Circuit Court for Frederick County
Case No.: 10-C-12-002939

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 676 and 1501

September Term, 2017

No. 676
ROCKY GORGE DEVELOPMENT, LLC
F/K/A ROCKY GORGE HOMES, LLC, *et al.*
v.
GAB ENTERPRISES, INC.

No. 1501
ROCKY GORGE DEVELOPMENT, LLC, *et al.*
v.
GAB ENTERPRISES, INC.

Friedman,
Beachley,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: November 30, 2018

The litigation that resulted in this consolidated appeal commenced on September 28, 2012 when GAB Enterprises, Inc. ("GAB") filed a nine count complaint in the Circuit Court for Frederick County against four defendants: Rocky Gorge Development, LLC (F/K/A Rocky Gorge Homes LLC, *et al.*) ("Rocky Gorge"), Christopher Dorment ("Dorment"), Dorment's wife, Rosemary P. Dorment ("Mrs. Dorment"), and Waverley View Investors, LLC ("Waverley"). Dorment was, at all times here relevant, president and chief executive officer of Rocky Gorge. Waverley is a company formed and controlled by Dorment. The nine counts, and the defendants named in each count, were:

1. Count I: Intentional Misrepresentation – Rocky Gorge and Dorment;
2. Count II: Constructive Fraud – Rocky Gorge and Dorment;
3. Count III: Negligent Misrepresentation – Rocky Gorge and Dorment;
4. Count IV: Fraudulent Conveyance Pursuant to Maryland Uniform Fraudulent Conveyance Act – Dorment and Mrs. Dorment;
5. Count V: Fraudulent Conveyance Pursuant to Maryland Spouses Liability Statute – Dorment and Mrs. Dorment;
6. Count VI: Tortious Interference with Contractual and Economic Relations – all defendants;
7. Count VII: Breach of Contract – Rocky Gorge;
8. Count VIII: Breach of Fiduciary Duty – Rocky Gorge and Dorment;[1]
9. Count IX: Civil Conspiracy – all defendants.

The circuit court granted defendants' motion to dismiss and a motion for summary judgment as to all counts. The reason for the dismissal and the grant of summary judgment was based on a previous finding by a judge in a related bankruptcy case. The circuit court ruled that the bankruptcy decision barred plaintiff's claims under the collateral estoppel

[1] Count VIII was later withdrawn by GAB.

doctrine. GAB appealed the circuit court's decision and we reversed the dismissal as well as the grant of summary judgment and remanded the case to the circuit court for further proceedings. *See GAB Enterprises v. Rocky Gorge Dev.*, 221 Md. App. 171 (2015). The Court of Appeals denied the defendants' petition for a writ of certiorari on May 27, 2015.

On September 27, 2016, GAB filed an amended complaint that added Count X and requested a declaratory judgment against Rocky Gorge, Dorment, and Waverley. Count X alleged:

> - [I]n the circumstances of this case, an actual controversy exists between GAB, on the one hand, and Rocky Gorge, Mr. Dorment, and Waverley, on the other, regarding the respective rights and interests of GAB, Rocky Gorge, Mr. Dorment, and Waverley concerning the Property. Specifically, as described above, GAB maintains that, because of Rocky Gorge's, Mr. Dorment's, and Waverley's wrongful and tortious conduct, GAB is entitled to (1) twenty percent of the current value of the Property, including, but not limited to, any settlement proceeds from, or judgment that is obtained against, any party, including, but not limited to, the Department of the Army, in connection with any environmental contamination issues, and (2) any and all profits received in connection with the parcel of the Property developed with pad sites for 240 multi-family apartment homes. In contrast, Rocky Gorge, Mr. Dorment, and Waverley contend that GAB has no rights or interests in the Property or any profits or proceeds received therefrom.

Reduced to its essence, Count X asked the court to declare what damages GAB was entitled to recover, due to the "wrongful and tortious conduct" alleged in Counts I – VII and IX.

On October 14, 2016, the defendants, for the first time, filed an answer to the complaint. GAB filed a motion to strike the answer on the grounds that the answer to the complaint was filed over thirteen months late. That motion was denied.

Count X was bifurcated and all remaining counts that had not been voluntarily dismissed, were tried before a Frederick County jury from October 24 through November 2, 2016. The jury returned a verdict in favor of GAB and against Dorment and Rocky Gorge on Count III (negligent misrepresentation) but awarded no damages as to that count. In regard to Count VI (tortious interference with contractual and economic relations), the jury found against Dorment but in favor of the other defendants and awarded GAB $1,400,000 in damages against Dorment. As to Count VII (breach of contract), the jury found in favor of GAB and against Rocky Gorge and awarded GAB $1,440,000. The jury returned a verdict in favor of Rocky Gorge and Dorment in regard to the counts alleging intentional misrepresentation and constructive fraud; additionally, the jury found in favor of Dorment and Mrs. Dorment, on the counts alleging fraudulent transfer of assets. The jury found in favor of all defendants in regard to the count alleging civil conspiracy and found, in answer to a question on the verdict sheet, that Dorment did not act with "actual malice," which, according to the court's instructions, meant "evil motive, intent to injure, or ill will."

Judgments, in accordance with the jury verdicts, were entered on November 3, 2016. Rocky Gorge and Dorment filed a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial or for remittitur. GAB filed an opposition to each of the post-trial motions. Following a hearing on the motions, the circuit court entered judgment in favor of Dorment and Rocky Gorge on the negligent misrepresentation claim because the jury had found no damages as to that count and, as a consequence, there could be no

liability. Otherwise, the court denied Rocky Gorge's and Dorment's post-trial motions. This left, for trial, the declaratory judgment count.

In regard to Count X, GAB filed a motion to reopen discovery on June 9, 2017. The circuit court denied that motion on June 27, 2017.

After a hearing on the declaratory judgment count, the circuit court entered judgment against GAB as to Count X. GAB filed a timely motion to alter or amend the declaratory judgment, which the circuit court denied on September 2, 2017. This appeal by Rocky Gorge and Dorment and cross-appeal by GAB followed. The questions presented, as phrased by Rocky Gorge and Dorment, are:

> 1. Did the circuit court err by not entering judgment for Dorment on GAB's intentional interference claim, where (a) Dorment was Chairman and CEO of Rocky Gorge; (b) the only alleged interference was with GAB's rights under its contract *with Rocky Gorge*; (c) the complained-of acts were within the scope of Dorment's duties and benefited Rocky Gorge and GAB; and (d) the jury expressly found no fraud, breach of fiduciary duty, fraudulent conveyance, civil conspiracy or actual malice by Dorment?
>
> 2. Did the circuit court err by failing to instruct the jury that it could not consider evidence of post-breach value in assessing damages for an alleged 2010 breach of contract, and by failing to set aside the resulting damages award that was plainly based on the property's value in 2016?
>
> 3. Did the trial court err by not setting aside or reducing damages on the ground that (a) they did not account for development costs, and (b) the two awards double counted the value of the same parcel?

In its cross-appeal, GAB words the questions presented, which we have re-ordered, as follows:

> 1. Did the circuit court err in overruling GAB's objection to Appellants filing an answer more than thirteen months late and on the eve of trial where Appellants failed to request an extension of time to do so and failed to offer any evidence of excusable neglect?

2. Did the circuit court err in denying GAB the right to discover any post-December 31, 2010 documents in the possession, custody, or control of the Appellants where GAB's document requests related to the issues and claims raised in the amended complaint and were reasonably calculated to lead to the discovery of admissible evidence?

3. Did the circuit court err by not entering judgment in GAB's favor on the declaratory judgment count where the relief sought in that claim was separate and apart from and in addition to the damages awards entered against Dorment and Rocky Gorge?

BACKGROUND

A. Evidence Regarding Liability.

Gary A. Berman ("Berman") is the president and sole owner of GAB. In 2003, Berman and Dorment wanted to develop a tract of land that was approximately 93 acres, as well as two smaller parcels, all located on Shookstown Road in Frederick City, Maryland ("the Property"). To accomplish their goal, Dorment, the chairman and CEO of Rocky Gorge, and Berman, the president of GAB, formed a company named RGHGAB at Frederick, LLC ("RGHGAB").

Although RGHGAB is technically a limited liability company, at trial, both Dorment and Berman referred to RGHGAB as "our partnership" or "the partnership." RGHGAB was formed so that it could purchase a promissory note that secured a loan on the Property, then foreclose on the loan so that RGHGAB would own the Property.

On November 10, 2003, GAB and Rocky Gorge signed a document titled "RGHGAB at Frederick, LLC Operating Agreement" ("the Operating Agreement"). The Operating Agreement was thirty-two pages in length with numerous exhibits attached. It provided that Rocky Gorge would be an 80% member and GAB would be a 20% member

of RGHGAB. Expenses, profits and losses were to be allocated in accordance with each party's ownership interest.[2] Under the Operating Agreement, RGHGAB would develop the property. All parties agreed to use "good faith and best efforts in all dealings."

The Operating Agreement contained several provisions that later turned out to be important in this litigation. Those provisions were:

- Section 1.3.2 described the zoning of nine of the parcels that made up the Property and the acreage of each parcel as follows:

Parcel A	Multifamily	16.1 acres +/- 366 units
Parcel B	Commercial	3.7 acres +/- TBD
Parcel C	Independent Elderly	4.2 acres +/- 150 units
Parcel D	Townhouse	2.9 acres +/- 24 units
Parcel E	Multifamily	11.7 acres +/- 240 units
Parcel F-1	Day Care	1.6 acres +/- 1 unit
Parcel F-2	Recreation Area	1.6 acres +/- 0
Parcel F-3	Single Family	12.1 acres +/- 48 units
Parcel F-4	Townhouse	7.6 acres +/- 51 units

- Section 5.1.4 stated that "The Company [RGHGAB] shall sell GAB Parcel E . . . for a price and subject to such other terms and conditions outlined on Exhibit E attached hereto." Exhibit E provided that the 240 units that made up Parcel E would be sold to GAB for a price of $12,000 per lot.
- The Company agreed in Section 5.1.4 to sell Parcels D, F-3 and F-4 to Rocky Gorge for a price and subject to the terms and conditions outlined on Exhibit F. Exhibit F provided that the price for parcels D, F-3 and F-4 would be $40,000 per single-family lot and $28,533 for the Townhouse lots.
- Section 5.1.4 also provided that if the lots intended for sale to either GAB or Rocky Gorge could not be delivered under the terms provided above by December 31, 2011, "through no fault of" RGHGAB then the obligation of RGHGAB shall terminate, but the members shall have the right, but not the obligation, to purchase their respective Parcels . . . at their appraised "as is" value of such parcel for a period of one year (i.e. December 31, 2011 to December 31, 2012.)

[2] There were two later amendments to the Operating Agreement.

