

**IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT
STATE OF FLORIDA**

The ESTATE of ILANA MORROW
And HOPE STOLLER as PERSONAL
REPRESENTATIVE of the ESTATE
OF ILANA MORROW,

CASE NO.: 4D24-1093

Appellants,

T/C CASE NO.:
CACE16-013637

v.

YURI MOSHELL, et. al.,

Appellees.

_____ /

Appeal from Final Judgment of the Honorable Daniel Casey

INITIAL BRIEF OF APPELLANTS

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PRELIMINARY STATEMENT

Citations to the Record in this Initial Brief shall be made using the format (R. ____), where the number(s) following the “R.” notes the page(s) of the record. Citations to the trial transcript shall be made using the format (T. ____), where the number(s) following the “T.” notes the page(s) of the transcript.

The Appellants, The ESTATE of ILANA MORROW and HOPE STOLLER as PERSONAL REPRESENTATIVE of the ESTATE OF ILANA MORROW, shall be referred to herein as “Morrow.”

The Appellees, YURI MOSHELL, JACOB LUBELSKI, YAVNEH HOLDINGS, LLC, ELI MOSHENAYOV, and BENJAMIN COHEN, shall be referred to herein as “the Plaintiffs.”

The Honorable Daniel Casey shall be referred to herein as “the Judge.”

STATEMENT OF THE CASE AND FACTS

On February 4, 2010, the Plaintiffs and Morrow and her now-deceased husband, David Morrow, created the Fairview Group and Associates, LLC, a Florida limited liability company hereinafter referred to as “the Fairview Group.” (R. 1423) The Fairview Group’s Articles of Organization and Operating Agreement were adopted on February 24, 2010. (R.1423-4) This company was formed for the sole purpose of owning and operating a multi-family property hereinafter referred to as “the Fairview Apartments.” (R. 1423) The Fairview Apartments consists of one hundred four (104) apartment units located at 874 S.W. 10th Drive, Pompano Beach, Florida, in Broward County. (R. 1423) This property was purchased by the Fairview Group on or about March 29, 2010, for \$3,200,000, of which \$2,720,000 was mortgaged by the group. (R. 1657-66; T. 40-1)

The Fairview Group consisted of the following members, holding the following membership interests, based upon the following capital contributions, respectively:

Ilana Morrow	0.01%	\$1,000
Yuri Moshell	26.31%	\$250,000
Eli Moshenayov	26.31%	\$250,000
Yavneh Holdings, LLC	15.79%	\$150,000

Benjamin Cohen 10.53% \$100,000

Jacob Lubelski 21.05% \$200,000

(R. 1424, 1629) The Fairview Group contracted with I.D.M. Management Group, Inc., hereinafter “IDM,” to exclusively rent, lease, and manage the day-to-day operations of the Fairview Apartments. (R. 1424) This management was dictated by a Management Agreement entered into between the Fairview Group and IDM, hereinafter referred to as “the Management Agreement.” (R. 1645-9) Morrow’s husband managed the Fairview Apartments on behalf of IDM, pursuant to the Management Agreement. Morrow was not involved in said management at all (R. 1163, 1164, 1167; T. 43). Additionally, per the terms of the Fairview Group’s Articles of Organization and Operating Agreement, Morrow was the managing member of the group. (R. 1629) Before the Fairview Group was formed and before the group purchased the Fairview Apartments, all members of the Fairview Group were made aware that Morrow’s husband would manage the group and the property. (R. 1387-8) Over the next few years, the Plaintiffs received monthly distributions from their investment in the Fairview Group. (R. 1248, 1424-5) They also received a portion of the capital outlay back in 2013. (T. 131) For example, Plaintiff Yuri Moshell presented \$250,000 in capital outlay when the Fairview Group was created

in 2010. (T. 131) He subsequently collected monthly dividends. (T. 131) Plaintiff Moshell also received \$39,000 of his original capital outlay back through a refinancing agreement on the Fairview Apartments in 2013. (T. 59, 131)

Some of the Plaintiffs entered into other unrelated investment opportunities with Morrow's husband. (T. 63-4) One such investment group, Olive Tree Group & Associates, LLC, hereinafter referred to as "Olive Tree," suffered a loss of returns on its investment(s). (T. 61-2) The Plaintiff members of Olive Tree then entered into a settlement agreement with Morrow's husband in order to recover some of their investment contributions to Olive Tree. (T. 65-6) However, the settlement agreement reflected that a portion of the Olive Tree settlement proceeds would come from the Fairview Group's sale of the Fairview Apartments. (T. 66-7)

In January of 2014, a proposal was made by a buyer for the sale of the Fairview Group's membership interests. (R. 1714-23; T. 71) The proposed Membership Sale Agreement called for the Plaintiffs to receive \$5 million in exchange for their 99% membership interests in Fairview Group and Morrow was to retain her 1% interest in the Fairview Group and her status as the managing member of the group. (R. 1714) Plaintiffs' original investment of \$950,000 in 2010 resulted in a payout of \$5 million (T. 74). The Membership

Sale Agreement included additional relevant terms, such as requiring the Fairview Apartments to be in compliance with all city and county zoning and building codes, all certificates of occupancy had to be presented to the buyer, Forrest Wind Capital, LLC, and the closing would take place sixty (60) days after the expiration of the inspection period, allowing for another extension of that period by the buyer. (R. 1715; T. 75-6) The Plaintiffs executed the Membership Sale Agreement in early 2014 under their own volition, without undue influence or force. (T. 141-5) The Forrest Wind Capital offer is the only offer to purchase the Plaintiffs' Fairview Group membership interests contained in the record evidence. Likewise, no offer to purchase the Fairview Apartments property at or near the time of the Plaintiffs' execution of the Membership Sale Agreement exists in the record.

