Circuit Court for Montgomery County
Case No. 444069-V

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 783, 1151

September Term, 2020

BRANDI J. HOOKER, *et al*.

v.

JN PROPERTY SOLUTIONS, LLC

Shaw Geter,
Wells,
Ripken,
JJ.

Opinion by Ripken, J.

Filed: September 22, 2021

JN Property Solutions, LLC ("JN") sued Brandi Hooker ("B. Hooker") and Judy Hooker ("J. Hooker") in the Circuit Court for Montgomery County regarding a series of real estate ventures. Following a two-day bench trial, the circuit court entered judgments in JN's favor on claims of common law fraud, negligence, and violation of the Maryland Securities Act ("MSA"). The circuit court awarded JN $101,500 in damages, $59,165.82 in attorneys' fees, $433 in costs, and $50,722.19 in prejudgment interest. The circuit court found B. Hooker and J. Hooker jointly and severally liable. B. Hooker and J. Hooker appeal from the circuit court's judgments, arguing that the court erred in finding that JN's real estate investments constituted a security under the MSA, erred in interpreting the parties' joint venture agreement, failed to correctly apply the time limitation in the MSA, erred in concluding that B. Hooker committed common law fraud, erred in concluding that J. Hooker aided and abetted the fraud, erred in concluding that B. Hooker and J. Hooker were negligent and erred in calculating JN's damages.

For the reasons explained below, we shall affirm the circuit court's judgments. The circuit court's damages award may be sustained by the MSA claim as well as common law fraud claim, however we also address B. Hooker and J. Hooker's additional contentions for completeness.

FACTUAL AND PROCEDURAL BACKGROUND

The Real Estate Investments

JN is a limited liability company owned by Koye Jemisin ("Jemisin"). JN "buys property, renovates, and sells or rents out [property]." Jemisin has a post-graduate degree in Human Resources and professional certifications in real estate and information

technology. B. Hooker is a licensed real estate agent and is J. Hooker's daughter. J. Hooker is a licensed real estate agent and broker. J. Hooker and B. Hooker are employed by Inkscale Realty.

B. Hooker introduced Jemisin to investors operating as Lily Pond Community Development, LLC ("Lily Pond"). In June 2013, JN and Lily Pond signed an investment agreement and a "silent partnership agreement." Under these agreements, Lily Pond, as a general partner, would purchase, rehabilitate, and sell (or "flip") the property at 3328 Ames Street, NE, in Washington, D.C. JN would be a silent partner, advancing $40,000 for the project. B. Hooker was the listing agent. Jemisin testified at trial that he was told the investment would be "a very easy fix and flip," that he would earn a minimum return of $10,000, and that the property would sell in less than six months. Jemisin also testified that B. Hooker was responsible for the "renovation, flipping, purchase, [and] sale" of the Ames Street property.[1] Jemisin signed the agreements as JN's representative, sent them to B. Hooker by email, and wired the $40,000 as instructed.

Costs for renovation of the Ames Street property were greater than expected. B. Hooker informed Jemisin there would not be any net profit on JN's investment. During the renovation of the Ames Street property, B. Hooker told Jemisin about another investment opportunity at 1614 D Street, SE, in Washington, D.C., that was a "homerun," which would "compensate [JN] for the lack of profits" from the sale of the Ames Street property. B. Hooker asked Jemisin "to send back the [$]40,000 . . . to participate in the next property."

[1] B. Hooker testified that she introduced Jemisin to the principal of Lily Pond and that her role was otherwise limited to that of the seller's agent.

B. Hooker showed Jemisin the property at 1614 D Street, SE. B. Hooker described the planned renovations and expenses, identified a contractor for the project, and told Jemisin the property should sell for $725,000 or more. On November 7, 2013, B. Hooker and J. Hooker signed a "joint venture deed" ("the D Street agreement") with JN. B. Hooker agreed to contribute $66,300 as well as "management and expertise" to "oversee the day to day operation of the rehabilitation of the property to the final stages of the sale of the property." JN agreed to "contribute an initial sum of $60,000 and subsequent funds of between $50,000 and $60,000 once #3328 Ames Street . . . ha[d] been sold." J. Hooker agreed to be a credit investor responsible for the loan application and acquisition. The agreement did not anticipate J. Hooker paying to maintain the loan.

