UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2178

September Term, 2013

JACK SPECTOR, *et ux.*

v.

REALTY CAPITAL COMPANY II, L.L.C., *et al*.

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*Zarnoch,
Reed,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Zarnoch, J.

Filed: December 2, 2015

* 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 dispute between members of inter-related business entities comes to us from the Circuit Court for Montgomery County. Appellants/Cross-Appellees Jack Spector ("Spector") and Roslyn Spector ("Roslyn") ("the Spectors") owned, as tenants by the entirety, a majority interest in Appellees/Cross-Appellants Realty Capital Company II, L.L.C. ("RCC II") and RCC Asset Management Company, L.L.C. ("RCCAMC") ("the Entities"). Appellee/Cross-Appellant Elliot Liffman ("Liffman") owned a minority interest in both RCC II and RCCAMC.

In February 2003, Spector and Liffman created RCC II, a private equity commercial real estate investment firm that participated in certain real estate ventures. They also created RCCAMC in January 2007 to provide management services to RCC II's real estate ventures. The parties entered into separate operating agreements with identical terms for both RCC II and RCCAMC. Spector was President, Liffman was Vice President, and both were on the management committees of each entity.

Spector was an experienced real estate developer with an extensive knowledge of Real Estate Investment Trusts (REITs)[1] and other real estate investment vehicles. At some point prior to 2005, however, Spector incurred more than $750,000 in tax liability to the Internal Revenue Service. The substance of this appeal from the circuit court concerns what happened afterwards.

In September 2005, Liffman discovered that Spector "had been paying himself a

[1] Maryland's REIT law is set forth in Maryland Code (1975, 2014 Repl. Vol.), Corporations & Associations Article ("CA") § 8-101 *et seq.*

lot more than he should have been paying himself" out of RCC II's accounts (the "Cash Transactions") and that Spector was using the company American Express credit card more than expected (the "Credit Card Transactions"). Liffman drafted a memorandum to him expressing his concerns and recommending certain actions. Spector claims to have disputed these allegations orally and in writing. In a meeting with company counsel Joel Silver on October 3, 2005, Liffman drafted a handwritten document reflecting the parties' discussions.

Liffman later testified that in October 2007, he discovered that Spector "had authorized the company to take an advance from its line of credit in the amount of $150,000," wrote himself a check in that amount, deposited it in his personal account, and then, recorded the transaction in RCC II's books and records (the "Line of Credit Transaction"). The parties met to discuss the dispute. Appellees contend that Spector "apologized, admitted it was wrong, said he wouldn't do it again, and said he would pay it back as soon as he could, and explained why he did it, which was because he needed money."

In 2010, Liffman discovered that Spector "had written a series of checks . . . drawn on [an] account that RCC maintained . . . for various ventures." Liffman also found that "these were checks that were in the main made payable to RCC II [or RCCAMC]. They were recorded on the books of the respective ventures as being generally for consulting fees." Spector wrote these checks from the ventures' accounts, endorsed them to himself, and deposited them into his personal Eagle Bank checking

account (the "Check-Writing Transactions"). On January 29, 2010, the parties met to discuss the Check-Writing Transactions and Spector apologized, explaining, "I just needed the money."

On February 1, 2010, Liffman received an unsigned email that appeared to have been written by Roslyn Spector:

> First of all, if it weren't for Jack, you wouldn't have a job or the knowledge of the business. I am sure that you do your share, but nobody is indispensable. We are having some very hard times now. We are not as fortunate as you to have wealthy relatives to help us out in times of need. For you to disrespect Jack the way you do is sickening. He is not taking anything away from you, nor would he ever. You get what you deserve. Yes, maybe he should have told you first, but the manner in which you treated him in the beginning was out of line, especially to someone who is much older than you. He, of all people, is not a criminal and to treat someone like that is horrific. There are people that you personally know that would fend for themselves first and not care about anybody but themselves. You forgot how much of the company he gave to you at first. NOBODY WOULD EVER DO THAT. PEOPLE TOLD JACK HE WAS CRAZY FOR DOING THAT!! How quickly we forget. I think you should reflect on where you have come since the onset of the company. You may be book smart, but you need to learn how to deal with people and be more considerate to those who have helped you. You can't learn that in books. This is also a business dealing with people, not just dealing with a computer all day. If I were you, I would really think about all the progress the company has made and how Jack played and plays a major part. Frankly, my one and only concern is my husband.

Liffman forwarded the email to Spector, who responded, "I'm sorry about that. Listen, you know what she's like."

Liffman subsequently secured a third-party audit, and also conducted a personal audit, to investigate Spector's alleged misuse of company funds. He reviewed the Cash Transactions, the Credit Card Transactions from February 13, 2003 to March 22, 2010,

the Line of Credit Transaction, and the Check-Writing Transaction. Liffman stated that he determined whether a Credit Card Transaction was personal in nature based "on the date, the location, and just the general context." During this period in 2010, Liffman did not sign Spector's "monthly check" for officer compensation. Liffman explained this denial to Spector, saying: "You owe the company a ton of money. I'm not paying you." In February 2010, Spector received his final officer compensation check of $14,583; Liffman received $10,416 at that time.

Liffman, Silver, and Spillman Short, an attorney for RCCII, held a meeting on April 27, 2010 with Spector in which they summarized their findings. Spector denied the allegations that he had spent funds without authorization and he "declared war." Over the next few weeks, Liffman stated that he received a call and a subsequent voicemail from Roslyn, both "filled with general profanities."

In September 2010, Liffman requested that Spector stop initiating Automated Clearing House transactions ("ACH Transactions") from RCC II's bank accounts. Liffman testified that Spector had initiated these ACH Transactions to pay his RCC II credit card bills, which he had incurred for allegedly "personal" charges.

On November 19, 2010, Appellees filed a Complaint against the Spectors in the circuit court, which was followed by the filing of an Amended Verified Complaint seeking a preliminary and permanent injunction, a declaratory judgment, and damages. The ten-count complaint alleged constructive fraud, civil conspiracy, and breach of operating agreement as related to both RCC II and RCCAMC. The complaint also

sought declarative and injunctive relief removing Spector from his management position and stripping him of his rights under the operating agreement. Effective January 1, 2011, Spector resigned from the Management Committee.

On January 10, 2011, Circuit Judge Ronald B. Rubin granted Appellees a preliminary injunction, which, among other things, enjoined Spector from taking part in the management of the entities; appointed his son, Adam Spector, as a member of the committee in Spector's place; and appointed Theodore P. Stein as Special Fiscal Agent. After the injunction was entered, the court noted that "conflicts between Spector and Liffman continued even after Stein was appointed." Among other things, the court found that Adam Spector lacked the business acumen to make decisions on the Management Committee, and that he had sent emails written by Jack Spector and "passed them off as his own." Additionally, the court found that Spector "attempted to divert company opportunities and leverage business opportunities for his own personal advantage, even after the [c]ourt entered the preliminary injunction."

On June 16, 2011, the court granted Appellees' motion for a modified preliminary injunction.[2] This injunction prohibited Spector from "taking any part in the management of RCCII and RCCAMC in any capacity or for any purpose," including authorizing debts or writing checks on behalf of the entities. The injunction also "restrained and enjoined" the Spectors from having any contact with Liffman or any of his family members.

