STATE OF MICHIGAN

COURT OF APPEALS

KARL HORVATH, Plaintiff-Appellee,	UNPUBLISHED January 18, 2011
v	No. 292304 Wayne County Circuit Court LC No. 06-625310-CZ
HRT ENTERPRISES, HEIN RÜSEN and CARL THOMAS, Defendants-Appellants.	

Before: ZAHRA, P.J., and TALBOT and METER, JJ.

PER CURIAM.

In this partnership accounting action, defendants HRT Enterprises (HRT), Hein Rüsen (Rüsen) and Carl Thomas (Thomas) appeal as of right a $691,033.32 judgment for plaintiff Karl Horvath. We affirm in part, vacate in part, and remand for entry of judgment consistent with this opinion.

I. BASIC FACTS AND PROCEEDINGS

In 1984, plaintiff, Rüsen and Thomas formed a partnership, HRT, with the intention of purchasing 11 acres in the city of Detroit that housed a vacant former Chrysler plant (plant) and an annex building. To finance the $450,000 purchase, HRT acquired a $300,000 note in exchange for a mortgage on the subject property and plaintiff, Rüsen and Thomas each contributed $50,000 to HRT.

The parties substantially disagreed at trial over the condition of the subject property at the time of purchase. Defendants presented testimony that the subject property was in "very very rough condition" and "borderline salvage." Defendants specifically cite testimony that thousands of panes of glass were broken, the roof leaked and that a homeless man lived in one the offices. At trial, plaintiff testified that the subject property was in "prime condition," "[t]he windows were nice and clean and the floor had a gloss on the concrete." He testified that "nothing needed to be fixed in the building when HRT bought it." However, on appeal, plaintiff concedes that "at the beginning of 1984 the [subject] [p]roperty needed cleaning and repairs."

Despite the alleged condition of the subject property, HRT, in 1984, executed leases with two companies to rent the plant. Plaintiff owned one of the companies, Canadian-American Steel, which executed a lease beginning on January 15, 1984. The other company, City Steel

(City Steel I), was a subsidiary of a company, Namasco, of which Rüsen and Thomas were executives. Namasco was a subsidiary to a company identified as Clockner. In December, HRT leased the second floor to RT, a separate partnership between Rüsen and Thomas. According to defendants, there was an understanding between the partners of HRT that RT was to improve the second floor offices, and, to recoup its expenses, RT would then sublet the property to City Steel I for more than the rent paid to HRT. Notably, defendants allege that plaintiff approved of this arrangement and thereby established a precedent in which HRT's lessee could sublet for a higher rent than the lessee paid to HRT.

Canadian-American Steel soon became financially troubled, missed three mortgage payments, and against plaintiff's will, HRT evicted Canadian-American Steel. After the eviction, plaintiff refused to communicate with Rüsen and Thomas and directed all correspondence to his attorney. Plaintiff did however file a lawsuit in regard to the eviction, naming Rüsen, Thomas, City Steel I, Namisco, and its parent Clockner, as defendants. Although Rüsen testified that the lawsuit was frivolous, Clockner nonetheless settled for $200,000. Despite this falling out, plaintiff remained a partner of HRT during the proceedings of this case.

After HRT evicted Canadian-American Steel, City Steel I continued to operate in the plant until Namasco terminated the venture in 1997. Rüsen and Thomas also had a steel sales company, Merkur, operating on the second floor of the plant. Faced with no tenant on the first floor of the plant, Rüsen and Thomas started their own steel processing company, and with Namasco's permission, named it City Steel (hereafter City Steel II).

In January 1997, HRT executed a five-year lease with Merkur for the entire subject property for $12,000 a month. In the same month, Merkur executed a 5-year sublease with City Steel II to rent an area of the plant for $12,000 a month. In February 1997, Merkur executed a 5-year sublease with Merkur Technical Services (Merkur Technical) to rent an area of the plant and annex for $7,500 a month. Rüsen and Thomas had a substantial ownership interest in Merkur Technical. In December 2001, HRT executed another five-year lease Merkur for the entire subject property for $13,000 a month. The same subtenants executed subleases with Merkur with the same terms as the previous subleases.