In section 2, the agreement states, "[B. Hooker] will purchase the Property in [J. Hooker's] name, and will fund the purchase of the Property, in cash or by external sources of funding, or both, using funds provided by [B. Hooker and JN]." Section 2.1 states "The Property shall be developed as the parties mutually agree and sold within [six months]." Section 2.5 states:

> While [B. Hooker] shall oversee the project, she shall also keep [JN] apprised of developments. Important decisions regarding the renovation of the property shall be taken by both of [B. Hooker and JN] only. The Credit Investor [J. Hooker] will be able to take part in decisions which only affect [J. Hooker's] credit.

Section 2.9 states: "[J. Hooker] grants an equitable interest in the Property to [B. Hooker] and [JN] to protect their interest under this Agreement until termination of this Agreement." The agreement reiterated that "the Property is not expected to sell for less than $725,000 and could well be higher." The anticipated net profit was to be divided with

twenty-eight percent to B. Hooker, forty-two percent to JN, and thirty percent to J. Hooker. The D Street agreement stated that the sale of the property would occur within six months. Jemisin also testified that B. Hooker told him this would be a "one-off" transaction. On November 8, 2013, JN wired $60,000 in new funds to a title company for the purchase of the D Street property. The purchase and rehabilitation work began at approximately the time the joint venture deed was signed.

In February 2014, the Ames Street transaction settled. JN was able to recoup its initial investment and B. Hooker allocated an additional $1,500 in profits to JN. B. Hooker and JN signed an amendment to the joint venture deed acknowledging the lower-than-expected return from the Ames Street sale. Under the amended agreement, JN would invest its $46,500 from Ames Street—down from the expected $50,000 to $60,000—into D Street, for a total investment of $101,500. Despite JN's reduced investment, its share in the profits would remain at forty-two percent. The amendment stated "[i]nvestor returns will remain unchanged" so long as JN wired funds to the "Inkscale Corporation Account" by February 22, 2014.

JN's funds were rolled into the D Street project. During the renovations to the D Street property, B. Hooker updated Jemisin about developments in the construction, and Jemisin occasionally visited the site. On July 29, 2014, B. Hooker informed Jemisin that the project was "becoming a loss situation." B. Hooker explained at trial that the rehabilitation ran into issues with funding and timing. The funds were inadequate to finish the basement construction, and J. Hooker had been paying $4,999 per month to maintain the mortgage. According to B. Hooker, J. Hooker pressured her to reduce the listing price

and sell the property. On September 19, 2014, the D Street property sold for $530,000. At settlement, $52,603 was paid to J. Hooker in cash. The settlement statement admitted at trial shows that approximately $430,000 of the purchase price went to paying off the mortgage held by Hard Money Bankers, LLC and approximately $40,000 went to settlement charges, including $18,550 to Inkscale Realty.

On September 19, 2014, Jemisin emailed B. Hooker seeking an explanation for the project's losses. On October 2, 2014, after further email exchange, B. Hooker responded that the project was a joint venture, for which the parties bore equal responsibility for the success or failure. She proposed attempting recovery against the contractor, but then stated "[f]rom here the funds will be split according to the contract."

B. Hooker and Jemisin discussed reinvestment of the D Street proceeds. B. Hooker identified another real estate flip project at 7721 Oxman Road in Hyattsville, Maryland, for which J. Hooker was the broker of record and B. Hooker the listing agent. On October 17, 2014, Jemisin emailed B. Hooker to express his concern with the disposition of the D Street proceeds and that any reinvestment should occur as a "joint LLC" with an operating agreement. On October 20, 2014, B. Hooker responded, "[y]es, [an] LLC will be established, which is an operating agreement, and you will need to review, and sign." On November 4, 2014, B. Hooker emailed Jemisin a form operating agreement with blank sections, stating that she was "in the process of editing" the operating agreement.

Unknown to Jemisin, prior to October 2014, the Oxman Road property was under contract for a short sale to Styles Unlimited LLC, a company owned by Maurice Izzard

("Izzard").[2] B. Hooker had helped Izzard incorporate Styles Unlimited LLC and prepared its articles of organization. B. Hooker was mentoring Izzard in real estate investment. When Styles Unlimited LLC could not obtain funding, B. Hooker accompanied Izzard to the Baltimore State Department of Assessments and Taxation office to cancel Styles Unlimited LLC and create a similarly named entity, Styles Unlimited, Inc. B. Hooker incorporated Styles Unlimited, Inc. on October 9, 2014. She testified that she was its sole owner. The new entity was created to attempt to take over the Oxman Road short sale contract that B. Hooker, as the listing agent, arranged with the short sale lender.[3]

Styles Unlimited, Inc. purchased the Oxman Road property by deed dated May 22, 2015, using the D Street proceeds. J. Hooker served as the broker on the sale. According to Jemisin, he did not authorize B. Hooker or J. Hooker to transfer the D Street proceeds to Styles Unlimited, Inc. or purchase the Oxman Road property. On June 1, 2015, Jemisin emailed B. Hooker to follow up regarding the possible reinvestment into the Oxman Road property. He wrote:

> Following our discussion in May 2015, you had indicated that the already delayed closing for the Oxman Rd Hyattsville property was expected to be on or about May 20, 2015. Please confirm if closing has now occurred.