Payment pursuant to the Membership Sale Agreement languished for more than a year. Morrow's husband, as manager of the property, accomplished repairs and renovations to acquire the compliances required as a condition precedent of the sale of the membership interests. (T. 102) Once those prerequisites were fulfilled, the Plaintiffs were paid their respective portion of the sale price of their membership interests in the Fairview Group, on or about March 12, 2015. (R. 1424, 1425) Said payments to the Plaintiffs included a cover letter of explanation and a closing

statement. (R. 1920-3, 1973-6, 1979-82, 1985-8, 1991-4) The Plaintiffs negotiated and deposited their respective checks in March of 2015 without contacting Morrow, Morrow's husband, or Morrow's husband's assistant regarding the Membership Sale Agreement, the payment(s) under the agreement, the transfer of their membership interests in the Fairview Group, or any objections to these subject matters. (T. 111)

More than a month after the Plaintiffs received their payments under the Membership Sale Agreement, thus ending their contractual relationship with the Fairview Group, the Fairview Apartments were sold to 874 Fairview Holdings, LLC. (R. 1425, 1926) The purchase price of the property was \$8,650,000. (R. 1425, 1926) The Fairview Group collected the net proceeds from this sale -- \$5,068,051.49. (R. 1926) This sale of the Fairview Apartments is the sole subject of the Order on appeal and the sole basis for the findings in the Order. (R. 1612)

A purchase contract for the Fairview Apartments was presented by a prospective buyer to a person named Krishna Persaud on March 10, 2015. (R. 1425, 1744-51) Although the record evidence contains no authorization from anyone associated with the Fairview Group for Persaud to execute said contract, that is exactly what Persaud did, listing himself as managing member of the Fairview Group. The contract was never executed by

Morrow, her husband, or anyone else associated with the Fairview Group. (R. 1751) Furthermore, the record evidence contains no proof that Morrow had any actual or constructive knowledge of this purchase contract in March of 2015. More than a month later, on April 23, 2015, a closing occurred on the purchase of the Fairview Apartments, pursuant to the terms of the purchase contract. (R. 1926-7) Morrow did execute the closing documents as the managing member of the seller, the Fairview Group. (R. 1926-71) The closing documents are the first indication in the record of Morrow's knowledge of the sale of the property. The proceeds from the April sale of the property were not distributed to any of the former members of the Fairview Group who sold their interests in March.

Thereafter, Plaintiffs sued Morrow for (1) breach of the Fairview Group's Operating Agreement, (2) breach of a covenant of good faith and fair dealing, (3) breach of a fiduciary duty, (4) civil conspiracy, and (5) unjust enrichment. (R. 1384-1403) Plaintiffs based these allegations upon the following theories: (1) that Morrow, her husband, and IDM conspired to renovate Fairview Apartments while the Plaintiffs were still members of the Fairview Group; and (2) that Morrow undersold Plaintiffs' interests in the Fairview Group while marketing, obtaining, and later consummating, a more lucrative sale of the Fairview Apartments without the Plaintiffs (R. 1425-6).

Morrow defended against the lawsuit based upon (1) Plaintiffs' lack of standing once they sold their membership interests in the Fairview Group; (2) Plaintiffs' failure to meet the requirements of a derivative action; (3) Plaintiffs' failure to prove damages from a loan or payoff negotiated by the Fairview Group; (4) Plaintiffs' failure to prove the elements of a conspiracy based upon a lack of a contract between defendants which caused damages to Plaintiffs; and (5) Plaintiffs' failure to prove unjust enrichment due to a lack of contractual relationship between Morrow and IDM (R. 1426-9).

Plaintiffs' claims were adjudicated by the Judge following a bench trial that took place on January 22 and 23, 2024. During the course of the proceedings, live testimony of Plaintiffs Yuri Moshell, Eli Moshenayou, Jacob Lubelski, Kevin Epstein, and Benjamin Cohen was presented in the Plaintiffs' case in chief. Defendant Ilana Morrow testified at trial on her own behalf.

At the close of the evidence, the Judge requested proposed orders from the attorneys (R. 1610) and, upon receiving those proposed orders, the Judge summarily executed Plaintiffs' counsel's version on March 28, 2024. (R. 1612-27) Said order is a Final Judgment, finding that Morrow (1) breached duties of loyalty, care, disclosure, good faith, and fair dealing owed to the Plaintiffs under the Operating Agreement; (2) usurped a corporate opportunity from the Plaintiffs; (3) breached the Operating Agreement; (4)

breached a fiduciary duty owed to the Plaintiffs; and (5) committed a civil conspiracy against the Plaintiffs. The Final Judgment, which is the subject of this appeal, awarded damages to the Plaintiffs which were calculated by starting with the net purchase price of the Fairview Apartments in April of 2015, subtracting the proceeds paid to the Plaintiffs for the sale of their Fairview Group membership interests in March of 2015, subtracting 30% of the property sale price allocated to Morrow per the terms of the purchase contract, and dividing the remainder among the Plaintiffs based upon their respective percentages of interest in the Fairview Group. (R. 1624-6)

Two days after the entry of the Final Judgment, Morrow passed away. A Notice of Appeal was timely filed with the trial court by Morrow's counsel on April 26, 2024. (R. 1787-8) This Court granted a Motion to Substitute the Estate of Ilana Morrow as Appellant and added the personal representative of the estate, Hope Stoller, as an appellant.

SUMMARY OF ARGUMENT

The judge erred in entering judgment in favor of the Plaintiffs for two reasons. First, Defendant Morrow did not breach the Fairview Group Operating Agreement as alleged by Plaintiffs, and no competent substantial evidence exists in the record to support Plaintiffs' allegations of a breach. Second, Plaintiffs were no longer members of the Fairview Group at the time of the alleged breach, therefore, even if a breach of the Fairview Group's Operating Agreement did occur, Plaintiffs were not damaged by said breach because they were no longer parties to that contract.

Plaintiffs allege that Morrow breached the Fairview Group contract by allowing Plaintiffs to sell their interests in the Fairview Group and then allowing the Fairview Apartments to be sold for a higher price than what Plaintiffs received in the sale of their membership interests. However, Plaintiffs voluntarily sold their interests for the price offered to them, without Morrow's input. Furthermore, the record evidence fails to show that Morrow even knew about the later sale of the Fairview Apartments until she attended the closing and signed the closing documents as a managing member of Fairview Group. None of these circumstances constitute a breach of a contract causing damages to Plaintiffs. Therefore, the Order on appeal should be reversed.