- Rocky Gorge was to be the Managing Member of RGHGAB, possessing "full power and final authority to manage and control the Company's business and affairs," and "to make Company decisions in its sole discretion," subject to certain limitations. Rocky Gorge also was given all authority necessary to manage and control the business of the Company, including power to execute financial instruments and documents, purchase property, and sell property if, in its sole discretion, Rocky Gorge deemed it to be in the best interest of RGHGAB to do so.
- Section 2.2.2 of the Operating Agreement provided: "Rocky Gorge shall be responsible for obtaining and/or providing equity investments, institutional and/or private financing, working capital, deposits and guaranties (the 'Financial Resources'), necessary to permit the Company (RGHGAB) to carry out its business." The parties agreed that their intent was "that Rocky Gorge shall make such Financial Resources available for such purposes and for the continuing operations of the Company, by obtaining them from third parties on commercially reasonable terms or providing them directly on commercially reasonable terms."
- With exceptions not here relevant, the parties agreed in Section 8.1 of the Operating Agreement that: "A Member may not at any time withdraw from the Company or assign or transfer his/her/its Membership Interest to any Person unless the Members holding one hundred percent (100%) of all outstanding Membership Interests of the Members in the Company whose interests are not the subject of the proposed transfer (the 'Non-transferring Members'), in their sole and absolute discretion, shall have consented in writing to the withdrawal, assignment or transfer."
- Section 5.1.1 provided that Rocky Gorge "shall meet and consult with GAB as often as reasonably necessary to keep GAB advised of all material matters regarding the Company, and GAB shall have the right and opportunity to offer its input and opinion regarding such matters. The parties acknowledge that Managing Member has the right to make Company decisions in its sole discretion; however, if GAB believes that a particular Company decision materially adversely affects GAB's development of Parcel E as apartments, or materially adversely affects the overall development of the Property, then such issue shall be resolved by binding, non appealable, arbitration[.]"
- Section 5.1.5 stated that "[i]n the event that the Company decides to sell Parcel A, then GAB shall be granted the 'right of first offer' and the 'right of first refusal' as defined in [the Agreement.]"

About two months after the Operating Agreement was signed, Rocky Gorge, in accordance with its duties and obligations under the Operating Agreement, signed a Promissory Note ("the Note") in the principal amount of $2,750,000. The Note was payable to BB&T bank, the lender, and was secured by a deed of trust on the Property that was executed by RGHGAB. Dorment, individually, and Rocky Gorge guaranteed the full repayment of the Note. GAB guaranteed the partial repayment of the Note in a Guarantee Agreement it signed. That agreement obligated GAB, in the event of a default, to pay 20% of the outstanding balance on the Note.

After January 2004, the principal amount of the Note was amended upward on three occasions. The final adjustment was on September 12, 2007 when the loan was increased to $8,950,000. The maturity date of the Note was extended to January 15, 2010 pursuant to a Loan Modification Agreement dated February 17, 2009. In connection with each of the amendments, Rocky George, RGHGAB, and Dorment reaffirmed their guarantee of the repayment of the Note and GAB reaffirmed its guarantee of repayment of 20% of the amount due on the Note.

By 2009, because of the severe banking and real estate crisis that existed in the Washington metropolitan area and elsewhere in the United States, the value of the Property and other land owned by Rocky George and RGHGAB substantially decreased. As a consequence, in a November 12, 2009 letter from Dorment, on behalf of Rocky Gorge, to GAB, the latter was informed that RGHGAB's financial prospects were bleak and that Rocky Gorge might attempt to purchase the Note from BB&T at a discount. Because the

Note was set to mature on January 15, 2010, Dorment predicted that BB&T would have the Property reappraised. Dorment opined that there was a "high likelihood that the [new] appraisal will be sharply lower than the appraisal currently in place," which would give the lender the right to declare the loan in default. Dorment said that he would try to get BB&T to agree to discount the Note and he would also "be attempting to attract fresh equity capital in order to strengthen the financial condition of" RGHGAB.

In his November 12, 2009 missive, Dorment also said that if the first option (negotiation of a discount with BB&T) was unsuccessful, the second option (attracting fresh capital) would "almost certainly require" RGHGAB "to cede control of its assets and significantly dilute the members' respective equity stakes." Dorment added that if both options should fail, then Rocky Gorge and GAB would face significant "financial exposure on our respective guarantees." Dorment closed the November 12, 2009 letter by saying that "[i]f you have the capacity to bring either senior debt or equity capital to the project, your efforts would be welcome[.]" Dorment cautioned, however, "that any contacts should be cleared and coordinated with me to avoid either conflict or confusion in the marketplace."

In response, Berman, writing on behalf of GAB, reminded Dorment that under the Operating Agreement Rocky Gorge was solely responsible for obtaining, or providing for, all financial resources necessary for RGHGAB to continue operations. Rocky Gorge replied with an email to GAB stating that it would continue to seek an alternative to foreclosure.

Because the BB&T loan had a maturity date of January 10, 2010, Dorment, on behalf of Rocky Gorge, began negotiation with BB&T for a forbearance agreement. Berman refused to cooperate by signing such an agreement. Nevertheless, without Berman's or GAB's cooperation, BB&T, on March 31, 2010, signed a forbearance agreement giving the debtor until June 1, 2010 to pay the amount owed on the debt. The forbearance agreement was signed by Dorment, Rocky Gorge, RGHGAB, and BB&T, but not GAB.

After the forbearance agreement was signed, Dorment, on behalf of Rocky Gorge, informed GAB that it believed "it was in the best interest of [RGHGAB], its members, and the guarantors, to work with the bank rather than face foreclosure, and that's why [Rocky Gorge, RGHGAB and Dorment] signed the forbearance agreement." One week later, on April 14, 2010, Dorment, on behalf of Rocky Gorge, sent an email to GAB that read, in part, as follows:

> [I]f you have the capacity to raise money for the Partnership as we head into negotiations with the Bank, please let me know. Alternatively, should you have an interest[ ] [in] pursuing the debt on the property from the Bank on the assets of the Partnerships, hopefully at a discount, that would be useful information as well.

On May 21, 2010, Dorment met with BB&T to negotiate, on behalf of Rocky Gorge, to secure the exclusive right to purchase the Note. BB&T offered to sell the Note and guarantees at a discounted price of $2,400,000. That offer was contingent on the sale being closed by June 30, 2010. After the meeting with BB&T, Rocky Gorge wrote GAB and offered to seek capital necessary to purchase the Note and guarantees, return GAB's

principal investment, release the guarantees, and dissolve RGHGAB. Conversely, Rocky Gorge extended the identical deal to GAB. In response, GAB informed Rocky Gorge that it did not want to dissolve RGHGAB, but that it was interested in purchasing the Note and guarantees from BB&T and eventually acquiring Rocky Gorge's interest in RGHGAB.

Dorment, on behalf of Rocky Gorge, told Berman that because neither RGHGAB nor Rocky Gorge had the financial resources to buy the Note at the discounted price, he suggested that "either you or I" should try to purchase the Note and the guarantees.

On May 28, 2010, Rocky Gorge presented a formal buy-sell agreement to Berman proposing to give GAB the first opportunity to buy the Note, to acquire the Rocky Gorge membership interest in RGHGAB and release Rocky Gorge's and Dorment's guarantees. The proposed agreement provided that if GAB could not acquire the Note by June 15, 2010 and satisfy the other obligations in the proposed agreement, then Rocky Gorge would have the opportunity to purchase the Note, acquire GAB's membership interest, and release GAB's guarantee.

The proposed agreement was rejected by Berman, on behalf of GAB. Berman then began investigating the feasibility of enlisting his father, Malcolm Berman, another real estate developer, to acquire the Note. Accordingly, on June 3, 2010, Berman informed Dorment of his "interest in obtaining financing for the purchase of the BB&T [N]ote and, ultimately, acquir[ing]" Rocky Gorge's interest. The next day, by email, Berman advised Dorment that his father would like to meet with him.

On June 4, 2010, Rocky Gorge acquired the right to purchase the Note at the discounted price of $2,160,000. To acquire that right, Rocky Gorge put down a $180,000 deposit. Closing on the purchase was to be on June 30, 2010.

On June 15, 2010, by email, Berman informed Dorment that he believed he could convince his father to purchase the Note from the bank, restate the Note for the purchase amount, and simultaneously release Dorment's personal guarantee. At trial, Berman's father testified that he had been willing to advance a loan at a "market commercial rate," for the purchase of the Note from BB&T and that he would reinstate the Note to the purchase price. According to Dorment's testimony, Berman's father offered to loan the money at a 6% interest rate. Malcolm Berman did not say, however, how long the debtor would have to pay off the reconstructed Note.

Dorment testified at trial that he "wasn't convinced that if Malcolm Berman controlled that [N]ote, he would behave benevolently towards me or Rocky Gorge." In Dorment's words: "What I know about him [Malcolm Berman] is he was a very dangerous, ruthless man that separated a lot of people from property on very unsavory terms[.]"[3]

[3] Dorment's opinion concerning Malcolm Berman's business practices was based on: 1) what a lawyer had told him about those practices; 2) discussions with several of Malcolm Berman's former partners; and 3) Dorment's familiarity with what a trial judge had said about Malcolm Berman's lack of truthfulness in a case Malcolm Berman's corporation (i.e., a bank that Malcolm Berman controlled as its CEO and Chairman of the Board) brought against the law firm of Weinberg and Green. More specifically, Dorment testified that his opinion of Malcolm Berman's character was influenced by reading our decision in *Fairfax Savings, F.S.B. v. Weinberg and Green*, 112 Md. App. 587, 610 (1996), which quoted the trial judge's (Honorable Ann Harrington's) finding that Malcolm Berman had testified falsely about many issues during a thirty-day bench trial.

Dorment testified that he feared that Berman's father, or some other third-party might buy the Note at a discount, declare the loan to be in default, and pursue Rocky Gorge and the guarantors for the full balance of almost nine million dollars. In any event, on July 13, 2010, Dorment sent Berman a "Term Sheet" for Malcolm Berman to consider. The Term Sheet proposed the assignment of the Note and the Property to Malcolm Berman. Under the Term Sheet, Berman and his father would purchase the Note and Rocky Gorge's interest in RGHGAB.

By email dated July 17, 2018, Berman rejected the proposal as set forth in the Term Sheet. Berman made no counter-offer, but Dorment, in an email dated July 20, 2010, indicated a willingness to continue to negotiate saying: "[I]f you have a definitive proposal . . . I am willing to meet."

On August 10, 2010, Dorment, on behalf of RGHGAB and Rocky Gorge, negotiated with BB&T and received an agreement for a further reduction of the purchase price of the Note to $2,000,000 with a closing date of September 13, 2010.

Dorment sent an email to Berman on August 18, 2010 that said: "[Y]ou had said that your father might be willing to purchase the [N]ote . . . and I think it would be worthwhile for us to see if we can go down that path together. . . . We can discuss the financing Term Sheet I sent you in July. If you have an alternative term sheet from your father . . . that would be fine too[.]"

Berman never made a counter-offer. He testified at trial that the reason he rejected the proposals by Dorment as set forth in the Term Sheet was because certain modifications of the Operating Agreement were required which, in Berman's opinion, would have solely benefited Rocky Gorge, and would have removed GAB's limited powers. It was Berman's position that Dorment, on behalf of Rocky Gorge, should have accepted his father's tentative proposal to buy the Note without modification to the Operating Agreement.

Peter Knudson, financial officer for Rocky Gorge, testified that even if Malcolm Berman had bought the Note and restated it to two million dollars, RGHGAB's problems would not be solved. He pointed out that any restated note would have been secured by a lien on the Property. But RGHGAB had no money to pay interest on a two million dollar note. Moreover, RGHGAB needed financing to pay for development costs "to bring that project up to where it had value." Financing costs for the infrastructure and development of Phase 1 would cost, in Mr. Knudson's opinion, an estimated 6 to 7 million dollars. And, to get financing, the lender would want a lien on the Property and would want to be in first place. In other words, in order to obtain financing for the infrastructure, Malcolm Berman would have had to subordinate his lien. It was for these reasons, according to Mr. Knudson, that the existing Operating Agreement needed to be modified.