The central issues at trial involved the above sublease arrangement. At trial, defendants maintained that "the total rents received by Merkur . . . from its subtenants were greater than the rent paid by Merkur . . .to HRT, because the subtenants were reimbursing Murkur . . . for the improvements and the use of equipment owned by Merkur . . . ." There was testimony at trial Merkur spent over $850,000 in improvements, though there was little or no documentation to substantiate the claims. Plaintiff, on the other hand, maintained that the subleases indicate that each subtenant confirmed that they inspected the rented property and accepted it in its present condition. Plaintiff also stresses that all the leases require that the tenants pay all operating, maintenance and repair costs (referred to as net-net-net leases or triple net leases). Plaintiff also elicited evidence that when City Steel I operated in the plant, Namasco paid for improvements. In response to the claim that the lease did not obligate Merkur to make improvements, defendants maintained it was not necessary because "[i]t was a lease between a company that [Rüsen and Thomas] owned and another company that [Rüsen and Thomas] owned." Plaintiff maintained that this sublease arrangement simply allowed for Rüsen and Thomas to avoid having to pay HRT the actual rent that was paid to Merkur, thereby denying plaintiff his portion of the rents that should have been paid to HRT.

There was also evidence at trial that Rüsen and Thomas made several capital contributions to HRT. Since plaintiff refused to contribute to HRT, his share in the partnership was reduced pursuant to the HRT partnership agreement. HRT continued to send plaintiff profit checks, totaling close to $500,000 at the time of trial. Notably, at trial plaintiff counsel agreed to the legitimacy of the capital contributions and accepted plaintiff's resulting reduction in partnership interest. The trial court likewise found that the capital contributions were appropriate and plaintiff does not challenge this finding on appeal.

After the bench trial, the trial court noted that "[t]he main issue in this lawsuit is whether or not [plaintiff] received—should have received the income from the subtenant[s] on this industrial complex." In this regard, the court held:

> The payment of the two subtenants wasn't paid directly to HRT, which would be the appropriate entity to receive the net income from those buildings because of the Partnership Agreement. Instead, the money was paid to Merkur Steel. And the Court believes that was legally incorrect. That the partnership, HRT, should have received the income from the subleases.

The court also held that, "[t]he entire award is based on subleases that the Court believes [plaintiff] should have received . . . [a pro rata share.]" In fashioning the award, the court went "through and indicate[d] each year, year-by-year what the gross amount was; what [plaintiff]'s percentage was, and what he should have received." The trial court entered judgment for plaintiff and this appeal followed.

II. CLAIM OF BREACH OF FIDUCIARY DUTY

On appeal, defendant maintains that plaintiff at trial waived any claim arising from a breach of fiduciary duty. We disagree.

During pre-trial proceedings, plaintiff indicated that he was asserting two claims. Specifically, plaintiff indicated he was litigating a partnership accounting claim, to which there is no right to a jury trial, and a breach of fiduciary duty claim, to which he asserted a right to a jury trial. Just prior to the commencement of trial, plaintiff counsel stated "what we will do is withdraw our jury demand in this case and so we will proceed as a bench [trial]." During plaintiff's opening statement plaintiff nonetheless argued that Rüsen and Thomas violated their fiduciary duty to plaintiff. However, during defendants' opening statement, defense counsel stated that "I'm a little confused I guess is the right word about the mention of a breach of fiduciary duty claim by [plaintiff counsel] in his opening statement. My understanding is that the only claim that remains in the case is the partnership accounting claim." The court replied, "[t]hat's correct."

On appeal, defendants claim that plaintiff "voluntarily dismissed his claims for breach of fiduciary duty." However, the record only literally supports the assertion that plaintiff intentionally waived his right to a jury trial on the breach of fiduciary duty claim, not the entire claim. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). At oral argument, defense counsel represented that the trial court had "absolutely" entered a written order dismissing the breach of fiduciary duty claim. However, our review of the record does not reveal such an order, nor has defense counsel produced the order alleged to exist.

Further, even assuming plaintiff waived his breach of fiduciary duty tort claim, we recognize that a partnership accounting claim can include a claim based on a breach of fiduciary duty. First, the statutory language under the Michigan Uniform Partnership Act expresses that partners must *account* as fiduciaries:

> Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property. [MCL 449.21.]