[2] B. Hooker testified that Izzard was Styles Unlimited LLC's sole owner.

[3] B. Hooker provided conflicting testimony regarding whether she was the buyer's agent for the Oxman Road purchase. The MLS real estate database information sheet admitted at trial lists B. Hooker as the buyer's agent and J. Hooker as the listing agent.

Jemisin testified that, as of June 1, 2015, he did not know that the Oxman Road property had been purchased. He testified that he later learned that the property had been purchased when he visited the property—but the record does not reveal the date of this visit.

On April 2, 2017, B. Hooker finally informed Jemisin that the D Street proceeds were lost because the Oxman Road property had been sold illegally. JN never received any amount of the D Street proceeds.

Trial

On March 9, 2018, JN filed a multicount complaint against B. Hooker and J. Hooker and ten other defendants in the Circuit Court for Montgomery County. The counts included fraud, negligence, breach of fiduciary duty, conspiracy to defraud, tortious aiding and abetting, and violation of the MSA.[4]

On February 4, 2019, the court held a bench trial on the claims against B. Hooker and J. Hooker.[5] During opening statements, counsel for B. Hooker and J. Hooker raised for the first time the defense that the MSA's statute of limitations had run. During trial, Jemisin, J. Hooker, and B. Hooker testified. The court also admitted documentary evidence, including the D Street agreement and emails between Jemisin and B. Hooker.

[4] The court dismissed the claims against five of the defendants with prejudice. The court dismissed the claims against Izzard and Styles Unlimited, Inc., without prejudice and with leave to amend. Another defendant, Millennium Title Co., was not dismissed, and the claims against it were not adjudicated.

[5] B. Hooker and J. Hooker filed a joint answer on the day of trial. They previously filed a motion to intervene, stating they intended to file an amended complaint with JN against the remaining defendants. They filed a cross-complaint, listing themselves as plaintiffs with JN, but later requested to withdraw the cross-complaint as having been filed in error. The court granted the request to withdraw the cross-complaint.

On February 5, 2019, the court found in favor of JN and awarded $101,500 in damages, holding B. Hooker and J. Hooker jointly and severally liable. In an oral ruling, the circuit court noted that it would consider together the claims for negligence (count 2) and breach of fiduciary duty (count 3). The court found that B. Hooker and J. Hooker entered a joint venture with JN for the D Street and Oxman Road deals, and that the enterprise constituted an investment contract. The court found as follows:

> [B. Hooker and J. Hooker], I find, stepped outside their ordinary role of real estate broker and real estate agent and became joint venturers with [JN]. At least by the D Street deal, I find, and then later in the Oxman Road deal I find.
>
> The, the problem here is the way and manner in which the transactions were handled. I do find that [JN] has satisfied me that starting with D Street and, and going into Oxman, what happened here was an investment contract. This was a security because under the [*Howey* test described in *Mathews v. Cassidy Turley Maryland, Inc.*, 435 Md. 584 (2013), and *Ak's Daks Communications, Inc. v. Maryland Securities Division*, 138 Md. App. 314 (2001)], the managerial efforts here were undertaken by largely Brandi Hooker with the assistance of Judy Hooker and [JN], I find, was an investor. . . . [Its] role was to put up money to help fund the deal.
>
> * * *
>
> Here, the efforts were [JN], I find, was relying on the acumen under *Howey* of [B. Hooker] and [J. Hooker].
>
> [Jemisin], while he had some knowledge, he's an educated man . . . . So, the mere fact that somebody has a college degree and is conversant in the English language does not make them anything other than an investor.
>
> The three factors [for an investment contract] are all found here under [*Securities & Exchange Commission v. Howey*, 328 U.S. 293, 298–99 (1946)]. I find that [JN] invested money. In fact, I find that the sum is $101,500. I find there was a common enterprise starting with D Street rolling into Oxman, and I find within, that it was done with an expectation of profits to be derived from the efforts of others.
>
> . . . . [Under *Mathews*,] [t]here could be some modest participation by the investor other than writing the check and that doesn't disqualify the entity as