ARGUMENT

I. THE TRIAL JUDGE ERRED IN GRANTING JUDGMENT IN FAVOR OF THE PLAINTIFFS BECAUSE NO BREACH OF THE FAIRVIEW GROUP'S OPERATING AGREEMENT OCCURRED.

The trial judge entered judgment in favor of the Plaintiffs based upon their breach of contract cause of action stated in their Second Amended Complaint (R. 1613). The Plaintiffs were parties to the Fairview Group Operating Agreement from February 24, 2010, until March 12, 2015. The Second Amended Complaint cites two provisions of the Operating Agreement as the basis for the breach of contract cause of action: Article III, Section 1, states: "The members shall elect the Manager or Managers annually at the annual meeting of the members, and each Manager shall serve at the pleasure of the members." Article III, Section 2, states:

Section 2. Powers. The powers of the Manager or Managers may be enlarged or restricted, as set forth in the resolution of the members; provided, however, that the Manager or Managers shall not have the right or power to do any of the following acts without a vote by the members approving the acts:

(a) sell, assign, pledge, mortgage or otherwise encumber any of the property, real, personal or mixed, of the Company;

(b) borrow money in the name of the Company. . .

(R. 1020-3). The record contains no evidence of Morrow breaching these

terms in the Operating Agreement. Upon entering into the Fairview Group contract, the Plaintiffs invested a total of \$950,000 in the company. Upon selling their membership interests in the company, they were paid the net proceeds of a \$5 million sale price. During the time frame that the Plaintiffs were subject to the terms of the Operating Agreement, they were paid dividends and were reimbursed a portion of their capital contributions. The Order on appeal found that Morrow breached the Operating Agreement by failing to advise Plaintiffs of an opportunity to sell the Fairview Apartments. However, Plaintiffs were no longer parties to the contract at the time of the sale and no evidence exists in the record to show that Morrow knew of the offer to purchase the apartments before the closing on that purchase. The March 10, 2015, commercial contract to sell the Fairview Apartments was not a transaction prohibited by Article III, Section 2 of the Operating Agreement. The failure to prove a breach of the Operating Agreement requires this Court to reverse the Final Judgment in favor of the Plaintiffs.

A. STANDARD OF REVIEW.

“The interpretation of a contract or a covenant is a matter of law, and, therefore, reviewable by this court” using the *de novo* standard of review. Argoff v. Rainberry Bay Homes Ass'n, 828 So.2d 399, 401 (Fla. 4th DCA 2002); Royal Oak Landing Homeowner's Ass'n v.

Pelletier, 620 So.2d 786, 788 (Fla. 4th DCA 1993). In addition to interpreting the Operating Agreement, the judge considered many factual issues below as well. This Court has held that mixed questions of fact and law require the application of two different standards of review. Powell v. State, 958 So.2d 1012, 1013–14 (Fla. 4th DCA 2007). The factual findings must be supported by competent, substantial evidence, while legal findings are reviewed de novo. Id.

The standard of review for identifying whether a legal duty is owed by one party to another is a question of law subject to *de novo* review. R.J. Reynolds Tobacco Co. v. Grossman, 96 So. 3d 917, 920 (Fla. 4th DCA 2012).

B. MORROW DID NOT BREACH HER FIDUCIARY DUTY OWED TO THE PLAINTIFFS DURING THE PERIOD OF THEIR CONTRACTUAL RELATIONSHIP.

Morrow appeals the judge’s finding that she breached her fiduciary duty owed to the Plaintiffs as the Manager of the Fairview Group. “The elements of a claim for breach of fiduciary duty are: the existence of a fiduciary duty, and the breach of that duty such that it is the proximate cause of the plaintiff’s damages.” Gracey v. Eaker, 837 So.2d 348, 353 (Fla. 2002). When the true facts and time period of the contractual relationship of the parties is properly considered in the record evidence by this Court, the

judge's findings regarding the breach of a fiduciary duty must be reversed.

The contractual relationship between Morrow and the Plaintiffs ended with the sale of Plaintiffs' membership interests in the Fairview Group. The Plaintiffs' actions voluntarily terminated that contract in two manners. First, the Plaintiffs executed a contract to sell their membership interests in the Fairview Group and, although the timing of closing the deal under the terms of the contract expired, the Plaintiffs waived strict compliance with the sale contract by accepting the later payment of the sale price pursuant to the terms of the contract. See Caldwell v. Snyder, 949 So.2d 1048 (Fla. 3d DCA 2007) (holding that the acceptance of a method of payment which differs under the terms of a contract constitutes a waiver of the right to demand strict compliance under the contract). Second, the Plaintiffs' acceptance of payment in exchange for their membership interests constitutes an accord and satisfaction of the membership sales contract so that Plaintiffs were no longer a party to the Fairview Group Operations Agreement. See Construction Consulting, Inc. v. Board of Trustees of Broward College, 374 So.3d 14 (Fla. 4th DCA 2022).

During the course of the contractual relationship between Morrow and the Plaintiffs, Morrow did not breach her fiduciary duty owed to the Plaintiffs, contrary to the judge's finding in the Order on appeal. No competent

substantial evidence exists in the record to support this finding. The Order relies upon a federal district court case in finding that Morrow breached her fiduciary duty, however, the federal case is entirely inapplicable to the case at bar (R. 1621). In fact, the federal court's order in Tempay, Inc. v. Biltres Staffing of Tampa Bay, LLC, 2103 WL 12158136 (M.D. Fla. June 13, 2013), fails to address a fiduciary duty at all. The federal court order addresses fraud, fraud in the inducement, Florida Deceptive and Unfair Trade Practices, fraudulent transfer and PFG loans, breach of 2011 Guaranty, and violation of Florida RICO Act. Virtually nothing in the federal court order establishes a precedent for the judge to have followed in the case at bar. Therefore, the judge erred in relying upon this federal court order in the Order on appeal.