[2] This motion modified the preliminary injunction that was entered on January 10, 2011.

Furthermore, the court appointed Joel Silver and Spillman Short to the Entities management committees of the entities, and removed Stein from his role as Special Fiscal Agent.

On December 29, 2011, Spector was indicted on eight counts of felony theft, Md. Code (2002, 2012 Repl. Vol.), Criminal Law Article ("CL") § 7-104, and one count of embezzlement, CL § § 7-113, for the same actions underlying this case. On July 20, 2012, Spector pled guilty in the circuit court to one count of felony theft of $108,500.00 from the Ventures. The facts upon which the plea was based were the same as those offered by the entities in support of their constructive fraud claim and, in particular, the "Check Writing Transactions" allegations. On October 17, 2012, the court sentenced Spector to 12 years of incarceration, with all but 18 months suspended, conditioned on 4 years of supervised probation, with a specific prohibition against participating in any business venture similar to those he had undertaken with Appellees.

On the civil front, after a three-day trial in July 2013, Judge Rubin issued an oral ruling on the claims of the amended complaint and counter-claim, explaining that all of the court's findings were "by a preponderance of the evidence except findings with respect to fraud and findings with respect to punitive damages. Those findings are by clear and convincing evidence." The court found Spector liable for fraud, found both he and his wife liable for breach of contract, and found a conspiracy between the Spectors to commit fraud. Spector was found to have acted with malice, and as a result, the Appellees were awarded punitive damages.

Among other findings by the court were that in 2007, Spector had acknowledged his debt to Appellees and had agreed to repay it, thereby tolling the statute of limitations; that Spector's attempt to characterize his misappropriations as "consulting" or "development" fees "was a sham designed to put money in . . . Spector's pocket"; and that "he was going to blame everybody but himself and try to hide behind the notion that it was authorized when he knew that it was false"; and that because Spector did not "provide his own account of the charges," the court drew an adverse inference regarding his misconduct.

A critical finding of the court was the reason Spector needed large sums of money. In particular, the trial judge noted:

> I find that the genesis of most of the problems here relate to a federal tax liability that Mr. Spector had from prior business dealings. This tax liability which was assessed of some $750,000, I find drove a lot of the behavior and conduct here. Not all, but drove it in material part. Mr. Spector, I find, was pretty desperate to get money to pay the IRS and prevent them from taking aggressive collection activities. I mention this because it is germane to my findings about motive and intent.

As to the conspiracy count, the court said:

> I find there was, inferentially, an agreement between Mr. and Mrs. Spector to loot the two LLCs and the ventures. Not only was Mrs. Spector a direct beneficiary in several ways, in addition to the American Express charges, she was the beneficiary of the $150,000 because it was used to pay her joint federal tax liability. So it was clearly in many ways for her benefit. I also find that she, at least on three occasions, ran interference for Mr. Spector, trying to either persuade or bully Mr. Liffman into backing off. To me, this is not simply a spouse being concerned about allegations made against another spouse. She was trying to preclude or pretermit further investigation, because she knew what it would disclose and what would be uncovered and she wanted to hide it. So I do find there is legally sufficient evidence of a conspiracy. I do find there is legally sufficient evidence that

> Mrs. Spector took a number—at least three affirmative acts in furtherance of the conspiracy that [were] not only in furtherance of the conspiracy, but it was designed to prevent its full discovery and/or delay the non-defalcating partners in figuring out what was going on under Mr. Spector's tutelage.

On October 28, 2013, the court entered both a Declaratory Judgment and a Permanent Injunction. The court declared that the Spectors "as a result of their fraud, breach of contracts and conspiracy,"

> have lost all noneconomic and contractual interests and rights associated with their membership interests in . . . RCC II . . . and RCCAMC . . ., *including, but not limited to*: (a) their right under Section 6.1 of the RCC II and RCCAMC Operating Agreements to nominate and elect a new member to the Management Committees to fill any vacancy that may arise at any time from the date of this Order; (b) their right to receive lists of Members' names and addresses as provided for under Section 12.2 of the Operating Agreements; and (c) their right to access all records of RCC II and RCCAMC as provided for under Section 12.3 of the Operating Agreements . . . . [T]he Spectors have no membership rights except the right to receive future distributions, if any, as shall be determined by the Management Committee.
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> . . . the Spectors have no membership rights except the right to receive future distributions, if any, as shall be determined by the Management Committee.[3]

(Emphasis added). The judgment also removed Spector from the Management Committee and his officer roles in both entities, and eliminated the Spectors' membership rights. Lastly, the Entities were granted a monetary judgment of $368,397.90, plus pre-judgment interest totaling $109,796.56, plus post judgment interests and costs. Although

[3] At the July 2013 hearing, the circuit court initially said it was not persuaded that it had the power to strip the Spectors of their membership interests.

the trial judge preliminarily indicated that attorney's fees might be awarded, their request for attorney's fees was denied.

The Spectors appealed, and Appellees cross-appealed because of the rejection of the attorney's fee request. Additional facts will be set forth below.

QUESTIONS PRESENTED

The Spectors ask:

1. Whether the trial court erred in awarding certain declaratory judgments;
2. Whether the trial court erred by entering a judgment against Ms. Spector, under a civil conspiracy theory;
3. Whether the trial court correctly determined that the Spectors were liable for constructive fraud;[4]
4. Whether the trial court erred by finding that the statute of limitations for constructive fraud had been tolled by Mr. Spector's acknowledgment of a debt;
5. Whether the trial court erred by failing to award appellants a set-off or recoupment for Mr. Spector's unpaid officer compensation;
6. Whether the court erred by awarding a double recovery for automated clearing house (ACH) transactions.

Appellees/Cross-Appellants ask:

[4] We have consolidated questions three and four originally posed by the Spectors. These are:

1. Whether the trial court applied the incorrect evidentiary standard in determining that Mr. Spector committed constructive fraud in his use of company credit cards
2. Whether the trial court erred by finding that appellees presented sufficient evidence of constructive fraud in Mr. Spector's the [sic] use of company credit cards

1. Did the Trial Court err when it concluded that it had no legal authority to grant Cross-Appellant Elliot Liffman, as a prevailing party in the derivative action case, his attorney's fees and expenses?

DISCUSSION

In an appeal of a bench trial, an appellate court will not disturb a circuit court's findings of fact unless they are clearly erroneous, giving due regard to the opportunity of the trial court to judge the credibility of witnesses. *Bontempo v. Lare*, 444 Md. 344, 363 (2015). A trial court's decision whether to award particular equitable relief based on its fact findings and the applicable legal standard is reviewed for abuse of discretion. *Id.* And purely legal issues, such as the interpretation of a statute, are reviewed *de novo*. *Maryland-Nat'l Capital Park & Planning Comm'n v. Anderson*, 395 Md. 172, 181 (2006) (Citations omitted).

I. Removal of the Spectors' Interest in the Entities

The Spectors claim that the circuit court erred in entering a declaratory judgment/injunction that removed the Spectors of their non-economic interests in the Entities.[5] The Spectors argue that they never consented to Spector's removal from the Management Committee in January 2011, and that the court lacked the power to remove him. Furthermore, they claim that the court should not have removed his rights to access company financial records under Section 12.1 of the Operating Agreement as this contradicts the court's earlier view that the Spectors would maintain this right. Appellees

[5] Although the Spectors take aim at the declaratory judgment, for the sake of clarity, we will address his challenge as also attacking the injunction, which carries greater force.

respond that the court had the authority to modify the original preliminary injunction under both the general law regarding injunctions and the specific grant of authority contained in the Maryland Limited Liability Company Act.