Second, case law supports the conclusion that a partnership accounting claim can include claims similar to those made here based on a breach of fiduciary duty. See i.e., *Bondy v Davis*, 40 Mich App 153, 198 NW2d 418 (1972) (the plaintiff filed an action for a partnership accounting arguing that the defendant partner had defrauded plaintiff by appropriating partnership funds to defendant's own use) *Bellware v Wolffis*, 154 Mich App 715, 397 NW2d 861 (1986) (the plaintiff alleged that the defendant without plaintiff's knowledge took exclusive control and possession partnership's assets and that the defendant used the profits for her use and benefit to the exclusion of plaintiff and denied plaintiff any participation in the management of the business).

Third, treatise partnership law supports the proposition that a partnership accounting claim can include claims similar to those made here based on a breach of fiduciary duty. "Since all activities related to the partnership are subject to scrutiny, a wide variety of matters may be determined, for example . . . [q]uestions of fiduciary duty, such as whether a partner must account for profits from an outside transaction . . . ." Crane and Bromberg, Law of Partnership, Right To An Account, § 72. This conclusion is supported in that Michigan partnership law largely follows the Uniform Partnership Act. Accordingly, we agree with plaintiff that an equitable partnership accounting claim may include claims based on a breach of fiduciary duty.

III. STATUTE OF LIMITATIONS/LACHES

In the absence of disputed facts, we review de novo questions regarding the applicability of a statute of limitations. *Joliet v Pitoniak*, 475 Mich 30, 35; 715 NW2d 60 (2006). In regard to laches, this Court reviews de novo a trial court's equitable decisions but reviews the findings of fact supporting an equitable decision for clear error. *Yankee Springs Twp v Fox*, 264 Mich App 604, 611; 692 NW2d 728 (2004).

Defendants argue that the trial court erred in denying them summary disposition because the action was barred by the statute of limitations and laches. We disagree.

Defendant first argues that because the Michigan Partnership Act does not contain a statute of limitations, MCL 600.5805(10) applies a general 3-year statute of limitations. However, in regard to a partnership accounting action, MCL 449.43 provides, "[t]he right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary." See, also, *Reindel v Reindel*, 253 Mich 680, 682-683; 235 NW 861 (1931) (holding that the applicable statute of limitations does not begin to run in a suit for an accounting and dissolution until dissolution occurs or there has been a settlement or accounting of partnership dealings). Here because the partnership had not been dissolved at time of trial and the partnership agreement does not contain a provision barring the action, the partnership accounting action is not barred by any statute of limitations.

Defendants next argue that laches bars plaintiff's accounting claim. We disagree.

> Laches is an affirmative defense based primarily on circumstances that render it inequitable to grant relief to a dilatory plaintiff. The doctrine of laches is triggered by the plaintiff's failure to do something that should have been done under the circumstances or failure to claim or enforce a right at the proper time. The doctrine of laches is founded upon long inaction to assert a right, attended by such intermediate change of conditions as renders it inequitable to enforce the right. But [i]t has long been held that the mere lapse of time will not, in itself, constitute laches. The defense, to be raised properly, must be accompanied by a finding that the delay caused some prejudice to the party asserting laches and that it would be inequitable to ignore the prejudice so created. The defendant bears the burden of proving this resultant prejudice. [*Attorney General v PowerPick Club*, 287 Mich App 13, 50-51; 783 NW2d 515 (2010) (citations omitted).]

Initially, we cannot agree that laches can bar an accounting claim that can expressly be brought pursuant to law, MCL 449.43. "It is fundamental that equity follows the law." *LaBour v Michigan Nat Bank*, 335 Mich 298, 302; 55 NW2d 838 (1952). Nonetheless, defendants specifically maintain that laches is appropriate because plaintiff refused to participate in the partnership for over twenty years and could have readily discovered the subleases. Notably, however, all of the cases cited by defendant involving laches and partnership accounting actions are distinguishable because they were brought either after the dissolution of the partnership or involve the formal abandonment of the partnership. Further, there is no record evidence that defendants ever disclosed to plaintiff that Merkur subleased the subject property to companies owned by defendants for more than Merkur leased the subject property from HRT. Accordingly, there is no basis to conclude that plaintiff was aware of a possible cause of action for breach of fiduciary duty. In addition, the record evidence only indicates that plaintiff could have had access to HRT's records, which would include HRT's leases with Merkur but not likely Merkur's subleases with City Steel II and Merkur Technical. Defendants only offer anecdotal evidence that plaintiff could have discovered the subleases given "a big sign in front of the main building that identified it as the home of City Steel [II]." Just as persuasive however is that plaintiff counsel only discovered the subleases shortly before trial through discovery, and thus, we cannot impute that plaintiff could have earlier discovered the subleases.