> an investment contract. Here, it clearly was, both in substance and form and how the parties looked at it. So, under [*Matthews* and *Ak's Daks*], starting with Plaintiff's Exhibit 5, this is an investment contract.
>
> I also find that [JN] has satisfied both for common law fraud and for the other, other two claims, his burden of proof production and persuasion. There were, I find, false statements and material fact made by B. Hooker and made with the intention to mislead specifically, among others. She said, yes, we will form an LLC. Yes, there will be an operating agreement. Yes, there will be terms and conditions outlined.
>
> And she said it at a time when, A, she didn't intend to do it and, B, she had already formed a different type of entity and already assigned the contract to that entity and, and I find didn't tell [JN] about it. I disbelieve her testimony almost, almost entirely.
>
> * * *
>
> I find that [J. Hooker] was not really a passive credit investor, she was an active participant and aided and abetted [B. Hooker's] machinations by when, when D Street escrow was broken, the money was not distributed to the investors in accordance with their pro rata shares or in accordance with any specific understanding. I am not persuaded that [JN] consented to what [J. Hooker] did or how she did it. I find that the Hookers just did it and tried to cover it up.
>
> This transaction, I find, is rife with fraud and deceit and material misrepresentation upon which I find [JN] reasonably and justifiably [re]lied. The damages, I find, that [JN] has suffered as a result of the conduct of [J. Hooker] and [B. Hooker] are $101,500.
>
> * * *
>
> Judy Hooker is an aider and abetter under . . . the Maryland and Federal Securities Act.

As to B. Hooker and J. Hooker's defense regarding the statute of limitations, the court found that the defense was "not properly pled or timely pled." Even, if a statute of limitations would have otherwise barred the claims, the court found that B. Hooker and J. Hooker, "lulled [JN] into a false sense of security by making the misrepresentations

regarding the formation of an LLC and that his complaint was timely filed under the statute." The court entered the merits award as a judgment on February 12, 2019.

Following the verdict of the court, B. Hooker and J. Hooker appealed from the award. JN filed a petition for attorneys' fees, costs, and prejudgment interest, which B. Hooker and J. Hooker opposed. On May 30, 2019, during the pendency of the appeal, the court granted JN's petition and entered the fee award as a judgment. In a Memorandum and Order entered May 30, the court summarized its findings, including that "[JN's] sole function in the [D Street] joint venture was the investment of capital." Furthermore:

> Without [JN's] authority, and while [JN] was under the impression that a joint LLC was going to be formed with an operating agreement, [B. Hooker and J. Hooker] purchased a property located at 7721 Oxman Road, Hyattsville, MD 20785 . . . with the original investment and profits earned from the D Street transaction.
>
> Subsequent to the purchase, [B. Hooker and J. Hooker] represented to [JN] that the Oxman property was sold to them illegally, therefore the entire investment of the joint venture was lost, and [JN] would not be able to recover his $101,500.00 investment.

In July 2020, this Court, in an unreported opinion, dismissed the appeal because it was taken from a nonfinal judgement—the award did not finally adjudicate all claims as to all parties. *Brandi J. Hooker, et al. v. JN Property Sols. LLC*, No. 89, Sept. Term 2019 (Md. Ct. Spec. App. July 16, 2020). B. Hooker and J. Hooker jointly filed another premature appeal in September 2020, docketed in this Court as No. 783. In November 2020, the circuit court dismissed remaining defendants Millennium Title Co., Izzard, and Styles Unlimited, Inc. with prejudice. In December 2020, B. Hooker and J. Hooker jointly

filed another notice of appeal, docketed in this Court as No. 1151. The appeals were consolidated.

ISSUES PRESENTED FOR REVIEW

B. Hooker and J. Hooker present the following questions for our review, which we have rephrased as follows:[6]

I. Did the circuit court err in finding B. Hooker and J. Hooker liable under the Maryland Securities Act?

II. Did the circuit court err in concluding that B. Hooker and J. Hooker waived their time limitation defense under the MSA?