The purpose of "a preliminary injunction is to preserve the status quo between the parties, pending a hearing on the merits." *Maloof v. State, Dep't of Env't*, 136 Md. App. 682, 692 (2001). Fundamentally, injunctive "relief is designed to preserve the status quo from future acts so as not to undermine the final disposition of the case on the merits." *Ehrlich v. Perez,* 394 Md. 691, 735 (2006) (Citation omitted). A preliminary injunction is designed to maintain the "last actual, peaceable, noncontested status which preceded the pending controversy," until the parties' rights and obligations can be adjudicated at trial. *Maloof*, 136 Md. App. at 693.

Courts have the power to issue injunctions under Rule 15-502(b) "at any stage of the action and at the instance of any party or on its own initiative . . . as justice may require." A court has the power to modify a preliminary injunction, under Rule 15-502(f). Because the difference "between a preliminary injunction and an injunction turns on 'whether there has been a determination on the merits of the claim,' [once] that determination has been made, then the injunction may be final." *Maloof*, 136 Md. App. at 693. And although courts do not need express statutory authority to issue an injunction, some statutes specifically provide this authority. *See, e.g.*, *id.* at 694. The Spectors have not argued that the preliminary injunction was unwarranted, nor did they appeal the ruling when it was issued. Instead, they contend that an injunction should not

have been granted because the court lacked the power to do so. We disagree. CA § 4A-402(d) of the Maryland Limited Liability Company Act (the LLC Statute), provides that "[a] court may enforce an operating agreement by injunction or by granting such other relief which the court in its discretion determines to be fair and appropriate in the circumstances." The Spectors have not cited any authority that would prevent the application of this provision to the facts of this case. Accordingly, we hold that the court had the authority under the LLC Statute to issue a preliminary and permanent injunction.

As discussed *infra*, the evidence clearly and convincingly showed that Spector had acted against the financial interests of the Entities, and that he persisted in this course of conduct after being confronted by Liffman and after the Revised Operating Agreement went into effect. Before issuing the preliminary injunction, the circuit court found that Spector's conduct was not in the best interests of the Entities:

> [W]hat I heard from Mr. Spector through his counsel is "we need to monetize things to put money in my pocket," without any particular regard one way or the other whether now it would or wouldn't be a good time, what the other investors want to do . . . There are a lot of factors that go into turning something into cash. And the only factor I find Mr. Spector cares about is putting cash in his pocket, which is not acceptable in my view for a fiduciary.

Under the circumstances, the court had sufficient reason to enter a preliminary injunction against Spector. As Appellees argue, the status quo, which "was intended to be preserved in the initial preliminary injunction, was the period of time in which the entities were being operated lawfully and in accordance with the managers' fiduciary duties - sometime before 2005 when Liffman first discovered that Jack Spector had been

misappropriating money from the entities."[6] For the same reasons, we hold that the court did not abuse its discretion in ordering a permanent injunction against Spector removing him from the management of the Entities.

We are also unpersuaded by the Spectors' argument that the court incorrectly stripped them of their noneconomic rights. The declaratory judgment/injunction specifically addressed "all noneconomic and contractual interests and rights associated with their membership interests." It then specifically enumerated "(b) their right to receive lists of Members' names and addresses as provided for under Section 12.2 of the Operating Agreements; and (c) their right to access all records of RCC II and RCCAMC as provided for under Section 12.3 of the Operating Agreements." Section 12.1, which was not mentioned in the judgment, applies to "Reports," *i.e.*, "financial statements prepared by the Company regarding the Company, including a balance sheet, an income statement," as well as information necessary for filing federal income tax returns. The court specifically noted at the hearing on October 17, 2013, "[b]ut I'm allowing him 12.1, which I think is fair under the circumstances."

We disagree with the Spectors' contention that the declaratory judgment/injunction removed the right to receive reports under Section 12.1. It did not strip them of their *economic* interest in the Entities; it would be illogical to conclude that

[6] The injunction removed Adam Spector from the Management Committee as well, because the court found he was acting solely as Spector's "mouthpiece" and acting pursuant to his father's wishes. The Spectors have not contested this finding.

they could retain that interest without receiving any statement as to the financial performance of that investment. But the court very carefully and specifically prohibited the Spectors from receiving information about other members and from accessing company records. Given Spector's history of meddling in the affairs of the Entities and his attempts to exercise control through others such as his son, we see no abuse of discretion in the court's attempt to create as much distance as possible between Spector and the Entities. For that reason, we will affirm the court's decision to enter the declaratory judgment, with the understanding that the Spectors are still entitled to the rights set forth under Section 12.1.

II. Civil Conspiracy

The Spectors take aim at the circuit court's finding of a conspiracy between the couple, particularly attacking the evidence of Roslyn's role in the conspiracy to defraud. We reject these contentions.

A. Clear and Convincing Evidence

Civil conspiracy is "a combination of two or more persons by an agreement or understanding to accomplish an unlawful act or to use unlawful means to accomplish an unlawful act not in itself illegal, with the further requirement that the act or means employed must result in damages to the plaintiff." *Shenker v. Laureate Educ., Inc.*, 411 Md. 317, 351-52 (2009). The plaintiff "must also prove the commission of an overt act, in furtherance of the agreement, that caused the plaintiff to suffer actual injury." *Id.* at 25. The tort of civil conspiracy "lies in the act causing the harm; the agreement to

commit the act is not actionable on its own but rather is in the nature of an aggravating factor." *Id.* To find a person liable for civil conspiracy, there must be an underlying tortious act. *Alleco Inc. v. Harry & Jeanette Weinberg Found., Inc.*, 340 Md. 176, 189 (1995) (Quotation omitted) ("[c]onspiracy is not a separate tort capable of independently sustaining an award of damages in the absence of other tortious injury to the plaintiff").

"A civil conspiracy to defraud is the confederation of two or more persons to cheat and defraud, when the design has actually been executed, thus harming the victim." *Hoffman v. Stamper*, 155 Md. App. 247, 291 (2004) (*Hoffman I*) *aff'd in part, rev'd in part and remanded*, *Hoffman v. Stamper*, 385 Md. 1 (2005) (*Hoffman II*) (Quotation omitted). A defendant who has entered into an agreement to defraud a plaintiff resulting in actual damage is liable to the defrauded plaintiff "irrespective of the degree of [that defendant's] activity in the fraudulent transaction or whether he shared in the profits of the scheme." *Id.* (Citation omitted).

Conspiratorial agreements need not be formalized, and their existence can be proved by circumstantial evidence: "[I]t is enough to show that the conspirators came to a tacit understanding about the unlawful purpose; it is not necessary to show that they reached a formal agreement." *Hoffman I*, 155 Md. App. at 290. Such a "tacit understanding" may be shown "by inferences drawn from the nature of the acts complained of, the individual and collective interests of the alleged conspirators, the situation and relations of the parties, their motives and all surrounding circumstances preceding and attending the culmination of the common design." *Id.*

The Spectors argue that the circuit court erred because it used a "preponderance of the evidence" standard to prove that the Spectors had formed a conspiratorial agreement. They argue that one can only be found to have entered into a civil conspiracy to commit fraud by "clear and convincing evidence." Appellees respond that there was no requirement to prove a conspiracy by direct evidence and that substantial evidence was submitted to show the agreement to divert money from the Entities.