Plaintiffs' allegation of the breach of a fiduciary duty specifically pointed to Morrow marketing and selling the Fairview Apartments without advising the Plaintiffs as members of the Fairview Group. However, there is no record evidence of Morrow marketing for the sale of the apartments at all, and the evidence of her knowledge and involvement in the sale of the apartments all comes after the Plaintiffs sold their interests in the Fairview Group and, thus, no longer had an interest in the sale of the apartments. Therefore, the record fails to support the judge's finding that Morrow breached her fiduciary duty to the Plaintiffs and the Order should be

reversed.

C. MORROW OWED NO DUTIES OF LOYALTY, CARE, DISCLOSURE, GOOD FAITH, OR FAIR DEALING TO THE PLAINTIFFS AT THE TIME OF THE SALE OF THE FAIRVIEW PROPERTY.

Morrow appeals the judge's findings that she breached a covenant of good faith and fair dealing, a duty of loyalty and care, and a duty of disclosure (R. 1618-9). First and foremost, these duties were not breached because Morrow's contractual relationship with the Plaintiffs had ended by the time of the sale of the Fairview Apartments, which is what Plaintiffs allege was the breach. Secondly, even the Plaintiffs never recognized, utilized, or required anything of Morrow in fulfillment of these duties during their contractual relationship.

The order on appeal finds that Morrow owed statutory duties of loyalty and care to the Plaintiffs under section 605.04091, Florida Statutes (R. 1618). Section 605.04091 states, in part:

605.04091 Standards of conduct for members and managers.—

(1) Each manager of a manager-managed limited liability company and member of a member-managed limited liability company owes fiduciary duties of loyalty and care to the limited liability company and members of the limited liability company.

(2) The duty of loyalty includes:

(a) Accounting to the limited liability company

and holding as trustee for it any property, profit, or benefit derived by the manager or member, as applicable:

1. In the conduct or winding up of the company's activities and affairs;
2. From the use by the member or manager of the company's property; or
3. From the appropriation of a company opportunity;

(b) Refraining from dealing with the company in the conduct or winding up of the company's activities and affairs as, or on behalf of, a person having an interest adverse to the company, except to the extent that a transaction satisfies the requirements of s. 605.04092; and

(c) Refraining from competing with the company in the conduct of the company's activities and affairs before the dissolution of the company.

...

§605.04091, Fla. Stat. (2015). Morrow was the original managing member of the Fairview Group in name only (R. 134). However, she was not involved in the true management of the company at all, according to her deposition and trial testimony (R. 1163, 1164, 1167). Other than the Fairview Group's Articles of Organization naming Morrow as the managing member in 2010, the record evidence is void of even one decision or action by Morrow consistent with the responsibilities of a managing member. Furthermore, during the period of time the Plaintiffs owned membership interests in the Fairview Group, not one of them communicated with Morrow

in fulfillment of her role as a managing member. None of the Plaintiffs relied upon Morrow for information, communication, transactions, or any actions to be taken on behalf of the company. The record evidence shows that the Plaintiffs relied upon Morrow's husband or his assistant for most information and transactional communications pertaining to the company during the entire five years of Plaintiffs' membership in the company (R. 1020-1; T. 44-5).

As noted by this Court in Taubenfeld v. Lasko, 324 So.3d 529 (Fla. 4th DCA 2021):

Lawyers tend to sling the term "good faith" into a pleading as if it creates contractual or other duties that form the basis of a lawsuit. For example, in Hospital Corp. of America v. Florida Medical Center, Inc., 710 So. 2d 573, 575 (Fla. 4th DCA 1998), we rejected the argument that a breach of contract could arise from an implied duty of good faith; we observed that "a duty of good faith must relate to the performance of an express term of the contract and is not an abstract and independent term of a contract which may be asserted as a source of breach when all other terms have been performed pursuant to the contract requirements."

324 So.3d at 538.

A duty of loyalty should relate to the performance of an express term in the contract between the Plaintiffs and Morrow. In other words, specific performance or failure to perform an act under the terms of the contract will

give rise to the breach of a duty of loyalty, but a breach of duty cannot be said to have occurred where all terms of the contract have been fulfilled. See generally Hospital Corporation of America v. Florida Medical Center, Inc., 710 So.2d 573, 575 (Fla. 4th DCA 1998)(finding that a duty of good faith is not an abstract concept to be asserted in spite of all terms of a contract have been performed). In the case at bar, all terms of the Operating Agreement were met for the entire period that the Plaintiffs owned their membership interests in the company. In fact, the Plaintiffs collected dividends on their investments as members of the Fairview Group and the record contains no evidence of any of the Plaintiffs disputing the performance of all terms of the contract until **after** the contractual relationship was terminated by their voluntary sale of their membership interests. With no evidence of a failure to perform under the terms of the contract while the Plaintiffs were members of the Fairview Group, an allegation of a breach of a duty of loyalty and care cannot stand.

The Order on appeal also faults Morrow with breach of a duty of disclosure as a “subset of the duties of loyalty and care” (R. 1619). The judge brings this duty of disclosure into this case through Delaware case law and based upon an article in the Florida Bar Journal. Id. Florida courts that have addressed a “duty of disclosure” have limited its application to

circumstances which are governed by an explicit, not implied, duty. See Taylor v. Nicholson-Williams, Inc., 368 So.3d 1007, 1016 (Fla. 5th DCA 2023)(discussing the statutory duties of commercial real estate brokers, finding that a statute expressly imposes disclosure requirements, but “(t)he plain text of the statute thus makes clear that the duty of honest and fair dealing is not a disclosure requirement.”); Maxwell v. First United Bank, 782 So.2d 931 (Fla. 4th DCA 2001)(finding that a bank owed no fiduciary duty to disclose participation interests in a loan to a customer); Carpenter v. Community Bank of Homestead, 710 So.2d 65 (Fla. 3^d DCA 1998)(refusing to impose a fiduciary relationship and a duty to disclose upon a bank for not advising one customer of the financial hardship of another customer when the two customers were contracting with each other for business).