On August 27, 2010, Dorment sent an email to Berman that read:

> I want to point out that Rocky Gorge . . . will not be the purchaser of the [N]ote. Rocky Gorge does not have the financial capacity to purchase the [N]ote. Neither does our partnership. So Rocky Gorge is assigning the right to purchase the [N]ote to a new entity, Waverley . . . which will close on the [N]ote purchase on September 13. This will prevent a foreclosure by BB[&]T or a sale of the [N]ote to a stranger at a higher price.

Within an hour of receiving the aforementioned email, Berman sent Dorment a return email saying:

> Who are the members of Waverley View Investors, LLC? May I see a copy of their Operating Agreement and the Loan/Note closing documents? If Rocky Gorge Development, LLC is not purchasing the Note, what favorable terms or modifications did you negotiate for RGHGAB at Frederick, LLC and the Note's Guarantors? Are the new terms similar to the Term Sheet you proposed to Malcolm Berman or he proposed to you in my e-mails? Because the option to buy the [N]ote with BB[&]T was with Rocky Gorge Development, LLC, the Managing Member, I am now more interested in this transaction. Please advise?

Dorment did not supply Berman with the requested information. Instead, on August 31, 2010, Dorment sent Berman an email that read:

> Gary: you need to understand that the deal I'm working on with the bank and investors is still being worked out so I can't give you any specific details. But it's the only deal on the table, and any deal is better than no deal. I've told you that we will purchase the [N]ote to take advantage of the discount and avoid foreclosure. I've asked you to provide a term sheet from your father so that I'd have two deals to consider. Until I have something from you that is detailed, comprehensive and binding, I still have only one way to go, and that's with the proposed bank and investors. Send me the details of a loan proposal from your father and then I'll be glad to talk or meet with you. Until then, time is running out and I have to go forward with the investor/bank deal. Best, Chris.

The requested proposal from Berman's father was never sent.

On September 12, 2010, over GAB's objection, Rocky Gorge assigned its right to purchase the Note to Waverley and Waverley extinguished RGHGAB's loan exposure and the exposure of the guarantors of the Note, i.e., Rocky Gorge, GAB and Dorment. Waverley also paid Rocky Gorge $200,000 to reimburse it for the otherwise non-refundable deposit that Rocky Gorge had paid BB&T to obtain the various loan extensions.

Evidence introduced at trial showed that Waverley was formed by Dorment in June 2010. Dorment was the sole Class A member of Waverley, and its managing member, with full control. The accredited investors in Waverley included three out-of-state residents.

At trial, Dorment testified that, at the time Waverley purchased the Note, he believed that GAB benefited by the transaction because GAB had guaranteed repayment of 20% of the loan balance, i.e., 20% of $8,930,000 or $1,780,000, and Waverley, when it purchased the Note, agreed to forego its right to enforce the guarantees. In actuality, GAB received no benefit, because, according to Berman's testimony, GAB didn't have the assets necessary to fulfill its guaranty obligations.

On October 13, 2010, Waverley commenced a foreclosure proceeding against the Property in the Circuit Court for Frederick County. Immediately after the foreclosure case was filed, GAB filed a suit in federal court to have RGHGAB placed in involuntary bankruptcy. Ultimately, however, through an agreement reached in the bankruptcy proceeding, Waverley became the owner of the Property.

In these consolidated appeals, the parties agree that the evidence introduced at trial was sufficient for the jury to find that Rocky Gorge breached its obligation under section 5.3 of the Operating Agreement to provide financing for the project. Rocky Gorge also breached its pledge not to sell its interest in RGHGAB without Berman's consent. Additionally, Rocky Gorge breached its obligation under section 5.3 of the Operating Agreement by performing an "act in contravention of this Agreement[.]"

B. Damage Evidence.

GAB's expert, Robert Lipman, a real estate appraiser and real estate consultant with fifty years' experience, testified that the Property, in 2010, had a value of $7,000,000. As of August 30, 2016, the Property had a value of $14,000,000. Mr. Lipman's opinion as to the value of the Property was based on the assumption that the Property was not contaminated by any past activity of the United States Army at Fort Detrick, which was near the Property. On the other hand, he testified that if it turned out that the Property was contaminated by past activities at Fort Detrick, it would not make any difference as to the value of the land because the land owner would have a deep-pocketed defendant (the United States government) from whom to recover for damages that resulted from the contamination.

Dorment testified that Waverley sold Parcel E (referred to at trial as the "Apartment Units") in August 2016 for $5,000,000 or $20,832.33 per unit. But, to sell Parcel E for that price, according to Dorment, certain development costs were incurred. He testified:

> Q. [Counsel for Defendants]: And how much money, if any, did Waverley have to put in to the apartment parcel to get into that $5 million sale?
>
> A. [Dorment]: Well, we spent $4 and a half million to bring the roads to the edge of the apartments. And we carried that property for a couple of years at very high interest rates. It just, I mean, it, I don't, the question isn't as precise at it might be, but the bottom line is, we sold it for 5 million. We probably spent more than 5 million to sell it for 5 million, but we also had some development work done that led to the apartment . . . parcel that will add value to the project.

Dorment's deposition was read into evidence by GAB. In regard to the sale of Parcel E, he testified that the sales price was about $20,000 per unit and as a "ball park

figure, the cost to develop those apartment 'pod sites' (i.e. Parcel E) was about $4,500,000 and that" it remains to be seen "whether that was a profitable transaction."

A report from Terrence McPherson, prepared in 2010, on behalf of a bank, valued the Property at $3,000,000 as of June 19, 2010. The report stated that when Phase 1 was completed on June 19, 2011, the prospective future value of the Property would be $14,650,000. The last mentioned figure was based on the assumption that by June 19, 2011, all of the Phase 1 infrastructure would be complete. According to McPherson, however, the developer would have to spend approximately eleven million dollars in "off-site" road improvements to obtain that price.

On December 29, 2010, Rocky Gorge received an offer, with some contingencies, to purchase Parcel E for $16,667 per unit or ($4,000,080).

Berman testified that, all told, GAB made a $400,000 capital investment in RGHGAB.

Additional facts will be set forth to answer the questions presented.

DISCUSSION

I.

The jury was allowed to consider whether Dorment tortiously interfered with GAB's contract and also whether Dorment interfered with GAB's economic relations. Dorment contends that the circuit court erred "by not entering judgment for Dorment on GAB's intentional interference claim."

A. Tortious Interference with Contractual Relations.

The elements of a claim for tortious interference with contractual relations are:

> (1) The existence of a contract or a legally protected interest between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional inducement of the third party to breach or otherwise render impossible the performance of the contract; (4) without justification on the part of the defendant; (5) the subsequent breach by the third party; and (6) damages to the plaintiff resulting therefrom.

Brass Metal Products, Inc. v. E-J Enterprises, Inc., 189 Md. App. 310, 348 (2009) (and cases cited therein).

In regard to the tortious interference with the contractual relations claim, Dorment argues:

> It is well settled that a corporate officer may not be held liable for interference with contracts to which his company is a party, except in limited circumstances not present here. *See K&K Mgmt.* [*v. Lee*], 316 Md. [137] at 170-71 n.14 [(1989)] . . . ; *see also Bagwell v. Peninsula Reg'l Med. Ctr.*, 106 Md. App. 470, 503 (1995); *Pope v. Bd. of Sch. Comm'rs of Balt. Cty.*, 106 Md. App. 578, 592-93 (1995); *Bleich v. Florence Crittenton Serv. Of Balt., Inc.*, 98 Md. App. 123, 146-47 (1993); *Cont'l Cas. Co. v. Mirabile*, 52 Md. App. 387, 402 (1982). This is because corporate officers are not truly strangers or third parties to their employers' contracts: "[c]ommercial contracts and other business relationships ordinarily involve corporate entities, which can act only through their agents." *Med. Mut. Liab. Soc'y of Md. v. B. Dixon Evander & Assocs.*, 339 Md. 41, 60-61 (1995) (per curiam); *see also Cont'l Cas. Co.*, 52 Md. App. at 402 ("[Defendants] cannot be Continental's agents for the purposes of the first three counts and not for the purpose of the [intentional interference] count."). If corporate agents were treated as third parties, it would encourage plaintiffs in contract actions to add parallel tort claims against them in the hopes of recovering more expansive tort damages. *See Alexander*[*& Alexander Inc. v. B. Dixon Evander and Assocs., Inc.*], 336 Md. [635] at 654 [(1994)] (noting that for tort claims, plaintiffs are "not limited to the contract measure of damages, the benefit of the bargain, but can recover the more extensive tort damages" (citations and internal quotation marks omitted)). *Cf. Kann v. Kann*, 344 Md. 689, 713 (1997) ("This Court would not preside over the death of contract by

> recognizing as a tort a breach of contract that was found to be in bad faith." (Citing *K&K Management* and *Alexander*)).

Dorment also argues:

> This court recently held that a plaintiff has no claim for intentional interference when the plaintiff's claim arises out of and is "based on duties established and defined" in contract. *Petty v. Mayor & Cty. Council of Balt. Cty.*, 232 Md. App. 116, 122-23 & n.1 (2017). *See also Wilmington Tr. Co. v. Clark*, 289 Md. 313, 328-29 (1981) ("While a tort action in favor of a contracting party can be founded upon a duty arising out of the contractual relationship, the duty giving rise to the tort cause of action must be independent of the contractual obligation…. Mere failure to perform a contractual duty, without more, is not an actionable tort." (citations omitted)). Because GAB's intentional interference claim is "indistinguishable from the breach of the Agreement" by Rocky Gorge, it is compensated by contract damages, not an intentional interference claim. *K&K Mgmt.*, 316 Md. at 162, 169; *see Alexander*, 336 Md. at 654.

The limited circumstances when an agent or employee of a party to a contract may be held liable for tortious interference with that contract is when the agent "acted maliciously for his own motives and beyond the scope of his authority without the intent to further the interests of the employer." *Pope v. Bd. of School Comm'rs of Baltimore City*, 106 Md. App. 578, 591-92 (1995) (emphasis added).

According to Dorment, "GAB's intentional interference [with contract] claim [against him] is indistinguishable from its breach of contract claim against Rocky Gorge[.]" He points out, accurately, that all of GAB's allegations against him concerning the tortious interference with contract claim derive from Rocky Gorge's breach of duties in the Operating Agreement. Dorment stresses that the Court of Appeals "has refused to adopt any theory of tortious interference with contract . . . that converts a breach of contract into an intentional tort." *Alexander*, 336 Md. at 654 (internal quotation marks omitted).

According to Dorment, all that GAB proved at trial was that he [Dorment] interfered with GAB's contract with Rocky Gorge that is set forth in the Operating Agreement.