In *Hoffman I*, we held that "[b]ecause fraud must be proven by clear and convincing evidence, a civil conspiracy to defraud likewise must be proven by that standard." 155 Md. App. at 291. On appeal, the Court of Appeals did not reverse this holding, and at most reserved the issue.[7] *Hoffman II*, 385 Md. at 16.

We see no reason to depart from our holding in *Hoffman I*, particularly since it is in accord with the law generally. *See* 54 Causes of Action 2d 603 (2012) ("When a civil conspiracy claim necessarily requires the plaintiff to prove fraud, the elements must also be proven by clear and convincing evidence."); *see also Master-Halco, Inc. v. Scillia*

[7] The Court in *Hoffman II* stated:

> Hoffman is correct in stating that fraud must be proved by clear and convincing evidence. *VF Corp. v. Wrexham Aviation,* 350 Md. 693, 704, 715 A.2d 188, 193 (1998). It is not so clear whether that standard applies to the conspiracy count. In *Daugherty v. Kessler*, 264 Md. 281, 292, 286 A.2d 95, 101 (1972), we held that "[i]n a civil case not involving a criminal act, conspiracy may be shown by a preponderance of the evidence." *Compare,* however, *Rent-A-Car Co. v. Globe & Rutgers Fire Ins. Co.*, 161 Md. 249, 267-68, 156 A. 847, 855 (1931), which could be read either consistently or inconsistently with that holding. In this case, it matters not.

385 Md. at 16.

Dowling & Natarelli, LLC, 739 F. Supp. 2d 109, 115 (D. Conn. 2010); *McClure v. Owens Corning Fiberglas Corp.*, 720 N.E.2d 242, 258 (Ill. 1999); *N. Texas Prod. Credit Ass'n v. McCurtain Cnty. Nat. Bank*, 222 F.3d 800, 815 (10th Cir. 2000); *John Knox Vill. v. Fortis Const. Co., LLC*, 449 S.W.3d 68, 80 (Mo. Ct. App. 2014)).

From our examination of the record, we believe that the circuit court applied the clear and convincing standard to the conspiracy claim here because fraud was the underlying wrongful act. Moreover, the court did not abuse its discretion in applying that standard to the facts in this case—facts that have not been shown to be clearly erroneous.

A major component of the Spectors' challenge to the circuit court's finding of a conspiracy between the couple is that the agreement to accomplish the unlawful act in furtherance of the conspiracy must occur "before" the act itself is committed. This is a misstatement of Maryland law as well as the law generally. *See Rent-a-Car Co. v. Globe & Rutgers Fire Ins. Co.*, 161 Md. 249, 261 (1931) ("[N]or is it necessary that any particular order be followed in adducing such proof, it being sufficient if the connection and inculpating significance of the facts appear from the whole evidence in whatever order it may be given"); *Downing v. United States*, 348 F.2d 594, 600 (5th Cir. 1965) ("The very nature of [conspiracy] cases requires that broad discretion be vested in the trial court with respect to the order of proof"); 16 Am. Jur. 2d Conspiracy § 45 (2009) ("The order of proof in this context is largely within the discretion of the trial court").

B. Roslyn's Liability for Conspiracy

The court considered Roslyn liable based on her receipt of direct benefits and

interference with Liffman's investigation. First, the court noted that Roslyn was a "direct beneficiary in several ways." The court determined that the Credit Card Transactions were used to purchase luxury items for her, such as jewelry and women's clothing, and that the Line of Credit Transaction "was used to pay her joint federal tax liability."

Second, the court found that Roslyn "at least on three occasions, ran interference for Mr. Spector, trying to either persuade or bully Mr. Liffman into backing off." The court reasoned that this was "not simply a spouse being concerned about allegations" against Spector, but rather was motivated by her fear of what Liffman's investigation "would disclose and what would be uncovered [so] she wanted to hide it." The court determined that her email, voicemail, and telephone call were "three affirmative acts in furtherance of the conspiracy . . . designed to prevent its full discovery and/or delay the non-defalcating partners in figuring out what was going on."

The timing of Roslyn's interactions strongly suggests that she shared a common desire with Spector to have Liffman cease his investigations. Crucially, Roslyn was a member of the LLCs. Rather than respond to the allegations of significant financial improprieties, she demonstrated a pattern of responding to Liffman's warnings with angry tirades. Roslyn held a significant financial stake in a company (The Spectors owned 54% of the Entities as tenants by the entirety). After being told that the company was being defrauded, she responded not by confronting the alleged wrongdoer, but the person who alerted her of these improprieties. The more than reasonable inference to be

drawn from her actions is that she was trying to prevent Liffman from investigating further with respect to monetary diversions that benefited both spouses.

The circuit judge in essence concluded that Roslyn was not a mere innocent spouse. *Cf. In re Capasso*, 225 B.R. 573, 578-89 (S.D.N.Y. 1998). She was part of the business, knew where the funds were coming from, benefited from the expenditures, and immediately contacted Spector's accuser when his diversions were challenged as improper. In our view, the circuit court's finding that Roslyn had tacitly agreed to further Spector's fraudulent acts was supported by clear and convincing evidence and was not clearly erroneous.

III. Constructive Fraud

Spector contends that circuit court erred (1) by drawing a negative inference with respect to the Credit Card Transactions based on his refusal to testify; (2) by utilizing a lesser standard of proof than required to prove constructive fraud; and (3) by finding evidence of constructive fraud without meeting the clear and convincing evidence standard. Appellees argue that a court may draw such a negative inference, without giving notice. They add that the court did apply a clear and convincing evidentiary standard to constructive fraud, and that the court applied this standard correctly.

The circuit court found:

> [T]he fact of damage has been proven with reasonable certainty and that the extent or amount thereof may, in this case, be left to reasonable inference. . . . Mr. Spector had the opportunity during the trial to help me understand, a least illustratively or in a representational fashion, either why Mr. Liffman was wrong or provide his own account of the charges. He elected not to do so, and as I mentioned under [*Dileo v. Nugent* 88 Md. App. 59, 71 (1991)],

> I am entitled to and I do draw an adverse inference because . . . he elected not to share that with us . . . . So I am very much persuaded that Mr. Liffman's work, subject to the statute of limitations adjustment, has been proved by a preponderance of the credible evidence. And that goes for the cash, the credit card charges, the monies taken from the ventures, [and] the ACH transactions.

A. The Adverse Inference

We explained in *DiLeo* that a party in a civil case who refuses to testify when it would be "natural under the circumstances for a party to speak" risks the fact-finder inferring "that the testimony not produced would have been unfavorable." 88 Md. App. at 69. At the outset, we note that the Spectors appear to concede this issue during closing argument:

> The Court: Let me put it this way. Why am I not permitted to draw a negative inference?
>
> [Spector's counsel]: Well, your honor, I mean, you certainly can do that.

