreed that Honey [G-R] owned 16.83% of AMCP-1. . . . Honey [G-R]’s fellow AMCP-1 members and Compass Bank relied upon this Resolution’s confirmation of AMCP-1’s ownership structure when financing the loan.

On April 4, 2008, in furtherance of the Compass Bank/AMCP-1 financing process, Kurz, Holland[,] and Bolduc executed an inter-creditor agreement. In the inter-creditor agreement, all AMCP-1 members agreed to provide indemnification to each other at a level coincident with their then-ownership in AMCP-1. Honey [G-R] confirmed once again that it owned just 16.83% of AMCP-1. Moreover, on April 28, 2008, proceeds from the Compass Bank loan provided sufficient surplus to return money to the investors. Kurz was paid, and readily accepted, 16.83% of that distribution from the Compass Bank loan concerning AMCP-1. He did not object or complain in any manner.

Here, Kurz benefited from claiming that Honey [G-R]’s ownership in AMCP-1 was diluted to 16.83%, as a lower ownership percentage significantly lowered his liability under the indemnification agreement. Moreover, Kurz’s partners, *to their detriment*, assumed increased indemnity exposure in light of Kurz’s confirmation of Honey [G-R]’s diluted stake.

* * *

[O]n November 15, 2010, in support of AMCP-1’s application to the Anne Arundel Economic Development Corporation for a loan, Kurz, along with Holland and Bolduc, provided a written guaranty. In that Guaranty Agreement, Kurz once again agreed that his exposure was limited to 16.83% of AMCP-1’s

obligations. Again, Kurz benefited by having a decreased financial exposure resulting from his stated percentage ownership of AMCP-1. Furthermore, as a result of Kurz's representations, and in reliance upon Honey [G-R]'s continuing confirmation of its diluted AMCP-1 ownership, his partners each assumed an increased guarantee liability to the Anne Arundel Economic Development Corporation for the loan, to their detriment. The increase in contingent liability by Honey [G-R]'s partners constitutes prejudice in a material way.

At trial, and for the first time, Kurz stated that he chose not to protest the reduced ownership interest in order to avoid conflict. The Court does not find this to be credible in light of the facts: Kurz admitted that he acted consistent with dilution, did nothing to stop or protest dilution, and filed tax returns year after year, and under oath, confirming dilution. Moreover, as described in detail above, the evidence clearly shows that Kurz benefited from dilution when it came time to guarantee and indemnify AMCP-related debts. Kurz is a highly educated, experienced, and sophisticated businessman and the Court simply does not believe that he would have permitted all who dealt with him to believe that his company's interest was 16.83%, simply to maintain peace. Rather, the Court finds that Kurz's contentions in this lawsuit are an attempt to re-write history to his benefit, and to the detriment of his partners. Therefore, this Court finds that Honey [G-R] is estopped from claiming its ownership stake in AMCP-1 and AMCP-2 is other than what it has previously claimed: 16.83%.

Finally, Honey [G-R] claims that equitable estoppel is not applicable here because the closest Plaintiffs can come to alleging a resulting detriment are the various contingent liabilities that the individuals agreed to divide in proportion of plaintiffs' alleged percentages in AMCP-1. Honey [G-R] argues that the contingent liabilities never came to fruition and therefore, no injury occurred.

The Court notes that no actual injury is required under the doctrine of equitable estoppel. In any event, the Court finds that in assuming a larger proportion of liability for the Project, Plaintiffs have clearly shown that they were, in fact, "misled to

[their] injury and changed [their] position for the worse after having believed and relied on” Honey [G-R]’s representations. *Savonis v. Burke*, 241 Md. 316, 231 (1966). Honey [G-R]’s own case law supports this finding. *See e.g., Exxon Mobile Corp. v. Albright*, 433 Md. 303, 338-340 (2013) (reversing trial court verdicts for Plaintiffs alleging fraud when Plaintiffs demonstrated *no evidence* of any reliance resulting in injury) (emphasis added); *Lusby v. First Nat’l Bank*, 263 Md. 492, 505 (1971) (equitable estoppel did not apply when part alleging estoppel showed *no injury or detrimental reliance*) (emphasis added).

(emphasis in original).

Kurz attempted at trial, and attempts again here, to argue that, because the other partners’ contingent liabilities never came to fruition, they suffered no injury. As was clearly stated by the trial court, however, Holland and Bolduc changed their position in reliance upon Kurz’s acceptance of his dilution. *See Creveling v. Government Employees Ins. Co.*, 376 Md. 72, 102 (2003) (quoting *Cunninghame v. Cunninghame*, 364 Md. 266, 289 (2001) (describing detriment as when someone “who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse...”). Holland and Bolduc accepted a higher risk of loss. The trial court properly concluded that it would be inequitable to allow Kurz to flip his position now that the risk of loss had passed. We, agree and therefore conclude that the trial court did not err in finding that Kurz was equitably estopped.