Last, for the reason cited above, even if MCL 600.5805(10) applied, a breach of fiduciary duty claim accrues when a plaintiff knew or should have known of the breach. *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 47, 698 NW2d 900 (2005); *Bay Mills Indian Community v Michigan*, 244 Mich App 739, 751; 626 NW2d 169

(2001). Accordingly, the trial court did not err refusing to bar plaintiff's action based on the statute of limitations or laches.

IV. ACCOUNTING CLAIM

This Court reviews a trial court's factual findings at a bench trial for clear error, but its legal conclusions are reviewed de novo. *Villadsen v Mason Co Rd Comm*, 268 Mich App 287, 291-292; 706 NW2d 897 (2005).

We conclude there is sufficient basis to find that defendants breached a fiduciary duty to plaintiff. Specifically, we conclude there is sufficient evidence that defendants engaged in self-dealing, which as previously addressed, can be asserted as in a partnership accounting action as a breach of fiduciary duty.

> Partners have rights and duties that arise from a partnership in general. A partnership is "an association of 2 or more persons, . . . , to carry on as co-owners a business for profit" MCL 449.6. The duty of the general partners is based on two provisions of the Uniform Partnership Act. MCL 449.420 requires that, "[p]artners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability." MCL 449.20 "has been broadly interpreted as imposing a duty to disclose all known information that is significant and material to the affairs or property of the partnership." *Band v Livonia Associates*, 176 Mich App 140, 113; 439 NW2d 285 (1989). Generally, this fiduciary duty among partners is one of full and frank disclosure of all relevant information. *Id.* at 113.
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> MCL 449.421 also provides that:
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> Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property;

Partners have a fiduciary relationship and, in their dealings with each other, are required to exercise the highest standards of good faith. MCL 449.25(2)(c); *Van Stee v Ransford*, 346 Mich 116; 77 NW2d 346 (1956).

Defendants present several arguments to avoid liability, but primarily argue that,

> [t]his ruling was incorrect for at least three reasons. First, Merkur Steel leased the entire Property from HRT, and HRT was not a party to its subleases. Second, Merkur Steel paid for the majority of the improvements to the building, as well as equipment, and thus was entitled to charge rent to its subtenants for the benefit of using those improvements and equipment. Third, the Circuit Court essentially pierced the corporate veil of Merkur Steel, which was not a party to this case, by holding its shareholders (Rüsen and Thomas) personally liable for additional rent allegedly owed to Horvath.

We find that defendants' arguments fail to address the relevant issue in this case. We agree with defendants that the partnership agreement itself does not prevent Rüsen and Thomas from owning Merkur Steel, executing a lease between HRT and Merkur Steel, owning City Steel II and Merkur Technical, or executing subleases between Merkur Steel and City Steel II and Merkur for a higher amount than the lease between HRT and Merkur Steel. The partnership agreement simply does not bar these activities. However, the issue in this case is defendants' failure to disclose this arrangement to plaintiff, their partner. In *Band*, 176 Mich App at 113-114, this Court elaborated on a partner's fiduciary duties:

> The courts universally recognize the fiduciary relationship of partners and impose on them obligations of the utmost good faith and integrity in their dealings with one another in partnership affairs. Partners are held to a standard stricter than the morals of the marketplace and their fiduciary duties should be broadly construed, "connoting not mere honesty but the punctilio of honor most sensitive." The fiduciary duty among partners is generally one of full and frank disclosure of all relevant information. Each partner has the right to know all that the others know, and each is required to make full disclosure of all material facts within his knowledge in any way relating to the partnership affairs. Thus, disclosure to one or several partners does not fulfill this duty as to every other partner. [Citations omitted.]