Even if Morrow’s status on paper as a managing member of the Fairview Group triggered the duties discussed *supra*, she owed those duties to the Plaintiffs only until they sold their membership interests in the company. The sales contract was signed by the Plaintiffs in January 2014, with the transaction completed and consideration paid on the sale on or about March 12, 2015. During the interim period from the signing of the membership sales contract until the final payment transaction on the sale was completed, the Plaintiffs continued to receive dividends from the

continuing operation of the Fairview Group (T. 78-9). No Plaintiff ever disputed the adequacy of performance under the Operating Agreement while they were parties to that contract. Not even one instance of poor judgment was alleged by the Plaintiffs against Morrow during the five years that she was listed on paper as the managing member of the Fairview Group. See Taubenfeld v. Lasko, 324 So.3d at 538 (quoting Zirn v. VLI Corp., 681 A.2d 1050, 1062 (Del. 1996), for the proposition that a good faith erroneous judgment implicates the duty of care, not the duty of loyalty). In fact, the record evidence shows that Plaintiffs assumed their membership sales contract signed in 2014 was terminated because they continued to receive their normal payouts from the operation of the business throughout 2014 and they were not paid the purchase price on their memberships until March of 2015 (T. 79).

“The duty of care is the requirement to ‘use that amount of care which ordinarily careful and prudent men would use in similar circumstances, and consider all material information reasonably available in making business decisions. . . .’ Id. (quoting another Delaware court for this concept). There is no record evidence of Morrow making any business decision for the Fairview Group during her tenure as managing member. Therefore, it naturally follows that the Plaintiffs had no complaints about her loyalty to the

company or the care that she exercised as managing member during the Plaintiffs' tenure as members of the company. Following the Plaintiffs' sale of their memberships in the company, Morrow's duties to the company could no longer be a concern for them. Simply put, Morrow owed no duty of care, or loyalty, or disclosure, to people who were no longer members of the Fairview Group when the Fairview Apartments were sold. For all of the above reasons, the trial judge's finding that Morrow breached duties of loyalty, care, and disclosure owed to the Plaintiffs should be reversed by this Court.

The Order on appeal finds that Ilana Morrow breached a duty of good faith owed to the Plaintiffs. The parties do not dispute that an implied covenant of good faith exists in all contracts, at least under Florida law. Furthermore, the parties agree that good faith includes honesty in conducting oneself under the terms of a contract. Insurance Concepts and Design, Inc. v. Healthplan Services, Inc., 785 So.2d 1232 (Fla. 4th DCA 2001). Nonetheless, Morrow breached no such duty owed to the Plaintiffs in this litigation, and the judge's finding that she did should be reversed by this Court.

This finding in the Order on appeal is based entirely upon the allegation that Morrow knew of FELCA II, LLC's, offer to purchase the Fairview

Apartments before the Plaintiffs sold their membership interests in Fairview Group, therefore, she had a good faith duty to inform the Plaintiffs of the potential sale, and the amount of the offer. However, the record evidence fails to show that Morrow had any personal knowledge of the purchase offer before Plaintiffs relinquished their membership interests. The record evidence does include Morrow's signature on all of the closing documents related to the sale of Fairview Apartments on April 23, 2015. However, said evidence does not prove Morrow had actual knowledge of the sale before the Plaintiffs relinquished their memberships in Fairview Group. Knowledge that is apparent from the record evidence is that the Plaintiffs knew they could not recover all of the money owed to them from their Olive Tree settlement unless and until the Fairview Apartments were sold. As an alternative, Plaintiffs were presented with a sale and purchase agreement, proposing that another entity, Forest Wind Capital, LLC, purchase the Plaintiffs' membership interests in Fairview Group for \$5 million. Plaintiffs accepted this proposal without further investigation or efforts to obtain other bids for their interests. Shortly after this deal was done, the apartments were purchased by another outside buyer. Had the purchase price of Fairview Apartments been lower than \$5 million, the Plaintiffs would not have initiated this litigation and would have considered their membership sale a

good deal. However, when Plaintiffs learned of the sale price for the apartments after they collected their \$5 million, they regretted their prior deal, but there was no going back. Plaintiffs did not have to accept the offer to buy their membership interests for \$5 million. They could have turned it down and waited for a better offer. They did not turn it down, and now they are acting on seller's remorse, which does not establish a viable claim for additional money. See Pierce v. Pierce, 128 So.3d 204 (Fla. 1st DCA 2013)(refusing to set aside a mediated settlement agreement due to buyer's remorse); Tanner v. Tanner, 975 So.2d 1190 (Fla. 1st DCA 2008)(refusing to overturn a marital settlement agreement due to buyer's remorse).

Morrow's duty of good faith and fair dealing in her role in the Fairview Group was also implicated in the judge's finding that she usurped a corporate opportunity in the sale of the Fairview Apartments (R. 1619-20). The judge found that the sale and purchase agreement for the Plaintiffs' membership interests supports this finding (R. 1619). The terms of that agreement include a stop date of July 1, 2014, or within sixty (60) days thereafter by extension. If the purchase of the membership interests was not completed by that deadline, "all parties shall then be relieved of all obligations under this agreement." (R. 1726). The deadline passed with no payment of the sale price for the memberships, which was an indication to the Plaintiffs that

the deal was off (T. 179). Plaintiff Yuri Moshell testified at trial that he inquired about the sale and was told of “violations” (T. 151-2). The Plaintiffs just continued to collect their dividends from the Fairview Group as passive income with no efforts required of them (R. 1248; T. 179-80). Later, when all of the prerequisites for performing under the sale and purchase agreement for the membership interests were fulfilled, the interested buyer offered the purchase price, and the Plaintiffs took it, no questions asked. Plaintiff Yuri Moshell testified at trial that he exercised no due diligence pertaining to this transaction (T. 135-6). Not one Plaintiff communicated with Morrow, her husband, or his assistant regarding the payments made to them (T. 138, 190). They accepted the money, accepted the accompanying correspondence explaining the transaction, and their interests in the Fairview Group ended. Plaintiff Yuri Moshell testified at trial that he doubled his money in five years with the Fairview Group (T. 132). Plaintiff Benjamin Cohen testified the same (T. 227-8). Thereafter, the sale of the Fairview Apartments occurred.