III. Did the circuit court err in finding B. Hooker and J. Hooker liable for common law fraud?

IV. Did the circuit court err in finding B. Hooker and J. Hooker liable for negligence?

IV. Did the trial court err in calculating JN's damages?

DISCUSSION

This Court reviews a bench trial giving "due regard" to the trial court's opportunity to judge the credibility of witnesses. Maryland Rule 8-131(c). This Court does "not set aside the judgment of the trial court on the evidence unless clearly erroneous." *Id.* "Our

[6] B. Hooker and J. Hooker phrased the questions presented as:

I. Is the joint venture agreement a security pursuant to the Maryland Securities Act?

II. Did the trial court err in applying the statutes of limitations and repose pursuant to the Maryland Securities Act?

III. Did the trial court err in finding that Appellee proved Common Law fraud, negligence, and aiding and abetting?

IV. Assuming the trial court did not err in finding fraud or negligence, did the trial court err in calculating damages?

task is limited to deciding whether the circuit court's factual findings were supported by 'substantial evidence' in the record." *Liberty Mut. Ins. Co. v. Md. Auto. Ins. Fund*, 154 Md. App. 604, 609 (2004) (quoting *GMC v. Schmitz*, 362 Md. 229, 234 (2001)) "[W]e must view all the evidence in a light most favorable to the prevailing party." *Id.* (internal quotation marks omitted). This Court reviews legal rulings *de novo*. *Spaw, LLC v. City of Annapolis*, 452 Md. 314, 338 (2017).

I. THE CIRCUIT COURT DID NOT ERR IN CONCLUDING THAT B. HOOKER AND J. HOOKER ARE LIABLE UNDER THE MSA.

B. Hooker and J. Hooker argue that the circuit court erred in finding that they sold JN an investment contract because the facts show that "the Joint Venture contract was jointly prepared and negotiated, and JN maintained significant control over its investment as a general partner." In particular, B. Hooker and J. Hooker argue that JN was not a passive investor but was a knowledgeable and experienced investor actively protecting its interests. They also dispute the court's finding that B. Hooker made material misrepresentations or omissions pertaining to the offer or sale of the investment contract. Without such misrepresentations, they argue, they cannot be liable under the MSA.

We first explain that the circuit court's finding that the D Street agreement constituted an investment contract is supported by substantial evidence in the record. Second, we explain that there is, likewise, substantial evidence that supports the circuit court's finding of liability under the MSA.

A. The Circuit Court Did Not Err in Concluding That the D Street Investment Constituted an Investment Contract.

The MSA "regulates the offer and sale of securities in Maryland, as well as the individuals who advise on and effect such transactions." *Mathews v. Cassidy Turley Md., Inc.*, 435 Md. 584, 599 (2013). The MSA defines "security" broadly, encompassing an array of financial instruments, including any "investment contract." Corporations and Associations ("CA") § 11-101(s) (2014 Repl. Vol.). Like other provisions in the MSA, the broad definition of security in the MSA, "mimic[s]" the definition contained in the federal Securities Act. *Mathews*, 435 Md. at 601 n.13; *see* 15 U.S.C. § 77b(a)(1).

The Court of Appeals has endorsed the *Howey* test—taking its name from U.S. Supreme Court's decision in *SEC v. Howey*, 328 U.S. 293, 298–99 (1946)—for construing the term "investment contract" under the MSA. *Mathews*, 435 Md. at 604–05. An investment contract is "(1) an investment of money; (2) in a common enterprise; (3) with an expectation of profits derived solely from the efforts of others." *Id.* at 608. This definition "embodies a flexible rather than static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." *Id.* at 605 (quoting *Howey*, 328 U.S. at 299) (internal quotation marks omitted).[7]

[7] "The General Assembly has directed that the [MSA] be construed to carry out the general purpose of encouraging uniformity in state laws regulating securities and investment professionals and to coordinate the interpretation and administration of [Maryland law] with the related federal regulation." *Mathews*, 435 Md. at 601 (quoting CA § 11-804) (internal quotation marks omitted).

The Court of Appeals has also embraced an interpretation of the third factor, following the majority view among the federal circuits, that minimal efforts by the investor do not defeat the finding of an investment contract. *Id.* at 607. An investment contract may be found where the expectation of profit derives from the essential and significant managerial and entrepreneurial efforts of others. *Id.* 606–07; *Ak's Daks Commc'ns, Inc. v. Md. Sec. Div.*, 138 Md. App. 314, 328–29 (2001). Investment in a common enterprise is not an investment contract where the investor has "an actual, practical ability to exercise management rights and control over the business." *Ak's Daks*, 138 Md. App. at 329–30 (affirming finding of investment contract where investors lacked experience, were solicited from the general public, asked to make decisions only on minor issues, and were completely dependent on the management of others).