GAB does not take issue with the legal principle that ordinarily a corporate officer may not be held liable for interference with contracts to which his company is a party. Instead, GAB contends:

> It is undisputed that from 2004 until November 2012, RGHGAB was the owner of the Property, including Parcel E. It is further undisputed that GAB had the contractual right to purchase Parcel E from RGHGAB, partially improved for a minimum of 240 multi-family apartment homes with water tap allocations, at a set price of $14,000 per apartment unit.[4] Section 5.1.4 of the Operating Agreement specifically provides:
>
> > The Company shall sell GAB Parcel E for a price and subject to such other terms and conditions outlined on Exhibit E attached hereto. . . . [T]he obligation to evidence the sale of the parcels to GAB and Rocky Gorge with Contracts of Sale shall in no way affect the underlying obligation of the Company to sell Parcel E to GAB . . . .
>
> In that regard, GAB clearly had a contractual relationship with RGHGAB, the Company, for the purchase of Parcel E. That contractual right was absolute and not terminable at will.

(References to record extract and footnote omitted.)

GAB maintains that the contract with which Dorment interfered was the contract between RGHGAB and GAB. According to GAB, its "contractual right to purchase Parcel E was a two-party relationship – one to which Rocky Gorge could not have been a party as a non-owner of Parcel E[.]"

[4] Exhibit E to the Operating Agreement gave GAB the option of buying the 240 apartment units in Parcel E at $12,000 per unit. The parties agree, however, that by mutual agreement, the price was later increased to $14,000 per unit.

We disagree with GAB's contention that its contractual right to purchase Parcel E was a two-party relationship to which Rocky Gorge "could not have been a party" as a "non-owner" of Parcel E. As mentioned earlier, Berman and Dorment, in their testimony, referred to RGHGAB as a partnership, although it was technically an LLC. They did so for good reason. There was only one contract (the Operating Agreement) that gave GAB any right to purchase Parcel E. Rocky Gorge, pursuant to the Operating Agreement, was the managing agent of RGHGAB. Section 5.1.4, the same provision GAB cites in support of its argument that it had a separate contract with RGHGAB, was a section in the Operating Agreement that Rocky Gorge signed. That section gave Rocky Gorge rights and obligations. GAB is clearly incorrect when it argues that the contractual right to purchase Parcel E was a two-party relationship, i.e., a contract between only GAB and RGHGAB. That argument ignores the fact that: 1) under Section 3.1 of the Operating Agreement, Rocky Gorge, in the event that Parcel E was sold at a profit, had the right to receive eighty-percent of the profits from the sale; 2) all of GABs' rights to purchase Parcel E came as a direct result of Rocky Gorge agreeing, in the Operating Agreement, to allow RGHGAB to make the sale; and 3) Rocky Gorge was RGHGAB's managing agent. Thus, GAB's contractual right to purchase Parcel E was in no sense a "two-party relationship" "to which Rocky Gorge could not have been a party[.]"

The Operating Agreement produced a three-party relationship in which all of RGHGAB's duties to GAB were to be determined by the Operating Agreement that GAB and Rocky Gorge signed.

We hold that Rocky Gorge was a party to the contract giving GAB the right to purchase Parcel E. Thus, Dorment, as CEO of Rocky Gorge cannot be held liable for tortious interference with that contract, unless an exception to the usual rule is applicable.

GAB argues, in the alternative, that "even assuming, *arguendo*, that Rocky Gorge was a party to GAB's contractual relationship with RGHGAB," Dorment's conduct fits within the exception to the rule that an agent of a party to a contract cannot be held liable for tortious interference with that contract. The exception is applicable if the agent acted "maliciously for his own motives and beyond the scope of his authority without the intent to further the interests of the employer." *Pope*, 106 Md. App. at 591-92. The exception applies only when the plaintiff can prove: 1) that an agent of the contracting party acted for his own motives; 2) beyond the scope of his authority; and 3) without the intent to further the interests of his employer. *Id.*

In this case it is clear that Dorment, on behalf of Rocky Gorge, interfered with GAB's rights under the Operating Agreement. And the evidence also showed that Dorment interfered with GAB's rights, in part, for his own benefit, i.e., to escape liability for his guarantee of the Note which, at the time he commenced negotiating with BB&T for a restructuring of the loan, would have exposed him to nearly nine million dollars in liability.

In regard to the second prong, GAB contends that there was ample evidence in the record that Dorment, in interfering with the contract, exceeded the scope of his authority as an agent of Rocky Gorge. In this regard, GAB argues:

> Dorment testified that he would never put his personal financial interests ahead of those of RGHGAB, GAB, and Rocky Gorge. Despite

> acknowledging he lacked authority to put his interests above those of Rocky Gorge, Dorment testified repeatedly that his personal guaranty with respect to the Note was his primary concern.

In support of the foregoing argument, GAB points to four pages in the joint record extract that dealt with Dorment's motives. Unfortunately for GAB, however, its argument is not supported by anything in the record. Dorment never said that getting rid of his personal guarantee with respect to the Note was his primary concern.

The pertinent part of Dorment's testimony in this regard is:

> [Counsel for GAB]: Well, whether you knew it or not, if it [GAB] didn't have assets, if somebody called on a guarantee against GAB and it had nothing, the person calling on a guarantee would get nothing, right?
>
> [Dorment]: Absolutely right.
>
> [Counsel for GAB]: But your guarantee, and that of your company, actually had some meaning, and you wanted to get those released, right?
>
> [Dorment]: I just said to you, I did not know that GAB was not a very substantial company at that time.
>
> [Counsel for GAB]: All right. But whether you knew it or not, your company and you did have assets that . . . someone who was the beneficiary of a guarantee could grab?
>
> [Dorment]: That's correct.
>
> [Counsel for GAB]. And you wanted to get out from under that obligation that you had undertaken?
>
> [Dorment]: You know, the truth of the matter is, what I really wanted to do was avoid a car wreck for all the parties involved, including subcontractors. I didn't want the disgrace of a bankruptcy, a failed project. I want to look after GAB, Rocky Gorge Communities, CSD [Christopher S. Dorment]. I wanted to do the best I could for the entire entity, including the people that are affiliated with the company, because a lot of people get hurt in bankruptcies.

(Emphasis added.)

Rocky Gorge did, of course, receive benefits from Dorment's actions. The evidence showed that at the time Rocky Gorge negotiated with BB&T to obtain the right to buy the Note at a discount, Rocky Gorge did not have the money to purchase the Note, even at a discount, although it did have substantial assets. Waverley, acting through Dorment, agreed to pay Rocky Gorge $200,000 to reimburse Rocky Gorge for the otherwise non-refundable deposits it paid to obtain the forbearance agreement. Additionally, by Dorment's actions, Rocky Gorge's obligations as guarantor of the Note, were eliminated.[5] Despite GAB's argument to the contrary, there was no evidence from which the jury could have legitimately found that Dorment acted without the intent to benefit Rocky Gorge or that Dorment acted outside the scope of his authority as Rocky Gorge's agent.[6] For the

[5] During closing argument, counsel for GAB did not argue that Dorment acted outside the scope of his authority as an agent for Rocky Gorge.

[6] GAB's counsel, in closing argument, explicitly admitted that eliminating the guarantee on the Note, was "real good" for Dorment's Company, i.e., Rocky Gorge. Counsel for GAB, argued:

> [GAB] didn't have cash reserves, and [Berman] never claimed it did. What GAB, his little company, had was just the right to 20 percent and the right to the profits off parcels.
>
> So it wasn't sitting there loaded with cash that could be taken away if the guarantee didn't go away. That's nonsense.
>
> Dorment - - Mr. Dorment on the other hand, did have a personal guarantee. He was very worried about it. And that's undisputed. So the bottom line of all this is that eliminating the guarantees did nothing for Mr. Berman or GAB, but was real good for Mr. Dorment and his company.

(Emphasis added.)

above reasons, we agree with Dorment that the exception to the usual rule that an agent of a party to a contract may not be sued for tortious interference with that contract does not apply.

B. Tortious interference with economic relations.

GAB's complaint asserted claims against Dorment for both tortious interference with contractual relationships and tortious interference with economic relations. Based on the verdict sheet provided to the jury[7] it is impossible to know whether the jury found Dorment liable under the tortious interference with contractual relations theory (discussed *supra*) or the theory of tortious interference with economic relations.

GAB argues that even if Dorment cannot be held liable for tortious interference with the contract to purchase Parcel E from RGHGAB, there was sufficient evidence presented that Dorment was guilty of tortious interference with economic relations based on its option to purchase Parcel E. GAB argues that it had:

> an economic relationship with prospective purchasers of Parcel E. Pursuant to the Operating Agreement, RGHGAB was required to sell GAB Parcel E fully developed and ready for the construction of 240 apartment units. GAB would have then been free to construct the apartments and then rent or sell them, or GAB could have simply sold Parcel E "as is" to another developer (which is what Waverley ended up doing). Either way, GAB was entitled to any and all proceeds from the subsequent sale or rental of Parcel E. Dorment's unlawful and improper actions (as set forth above) improperly caused GAB to lose out on those prospective advantages.

[7] The verdict sheet asked "Do you find, by preponderance of the evidence that one or more of the Defendants tortiously interfered with GAB Enterprises, Inc.'s contractual and/or economic relations? The jury responded in the affirmative and identified Dorment as the Defendant who had interfered.

Dorment disagrees, arguing:

> According to GAB, Dorment is liable for intentional interference with GAB's economic relations (as opposed to an existing contract) because Dorment's actions prevented RGHGAB from selling Parcel E to GAB, which interfered with GAB's economic relationship with unspecified "prospective purchasers" of Parcel E. This argument depends on four assumptions: (1) Dorment, as Rocky Gorge's CEO and agent, can be liable for interference when acting on his company's behalf; (2) an interference with economic relations claim can lie when the alleged interference derives from a breach of contract; (3) Dorment accomplished the interference "through improper or wrongful means," either a negligent misrepresentation or some other, unspecified bad act (leaving the task of finding such a bad act entirely to the Court); and (4) Dorment acted with the specific intent to injure GAB. Each of these premises is wrong, although only one need be for GAB's argument to fail.

A claim for intentional interference with economic relations requires proof of four elements, which are:

> "(1) intentional and wilful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendants (which constitutes malice); and (4) actual damage and loss resulting."

Alexander, 336 Md. at 652 (quoting *Willner v. Silverman*, 109 Md. 341, 355 (1909)). In addition, Maryland courts have emphasized that a plaintiff must prove both a tortious intent and that the alleged interference "was accomplished through improper means." *Lyon v. Campbell*, 120 Md. App. 412, 431 (1998) (citing *inter alia*, *Macklin v. Robert Logan Assocs.*, 334 Md. 287, 301 (1994)).

In his closing argument, counsel for GAB explained to the jury how he contended that Dorment interfered with GAB's contractual or economic relations and why the jury should answer "yes" to the question: "Do you find, by a preponderance of the evidence,

that one or more of the Defendants tortiously interfered with GAB Enterprises, Inc.'s contractual and/or economic relations?" Counsel for GAB argued:

> Now, under Maryland law, a person or a company is not permitted to interfere with a contractual relationship between two other people or entities. And because the defendants in this case interfered with GAB's contract with the RGHGAB - - GAB is one of the parties to the operating agreement, and with GAB's contract, it was a contract to purchase parcel E and with the overall contract between GAB and RGHGAB. Because of the fact that the defendants interfered with that agreement and caused harm to GAB and Mr. Berman, they should be held liable for what's called contractual interference. They busted up the contract and interfered with the obligation of the other party to that contract, to GAB and Mr. Berman. So you should answer yes to the contractual interference questions.