In any event, we find no merit to this contention.

In *DiLeo*, appellee alleged that appellant, her therapist, had given her drugs and had sexual relations with her during the time she was seeking treatment. *Id.* at 65-68. Appellant did not testify at trial, but on appeal, argued that the court should not have instructed the jury that they could draw an adverse inference from his refusal to testify. *Id.* at 68. We reasoned:

> When a party in a civil case refuses to take the stand to testify as to facts peculiarly within his knowledge, the trial court or jury may infer that the testimony not produced would have been unfavorable. The unfavorable inference applies, however, *only where it would be natural under the circumstances* for a party to speak, call witnesses or present evidence.

> The events which transpired at the psychotherapy sessions are clearly within appellant's peculiar knowledge. He was in the *unique position of being the only other person with any first-hand knowledge* of the therapy sessions. In light of the accusations made and the aspersions cast by appellee, we believe it would have been natural for the appellant to offer his account of the therapy sessions.

Id. at 69-70 (Emphasis added) (Citation omitted). The issue here is whether the Credit Card Transactions were for personal or business expenses. Through Liffman's efforts, evidence was introduced showing spending on, among other things, jewelry and travel. Under these circumstances, it would have been natural for Spector to explain why these expenditures were connected with a business purpose, especially since he, as the cardholder, "was in the unique position of being the only person with any first-hand knowledge" of the purpose and context of those expenditures. *See id.* at 70. We see no error in the court's adverse inference that the money was spent inappropriately under these circumstances

The Spectors cite *Bereano v. State Ethics Comm'n*, 403 Md. 716 (2008) for the proposition that the court should have given Spector notice that it would draw an adverse inference. That case involved a negative inference taken by the State Ethics Commission against a defendant lobbyist because he did not call a particular non-party witness. *Id.* at 739. It is, however, clear from *DiLeo* that an adverse inference applies "[w]hen a *party* in a civil case refuses to take the stand . . ." 88 Md. App. at 71. Obviously, Spector was a party. Thus, it was not error for the circuit court to draw an adverse inference when he refused to testify about the expenditures.

B. Evidence of Constructive Fraud

On appeal, we "must consider evidence produced at the trial in a light most favorable to the prevailing party and if substantial evidence was presented to support the trial court's determination, it is not clearly erroneous and cannot be disturbed." *State Sec. Check Cashing, Inc. v. Am. Gen. Fin. Servs. (DE)*, 409 Md. 81, 110 (2009) (Quotation and citations omitted). "[T]he trial court is not only the judge of a witness's credibility but also of the weight to be attached to the evidence." *Id.*

The Spectors argue the court incorrectly applied a preponderance of the evidence standard to the claims of constructive fraud. In particular, they claim that

> Appellees presented no direct evidence at trial to support their claims with respect to the alleged personal credit card charges. They did not produce any individual credit card receipts. They also failed to offer a witness with *actual* knowledge to corroborate the personal nature of the charges. Despite calling Mr. Spector as a witness in their case-in-chief, Appellees never asked Mr. Spector about any of the credit card purchases. . . . Instead, Appellees based their entire claim on circumstantial evidence, inference, and *assumptions* made by Mr. Liffman in his review of credit card statements.

Appellees counter that the court specifically noted "All of my findings are by a preponderance of the evidence except findings with respect to fraud and findings with respect to punitive damages. Those findings are by clear and convincing evidence."

The court found that the Spectors had committed constructive fraud by clear and convincing evidence: "I find, that at the time he either made the charges on American Express or took cash loans or money from the ventures, he knew he wasn't entitled to it

in the meantime, and I find that he only intended to repay enough to keep the hounds off the trail. I find that he never intended to pay all of these debts."

Liffman compiled an extensive list of the Credit Card Transactions, detailed in over 800 pages of the Record, which he summarized and presented to the court twice; once for the Modified Preliminary Injunction hearing in June 2011, and again at the trial in July 2013. The evidence was clear and convincing, *i.e.*, "'clear' in the sense that it is certain, plain to the understanding, and unambiguous and 'convincing' in the sense that it is so reasonable and persuasive as to cause one to believe it." *See Mathis v. Hargrove*, 166 Md. App. 286, 312 (2005). The Entities claim, and the Spectors do not rebut, that the charges were for: "thousands of dollars for jewelry; payments to the University of Florida where their son went to college; airplane tickets for family members; hotels in Florida (near the University of Florida); restaurants in Italy; purchases from Nordstrom and Neiman Marcus; Borgata Casino & Spa; Ocean Club Hotel in Nassau, Bahamas; Lifetime Fitness; and restaurants and hotels in Aruba."

Although the Spectors maintained at both the hearings that the spending was for legitimate business expenses or simply were paid back soon after, they never offered any proof to support either assertion. They also claim that Liffman, while being cross-examined, was unable to prove that *he* knew the specifics of these expenditures. However, we accept the court's conclusion that spending on jewelry, clothing, casinos, hotels, and a college education are not, without any valid explanation, connected to the operation of a real estate investment fund.

In light of the voluminous expenditures which have seemingly no connection to the operation of a real estate company, Spector's failure to provide any rationale for the spending, and the court's thorough review of the evidence and the witnesses' testimony, we find no error in the court's finding of fraud.

C. Proof of Damages

The Court of Appeals explained in *Hoffman II* that damages stemming from fraud do not need to be established by clear and convincing evidence.

> What must be proved by that standard is that *some* compensable injury arose from the deceit, because *a* compensable injury arising by reason of the fraud is an element of the tort. We have never held, however, that the *measure* of the damages required to compensate for that injury must be proved by clear and convincing evidence. Indeed, in *Empire Realty Co. v. Fleisher,* 269 Md. 278, 284 (1973), we drew a distinction between liability for damages, on the one hand, and the measure of those damages, on the other, noting that, as to the latter, though not the former, Maryland applies "the flexible approach to damages for fraud and deceit."

385 Md. 1 at 41. Therefore, although the court had to find that a misrepresentation occurred by clear and convincing evidence, the amount of damages needed only to be shown with "sufficient reasonable certainty." *See David Sloane, Inc. v. Stanley G. House & Associates Inc.*, 311 Md. 36 (1987). As the Court of Appeals explained:

> (a) [I]f the fact of damage is proven with certainty, the extent or the amount thereof may be left to reasonable inference; (b) where a defendant's wrong has caused the difficulty of proving damage, he cannot complain of the resulting uncertainty; (c) mere difficulty in ascertaining the amount of damage is not fatal; (d) mathematical precision in fixing the exact amount is not required; (e) it is sufficient if the best evidence of the damage which is available is produced; and (f) the plaintiff is entitled to recover the value of his contract as measured by the value of his profits.

Id. (Quotation omitted). Notably, the court observed that Spector had contributed to the difficulty in ascertaining damages; for instance, he did not keep records of his spending to show why it was business related, and did not provide evidence of what business purpose it served. *See Zachair, Ltd. v. Driggs*, 135 Md. App. 403, 431 (2000) (Quotation omitted) ("[D]espite repeated requests to do so, neither [defendant] ever turned over any mining records that would have specified the types of materials that were taken, and . . . 'where a defendant's wrong has caused the difficulty of proving damage, he cannot complain of the resulting uncertainty.'")