Here, Merkur, which was leasing HRT's property, subleased that property to companies owned by Rüsen and Thomas at a higher rate than Merkur's lease with HRT. From these facts, there is clear inference that Rüsen and Thomas made use of Merkur to usurp profits that should have gone to HRT. Rüsen and Thomas "must account to the partnership for any benefit and hold as trustee for it any profits derived by him without the consent of the other partners from *any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property*." MCL 449.421 (emphasis added). Here, there is record evidence that Rüsen and Thomas profited from the use of property owned by HRT by allowing Merkur to sublease the property for more than Merkur paid HRT to lease it. We conclude there is suffieint evidence that Rüsen and Thomas violated their fiduciary duty by failing to disclose this arrangement.

Defendants also argue that the trial court erred in ignoring Merkur's improvements to the subject property. Here, there is no dispute that leases and subleases were all triple net-net-net leases, ". . . in which the lessee pays all of the expenses . . . ." Black's Law Dictionary, 6th ed. Clearly, under the leases and subleases if a tenant desired an improvement, it was the tenant's obligation to make the improvement. Further, consistently throughout this case defendants have maintained that they essentially acted pursuant to "understandings" instead of actual documentation. However, given the written leases, it must be assumed that Merkur made improvements for its own benefit. A clear contract will be enforced as written. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). Further, testimony to the contrary cannot be considered. Where a lease is clear and unambiguous, parol evidence of negotiations cannot be admitted to vary the lease. *Central Transport, Inc v Fruehauf Corp*, 139 Mich App 536, 544; 362 NW2d 823 (1984), citing *Goodwin, Inc v Coe Pontiac, Inc*, 392 Mich 195, 204; 220 NW2d 664 (1974).

In addition, defendants have not offered a genuine explanation as to why HRT could not have executed the subleases. Oddly, defendants maintain that,

> Rüsen and Thomas could have decided that the improvements would be made by HRT. Only two votes were needed to authorize a capital call by HRT, until the total paid-in capital of HRT equaled or exceeded $600,000. If Rüsen and Thomas had done that, Horvath's ownership interest in HRT would have been diluted, since Horvath did not participate in any HRT capital calls for over twenty years. As a result of a reduction in Horvath's percentage of ownership in HRT, the distributions paid to Horvath would have been substantially reduced over the years. He would have been paid much less than the $500,000 he actually received from HRT.

Although defendants portray this scenario as unacceptable, we find the above scenario is precisely how Rüsen and Thomas should have acted consistent with the partnership agreement and fiduciary duties. Accordingly, we cannot agree with defendants that the trial court erred in concluding that plaintiff established that defendants violated their fiduciary duty to plaintiff.

V. IMPROPER EXPERT WITNESS/DAMAGES/INTEREST

We review a trial court's decision to exclude undisclosed witnesses for an abuse of discretion. *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 90; 618 NW2d 66 (2000). We review for clear error a trial court's findings of fact at a bench trial, including its determination of damages. *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000). Statutory interpretation is a question of law that is considered de novo on appeal. *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

Defendant argues that the trial court erred in denying their motion to exclude Richard Wallis to testify as an expert witness. We agree with plaintiff that the trial court primarily questioned Wallis' on "undisputed lease revenue figures and the undisputed partnership equity percentage from . . . HRT's business records." Further, these figures and the partnership equity percentages from HRT's business records were not challenged below nor are they challenged on appeal. Here, the only prejudice defendants allege in regard to Wallis' testimony is that "it was his opinion that HRT was entitled to receive 'every penny' of the rent that was paid to Merkur by its subtentants, City Steel [II] and Merkur Technical." In essence, defendants claim that the trial court improperly relied on Wallis' testimony in regard to the ultimate question of damages.

It is appropriate to "presume that the trial court, sitting as trier of fact in this bench trial, knew the law and considered only the evidence properly before it." *Dep't of Human Services v Nierescher*, 277 Mich App 71, 84; 744 NW2d 1 (2007). Accordingly, this Court must presume that the trial court did not consider Wallis' opinion on this point, as expert testimony is inadmissible to express legal definitions, standards or conclusions. *Downie v Kent Products, Inc*, 420 Mich 197, 205; 362 NW2d 605 (1984).