Whether the efforts of others are the driver of profit expectation is highly fact dependent. *Id.* The inquiry requires consideration of the economic realities and "disregarding form in favor of substance." *Mathews*, 435 Md. at 604–05. Courts examine the "terms of the offer" as well as the "promotional emphasis" and "representations made by the defendants as the basis of the sale." *Aldrich v. McCulloch Props., Inc.*, 627 F.2d 1036, 1039 (10th Cir. 1980).

Here, the parties appear to agree on appeal that JN's transfer of $101,500 for the purchase, renovation, and sale of the D Street property constitutes an investment of money in a common enterprise—satisfying the first two *Howey* factors. The arguments on appeal focus on the circuit court's finding as to the third factor. Viewing the evidence in the light most favorable to JN, we sustain the circuit court's finding that the expectation of profits

derived from the significant managerial and entrepreneurial efforts of B. Hooker and J. Hooker.

The evidence adduced at trial supports the circuit court's finding that the D Street agreement was an investment contract. B. Hooker identified the D Street property, determined what improvements needed to be made, and identified a contractor prior to JN's investment. JN was told to wire funds by a certain date, otherwise B. Hooker would find another investor. B. Hooker was responsible for the purchase of the property and its later listing. She obtained an estimate for the construction, retained a contractor, and oversaw the renovation. J. Hooker obtained a hard money loan and approval for the draw schedule. Jemisin testified that JN's role was limited to the contribution of funds, first wiring $60,000 to the title company for the purchase of the property, then eventually forwarding $41,500 from the settlement of Ames Street.

The Ames Street project provides additional context for the investment in D Street. Jemisin testified that he first met B. Hooker in her capacity as a realtor and that she held herself out as being "well-versed in flipping properties." After B. Hooker and Jemisin discussed different real estate investments, B. Hooker solicited JN to participate as a silent partner in the Ames Street project. The Ames Street project proceeded just as D Street would, with B. Hooker identifying the property, discussing planned renovations, asking JN to wire funds for the purchase of the property, and eventually overseeing the renovations. As problems arose with Ames Street, B. Hooker doubled down on her estimate of returns to JN, expressly soliciting JN's investment in D Street as an opportunity to make up for the underperformance of the Ames Street venture.

B. Hooker and J. Hooker argue that other evidence and testimony controvert the circuit court's findings. They argue that the venture was a general partnership, and that there is a strong presumption general partnership interests do not fall within the scope of investment contracts. *See Williamson v. Tucker*, 645 F.2d 404, 421–22 (5th Cir. 1981). They relatedly argue that "JN was a knowledgeable and experienced investor" who earned post-graduate degrees, had previously invested in five or six properties, and actively negotiated his interests in the Ames Street and D Street ventures. B. Hooker and J. Hooker additionally point to the provisions of the joint venture agreement, including that "[i]mportant decisions regarding the renovation of the property" were to "be taken by both [B. Hooker] and [JN] only" and that JN was allowed to register an equitable interest in the property. These facts were available for the circuit court to consider, but none decisively establishes, as B. Hooker and J. Hooker ask this Court to conclude, that the D Street Agreement was not investment contract. We address their arguments in two parts.

First, an interest in a general partnership may constitute an investment contract where, as the circuit court found here, the investor remains dependent upon the managing partners. This Court previously addressed the contours of the "narrow exception" for general partnerships in *Ak's Daks*, 138 Md. App. at 330–33. Because general partners and joint venturers are liable for the obligations of the partnership and have a right to protect their interests through exercising control, regardless of their actual participation in the enterprise, "they cannot expect to be passive investors who derive profits solely from the efforts of others." *Id.* at 331; *see Williamson*, 645 F.2d at 422 ("An investor who is offered an interest in a general partnership or joint venture should be on notice, therefore, that his

ownership rights are significant, and that the federal securities acts will not protect him from a mere failure to exercise his rights."). Nevertheless, an interest in a general partnership may still constitute an investment contract where a general partner is "dependent on the promoter or manager for the effective exercise of his partnership powers," including where a partner "lacks the business experience and expertise necessary to intelligently exercise partnership powers." *Williamson*, 645 F.2d at 422–23. "A scheme which sells investments to inexperienced and unknowledgeable members of the general public cannot escape the reach of the securities law merely by labeling itself a general partnership or joint venture." *Id.* at 423.