Despite the extent of the Credit Card Transactions, Spector provided no evidence of their purpose. The court was not required to establish with "mathematical precision" the amount of damages having already conclusively determined that expenditures on Spector's son's college education, jewelry, and casinos, among other things, was not authorized and therefore fraudulent. The court credited Liffman's analysis of the Credit Card Transactions and believed his statement that the expenditures were not for a business purpose. The court stated, "I find here where a defendant's wrong has caused the difficulty in proving damage, he cannot complain of the resulting uncertainty" in proving damages. Despite this, Liffman provided a detailed explanation of the spending, and upon which the court relied. Accordingly, we affirm the court's finding that Spector is liable for constructive fraud.

IV. Statute of Limitations

Although Appellees sought damages for the Cash Transactions and American Express Credit Card Transactions dating back as early as 2003, the court found that the statute of limitations barred recovery for some of these damages. Spector characterizes the court's decision as one to "rule[] that the statute of limitations was tolled based on an alleged debt acknowledgement," *i.e.*, Spector's promise to repay to Appellees the sums he had wrongfully taken. Spector argues that a debt acknowledgement can only toll the statute of limitations to revive a contract-based remedy; therefore, the limitations period should have continued to run and limit the damages.

The Entities characterize the court's decision differently. In their view, the Spectors "are confused" because the court in fact tolled the statute of limitations based on Spector's acknowledgement of debts with respect to the 2007 Line of Credit Transactions, and the 2010 discovery of the (Eagle Bank) Check-Writing Transactions. Applying a "continuing harm theory," the court found that "every one of Spector's fiduciary breaches, including each and every one of the personal charges made through the American Express Payments Scheme and the Ventures American Express Payments Scheme after January 1, 2007, extended the period of limitations." The Entities rely on *MacBride v. Pishvaian*, 402 Md. 572 (2007), for the proposition that "violations that are continuing in nature are not barred by the statute of limitations merely because one or more of them occurred earlier in time." *Id.* at 584.

We agree with Appellees. Maryland Code (1974, 2013 Repl. Vol.), Courts &

Judicial Proceedings § 5-101 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." *Frederick Rd. Ltd. P'ship v. Brown & Sturm*, 360 Md. 76, 94 (2000).

The question of when a cause of action accrues "is left to judicial determination. This determination may be based solely on law, solely on fact, or on a combination of law and fact, and is reached after careful consideration of the purpose of the statute and the facts to which it is applied." *Id.* at 95. The Court of Appeals has adopted the "discovery rule," which "tolls the accrual of the limitations period until the time the plaintiff discovers, or through the exercise of due diligence, should have discovered, the injury. Thus, before an action is said to have accrued, a plaintiff must have notice of the nature and cause of his or her injury." *Id.* at 95-96.

In *O'Hara v. Kovens*, 305 Md. 280 (1986), the Court of Appeals made clear:

> whether or not the plaintiff's failure to discover his cause of action was due to failure on his part to use due diligence, or to the fact that defendant so concealed the wrong that plaintiff was unable to discover it by the exercise of due diligence, is ordinarily a question of fact for the jury.

Id. at 294-295 (Citations and internal quotations omitted).

Maryland recognizes a "continuing harm" doctrine, which tolls the statute of limitations in cases where there are continuing violations. *Litz v. Maryland Dep't of Env't*, 434 Md. 623, 646 (2013).

> The purpose of the continuing harm doctrine is to avoid punishing a plaintiff "because one or more [violations] occurred earlier in time" . . . when such violations "are continuing in nature." A potential plaintiff's

> knowledge of the harm, therefore, is inconsequential. To be sure, "the discovery rule does not impede the operation of the continuing-tort doctrine[,]"and the continuing harm doctrine tolls the statute of limitations regardless of a potential plaintiff's discovery of the wrong.

Id. at 647 n. 9 (2013); *see also Shell Oil Co. v. Parker,* 265 Md. 631, 634–36 (1972) (Where Plaintiffs' harm was "continuing in nature," their right to bring suit was "not barred by the three year Statute of Limitations for the continuing violation during the three year period prior to the filing of the action").

Under this doctrine, however, damages are limited to those incurred within the statutory period prior to the filing of the action. *Litz*, 434 Md. at 646 (Quotation omitted); *see also Singer Co. v. BG & E,* 79 Md. App. 461, 476–77 (1989) (Plaintiffs alleging breach of "*ongoing* duties owed [to] its customers," were not barred by statute of limitations to recover damages incurred "within three years of the commencement of the present action"). As Appellees argue, "the personal charges made through the American Express [Credit Card Transactions] and the Ventures American Express Payments Scheme after January 1, 2007, extended the period of limitations. . . because each wrongful act was part of the continuous tort of constructive fraud."

The court decided the Entities could recover the amounts taken after January 1, 2007 because this was the effective date of the Amended and Restated Operating Agreement for RCC II. This agreement specifically prohibited either Liffman or the Spectors from "perform[ing] any act detrimental to the best interests of the Company." This Agreement was signed in response to the 2005 confrontation over Spector's spending. For that reason, Appellees argue, "Spector's thefts after January 1, 2007, were

separate and distinct from the wrongful conduct that was the subject of the 2005 controversy and separate and distinct from any wrongful conduct (personal credit card charges) that occurred thereafter while the parties were still under the original operating agreement."

Here, the circuit court held that from January 1, 2007 onward, the parties had clearly defined obligations not to make false assertions about their spending. We find no error in the court's determination that this marked a separate period in the parties' relationship, and that therefore the continuing harm doctrine would apply to any subsequent breaches by Spector after that date. The court correctly found him liable for the entirety of his misappropriations of funds after the date of the revised agreement.

The Spectors also argue that the statute of limitations should have been tolled because of the parties' fiduciary relationship. This is incorrect. In *Herring v. Offutt*, 266 Md. 593, 600-01 (1972), the Court of Appeals said:

> Where a confidential relationship exists between the parties, failure to discover the facts constituting fraud may be excused. In such a case, so long as the relationship continues unrepudiated, there is nothing to put the injured party on inquiry, and he cannot be said to have failed to use due diligence in detecting the fraud. This is for the reason that a confidential relationship by its nature gives the confiding party the right to relax his vigilance to a certain extent and rely on the good faith of the other party and his duty to disclose all material facts, and therefore the confiding party has no duty to make inquiries until something occurs to make him suspicious.

(Citations omitted). In a similar view, the Court has noted:

> This Court should not, and will not, charge a complaining party with failure to search for a missing element of a cause of action if a diligent search would not have revealed it *or there was no reason for that party to conduct the search*. As we have seen, the existence of a continuous, fiduciary relationship permits a complaining party to trust, albeit not blindly, that

> such a relationship will not be violated and that the he or she receives will not be provided negligently.

Frederick Rd., 360 Md. at 108 (Emphasis added). Liffman believed Spector would serve the best interests of the company; once he had reason to doubt this belief, he took appropriate action. But he was not obligated to assume Spector was embezzling and defrauding Appellees from the beginning. The court correctly rejected this argument.

Finally, the circuit court did not err in concluding that in 2007 Spector acknowledged his debt to Appellees, thus tolling the limitations as to those expenditures.