The same argument is made in a footnote in GAB's brief that reads: "Based on the same evidence and for the same reasons set forth in this Argument Section I.A-B, it also would have been reasonable for the jury to conclude that Dorment tortiously interfered with GAB's contractual rights under the Operating Agreement."

As with the claim of tortious interference with contract, an employee, acting within the scope of his/her employment, cannot be held liable for tortious interference with business or economic relationship between his or her employer and another. Judge Motz, speaking for this Court in *Bleich v. Florence Crittenton Serv. of Baltimore, Inc.*, 98 Md. App. 123, 146-47 (1993) made this clear:

> It is well established that in order to state a cause of action for tortious interference with a business relationship, a plaintiff must allege that a *third party*, without justification and for an unlawful purpose, intentionally interfered with the business relationship between the plaintiff and another, causing the plaintiff actual damage. *See K&K Management v. Lee*, 316 Md. 137, 154-156, 557 A.2d 965 (1989); *Wilmington Trust Co. v. Clark*, 289 Md. 313, 329, 424 A.2d 744 (1981); *Continental Casualty Co. v. Mirabile*, 52 Md. App. 387, 402, 449 A.2d 1176, *cert. denied*, 294 Md. 651, 652 (1982).

> Maryland courts have "never permitted recovery for the tort of intentional interference with a contract when both the defendant and the plaintiff were parties to the contract." *Wilmington Trust*, 289 Md. at 329, 424 A.2d 774 and numerous cases cited therein; *K&K Management*, 316 Md. at 137, 557 A.2d 965. Thus, when an employee acts within the scope of her employment, or as an agent of her employer, she cannot be held liable for interfering with the contract, business relationships, or economic relationships, between the employer and another. *Continental Casualty Co.*, 52 Md. App. at 402, 449 A.2d 1176; *see also, Borowski v. Vitro Corp.*, 634 F.Supp. 252, 258 (D.Md.1986), *reversed on other grounds*, 829 F.2d 1119 (4th Cir.1987).

(Emphasis added.)

We shall first address the issue discussed in *Bleich*, i.e., does GAB seek to hold Dorment liable for interference with a business or economic relationship between Dorment's employer (Rocky Gorge) and another? The answer to that question is "yes," because Rocky Gorge was not a "third-party" to the businesses relationship. In the words of GAB's trial counsel, "they [Dorment and Rocky Gorge]" "busted up" RGHGAB's obligation to sell Parcel E to GAB. The only reason GAB could not, in the future, sell or rent the lots that constituted Parcel E, was because Rocky Gorge, RGHGAB's managing agent, breached the Operating Agreement. That breach made such sales or rentals impossible. Put another way, but for Rocky Gorge's breach, there would have been no interference with GAB's right to sell Parcel E to a third-party. Dorment, as Rocky Gorge's CEO, was responsible for that breach. But, a claim for tortious interference with contract or economic relations cannot be based on duties established and defined in contracts. *Alexander*, 336 Md. at 654; *Petty*, 232 Md. App. at 123. Here, the only interference with economic relations that GAB can point to came about as a direct result of Rocky Gorge's

breach of the Operating Agreement. Under the test set forth in *Bleich*, Dorment cannot be held liable for that interference.

For the above reasons, we shall reverse the judgment entered against Dorment as to Count VI, which alleged tortious interference with contractual and/or economic relations.[8]

II.

In Count VII of the complaint, GAB alleged that Rocky Gorge breached the Operating Agreement. As mentioned earlier, Rocky Gorge conceded that the evidence was sufficient to show such a breach. In regard to Count VII, Rocky Gorge argues:

> The circuit court erred by failing to instruct the jury not to consider post-breach value in assessing damages for the 2010 breach of contract, and by failing to set aside the resulting damages award based on 2016 value.

[8] Because we have concluded that Dorment cannot be held liable for interference with a business or economic relationship between his employer and GAB, it is unnecessary for us to reach the question of whether GAB proved that Dorment acted with the specific intent to injure GAB. If we had reached that issue, it is doubtful, in the extreme, that we would have been able to conclude that GAB proved that element of the tort. An intent to injure requires proof that the defendant acted "for the deliberate, independent, and successful purpose of interfering with [plaintiff's] contract with [a third person]," and not for "[his] own sake." *Winternitz v. Summit Hills Joint Venture, et al.*, 73 Md. App. 16, 28 (1987). After all, it is undisputed that Waverley eliminated GAB's guarantee obligation under the Note and, prior to entering into the contract with Waverley, Dorment, on behalf of Rocky Gorge, offered GAB the same opportunity to buy the Note, eliminate the guarantee, and restructure the Operating Agreement as Waverley had. And, even as late as August 31, 2010, Dorment kept open the possibility that GAB or Berman's father could make a successful offer. Such conduct is inconsistent with the specific intent to harm GAB.

GAB contends that Rocky Gorge's allegations of error are not preserved for appellate review. For the reasons stated below, we hold that the issue was preserved.

Prior to trial, the defendants filed a motion *in limine* to preclude evidence of the value of certain real property rights after the fall of 2010. GAB filed a motion *in limine* seeking to admit such evidence. The court denied defendants' motion and granted plaintiff's motion, thereby permitting the introduction of evidence of the value of the subject real property subsequent to the fall of 2010.

The issue was addressed again at a May 18, 2016 hearing on the defendants' motion for protective order. Defendants argued that they should not have to produce documents pertaining to the value of the property after 2010 because "anything that happened after 2010 . . . particularly in terms of the value of the property is irrelevant as a matter of law. It can't be relevant…. But that's the only issue. What was it worth in 2010." Relying primarily on *CR-RSC Tower I, LLC v. RSC Tower I, LLC*, 429 Md. 387 (2012) (hereinafter, "*Tower*"), defendants argued:

> We have the opposite situation [from the *Tower* case] here. Okay? Because the value of the property which was established by appraisal and which GAB argued was accurate in the bankruptcy court back in 2010, they, they're claiming that the value was $3 million or other appraisals which . . . we would rely on. But they're saying it's $3 million back in 2010. So using the logic of the [*Tower*] case, the fact that it, it may have been worth $4 million in 2014, maybe $5 million in 2015, and I'm making up those numbers 'cause I, I really don't know, but whatever the property is worth doesn't matter. Under the [*Tower*] case their damages are measured at the time of the breach.
>
> * * *

> Now why does that matter in this case? They're saying we breached our duties in 2010 and they lost out on the opportunity to, to buy the [N]ote and control the property in 2010. What that property is worth in 2015 doesn't matter as a matter of law.

GAB's counsel, who was also the attorney for the Petitioner in the *Tower* case, countered that *Tower* applied only with respect to breach of contract cases. Counsel for GAB argued:

> The, the only, ah, authority that the Defendants' [sic] assert for the proposition that they don't have to produce any discovery re, relating to what happened after 2010 is the [*Tower*] case, ah, in 2012. First of all, the first sentence in [*Tower*] makes it very clear that the opinion applies only in breach of contract cases. This is not a breach of contract case. There is a breach of contract count. But most of the counts are plain old tort claims. [*Tower*] applies, when it applies, only in contract cases. And even if it applied here, which it doesn't, because this is a tort case, ah, the, the Court of Appeals in [*Tower*] made it clear that depending on the circumstances even in a contract case evidence that happens after the breach may well be relevant on damages. For example, they say, if the parties to the contract contemplated a rise in the market, contemplated that the development would go up in value and that there would be profits in the future, and if that's what the parties were thinking, then, then it might well be relevant to get into evidence after the breach in order to determine what the lost profits were.

Subsequently, GAB again acknowledged that *Tower* "very clearly applies only in breach of contract claims," but asserted "[t]hat's not what's in play here. We're talking about torts. It doesn't apply."

GAB also argued that evidence of the property value after 2010 was relevant with respect to their claim for punitive damages. Counsel for GAB, referring to *Hall v. Lovell Regency Homes Ltd. P'ship*, 121 Md. App. 1 (1998), argued:

> [W]hen a plaintiff is seeking damages under the benefit of the bargain test, which is what we're doing, ah, that the plaintiff might present evidence showing that but for the defendant's misrepresentation or in, in our case,

> misrepresentation and fraud, he now would own property worth X when in fact he now owns property worth X minus Y. So the whole point is that you're looking at a future measure of damages[.]

Defendants asserted that GAB was not entitled to punitive damages and, therefore, was not entitled to any evidence of the property's value after 2010.

The court denied the defendants' request for a protective order with respect to bank records stating, in part, that although it had not yet heard all of the evidence, it was:

> listening to the issue with regard to a fraud claim and tort claims. So the Court does think that the value of the property today is relevant.

At the close of the evidence, on October 31, 2016, the defendants again moved for judgment arguing, in part, as follows:

> [Counsel for Defendants]: One other matter – which I understand that Your Honor has ruled – to preserve my record regarding the damage claim by the plaintiff. We have maintained all along that under the Court of Appeals decision cited in our motion *in limine*, that they're not entitled to have the jury consider the present value of the property or any damages related to the present value. So if you would permit me to incorporate that –
>
> THE COURT: Absolutely, sure.
>
> [Counsel for Defendants]: Rather than repeat those arguments, I would like to do that for purposes of our motion.
>
> THE COURT: Sure. Okay. You don't want to respond, do you? I was just allowing him to note his objection.
>
> [Counsel for Plaintiff]: No, no, no.

Immediately following the court's consideration of the motion for judgment, the jury was instructed. With respect to damages, the court instructed the jury, in part, as follows:

> Damages as a remedy for breach of contract. Compensatory damages for non-performance. The plaintiff is entitled to be placed in the same situation as if the contract had not been broken. The damages therefore are the profits the plaintiff would have made had the contract been performed. These damages are arrived at after deducting the amount that it would have cost the plaintiff to have performed the contract.
>
> Now, there's also damages as a remedy for breach of contract that are consequential damages. In an action for breach of contract, the plaintiff may recover those damages which naturally arise from the breaking of the contract. Those damages are the consequences of breaking the contract, which the defendant had reason to foresee would take place, or such damages as may reasonably be supposed to have been contemplated by both parties when they made the contract.
>
> In fraud cases in Maryland, Maryland applies the flexibility theory to determine what damages to award. Under that theory, the victim of a fraud or negligent misrepresentation may elect to recover either out of pocket expenses or the benefit of the bargain damages. Benefit of the bargain damages put the defrauded party in the position it would have been if the fraudulent misrepresentations had been true. In tort actions founded on misrepresentation, the aim of compensation is to put the plaintiff as nearly as practicable in the position he would have been had he not been defrauded.

The court asked counsel if the court had given the instructions they "expected" and both replied in the affirmative. Thereafter, the court allowed the parties to make a record of their exceptions. Counsel for the defendants took exception to the instructions, in part, as follows:

> [Counsel for Defendants]: And we would object to the instructions of the plaintiff which were Nos., 6, 7, 8 and 9 which dealt with the damages. Finally, their final instruction which was No. 10 dealt with the flexibility theory and the damages. <u>If I could simply quote from my earlier motion in limine – we think under the Court of Appeals case – whichever case [plaintiff's counsel] handled – I'm going to mess up the name of it, but I think the Court knows the case that was cited in the motion in limine</u>.
>
> THE COURT: Okay

> [Counsel for Defendants]: Their damages are limited to the value at the time of the breach. And whatever the market increase or decrease subsequent is inappropriate.
>
> THE COURT: And that would have been 2010?
>
> [Counsel for Defendants]: Right. Correct.
>
> THE COURT: Okay. Thank you. I will note all of those objections.