The circuit court made findings to the effect that Jemisin lacked such expertise to intelligently exercise partnership powers. The court found that, although JN was a "joint venturer" with B. Hooker and J. Hooker, JN was reliant on their acumen and was "not a sophisticated investor." It furthermore found that Jemisin, had "some knowledge," but impliedly little knowledge of relevance—i.e., familiarity with the operation of a joint venture. The circuit court apparently credited Jemisin's testimony that prior to investing in D Street, he regarded B. Hooker as a financial advisor. Jemisin testified that he sought investment advice from B. Hooker so that he could "lay a foundation" to "build capital" and "generate more revenue." They discussed various types of investments, and B. Hooker recommended a progression from flipping real estate into "buying notes." She said she would "identify one which she felt [Jemisin] would be good for." He further testified that he relied on B. Hooker's "expert knowledge of the markets" and "expert advice" about the profitability of the D Street project. In general, Jemisin testified that he was inexperienced

with real estate transactions in the District of Columbia but had purchased real estate as an investment on a few occasions in the prior decade. He stated that, in the D Street venture, he was ultimately thwarted in attempting to get his money back because "he was not in control of the funds." These facts are sufficient to support the circuit court's finding that JN depended on the acumen of B. Hooker and J. Hooker.

Second, the terms of the D Street agreement do not preclude the circuit court's finding that the D Street agreement falls under the ambit of the MSA. B. Hooker and J. Hooker cite to *Robinson v. Glynn*, 349 F.3d 166, 171 (4th Cir. 2003), and argue that the terms of the D Street agreement, as contrasted with Ames Street, evince a "carefully negotiated level of control 'antithetical to the notion of member passivity' required to find an investment contract." Robinson was an "active and knowledgeable" businessman who entered into agreements purchasing shares in and restructuring a limited liability company, which resulted in Robinson's appointment to the board of managers and being made its treasurer. *Robinson*, 349 F. 3d at 168–69. The Fourth Circuit held that Robinson's significant executive authority "preserved 'the sort of influence which generally provided him with access to important information and protection against dependence on others,'" defeating his claim that his membership interest was an investment contract. *Id.* at 171 (brackets omitted) (quoting *Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc.*, 840 F. 2d 236, 241 (4th Cir. 1988)). Robinson is not a close comparison, and the record before us lacks evidence of a careful negotiation between the parties. B. Hooker and Jemisin each testified that the other drafted the agreement, and the circuit court found B. Hooker not credible. The only negotiation that Jemisin described involved adjustment to the

"percentages," presumably the allocation of proceeds. Although the D Street agreement reflects more involvement by JN than the Ames Street transaction, the presence of additional terms does not indicate a careful negotiation. Rather, looking at the economic reality, the D Street transaction proceeded exactly as the Ames Street transaction did, where JN was a silent partner. On balance, we cannot say that the circuit court committed clear error in finding that JN's investment in D Street was an investment contract.[8]

B. The Circuit Court Did Not Err in Finding B. Hooker and J. Hooker Liable Under the MSA.

B. Hooker and J. Hooker also argue that, even if JN's investment falls under the ambit of the MSA, the circuit court erred in finding that B. Hooker and J. Hooker are liable for misrepresentations in the sale of the investment contract.

The MSA, declares:

> It is unlawful for any person, in connection with the offer, sale or purchase, of any security directly or indirectly to: (1) Employ any device, scheme, or artifice to defraud; (2) Make any untrue statement of a material fact or omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading; or (3) Engage in any act, practice, or course of business which operates or would operate as a fraud or deceit on any person.

CA § 11-301. The MSA establishes the Division of Securities to enforce its provisions, *see* CA § 11-201, and additionally "provides a private cause of action," *Mathews*, 435 Md. at 601. "Under CA § 11-703(a)(1)(ii), a purchaser [of a security] has a cause of action

[8] JN argues on appeal that the Oxman Road property constitutes a separate investment contract. We do not agree. Per Jemisin's testimony, he did not authorize B. Hooker or J. Hooker to purchase the Oxman Road property. JN cannot be said to have invested money in a common enterprise without his knowledge or authorization.

against the seller for untrue statements—or omissions—of material fact in connection with the offer or sale of a security." *Id.*[9] "[E]very broker-dealer or agent who materially aids in conduct [giving rise to liability under subsection (a)] [is] also liable jointly and severally" with the person responsible. CA § 11-703(c)(1).