V. Set-off and Recoupment Claim

At trial, the Spectors requested a set-off of $145,833.33 against the judgment entered against them because RCC II, at Liffman's direction, did not pay Spector his officer compensation for a ten-month period, during which time Spector continued to perform his duties as an officer. The court denied this request:

> [T]he entities have more than sufficient . . . set off and recoupment rights, that they were not legally obligated to distribute in any way any monies to Mr. Spector until he had made the LLCs whole, because he had stolen, albeit some of it's uncollectable because of the statute of limitations, over $450,000 over the years from his partners. His partners were not obligated, I find, under the relevant agreements and the law to write him checks while they were down over $470,000. That's, to me, silly.

We agree with the court's analysis. Spector was not an employee of the Entities entitled to a salary, under the statutory definition set forth in Md. Code (1991, 2008 Repl. Vol.), Labor & Employment Article § 3-501.[8] As the Entities explain,

[8] The statute provides certain definitions:
(Continued…)

> [The Spectors] presented no evidence at trial to support their new theory that Spector was an "employee" entitled to a "salary." There was no Form 8832 election, any W-2s, or any evidence that workers' compensation or unemployment taxes were paid on Spector's behalf. In fact, besides his self-serving testimony that he continued to work for RCC II after being confronted with the Ventures Check Writing Scheme, the only evidence Spector offered at trial in support of his claim for unpaid salary for services performed [were] notes Liffman took after the initial 2005 confrontation. That document exemplifies the colloquial nature in which the parties used the term "salary" to describe payments made to themselves: "Salaries to be $175k/$125k eff. 1/1/06, based on availability of operating capital."

Moreover, we are unable to see why Spector was entitled to be compensated for his "services" during a time in which he was stealing from his "employer."

VI. Double Recovery

The Entities received a $10,570.52 damage award for the ACH Transactions. Spector claimed at trial that these funds were withdrawn to pay off his debt on the American Express card. For that reason, the Spectors insist that the court improperly

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(…continued)

> (b) "Employer" includes any person who employs an individual in the State or a successor of the person.
> (c)(1) "Wage" means all compensation that is due to an employee for employment.
> (2) "Wage" includes:
> (i) a bonus;
> (ii) a commission;
> (iii) a fringe benefit;
> (iv) overtime wages; or
> (v) any other remuneration promised for service.

This section does not define "employee," but courts have explained that an employee "within the purview of the Wage Act is one who would be considered an agent or employee, as opposed to an independent contractor, at common law." *Horlick v. Capital Women's Care, LLC*, 896 F. Supp. 2d 378, 388 (D. Md. 2011) (citing *Baltimore Harbor Charters, Ltd. v. Ayd*, 365 Md. 366, 384 (2001)).

granted a "double recovery," because a portion of the credit card debt was paid off by the improper ACH transaction.

The Court of Appeals has embraced the general principle that "plaintiff is entitled to but one compensation for her loss and that satisfaction of her claim prevents further action against another for the same damages. This rule is equitable in nature and the purpose of the rule is to prevent double recovery and, thus, unjust enrichment." *Underwood–Gary v. Mathews,* 366 Md. 660, 667 (2001) (Internal citations omitted); *See John B. Parsons Home, LLC v. John B. Parsons Found.*, 217 Md. App. 39, 62 (2014). As such, "double recovery for the same harm is not permissible." *Id.* at 669.

It is clear from the Record that the ACH transactions were unauthorized. The Entities do not dispute that Spector initiated these transactions to pay the unauthorized American Express charges. In essence, Spector robbed Peter to pay Peter. The Entities were thus "harmed" twice, by both unauthorized transactions, but only suffered one financial harm, as one misappropriation canceled out the other. For that reason, we agree with the Spectors that the Entities cannot recover twice for both wrongful actions when they were essentially paid back for the harm caused by the Credit Card Transactions. *See id.* at 669 ("As we have indicated, a plaintiff is entitled to but one compensation for his or her loss, and full satisfaction of a plaintiff's claim prevents it from being further pursued.") Although the ACH payment does not qualify as a "satisfaction" of a debt, we adhere to the equitable principle that the Entities cannot recover the same sum of money twice for the same ultimate harm, even if multiple acts led to that harm. Therefore, we

remand to the circuit court for a reduction of damages by $10,570.52 (with an adjustment for interest, if any).

VII. Attorney's Fees

Whether a litigant is entitled to attorney's fees is a legal question we review *de novo*. *Garcia v. Foulger Pratt Dev., Inc.*, 155 Md. App. 634, 666-67 (2003). If we find that Appellees were entitled to fees, we would review the court's decision for an abuse of discretion. *Id.*

Maryland follows the "American Rule" for attorney's fees. *Id.* at 660. Under this rule, attorney's fees are ordinarily not recoverable by a prevailing party in a lawsuit. *Hess Const. Co. v. Bd. of Educ. of Prince George's Cnty.*, 341 Md. 155, 159 (1996). "[I]n the absence of a statute, rule, or contract expressly allowing recovery of attorneys' fees, a prevailing party in a lawsuit may not ordinarily recover attorneys' fees." *Bausch & Lomb Inc. v. Utica Mut. Ins. Co.*, 355 Md. 566, 590-91 (1999). "Maryland has adopted statutory cost-shifting provisions for limited partnerships and limited liability corporations." *Boland v. Boland*, 423 Md. 296, 352 n. 13 (2011) (citing CA § 10-1004 (limited partnerships) and CA § 4A-804 (LLCs)).

The Maryland LLC Act provides that:

> If a *derivative action* is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise, or settlement of an action or claim, the court:
>
> > (1) *May* award the plaintiff reasonable expenses, including reasonable attorney's fees; and
> >
> > (2) Shall direct the plaintiff to remit to the limited liability company the remainder of those proceeds.

CA § 4A-804 (Emphasis added). That is, a person may bring an action against an LLC "to enforce a right of a limited liability company 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." CA § 4A-801. Here, the court acknowledged that the constructive fraud claims were pleaded as derivative actions. The court analyzed the statute but decided not to award attorney's fees:

> The statute says, "If the derivative action is successful..." – this was – "in whole or in part . . ." – this was – "or if anything is received by the plaintiff . . ." – there wasn't – the court may do the following: award reasonable fees and expenses . . ." Okay, "and then . . ." And this is key, "direct the plaintiff to remit the limited liability company the remainder of those proceeds," i.e., the recovery.
>
> . . .
>
> So I conclude that, under the circumstances presented here, there being no fund, or res, or pot, there's nothing out of which to award the fees, so I don't get to the question of reasonableness.

The Entities do not dispute this analysis, but argue instead that the court should have applied "the common fund doctrine" to grant them attorney's fees. We disagree.

"Exceptions to the American Rule are premised on underlying equitable or policy considerations which support the need for such recovery." *Id.* at 660-61 (citing *Mills v. Electric Auto–Lite Co.,* 396 U.S. 375, 391–92 (1970). One exception recognized in Maryland is the "common fund doctrine." *Id.* at 661. Recently, we explained, "Maryland courts have applied the doctrine when a plaintiff has prevailed in a lawsuit on behalf of a class that benefits a group of others in the same manner as himself." *Bontempo v. Lare*, 217 Md. App. 81, 134-35, *aff'd* 444 Md. 344 (2015). The doctrine is

"infrequently invoked," but has applied "where a stockholder's derivative action benefitted all of the shareholders." *Id.* (Citations omitted). In *Hess Const. Co. v. Bd. of Educ. of Prince George's Cnty.*, 341 Md. 155 (1996), the Court of Appeals enumerated instances where the doctrine has applied, but none of these are applicable here.