(Emphasis added.)

The issue was raised again in the defendants post-trial motion for judgment notwithstanding the verdict and/or for new trial. Counsel for the defendants argued, as he had with respect to the motion *in limine*, that pursuant to the *Tower* case, although evidence of the property value in 2016 was "admissible for other purposes" it was not admissible for the purpose of establishing damages with respect to the breach of contract claim. GAB countered that defendants did not object or ask for a continuing objection at the time the evidence of the property value was admitted. Defendants responded that the court had already ruled that the evidence was admissible for other purposes and, at the time the evidence was admitted, the jury had not been instructed as to the plaintiff's theories of the case, so a limiting instruction would not have been appropriate. For that reason, defense counsel did not object until he noted his exception to the jury instructions.

In denying the post-trial motions, the trial court stated:

> Perhaps the Court erred in overruling [defense counsel's] objection to the jury instructions with regard to present value versus value of the property at the time of the breach, but at that time, of course, the case was going to the jury on fraud counts as well, and if this Court erred, I will respectfully accept correction.

The court also expressed its opinion that the defendants' objection with regard to the breach of contract claim and evidence of the present value of the property was preserved by the objection to the court's failure to give an instruction on that point.

Maryland Rule 2-520(e) provides, in relevant part, that "[n]o party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection." The purpose of this rule is:

> to enable the trial court to correct any inadvertent error or omission in the [instructions], as well as to limit the review on appeal to those errors which are brought to the trial Court's attention. Generally, objections under this rule must be precise because the trial judge must know the exact nature and grounds of the objection to correct the instructions. However, counsel need not make a precise objection after the instructions are read to the jury when the ground for objection is apparent from the record and the circumstances[,] . . . such that a renewal of the objection after the court instructs the jury would be futile or useless.

Houghton v. Forrest, 183 Md. App. 15, 31 (2008) (citations and internal quotation marks omitted), *aff'd in part, vacated in part on other grounds*, 412 Md. 578 (2010).

The record reveals that throughout the entire case, the court was aware of the defendants' position that evidence of the value of the property after 2010 was not relevant to the breach of contract claim. It appears that the parties and the court agreed that evidence of the property value subsequent to 2010 was relevant and admissible for other purposes, i.e., damages as to the tort claims. The defendants took exception to the court's instructions on damages immediately after they were read to the jury. Although defendants did not specifically request a jury instruction stating that in the breach of contract count the only

damages that could be considered were those suffered by GAB up until the time of the breach in 2010, the court was aware that defendants wanted a limiting instruction on that point. Read in context, the exception made by defense counsel after the jury was instructed constituted a request for a limiting instruction and was made at a time when the court still had an opportunity to give it. Moreover, the record makes clear that the judge was aware of the precise nature of the defendants' argument, even prior to the time the defendants' noted their exception. For these reasons, we hold that the issue was preserved properly for appellate review.

We turn next to the merits of Rocky Gorge's argument. "[W]hen the claim is based on value, it is a 'general damages' claim, calculated as 'the difference between the contract price and the fair market value at the time of the breach.'" *Tower*, 429 Md. at 407 (quoting *Burson v. Simard*, 424 Md. 318, 327-28 (2012)). On the other hand, when consequential damages are sought, such damages are based on loss of income from business operations and "are not based on the market value of the very thing promised[.]" *Tower*, 429 Md. at 413.

GAB contends that the instruction was appropriately rejected because, at trial, it sought consequential damages as to the breach of contract count. Rocky Gorge disagrees, arguing that GAB attempted to prove general damages only.

In support of its position, GAB claims that at trial it put forth evidence of "lost profits." But the word "profit" can refer to two types of losses. The *Tower* Court stated:

> As Professor Dobbs explains, . . . the word "profit" can refer either to business profits or the increase in value of an item. *See* 3 Dan B. Dobbs, *Law of Remedies* § 12.4(3) (2d ed.1993). In the former instance, when lost profits are claimed for lost income from business operations that would have been made but for the breach, the claim is for "consequential" or "special" damages. *Id*; *see also E. River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858, 874, 106 S.Ct. 2295, 2303-04, 90 L.Ed.2d 865 (1986) (lost profits claim for income that could have been earned but for a breach of warranty by a manufacturer who installed defective turbines on plaintiffs' ships was for consequential damages).
>
> In the latter instance when the lost profits claim is based on the value of the item promised, the claim is for "general damages," as the damages are "the difference between the contract price and the fair market value at the time of the breach." *Burson*, 424 Md. at 327-28, 35 A.3d at 1159 (citation and quotation marks omitted); *see also* Dobbs, *supra*, § 12.2(3) (lost profits are general damages when they are for "the market value of the very thing promised"); 11 *Corbin on Contracts* § 56.19 (Rev.ed.2005) (lost profits based on the resale of a promised car can be proved by looking to "the excess of this market price over the contract price").
>
> In such cases, as with all general damages claims, the market value of the item is determined at the time of breach. The cases cited by Tenants support this rule. *See, e.g., Charles County Broad. Co., Inc. v. Meares*, 270 Md. 321, 332, 311 A.2d 27, 34 (1973) ("[I]n breach of a contract to sell, damages are based on value at the time the transfer was to be made . . . ."); *Kasten Constr. Co. v. Jolles*, 262 Md. 527, 531, 278 A.2d 48, 51 (1971) ("In general, the measure of damages when a vendee breaches a contract to purchase real estate is the difference between the contract price and the fair market value at the time of breach."); Dobbs, *supra*, § 12.2(3) ("General damages . . . [i]n a contract for the sale and purchase of property or goods . . . the difference between contract price and market price on the date when performance was due.").

Id. at 408-09.

Later in the *Tower* opinion, under the heading "*Applying the Time of Breach Rule*," the Court said:

> Some of the cases cited by Tenants make this distinction very clear, explaining that the "time of breach" rule applies only to lost profits as general damages. *See, e.g., Anchor Sav. Bank, FSB v. United States*, 597 F.3d 1356, 1369 (Fed.Cir.2010) ("[T]he rule favoring the measurement of damages as of the time of the breach 'does not apply . . . to anticipated profits or to other expectancy damages that, absent the breach, would have accrued on an ongoing basis over the course of the contract.'" (citation omitted)); *Sharma v. Skaarup Ship Mgmt. Corp.*, 916 F.2d 820, 825-26 (2d Cir.1990) ("It is . . . fundamental that, where the breach involves the deprivation of an item with a determinable market value, the market value at the time of the breach is the measure of damages. . . . However, [when the things promised] did not have a market value and were not replaceable[, l]ost profits were therefore the best measure of the loss." (citations omitted)); *see also Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 668 (5th Cir.1974).
>
> * * *
>
> Dobbs explains in § 12.4(3) general damages with this example:
>
> [Suppose] the defendant breaches a contract to sell land or a business to the plaintiff. A parcel of land or a business which can produce $100,000 in annual profits will have a greater market value than a parcel or a business which can produce only $10,000 in annual profits. So the plaintiff might attempt to prove the value of the land or the business by proving the profits it could earn. Coupled with evidence about the ratio between value and profits for the particular kind of enterprise, it would be possible to back-construct the value of the defendant's promised performance. Once value is determined the ordinary contract-market value measure could be used to figure general damages. The damages are general damages in such a case because they are based on the value of the very performance promised by the defendant (land or business) and not on some secondary good derived from that performance.

Id. Dobbs uses the following example of consequential damages as a contrast with general damages:

> [Suppose] the defendant breaches a contract to supply paint to a painting contractor. The contractor cannot find substitute paint quickly and he suffers two losses: (a) he loses a contract job on which he would have made profits; and (b) his reputation suffers so that he loses future profits on customers he would have enlisted but for his reputation as a painter who falls behind schedule. Although the second kind of claim may be identified as a loss of

> good will, both kinds of claims are for lost profits and both represent consequential damages[.] The damages are consequential because they are not based on the market value of the very thing promised (the paint).

Id. at 410, 412-13.

To determine what damage test is to be used, it is important to examine carefully the nature of the evidence offered to prove "lost profits." In the case *sub judice*, GAB attempted to prove only general damages, because the damages it sought were based "on the value of the very performance promised by the defendant (land or business) and not on some secondary good derived from that performance." *Id.* at 412 (quoting 3 Dan B. Dobbs, *Law of Remedies* § 12.4(3) (2d ed. 1993). In other words, the damages claimed were not consequential, because GAB made no attempt to prove "anticipated profits or . . . other expectancy damages that, absent the breach, would have accrued on an ongoing basis over the course of the contract." *Id.* at 410.

GAB claims that there is an exception to the rule summarized above, if, at the time of the contract, the parties anticipated a post-breach "boom or bust" in the value of the property. According to GAB, when, at the time of contracting, the parties anticipated post-breach increase in the value of the land, the "time of breach rule" is inapplicable.

In *Tower*, the Court set forth the legal principles upon which GAB relies:

> As Professor Corbin explains, consequential lost profits "may be regarded as too remote or too speculative . . . [but] will not be so regarded if the defendant had reason to foresee them." *Corbin*, *supra*, § 56.19 (footnotes omitted). Professor Dobbs agrees that foreseeability is the key, because under *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145, 151 (1854), the "contemplation of the parties" at the "time of contracting governs" consequential damages. As he says:

> Both the moral and economic rationales for *Hadley v. Baxendale* suggest that the relevant time for determining the "contemplation of the parties" is the time of contracting, not, for example, the time of breach. If the point is to let the parties prescribe their own liabilities, the time of contracting must control, and that is in fact the rule.

Dobbs, *supra*, § 12.4(7) (citing *Hadley*, 156 Eng. Rep. at 151 (consequential damages are "such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract")).

> Likewise, Professor Sutherland explains that consequential damages are determined by looking to what the parties can be said to have planned and assumed when they contracted. As he says, consequential damages are "such as ordinarily arise according to the **intrinsic nature** of the **contract** and the surrounding facts and circumstances **made known to the parties at the making of it."** J.G. Sutherland, *A Treatise on the Law of Damages* § 51 (John R. Berryman, ed., 4th ed.1916) (emphasis added). These passages instruct us that consequential lost profits are calculated with reference to what the parties can reasonably be said to have anticipated when they entered into the contract. Thus, circumstances that cannot be said to have been "known to the parties" when they contracted—such as a post-breach boom or bust in the market—should not affect the measure of consequential damages that would "ordinarily arise" according to the "intrinsic nature of the contract." (footnote omitted.)

Id. at 417-18.

Dorment testified, without contradiction, that when the Operating Agreement was signed, the prices GAB would have to pay for Parcel E, and the prices Rocky Gorge would have to pay for Parcel D, were set at a "discounted rate." Mr. Dorment gave as an example, "if an apartment lot was worth 20, maybe [Berman] would have to pay 17, whatever it was, a modest discount." From this evidence, GAB argues:

> The evidence presented at trial established (or at a minimum, permitted the reasonable inference) that the reason GAB and Rocky Gorge agreed to the set prices was because they knew that, once completed, the parcels would have a market value far greater than the contractually agree[d] upon prices.