II. THE JUDGE ERRED IN ATTRIBUTING LIABILITIES TO MORROW BASED UPON AN AGENCY RELATIONSHIP BETWEEN MORROW AND HER HUSBAND.

The Order on appeal erroneously attributes wrongdoing to Morrow based upon the existence of an agency relationship between Morrow and

her husband (R. 1620-2). This constitutes an error for two reasons. First, the concept of agency contributing to a breach of duties was never raised in the record below and appears for the first time in the Order on appeal. Consequently, this issue exceeds the scope of the issues to be addressed by the judge and it should be stricken from the Order on appeal. Secondly, even if this Court finds that the concept of agency is reviewable in this appeal, the record evidence fails to support the judge's findings. Therefore, the assignment of wrongdoing to Morrow through agency should be reversed.

A. STANDARD OF REVIEW.

Unless the alleged agency relationship is to be proven exclusively by analysis of the contract between the principal and agent (in which case the question is an issue of law), the relationship is generally a question of fact and should be analyzed by looking at the totality of the circumstances. Villazon v. Prudential Health Care Plan, Inc., 843 So.2d 842, 853–54 (Fla. 2003).

B. THE FINDINGS REGARDING AGENCY EXCEED THE SCOPE OF THIS LITIGATION; NONETHELESS, THE ELEMENTS OF AGENCY ARE NOT MET BY THE RECORD EVIDENCE.

The concept of an agency relationship between Morrow and her husband appears for the first time in the record within the Order on appeal:

17. Plaintiffs proved by the greater weight of the evidence that Ilana Morrow, directly and through her agent (David Morrow), breached the Operating Agreement by failing to serve at the pleasure of the members and failing to get approval of the members before allowing the Commercial Contract to be signed on behalf of Fairview Group.

...

20. Ilana, either directly or through her husband's actions, failed to act with honesty in the conduct of carrying out the Operating Agreement.

(R. 1620-1).

Consequently, the judge exceeded the scope of the issues to be decided by him, and the findings regarding an agency relationship between Morrow and her husband should be reversed. Notwithstanding this error, if this Court chooses to review the issue of an agency relationship in this appeal, the record evidence fails to fulfill the elements of agency and, therefore, the judge's findings on the issue should still be reversed.

To establish an actual agency relationship, the Plaintiffs were required to establish: "(1) acknowledgement by the principal that the agent will act for him, (2) the agent's acceptance of the undertaking, and (3) control by the principal over the actions of the agent." See Goldschmidt v. Holman, 571 So.2d 422, 424 n. 5 (Fla.1990) (quoting Restatement (Second) of Agency § 1 (1957)). However, regarding an agency relationship between spouses,

“the mere relationship of husband and wife does not in and of itself constitute a sufficient basis upon which to impute to the wife or husband the negligence of the other.” Ward v. Baskin, 94 So.2d 859, 860 (Fla.1957), citing Bessett v. Hackett, 66 So.2d 694, 698 (Fla.1953). The Plaintiffs painted an image of Morrow’s husband as the mastermind behind everything related to the Fairview Group, the Fairview Apartments, and the Olive Tree matter which is unrelated to this litigation. Of course, Morrow’s husband was not alive to defend himself in this characterization throughout the proceedings below. Likewise, he was not available to establish the elements of agency for the Plaintiffs. The Plaintiffs, in their proposed final judgment which was wholly accepted by the judge, call Morrow’s husband her agent in the Fairview Group dealings. However, in spite of the husband’s unavailability, Morrow herself certainly debunked the third element of agency: control by the principal (Morrow) over the actions of the agent (Morrow’s husband). Morrow testified at the trial that she did not know what was going on with the Fairview Group and that her husband handled all matters associated with the Fairview Group and the Fairview Apartments (T. 346-51). Nothing in the record evidence shows that Morrow exercised control over her husband’s actions.

The Plaintiffs used the theory of agency to assert joint and several

liability, attempting to make Morrow liable for the actions of her husband (R. 1621). Problematic for the Plaintiffs is that Morrow's husband is not a party to the contract at issue in this litigation. Furthermore, there is no evidence in the record to support Morrow's control over her husband as her agent. See generally Stecher v. Franklin, 405 So.2d 739 (Fla. 5th DCA 1981)(reversing specific performance of a contract conveying land because the husband landowner could not establish agency with wife in order to convey on her behalf); Robbins v. Hess, 659 So.2d 424 (Fla. 1st DCA 1995)(another example of a failure to prove an agency relationship between a husband and wife when the wife hired an attorney and the attorney acted upon the husband's, not the wife's, instructions). The Plaintiffs had to name Morrow as the principal in their theory of agency because she was a party to the contract at issue in this litigation. The evidence simply is not there for an agency relationship, and it is not there because it was never plead or proven by the Plaintiffs during the litigation. Therefore, the judgment below should be reversed.

III. THE JUDGE ERRED IN FINDING THAT MORROW PARTICIPATED IN A CONSPIRACY WHICH CAUSED DAMAGE TO PLAINTIFFS.

The Order on appeal finds that Morrow conspired with her husband to renovate the Fairview Apartments without the approval of the Plaintiffs as member of the Fairview Group and then sell the upgraded property for a

price higher than \$5 million for the benefit of Morrow and excluding Plaintiffs from the deal (R. 1622-3). Because the record evidence does not support the judge's findings regarding a civil conspiracy, the Order should be reversed.

A. STANDARD OF REVIEW.

The conspiracy issue is reviewed by this Court to determine whether competent substantial evidence exists in the record to support the judge's factual findings, while the judge's legal conclusions are reviewed *de novo*. Ezer v. Holdack, 358 So.3d 429 (Fla. 4th DCA 2023).