Notwithstanding this presumption, however, we conclude that the trial court clearly erred in fashioning the award. The record reflects that the trial court simply divided the yearly amounts that the subtenants paid to Merkur into plaintiff's corresponding percentage of the partnership for that year. For instance, for the 1997 fiscal year, the court divided the $226,500 the subtenants paid in rent into plaintiff's share of the partnership that year, 24.14 percent, resulting in a $54,677 award for that year. However, this calculation does not account for the amount that Merkur undisputedly paid HRT, of which plaintiff already received his proper share. The award must be limited to plaintiff's share of the subtenants' rental payments to Merkur that exceeded the amount that Merkur paid to HRT. In 1997, Merkur paid HRT $144,000 in rent. Accordingly, the excess rent was only $82,500, which divided by plaintiff's partnership share, is $19.915.50. Viewing the evidence in the light most favorable to plaintiff, plaintiff can only be awarded his share of the amount that HRT would have profited from the subleases. *Taylor v Kent Radiology, PC*, 286 Mich App 490, 522; 780 NW2d 900 (2009). Accordingly, the proper total of the yearly amounts the subtenants paid to Merkur, less the yearly amounts Merkur to HRT, multiplied by yearly plaintiff's partnership share as reflected in the following note,[1] is $180,972.

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[1]

Fiscal Year	Amount of rent paid by subtentant(s)	Amount of rent Merkur paid HRT	Difference in rent paid by subtentant(s) and rent Merkur paid HRT	Plaintiff's partnership percentage	Plaintiff's share in subtentant(s) rent
1997	$226,500	$144,000	$82,500	24.14	$19,915.50
1998	$234,000	$144,000	$90,000	24.14	$21,726
1999	$234,000	$144,000	$90,000	24.14	$21,726
2000	$234,000	$144,000	$90,000	24.14	$21,726
2001	$234,000	$144,000	$90,000	24.14	$21,726

Defendants also argue the trial court improperly imposed judgment interest from 1997. We agree. MCL 600.6013(8) applies to “complaints filed on or after January 1, 1987,” and expressly states that “interest on a money judgment recovered in a civil action is calculated at 6-month intervals *from the date of filing the complaint*.” (Emphasis added). The Legislature clearly provided the extent to which interest may be awarded retroactively. There is no basis for retroactive interest provided by statute.

VI. CASE EVALUATION SANCTIONS

Rüsen and Thomas argue “the evaluation panel failed to comply with MCR 2.403 by issuing a separate award for each [d]efendant.” We disagree.

MCR 2.403(K)(2) provides that “[t]he evaluation must include a separate award as to the plaintiff’s claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action.”

We find Rüsen’s and Thomas’ claim unpersuasive. Rüsen and Thomas were separately delineated on the evaluation form and their attorney signed the document on their behalf. The case evaluation provided one figure, $75,000, for plaintiff and against each defendant, including Rüsen and Thomas. Technically, the figure could be considered as $75,000 against HRT, Rüsen and Thomas, separately. However, given that a partnership and two of its members are the named defendants in this case, we agree with the trial court that the most reasonable

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2002	$256,000	$156,000	$100,000	24.14	$24,140
2003	$258,000	$156,000	$102,000	24.14	$24,623
2004	$142,000	$116,000	$26,000	17.38	$4,519
2005	$114,000	$60,000	$54,000	17.38	$9,385
2006	$114,000	$60,000	$54,000	17.38	$9,385
2007	$84,000	$60,000	$24,000	8.75	$2,100 = $180,972

interpretation of the $75,000 evaluation figure indicates joint and several liability for each defendant. By definition, a partnership is "an association of 2 or more persons, . . . , to carry on as *co-owners* a business for profit" MCL 449.6. (Emphasis added). Defendants cannot maintain that liability for their conduct during the course of a partnership should be measured separately.

Rüsen and Thomas claim that the case evaluation sanction must be delineated separately "since Rüsen was no longer a partner in HRT after 2005," and thus he should have had a lesser separate award. We cannot conclude the trial court erred in finding Rüsen jointly and severally liable for the entire amount of evaluation sanctions. There is no real dispute that the vast majority of defendants' liability arose before 2005, and thus, holding Rüsen, a partner, jointly and severally liable for case evaluation sanctions is not improper. We reject Rüsen's and Thomas' claim to separately delineate Rüsen's case evaluation sanction.