> That was one way in which GAB and Rocky Gorge expected to turn a profit on the project.
>
> At the time the Operating Agreement was executed, Rocky Gorge agreed to a purchase price of $40,000 per single-family lot and a purchase price of $28,533 per townhouse lot. A reasonable inference is that Rocky Gorge would not have agreed to those prices if it knew or anticipated that 3 or 5 or 10 years later, when the lots were developed, the market value would be the same or less than those prices. Rather, the only reasonable (and logical) conclusion is that Rocky Gorge agreed to the $40,000 and $28,533 prices knowing that when it came time for it to resell the lots, the market value would likely be substantially higher. In that regard, there was evidence from which the jury could have reasonably concluded that Rocky Gorge knew, at the time it entered the Operating Agreement, that the market would experience a boom. Under [*Tower*], therefore, post-breach market data was relevant to GAB's breach of contract claim.

(References to record extract omitted.)

As far as is shown by the evidence, when the parties signed the Operating Agreement, they did not foresee the drastic downturn in the real estate market that came about as a result of the 2008-2010 recession, nor did they foresee a "boom" in the market post-breach, i.e., after the fall of 2010. Contrary to GAB's argument, the fact that the parties agreed that the contracting parties would be allowed, in the future, to buy lots cheap (i.e., at a below market rate) does not permit the inference that the parties anticipated at the time of contracting, a post-breach "boom" in the market price.

GAB also argues:

> Moreover, the mere fact that Mr. Dorment, through Waverley, borrowed $1,500,000 from a bank and in excess of $5,000,000 from friends and family members to purchase the Note, is sufficient to support the conclusion that a post-breach boom was expected. Furthermore, Rocky Gorge expressly told GAB on November 12, 2009 that the project could be "excellent" over the long term. Based on that evidence, it would have been reasonable for the jury to conclude that Rocky Gorge knew in 2003, when it

> executed the Operating Agreement, and in 2010, when it breached the Operating Agreement, that a post-breach boom in the real estate market was likely.

(References to record extract omitted.)

The argument has no merit. Dorment, at least arguably, may have anticipated in 2009-2010 that a post-breach boom in the value of the Property would occur. But this tells us nothing as to what the parties anticipated at the time they signed the Operating Agreement.

For the aforegoing reasons, we hold that the trial judge erred when she failed to instruct the jury as to the contract count, that damages should be calculated as the difference between the contract price and the fair market value at the time of the breach. Therefore, as to Count VII, the breach of contract count, the judgment shall be reversed, and the case remanded to the Circuit Court for Frederick County for a new trial as to damages only.

III.

Rocky Gorge next argues that the trial court erred in failing to set aside the damages awards on the grounds that they were duplicative and based on gross value, not net profits. Rocky Gorge contends that the monies awarded for the tortious interference count (1.4 million dollars) and the amount awarded on the breach of contract count (1.44 million dollars) "double count[ed]" the value of Parcel E. Rocky Gorge asks us to consider this issue, if we failed to agree with its argument that the judgment entered as to the tortious interference count should be reversed. Because we have reversed the judgment entered against Dorment as to Count VI, we need not consider the "double counted" argument.

In regard to the breach of contract count, Rocky Gorge argues that the jury arrived at the $1,440,000 figure by taking the $20,000 per lot price that GAB could have sold those for in 2016 and subtracting from that number $14,000, to get the $6,000 per lot difference. Because there were 240 lots, the jury awarded $1,440,000 (240 x $6,000). The basis for this argument is that GAB's attorney, in closing argument, asked the jury to award contract damages based on that exact formula. Rocky Gorge asked the trial court to grant a new trial as to the contract count on the grounds that even if it were properly based on contract damages using the 2016 value of parcel E as part of the damages formula, the award would have to be set aside because the formula did not take into consideration Waverly's development cost that had to be expended prior to the sale of Parcel E; those development costs were about $4,500,000, according to Dorment's testimony. We agree with that argument although it is not necessary to decide that issue. As explained *supra*, the jury should not have been allowed to consider the present (2016) value of the Property, and for that reason, we have ordered a new trial as to damages only in regard to the breach of contract count.

IV.

GAB'S COUNTER-CLAIM

GAB contends that the trial judge abused her discretion in denying its motion to strike the defendant's answer to the complaint. According to GAB, "[t]he averments in the complaint should have been deemed admitted and therefore, the circuit court abused its discretion in accepting the untimely answer and allowing [defendants] to present evidence

at trial that denied the averments." We disagree and shall hold that Rocky Gorge's answer, in so far as here relevant, was timely.

The original complaint was filed by GAB on September 28, 2012. On November 5, 2012, the defendants filed a motion to dismiss or in the alternative motion for summary judgment. By order entered on February 21, 2013, the court dismissed or granted summary judgment as to all counts of the complaint. GAB filed a notice of appeal. After we reversed the judgment, discovery proceeded, including a hearing concerning requests for protective orders.

In a footnote in GAB's March 2016 opposition to defendants' motion for protective order, GAB wrote:

> Defendants' refusal to take this proceeding seriously is further demonstrated by the fact that, even though the record in this matter was returned to this Court from the Court of Special Appeals on June 11, 2015, to date, Defendants have failed to file an answer to the Complaint. Just as there is no legitimate reason for Defendants' delay in filing the Motion, there is no legitimate reason why Defendants have not filed an answer to the Complaint in almost nine months. In that regard, pursuant to Maryland Rule 2-613 the Court should enter a default judgment against the Defendants.

GAB did not, however, file a motion requesting a default judgment pursuant to Md. Rule 2-613. Moreover, at that time, GAB did not request any other sanction.

On September 27, 2016, GAB filed an amended complaint.

At an October 13, 2016 hearing on all open motions, counsel for GAB advised the court that GAB had filed a motion *in limine* pertaining to the defendants' failure to file an answer to the original complaint, although according to the docket entries, that motion was actually filed the following day. At the hearing, counsel for the defendants stated that he

believed he had filed an answer, but agreed to "file an answer immediately." On October 14, 2016, the defendants filed an answer.

Thereafter, on October 18, 2016, GAB filed a motion to strike the answer to the complaint on the ground that it was not filed within 15 days after the entry of the Court of Appeals' denial of the petition for *writ of certiorari* or, at the latest, 15 days after the circuit court entered a scheduling order.

On October 24, 2016, immediately following jury selection, the court denied the plaintiff's motion to strike the answer so as to prevent defendants from asserting any defense or denying the averments in the original complaint.

In its appeal brief, GAB argues that the defendants were required to file their answer to the original complaint no later than September 8, 2015, which was 15 days after the circuit court entered the scheduling order following the remand. Alternatively, according to GAB, defendants should have sought an extension of time to file an answer prior to the expiration of the period prescribed pursuant to Md. Rule 1-204(a), which provides, in relevant part:

> (a) **Generally**. When these rules or an order of court require or allow an act to be done at or within a specified time, the court, on motion of any party and for cause shown, may (1) shorten the period remaining, (2) extend the period if the motion is filed before the expiration of the period originally prescribed or extended by a previous order, or (3) on motion filed after the expiration of the specified period, permit the act to be done if the failure to act was the result of excusable neglect.

GAB stressed that there was no evidence that the defendants' failure to file an answer "was the result of excusable neglect." GAB, however, did not allege that it was prejudiced by the allegedly late filing of the answer.

The amended complaint filed by GAB, on September 27, 2016, did not contain any reference to the original complaint. As a result, it replaced the original complaint in its entirety and the original complaint is regarded as having been withdrawn or abandoned. *See Shapiro v. Sherwood*, 254 Md. 235, 238-39 (1969) (an amended pleading that does not refer to or adopt a former pleading as a part of it supersedes the former pleading); *Priddy v. Jones*, 81 Md. App. 164, 169 (1989), *cert. denied*, 319 Md. 72 (1990) (amended complaint complete in itself without reference to the complaint that preceded it, replaces an earlier complaint in its entirety, and the earlier complaint is regarded as withdrawn or abandoned); *Villarreal v. Glacken*, 63 Md. App. 114, 125 (1985) (same). Pursuant to Md. Rule 2-341(a), defendants were required to file their answer to the amended complaint within 15 days plus the additional 3 days permitted for mailing by Md. Rule 1-203(c). On October 14, 2016, defendants filed an answer within the prescribed time period. Notably, there was never a contention by GAB that the answer that was filed was insufficient. Because the answer filed on October 14, 2016 was timely, the trial judge did not err in failing to strike it.

V.

GAB contends that the circuit court abused its discretion in denying it the right to discover post-2010 documents from appellants. We agree and explain.

In response to GAB's request for production of documents, the defendants filed a motion for protective order seeking to preclude GAB from obtaining any document(s) dated after December 31, 2010. Defendants argued that because GAB's damages were limited to the value of the subject property in 2010, documents created after December 31, 2010 were not relevant. The movants, in their written motion, relied on the *Tower* case. GAB contended below that the protective order should be denied because it was untimely. As to the merits, GAB contended, *inter alia*, that as to the tort counts, what happened after December 31, 2010, was discoverable because as to those counts, GAB sought consequential damages, such as lost profits. In other words, as to the tort counts, damages were not confined to the difference between the content prior and the fair market value of the Property at the time of the breach (2010).

Importantly, in its oral and written responses to the request for a protective order, GAB never contended that any post-December 2010 documents had any relevance to the issue of whether any of the defendants were liable for any of the torts allegedly committed. The court granted the motion for protective order (insofar as it concerned the defendants) thereby denying GAB the right to discover any post-December 2010 documents in possession of the defendants.[9]

Maryland Rule 2-402(a) provides, in part, that:

> [a] party may obtain discovery regarding any matter that is not privileged, including the existence, description, nature, custody, condition, and location of any documents, electronically stored information, and tangible things and

[9] The court denied the protective order insofar as GAB sought to obtain post December 2010 documents from several banks.

> the identity and location of persons having knowledge of any discoverable matter, if the matter sought is relevant to the subject matter involved in the action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party.

On appeal, GAB argues that the trial court abused its discretion in granting the protective order because appellants' motion was untimely and because precluding access to more than six years of documents was unfair and highly prejudicial. GAB maintains that granting the protective order was contrary to Maryland's discovery rules and case law and forced it to proceed to trial without having access to all documents and information "reasonably calculated to lead to the discovery of admissible evidence" as permitted by Md. Rule 2-402(a). More specifically, in its brief, GAB now argues:

> Appellants conceded, post-trial, that post-December 31, 2010 valuation information was relevant in connection with GAB's tort claims. In fact, the circuit court, in ruling on the motion for protective order, expressly stated that: "I haven't heard all the evidence. I'm listening to the issue with regard to a fraud claim and tort claims. So the Court does think that the value of the property today is relevant." Despite that statement, the circuit court denied GAB the right to *any* post-December 31, 2010 documents from Appellants.

GAB's argument continues:

> GAB's discovery requests were not limited to only documents concerning the value of the subject property. To the contrary, GAB sought specific categories of documents that were "relevant to the subject matter involved in the action" and were "reasonably calculated to lead to the discovery of admissible evidence." Md. Rule 2-402(a)[.] GAB was denied more than six years of documents from Appellants, which documents could have included communications or other documents that would have bolstered GAB's claims. It was unreasonable and an abuse of discretion for the circuit court to have assumed, at Appellants' request, that, after December 31, 2010 Appellants did not send a single non-privileged email or letter in which the dispute with GAB was referenced, mentioned, or discussed.