B. THE RECORD EVIDENCE FAILS TO FULFILL THE ELEMENTS OF A CONSPIRACY OR THAT MORROW WAS A PROXY FOR A CONSPIRACY.

The elements of civil conspiracy which needed to be proven by the Plaintiffs are: (1) an agreement between two or more parties, (2) to do an unlawful act or to do lawful act by unlawful means, (3) an overt act in furtherance of the conspiracy, and (4) damage to the Plaintiffs as a result of the act performed in furtherance of it. Gilison v. Flagler Bank, 303 So.3d 999 (Fla. 4th DCA 2020). Plaintiffs alleged a conspiracy between Morrow, her husband, and their management company. The Order on appeal states:

30. Here, Plaintiffs have established by the greater weight of the evidence that Ilana Morrow breached the contract, breached the implied covenant of good

faith and fair dealing, and breached her fiduciary duties. These underlying torts or wrongs support Plaintiffs' claim for civil conspiracy against Ilana Morrow, the Estate (of David Morrow), and I.D.M.

31. Plaintiffs also established by the greater weight of the evidence that Ilana and David Morrow, directly and through their company I.D.M., had an implied agreement to engage in these activities, as evidenced by David Morrow having Ilana Morrow sign all pertinent documents despite having no knowledge of any of the business dealings. Plaintiff (sic) successfully demonstrated that David Morrow, shielded his wrongful activities through the proxy of his wife. Ilana Morrow knew that her husband made her Managing Member and that he was having her sign all pertinent business documents, and Ilana Morrow assisted David Morrow with carrying out his plans. The foregoing conduct is sufficient to prove conspiracy relating to the underlying wrongs committed. Donofrio v. Matassini, 503 So.2d 1278, 1281 (Fla. 2d DCA 1987) ("The conspirator need only know of the scheme and assist in it in some way to be held responsible for all of the acts of his coconspirators.")

32. Plaintiffs also established the overt act – the usurpation of corporate opportunity through the sale of Fairview Apartments – and damage to Plaintiffs as a result of the overt act. (R. 1623)

The record facts do not support the above findings. While Morrow did testify that her husband asked her to sign documents and she did not always know what she was signing, her signature does not appear on the sales contract for the sale of Fairview Apartments (R. 1744-51). Although she did sign the closing documents on the sale, that was done more than a month

after her contractual relationship with the Plaintiffs was terminated by their voluntary sale of their memberships in the Fairview Group. Furthermore, Morrow did sign the contract for the sale of Plaintiffs' memberships, as did the Plaintiffs, and that contract was fulfilled for a total benefit to the Plaintiffs of \$5 million (R. 1733).

The record contains no proof of "wrongful activities" of Morrow's husband, accomplished with Morrow as his "proxy." There is no evidence showing that Morrow knew of a "scheme" to sell Fairview Apartments for a higher price than the Plaintiffs' earlier buyout. Furthermore, there is no evidence of a "scheme." The sale of the Plaintiffs' membership interests in Fairview Group, followed by the later sale of Fairview Apartments for a higher amount does not constitute an unlawful act or a lawful act by unlawful means, or a "scheme" at all.

The Order cites to case law for the proposition that a conspirator needs to know of the scheme and assist in it to be held responsible for it. (R. 1623) There is absolutely no evidence of Morrow having knowledge of the sale, or plan for sale, of the Fairview Apartments until she signed the closing papers more than a month after the Plaintiffs took their money and exited their relationship with Morrow. Furthermore, Plaintiffs allege to other members of the "conspiracy," Morrow's husband and I.D.M., however, neither of them

was a party to the Operational Agreement which is the subject of this litigation, or the sale of the Fairview Apartments, which is the basis of Plaintiffs' claim of breach. Therefore, no conspiracy was proven by Plaintiffs and the Order on appeal should be reversed.

The entirety of this litigation and appeal is based upon alleged damages to the Plaintiffs based upon their contractual relationship in the Fairview Group. The one fact that we have learned about the formation of this group and its relationship to Morrow's husband is that Morrow's husband encouraged the Plaintiffs to invest in the Fairview Group by promising them a 10% return on their investment. (T. 29) During their time with the Fairview Group, the Plaintiffs received "nice" monthly distributions from the fruits of their investment. (T. 45) When the Plaintiffs voluntarily left the Fairview Group five years after its formation, they had more than doubled their money (R. 1629, 1725). No conspiracy, and no damages, occurred here. The Order should be reversed.

The Plaintiffs pointed to "the usurpation of corporate opportunity through the sale of Fairview Apartments" as the "overt act" required for a conspiracy. (R. 1623) This Court has addressed the issue of usurping a corporate opportunity, but even more interesting is what this Court said about estoppel in the same case opinion. In Head v. Lane, 495 So.2d 821 (Fla.

4th DCA 1986), four gentlemen, including Head and Lane, created the Pine Creek Development Corporation as equal 25% shareholders for the purpose of buying and developing a land parcel for sale and profit. 495 So.2d at 822. The land purchase deal included the payment of a \$30,000 broker's commission to a broker affiliated with shareholder Lane, and Lane claimed entitlement to half of that commission based upon bringing the buyer to the broker. Id. at 823. A conflict developed among the four shareholders and three of them advised Lane he was not going to be included in the purchase transaction. Lane did not object; he merely advised that he would still be taking his half of the broker's commission on the deal. The other three gentlemen then formed another corporation and purchased the land parcel through that new company, providing Lane with half of the broker's commission. Thereafter, Lane filed a shareholder's derivative action on behalf of Pine Creek Development Corporation, asserting that the defendants usurped a corporate opportunity from Pine Creek when they formed another company and purchased the land parcel out from under Pine Creek. Id. at 822-3.

This Court held that the doctrine of estoppel applied in Head v. Lane based upon Lane's knowledge of the other Pine Creek shareholders' plan to purchase the land and Lane raised no objection to it until the deal was done.