> The common fund theory has been applied or recognized where all of the holders of mortgage debentures were benefitted by the sale of the security, ordered over the objection of receivers for the debtor corporation; where a stockholder's derivative action benefitted all of the shareholders; where all of the taxpayers of a municipality were benefitted by a taxpayer's action resulting in reimbursement to the municipality of unauthorized disbursements; and where a successful taxpayer's action benefitted all taxpayers of a "special tax district."

Id. at 168-69 (Citations omitted).

As we have noted, the purpose of the statute is to prevent unjust enrichment of the entity when the plaintiff confers on it a benefit earned through a successful derivative action:

> [A] litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee *from the fund as a whole.* The common-fund doctrine reflects the traditional practice in courts of equity, and it stands as a well-recognized exception to the general principle that requires every litigant to bear his own attorney's fees. *The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense.* Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorney's fees against the entire fund, thus spreading fees proportionately among those benefited by the suit.

Bontempo, 217 Md. at 134 (quoting *Boeing Co. v. Van Gemert,* 444 U.S. 472, 478 (1980)) (emphasis added in *Bontempo*). In *Foulger Pratt*, we observed that the common-fund doctrine is a "judicially-created exception . . . where a plaintiff has successfully

maintained a suit, usually on behalf of a class that benefits a group of others in the same manner as himself." 155 Md. App. 634, 662 (2003) (citing *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 392 (1970). "Because the common-fund doctrine is an equity-based judicially-created exception, it follows that the application of the doctrine is vested within the discretion of the trial judge." *Id.* However, "whether a prevailing party is *actually entitled* to fees under the doctrine is, as a pure conclusion of law, an issue we review for legal correctness." *Bontempo*, 217 Md. App. at 135 (emphasis in original) (Citation omitted).

In *Foulger Pratt*, we invoked the common fund doctrine for what was ostensibly a breach of contract claim, but which we treated as a derivative action. The plaintiff, a limited partner, sued on behalf of himself and other partners to recover a development fee to which they were entitled. 155 Md. App. at 650-51. We determined that the fee he recovered was a common fund that benefited the entire partnership. *Id.* at 671. Under the circumstances, if the plaintiff "was not entitled to pay his attorneys' funds out of the common fund, [the other partners], would reap the fruit of his labor, without sharing any of the costs." *Id.* We also noted that the filing of a derivative action is not necessarily a requirement for a plaintiff to recover attorney's fees under the common fund doctrine. *Id.* at 665. (citing *Tandycrafts, Inc. v. Initio Partners*, 562 A.2d 1162, 1166 (Del. 1989) ("There is no class action or derivative suit prerequisite to an award of attorney's fees under the common benefit exception.").

In this case, the plaintiffs were the two LLCs, RCC II and RCC AMC, and Liffman. There is no common fund that will benefit another party who might become unjustly enriched. CA § 4A-804(1) only states that the court "*may* award the plaintiff reasonable expenses," and the common fund cases indicate that this award is premised on the concern with unjust enrichment, or rather, preventing the plaintiff from paying legal expenses which yield a benefit enjoyed by others. The court correctly concluded that this equitable concern was absent in this case and properly declined to award the Entities fees.

The Entities also cite *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161 (1939), to argue that even one person bringing suit on behalf of herself may be entitled to fees in a common fund case. *Sprague* involved a plaintiff who won a judgment against a closed bank. *Id.* at 162. The Court noted that although the litigation produced no common fund and did not represent a class, this was immaterial, because the effect of the suit was to establish the bank's fiduciary obligation to its depositors. *Id.* at 166. The court noted:

> Whether one professes to sue representatively or formally makes a fund available for others may, of course, be a relevant circumstance in making the fund liable for his costs in producing it. But when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through stare decisis rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.

Id. at 167. *Sprague* is inapposite here, because there are no other parties other than the original plaintiffs in this case who may benefit from the recovered funds.

The Entities also argue that the Operating Agreement entitles them to fees. In a hearing on attorney's fees, counsel for the Entities explained:

[Entities' counsel]: Well. And it's not like the operating agreement doesn't address the issue that it doesn't want bad people. It does. It specifically says it's not going to tolerate willful, wanton misconduct and we're not going to protect you if you –

The Court: All the section says is that it means that the member's liable to the corporation.

[Entities' counsel]: Right.

The Court: Or the entity.

[Entities' counsel]: Right. And part of that should be the cost that it incurred in going after him.

The Court: You could have written that in this contract, [and] we wouldn't be having this conversation.

We agree with the court's conclusion that there is no explicit language in the Operating Agreement that provides for recovery of attorney's fees.

The Entities claim that even if no Maryland case interprets CA § 4A-804 as a "fee-shifting statute," numerous out-of-state courts interpret their own LLC provisions as such. *See, e.g.*, *Fitzgerald v. Cmty. Redevelopment Corp.*, 283 Neb. 428, 460 (2012). Yet the issue in *Fitzgerald* was simply whether the statute, which stated that "the court may award the plaintiff reasonable expenses" meant that the plaintiffs "must take their attorney fees out of the judgment." *Id.* (citing Neb. Rev. Stat. § 21-169). The *Fitzgerald* court affirmed the trial court's decision to award separate attorney's fees, without addressing whether § 21-169 was a mandatory fee-shifting statute. In any event, we are persuaded by the analysis in *Little v. Cooke*, 652 S.E.2d 129 (Va. 2007), in interpreting a statute almost identical to Maryland's:

> The operative language of Code § 50-73.65 is found in the first sentence directing a successful plaintiff who has received an award of reasonable attorneys' fees and expenses "to remit to the limited partnership the remainder of those proceeds received by him." Code § 50-73.65. The General Assembly's use of the word "remainder" indicates its intent for the award of reasonable attorneys' fees and expenses *to be subtracted from the total amount "received by the plaintiff as a result of a judgment*, compromise or settlement of an action or claim," with the "remainder" being remitted to the limited partnership.

Id. at 720. The Supreme Court of Virginia concluded that this view "is consistent with what is known as the "common fund" exception to the "American Rule" prohibiting the shifting of attorneys' fees to the losing party." *Id.* (Citations omitted). "Instead, in accordance with the requirements of Code § 50-73.65, the award of attorneys' fees and expenses must be paid from the "common fund" received by the Limited Partners on behalf of the Partnership and the remainder remitted to the Partnership.

In our view, the common fund exception and CA § 4A-804 serve the same purpose: to compensate plaintiffs who have, by their effort, won a judgment from which others might benefit. But it is not a fee-shifting statue designed to compensate plaintiffs for the costs of pursuing a derivative action where no common fund is created. Thus, the circuit court did not err in denying attorneys' fees.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED IN PART AND REVERSED IN PART; CASE REMANDED FOR REDUCTION OF DAMAGES CONSISTENT WITH THIS OPINION. COSTS TO BE PAID THREE-FOURTHS BY APPELLANTS AND ONE-FOURTH BY APPELLEES.