VII. SETTLEMENT AGREEMENT

The existence and interpretation of a contract are questions of law reviewed de novo. *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). The construction and application of a court rule are questions of law that this Court reviews de novo on appeal. *Wickings v Arctic Enterprises, Inc*, 244 Mich App 125, 133; 624 NW2d 197 (2000).

Under these circumstances, the trial court did not err in refusing to enforce an unsigned settlement agreement.

Defendants present evidence that on January 10, 2008, plaintiff's former attorney, Brian Nettleingham, stated in e-mail:

> After much discussion, Mr. Horvath is agreeable to the settlement proposal made by Mr. Thomas at our last meeting, in which Mr. Horvath retains a 12.5% interest in the net sale proceeds of the building, together with the other terms and conditions we discussed. There would be no upfront cash, but the amount would not reduce over time.
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> This acceptance is, is of course, subject to approval of a final written agreement specifying all terms.

On January 19, 2008, defense counsel Demorest purportedly reduced the terms of the Settlement Agreement to writing and e-mailed it to Nettleingham, and requested he prepare a stipulated order of dismissal. In response, Nettleingham requested two provisions be added to the settlement agreement. Defendants also present evidence that Nettleingham wrote the following to the Mediation Tribunal Association: "Please be advised that the parties have agreed to the essential terms of a settlement in this matter and are documenting their agreement for execution. We anticipate submitting a final order to the court for entry shortly."

In a February 25, 2008 email, Nettleingham sent the final settlement agreement to Demorest, and indicated that he had been attempting to contact plaintiff. Plaintiff never signed the settlement agreement.

Defendants argue that the settlement agreement should be enforced despite plaintiff's refusal to sign. Defendants rely heavily on *Kloian v Domino's Pizza LLC*, 273 Mich 449; 733 NW2d 766 (2006). In *Kloian*, "the parties attorneys agreed through a series of e-mails that [the] defendant would pay [the] plaintiff $48,000 to settle the lawsuit in exchange for a release of all possible claims." The plaintiff's attorney sent an e-mail to the defendants attorney, stating: "I confirmed with Mr. Kloian that he will accept the payment of $48,000 in [ex]change for a dismissal with prejudice of all claims and a release as [sic, of] all possible claims." In response , the defendant's attorney wrote: "Domino's accepts your settlement offer . . . ." On March 18, 2001, the plaintiff's attorney sent an e-mail to the defendant's attorney stating: "I reviewed your documents and find them to be in order. However, Mr. Kloian would like the protection of a mutual release." The defendant's attorney sent a response the same day stating: "I have the check and Domino's agreement to a mutual release. I need to revise the prior release and get it to you."

The plaintiff did not sign the settlement agreement, and the defendant moved to enforce. The defendant asserted that the parties established the terms of the settlement agreement. The trial court found that the parties had entered into a binding settlement agreement. On appeal, this Court agreed with the trial court, holding that:

> The language in plaintiff's settlement offer indicated that plaintiff would accept $48,000 from defendant to settle the lawsuit, and, in exchange, he would promise to release all possible claims against defendant. On the basis of this interpretation of plaintiff's offer, we conclude that defendant's acceptance was unambiguous and in strict conformance with plaintiff's offer. Therefore, defendant's acceptance was sufficient to create a contract between the parties on March 18, 2005.

Here, similarly, defendants argue that the parties reached an agreement. We agree with defendants that the elements of an agreement appear to be met. Indeed, all that was remaining to execute the agreement was the formality of acquiring plaintiff's signature.

However, plaintiff is correct that the instant case is distinguishable from *Kloian*, 273 Mich App 449. Here, plaintiff was subject to conservatorship and MCR 2.420 is applicable. Under MCR 2.420(b), "a proposed consent judgment, settlement, or dismissal pursuant to settlement must be brought before the judge to whom the action is assigned and the judge shall pass on the fairness of the proposal." The court rules clearly establish a particular procedure for those subject to conservatorship to enter into a settlement agreement. The Michigan Supreme Court has the exclusive authority to promulgate rules governing practice and procedure in Michigan courts. Mich Const1963, art. 6, § 5. Accordingly, the settlement agreement cannot be enforced absent compliance with MCR 2.420(b).

Consistent with this opinion, we affirm the trial court's finding of liability, but vacate the award and remand for entry of an award of $180,972, in addition to the award of case evaluation sanctions. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Patrick M. Meter