Id. at 824-5. The reasoning for applying estoppel is that Lane attempted to repudiate the sale of the land after he had accepted a portion of the broker fee from the transaction. Id. at 824. Likewise, in the case at bar, the Plaintiffs profited from their Fairview Group memberships for five years. They entered into the Fairview Group at least partially based upon a promise of good returns, allegedly made by Morrow's husband. They enjoyed good returns through their memberships. They dealt with Morrow's husband rather than Morrow on many matters. They knew that Morrow was not a decision-maker for the group. They accepted this arrangement wherein Morrow did not make herself available to them, but Morrow's husband did. They wanted more money than their monthly dividends, and Morrow's husband advised them that the only way to obtain more money was to sell Fairview Apartments or sell their interests in Fairview Group. They chose to sell their membership interests. They never questioned their options, or their price. Even when the sale was delayed for more than a year, they accepted payment for their price and sold their memberships in Fairview Group. Thereafter, the Plaintiffs initiated this litigation in an attempt to repudiate the Fairview Group's Operational Agreement, Morrow's handling of the contractual relationship between them in the Operational Agreement, and Morrow's husband's involvement in the Fairview Group. The Plaintiffs

benefitted from the Operational Agreement for more than five years. They more than doubled the money that they invested in Fairview Group. Like Lane, they should be estopped from asserting that Morrow usurped a corporate opportunity from them after they were no longer members of the Fairview Group.

IV. THE DAMAGES AWARDED BY THE JUDGE ARE NOT SUPPORTED BY THE RECORD EVIDENCE.

The judge allowed the Plaintiffs to formulate their damages below by calculating the difference between what they received in the sale of their Fairview Group memberships and what they would have received from the later sale of the Fairview Apartments. This was incorrect because the two transactions were not equitable. Furthermore, Plaintiffs presented no expert testimony on the calculation of damages to assist the judge in determining a remedy.

A. STANDARD OF REVIEW

The judge's determination of the method for calculating damages is reviewed de novo. Dooley v. Gary the Carpenter Construction, Inc., 2023 WL 7359849 (Fla. 3d DCA 2023).

B. THE CALCULATION OF DAMAGES USED BY THE JUDGE IS IMPROPER.

The Order on appeal lays out the method of calculating damages

presented by the Plaintiffs and adopted by the judge:

41. Plaintiffs presented a simple damages model based upon the difference the Plaintiffs would have received in distributions upon the sale of the Fairview Apartments to 847 Fairview Holding, LLC, compared with what they received under the Sale and Purchase Agreement with Forest Wind.

...

43. The calculation for these amounts was based upon the Operating Agreement and procedures for refunding capital contributions and distribution of profits. This calculation was the same for the sale of Plaintiffs' membership interests, rendering the calculation simple and straightforward (R. 1822-3).

What the Order calls a "simple damages model" is actually the use of the Operating Agreement's requirement for the distribution of "available cash" found in Article V, Section 4 (R. 1328). Two problems arise with using this provision for the calculation of Plaintiffs' alleged damages. First, Article V, Section 4 does not include the sale of the Fairview Apartments in its definition of distributions to be made to members of the Fairview Group. Article V, Section 4 states:

Section 4. Distributions. Available cash shall be distributable to the members in proportion to their respective then-existing non-returned, contributed capital. Available cash is (i) that sum of cash resulting from business operations, including sales revenues, royalties, interest income and any other income derived from sale or use of products developed by this Company plus funds reserved in a previous fiscal year but released without

expenditure, less (ii) all cash expenditures, including, but not limited to real and personal property taxes, principal and interest payments on all loans made to the Company, insurance, capital requirements, accounting and legal fees and supplies, and less any amount which the Manager or Managers may reasonably determine to be necessary as a reserve for operating expenses, capital improvements, security deposits or contingencies, but not including cost expenditures previously reserved against in a prior fiscal year. Distributions of available cash shall be made no less often than annually, as determined by the Manager or Managers.

(R. 1328). Nothing in this section of the Operating Agreement calls for the sale of the Fairview Apartments and the distribution of the proceeds from such a sale. Recall that the entire purpose of creating the Fairview Group was for the ownership, operations, and management of the Fairview Apartments (R. 1323). Therefore, including the proceeds from the sale of the property in the damages awarded to the Plaintiffs was improper and should be reversed.

Secondly, even if Article V, Section 4, of the Operating Agreement did call for the distribution of the proceeds from the sale of the Fairview Apartments, the Plaintiffs are not entitled to such distributions because they were no longer members of the Fairview Group at the time of the sale of the Fairview Apartments. Plaintiffs received and deposited their sales price for their memberships in the Fairview Group before the Fairview Apartments

were sold. Consequently, Plaintiffs were no longer members of the Fairview Group at the time of the sale of the Fairview Apartments, therefore, the Operating Agreement provides Plaintiffs with no relief for their alleged damages.

The “simple damages model” is also inaccurate and improper because Article V, Section 4 of the Operating Agreement defines “available cash” for distribution as the sum of cash resulting from the business operations of Fairview Group, less “. . . all real and personal property taxes, principal and interest payments on all loans made to the Company, insurance, capital requirements, accounting and legal fees and supplies, and . . . a reserve for operating expenses, capital improvements, security deposits or contingencies. . .” (R. 1328). However, the Plaintiffs’ simple math did not account for all of these expenses which must be covered first before a distribution is made.

In sum, the sale of the Fairview Apartments was a very different transaction than the Plaintiffs’ sale of their membership interests in the Fairview Group. The two transactions cannot be equated for the purpose of defining the Plaintiffs’ damages. The Operating Agreement does not call for the sale of the Fairview Apartments, nor does it account for distributing the monies received from the sale of said property. For all of these reasons,

the calculation of damages provided for in the Order on appeal should be reversed.

CONCLUSION

Because Defendant Morrow did not breach a contract causing damages to the Plaintiffs, the Final Judgment entered in favor of Plaintiffs on March 28, 2024, should be reversed. Furthermore, regardless of Morrow's compliance or non-compliance with the contract at issue, the Plaintiffs were no longer parties to that contract at the time they claim Morrow breached it, therefore, Plaintiffs could not suffer damages at the hands of Morrow and the Final Judgment entered against her should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of this Initial Brief was furnished to Chris Horton, Esq., Smith, Currie & Hancock, LLP, 101 N.E. Third Avenue, Suite 1910, Fort Lauderdale, FL 33301, at cmhorton@smithcurrie.com ; cgare@smithcurrie.com ; rweiner@smithcurrie.com this 19th day of August, 2024.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Initial Brief complies with the font requirements of rule 9.045(b) in that this Brief was prepared with Arial 14-point font, and it complies with the word count requirements of rule 9.120(a)(2) in that this Brief contains 8739 words.

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