* * *

> [I]n granting the motion for protective order, the circuit court seemed to accept the "undue burden and undue expense" argument Appellants' counsel advanced during the May 18, 2016 hearing. Indeed, the circuit court stated: "Well, the big deal according to the Defendant is undue burden expense basically." The circuit court's reliance on that argument was erroneous because: (a) Appellants failed to include the argument in their written motion (*see* Md. Rule 2-311(c); and (b) Defendants failed to carry their burden of demonstrating with particular and specific facts that it would be onerous and expensive to produce any post-December 31, 2010 documents (*see Forensic Advisors, Inc. v. Matrixx Initiatives, Inc.*, 170 Md. App. 520, 530 (2006)), as no information or evidence was provided about the volume of post-December 31, 2010 documents that exists or the amount of time it would take Appellants to gather and review those documents.

(References to record extract omitted.)

Preliminarily, appellants/cross-appellees argue, as they did below, as follows:

> [D]iscovery after 2010 was not relevant to GAB's claims [f]or damages, and ordering discovery of six years' worth of irrelevant documents would (a) be a disproportional, undue expense, and (b) interfere with sensitive negotiations and litigation in a case between Appellants and the United States Army.

The appellants/cross-appellees' sum up their argument by asserting that the circuit court did not:

> abuse its discretion in reaching a compromise between the parties' competing concerns. It was not inconsistent for the trial court to deny access to documents and communications reflecting sensitive communications in parallel litigation involving the United States, while at the same time concluding that present-value evidence was discoverable. The circuit court expected GAB would hire an expert-appraiser qualified to assess the value of the property. Such appraisals are performed based on objective, industry-accepted standards. The communications sought were not essential to GAB's damages case and presented significant collateral risks of disrupting Waverley's case against the federal government. The circuit court's opinion ably balances the competing considerations, including GAB's interest in the discovery, the burdens in producing post-2010 documents, and the collateral effects on parallel litigation.

We can find nothing in the record that supports the appellants/cross-appellees' argument that the requested discovery would interfere with Waverley's pending suit against the United States Government nor did the appellants/cross-appellees prove that production of the documents would invoke any "undue expense." As GAB pointed out, appellants/cross-appellees did not even mention the "undue expense" contention in their written motion for a protective order.

We disagree with appellants/cross-appellees' contention that "discovery after 2010 was not relevant to GAB's claim for damages." GAB is correct when it argues that as to the tort counts, its damages would not necessarily be restricted to proof of the difference between the contract price and the value of the Property at the time of the breach. As to those counts, GAB had the right to attempt to prove consequential damages. Potentially, at least, the documents might have been of use in proving consequential damages.

"Trial courts are vested with a reasonable, sound discretion in applying [the discovery rules], which discretion will not be disturbed in the absence of a showing of its abuse." *Falik v. Hornage*, 413 Md. 163, 182 (2010) (internal quotation marks and citation omitted). *See also*, *Price v. Orrison*, 261 Md. 8, 10 (1971). Although Rocky Gorge's motion for protective order was filed two months after its discovery responses were due, we need not reach the issue of whether the court properly considered appellants'/cross-appellees' request for a protective order because we agree with GAB that there was no factual or legal basis to support the trial court's conclusion that GAB was not entitled to

production of post-2010 documents. For that reason, we hold that the trial court abused its discretion when it granted the protective order.

We turn now to the issue of what prejudice, if any, GAB suffered as a result of the abuse of discretion. As mentioned in the trial court, GAB never contended that the post-2010 documents had any relevance to the issue of whether the defendants committed any of the torts alleged. There was good reason for this because if any defendant committed a tort it was committed long before December 31, 2010. Likewise, in its brief, GAB makes no meaningful effort to show prejudice in this regard. This is important, because as to all counts submitted to the jury, the jury found the various defendants not liable with only three exceptions: Count III, where the jury found Dorment and Rocky Gorge liable but concluded that no damages were proven; Count VI (tortious interference with contractual and economic relations) where the jury found one of the defendants (Dorment) liable, but found two of the other defendants named in that count not liable; and Count VII, where the jury found against Rocky Gorge for breach of contract. The failure to produce document(s) as to Count VI, had no adverse impact because for reasons explained *supra*, Dorment could not be held liable for that tort. Likewise, as to Count VII, the breach of contract count, the failure to produce documents could not have prejudiced GAB because as to that count, post-2010 damages were irrelevant inasmuch as GAB was restricted to general damages.

In every civil case, the party alleging error must prove not only error, but must prove, as well, that the error caused prejudice. *Flores v. Bell*, 398 Md. 27, 33 (2007). In

regard to Counts I, II, IV, V, VI, VII, VIII and IX, GAB has failed to demonstrate that it was prejudiced by the error.

In regard to Count III, where the jury found that Dorment and Rocky Gorge were guilty of the tort of negligent misrepresentation but found no damages, it is impossible for GAB to prove, at this stage, if it was prejudiced. It will only know if it has been prejudiced once the post-2010 documents are delivered. Under these unusual circumstances, as to Count III, we shall conditionally vacate the judgment in favor of Dorment and Rocky Gorge as to that count, with instructions to the trial judge to order defendants to produce all of the non-privileged documents requested. If, after production of those documents, GAB can show that if the documents had been produced before trial, the verdict as to Count III probably, as opposed to possibly, would have been different, *Brown v. The Daniel Realty Co., et al.*, 409 Md. 565, 584 (2009), then the court should order a new trial, as to damages only, as to that count. If GAB cannot make such a showing, the court should reinstate the judgment in favor of Dorment and Rocky Gorge as to Count III.

VI.

In Count X of its amended complaint, GAB asked the court to:

> a. declare, decree, and adjudge the parties' respective rights and interests with respect to the Property;
>
> b. declare, decree, and adjudge that GAB has a valid and enforceable right and interest in the Property;
>
> c. declare, decree, and adjudge that GAB is entitled to twenty percent of the current value of the Property, including, but not limited to, any settlement proceeds from, or judgment that is obtained against, any

party, including, but not limited to, the Department of the Army, in connection with any environmental contamination issues;

d. declare, decree, and adjudge that GAB is entitled to any and all profits received by Rocky Gorge, Mr. Dorment, and/or Waverley in connection with the parcel of the Property developed with pad sites for 240 multi-family apartment homes[.]

In a written opinion, the circuit court declared that GAB was not entitled "to any additional recovery." The trial judge wrote:

> After review of both parties' written and oral arguments, this court declares that Plaintiff is NOT entitled to any additional recovery. Over Defendants' objections, Plaintiff was permitted at trial to introduce evidence of the 2016 property value to the jury. Plaintiff relied on the testimony of its expert witness who stated that his valuation was for the full value of the property. Furthermore, he testified that if it had been damaged by the federal government, then he was fully confident that the government would pay the difference. Therefore, the trial testimony was the 2016 value regardless of whether or not the property was contaminated.

We shall hold that the trial judge did not err when she denied GAB the declaratory relief requested. But, in our view, the judge was right for the wrong reason. As mentioned earlier, in Count X, GAB asked the court to declare what consequential damages it was entitled to recover due to the breach of contract and common law torts alleged in Counts I – VII and IX. But at trial, as to each of those eight counts, GAB, in order to succeed, had to prove, with reasonable certainty, each item of damage it claimed to have suffered due to defendants' "wrongful conduct." As will be seen, a party is not allowed to obtain a declaratory judgment as to issues that have been or will be resolved in a pending case. The Court of Appeals decision in *Haynie v. Gold Bond Building Products*, 306 Md. 644 (1986) is directly on point. In *Haynie*, a tort action was pending between the parties, when one of

the parties filed a declaratory judgment action. *Id.* at 648-49. The tort action, had it been allowed to proceed, would have answered the same issues raised in the tort suit. *Id*. at 649. Nevertheless, the trial court filed an order granting a declaratory judgment. *Id*. But it was not until the date of oral argument before the Court of Appeals that the Court learned about the pending tort suit. *Id.* The Court of Appeals ruled that the trial court erred in granting declaratory relief. Judge Eldridge, speaking for the court, explained:

> The Declaratory Judgment Act, as amended by Ch. 724 of the Acts of 1945, provided that a party is not barred from obtaining a declaratory judgment merely because the controversy "is susceptible of relief through a general common law remedy . . . ." But the Act does not provide that, once the common law remedy is actually invoked to provide relief in the controversy, and the common law action is still pending, the parties may also institute a second lawsuit and obtain a declaratory judgment to resolve the same matter. Our cases have repeatedly held to the contrary.
>
> Recently in *Aetna Cas. & Sur. Co. v. Kuhl*, 296 Md. 446, 449, n.1, 463 A.2d 822 (1983), Judge Cole noted for the Court that a declaratory judgment action "is inappropriate where the same issue is pending in another proceeding. . . . Here, declaratory judgment was improper because the issue sought to be resolved could have been determined in the pending tort action."
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> In *Brohawn v. Transamerica Insurance Company*, 276 Md. 396, 406, 347 A.2d 842 (1975), after reviewing prior case law and E. Borchard, *Declaratory Judgments* (2d Ed.1941), we held that "where, as here, the question to be resolved in the declaratory judgment action will be decided in pending actions, it is inappropriate to grant a declaratory judgment." We went on to point out that under the circumstances of that case, "granting a declaratory judgment would constitute an abuse of discretion." 276 Md. at 406, 347 A.2d 842.

Id. at 649-50 (footnote omitted).

See also Maryland Auto. Insurance Fund v. Sun Cab Co., Inc., 305 Md. 807, 810 (1986) (observing that an issue "squarely presented" for resolution in the tort action was properly refused consideration in a declaratory judgment action).

When Count X was filed, GAB had "actually invoked" a "common law remedy to recover consequential damages. As the *Haynie* Court said, once the party has "invoked" a common law remedy to recover damages, that party is not entitled to file a declaratory judgment action to "resolve the same matter." *Haynie*, 306 Md. at 650.[10]

JUDGMENT AFFIRMED AS TO COUNTS I, II, IV, V, IX AND X; JUDGMENT ENTERED AS TO COUNT VI IN FAVOR OF ROSEMARY P. DORMENT, WAVERLY VIEW INVESTORS, LLC AFFIRMED; JUDGMENT ENTERED AGAINST CHRISTOPHER DORMENT AS TO COUNT VI REVERSED; JUDGMENT ENTERED IN FAVOR OF ROCKY GORGE DEVELOPMENT, LLC AND CHRISTOPHER DORMENT AS TO COUNT III VACATED, WITH INSTRUCTIONS FOR THE TRIAL JUDGE TO CONDUCT FURTHER PROCEEDINGS IN ACCORDANCE WITH THE VIEWS EXPRESSED IN THIS OPINION; JUDGMENT ENTERED AGAINST ROCKY GORGE DEVELOPMENT, LLC AS TO COUNT VII REVERSED WITH INSTRUCTIONS TO HOLD A NEW TRIAL AS TO DAMAGES ONLY; COSTS TO BE PAID 75% BY GAB ENTERPRISES, INC AND 25% BY CHRISTOPHER DORMENT AND ROCKY GORGE DEVELOPMENT, LLC.

[10] Even if the rule discussed in *Haynie*, did not exist, it would have been error for the trial judge to provide GAB with a declaration of its rights to the consequential damages it sought. For the reasons set forth, *supra*, GAB was not entitled to recover any damages against Dorment as to Count VI nor was it entitled to recover consequential damages as to the breach of contract counts. As to all other counts and all other defendants, judgment had been entered in favor of the defendants.