B. Judicial Estoppel

Honey G-R argues that the trial court disregarded the elements of judicial estoppel in deciding that the doctrine applied. Honey G-R argues that not only was it unclear that

the trial court in the mechanic's lien case actually relied upon Kurz's deposition testimony, it was also unclear that Honey G-R would derive an unfair advantage or that the other AMCP partners would suffer an unfair detriment.

The doctrine of judicial estoppel prevents a litigant from arguing inconsistent positions. *Abrams v. American Tennis Courts, Inc.*, 160 Md. App. 213, 225 (2004).

The doctrine of judicial estoppel provides that a party will not be permitted to occupy inconsistent positions or to take a position in regard to a matter [that] is directly contrary to, or inconsistent with, one previously assumed by him, at least where he had, or was chargeable with, full knowledge of the facts and another will be prejudiced by his action.

Id. When deciding whether judicial estoppel is applicable, there are generally three factors that apply: (1) “whether the party’s later position is clearly inconsistent with its earlier position;” (2) “whether the party succeeded in persuading the court in the earlier matter to accept its position, so that judicial acceptance of the contrary position in the latter matter would create the perception that one of the courts had been misled;” and (3) “whether the party seeking to assert the inconsistent position in the latter matter would derive an unfair advantage, or would impose an unfair detriment on the other party, from being permitted to do so.” *Id.* at 225-226 (internal quotations and citations omitted). These factors, however, are not “inflexible prerequisites.” *Id.* Rather, these factors serve as guidelines and there may well be other considerations that apply in individual cases.

The trial court did not err in finding that judicial estoppel applied here. The trial court accurately and succinctly explained the doctrine of judicial estoppel and then applied

the facts of this case to that doctrine. The trial court addressed the three factors discussed above:

- **Inconsistent Position:** The trial court found that Honey G-R's position in this case was clearly inconsistent with its position in the mechanic's lien case. In his deposition testimony regarding the mechanic's lien, Kurz testified that Honey G-R owned 16.83% of AMCP-1 and AMCP-2.
- **Perception that court misled:** The trial court found that, "it [was] unclear whether Honey [G-R] succeeded in persuading a court to accept its earlier position" but that, "it is clear that judicial acceptance of Honey [G-R]'s position in this proceeding would create a perception that either the first or the second court was misled."
- **Unfair advantage/unfair detriment:** The trial court found that "Honey [G-R]'s ability to assert an inconsistent position would allow it to derive an unfair advantage, and imposes an unfair detriment on the Plaintiffs' ability to protect their rightful ownership interests in AMCP-1."

The trial court considered the inter-creditor agreement executed between the parties, which required indemnification at a level commensurate with their then-ownership interest in AMCP-1, as evidence of the unfair advantage enjoyed by Honey G-R and unfair detriment suffered by the other partners. The trial court also relied on Kurz's acceptance of distributions at a lower percentage. Ultimately, the trial court concluded that Kurz is judicially estopped. We agree.

Despite Kurz's argument that the trial court improperly ignored the factors for judicial estoppel, we conclude that the trial court properly considered each factor with the facts of this specific case. Kurz's position at trial, that Honey G-R's ownership interest was not diluted in AMCP-1, is clearly inconsistent with his earlier acceptance of lower payout amounts and his deposition testimony in the mechanic's lien case. It is irrelevant whether

the trial court in the mechanic's lien case actually heard and accepted Kurz's testimony, the key is that if the trial court in this case allowed Kurz to assert that his interest was undiluted, it would create a perception that one of the courts had been misled. And finally, it would impose an unfair detriment on the other AMCP partners, who bore a higher liability risk in the inter-creditor agreement and in the Guaranty Agreement, to now allow Kurz to flip his position and demand higher payouts.

As the trial court noted, Kurz acted in a matter that was consistent with dilution. He did not protest, did not stop the reduced payouts, and benefited from having a lower liability risk. Now that the risk of the business venture is gone, Kurz wants to take back his testimony in the mechanic's lien case and his representations to the banks and his partners. There was no error in the trial court's decision.

CONCLUSION

The trial court summed up this case:

Honey [G-R] remained silent and did nothing to contest its dilution across the entire project. In fact, when it was to Honey [G-R]'s benefit by limiting its exposure under cross-indemnification and guarantee agreements, or when filing tax returns, Kurz affirmatively represented that Honey [G-R]'s percentage interest corresponded to what all parties believed to be his diluted ownership.

It was only when all of the risk had passed that Honey G-R decided it wanted a greater portion of the reward and attempted to re-write history. We affirm the trial court's judgment.

**JUDGMENT OF THE CIRCUIT COURT
FOR ANNE ARUNDEL COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**