In the context of federal securities regulation, "[a] fact is to be considered material if there is a substantial likelihood that a reasonable person would consider it important in deciding whether to buy or sell [securities]." *Azrielli v. Cohen Law Offices*, 21 F.3d 512, 518 (2d Cir. 1994). "The touchstone of the inquiry is not whether isolated statements within a document were true, but whether defendants' representations or omissions, considered together and in context, would affect the total mix of information and thereby mislead a reasonable investor regarding the nature of the securities offered." *Halperin v. eBanker USA.com, Inc.*, 295 F.3d 352, 357 (2d Cir. 2002); *see TSC Indus. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).[10] Statements of opinion and "puffery" are typically not actionable

[9] CA § 11-703 states:

> (a)(1) A person is civilly liable to the person buying a security from him if he: . . . (ii) Offers or sells the security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the buyer not knowing of the untruth or omission, and if he does not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission.

[10] A provision in the federal securities regulation, SEC rule 10b-5, similarly prohibits any person from making "any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading" "in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5.

standing alone, but such statements may nonetheless "emphasize and induce reliance upon" misrepresentations of fact. *Casella v. Webb*, 883 F.2d 805, 808 (9th Cir. 1989) (holding that describing investment as "a sure thing" emphasized misrepresentations about future performance, tax shelter status, and tax benefits from investment in limited partnership and could suffice to establish materiality of misrepresentations).

Here, the circuit court found that the investment was "rife with fraud and deceit and material misrepresentations" and that J. Hooker "was not really a passive credit investor." These findings are supported by substantial evidence. The record contains material false statements from B. Hooker regarding the parties' roles, the time frame of the D Street project, and overall risk associated with the investment as well as evidence of J. Hooker's material aid to B. Hooker. Although B. Hooker represented that J. Hooker would be a credit investor with a limited role and that JN would be informed about the project's developments, B. Hooker and J. Hooker worked in concert without JN's knowledge. This close coordination allowed B. Hooker and J. Hooker to transfer the D Street proceeds to Styles Unlimited, Inc. for the purchase of Oxman Road. Additionally, J. Hooker paid the carrying costs of the mortgage herself. When the payments became too burdensome, contrary to B. Hooker's representations and JN's expectations about J. Hooker's involvement, J. Hooker directed B. Hooker to lower the asking price of the D Street property. Relating to the timing of the project, the D Street agreement, executed in November 2013, stated that the sale of the property would take place six months from the date of the agreement. When Ames Street eventually settled in February 2014, B. Hooker asked JN to sign an amendment, stating that as long as JN wired the Ames Street funds to

Inkscale's bank account by February 22, 2014, the "[i]nvestor returns will remain unchanged." B. Hooker testified that, in fact, six months was the best-case scenario for such a project—her goal was to complete the project in six to nine months. Yet, B. Hooker did not discuss with JN the risks associated with a different time frame nor J. Hooker's true degree of involvement. Nearly nine months after signing the initial agreement, on July 29, 2014, B. Hooker informed JN that the investment would likely result in a loss.

Additional components of the mix of information B. Hooker conveyed to JN were assurances about the profitability of the investment: D Street was "a homerun," that would compensate JN for the low returns on its prior investment with B. Hooker, and that it would be a "one and done" or "one-off" deal. Jemisin testified that he relied on B. Hooker's professional expertise in making these assessments and that it was "paramount" that D Street would be a single transaction.

On appeal, B. Hooker and J. Hooker argue that "the trial court did not find fraudulent statements entering into the D-Street contract" and as a result, "the MSA claims as to the D-Street Joint Venture should have been dismissed."[11] This argument connects to their contention relating to the common law fraud counts—that B. Hooker's misrepresentations were exclusive to the Oxman Road property and were, in any event, "future promises" that a reasonable investor would not treat as material. Although the trial court found that B.

[11] B. Hooker and J. Hooker choose to focus their appellate arguments contesting the findings of misrepresentation and fraud (for the MSA and common law claims) almost entirely on the facts of the Oxman Road investment. We think it plain that the circuit court's broad findings of fraud and misrepresentation extend to the D Street transaction. We address B. Hooker and J. Hooker's arguments specific to the facts of the Oxman Road transaction in Section III.

Hooker made misrepresentations specifically relating to the formation of a limited liability company to purchase Oxman Road, the court's findings and the evidence at trial were not so limited. The circuit court found that JN's investment with B. Hooker and J. Hooker was "rife with fraud, deceit, and material misrepresentation." Although its findings on the matter were somewhat brief, in ruling in JN's favor, the circuit court impliedly found that the deceit and fraud touched the offer and sale of the D Street investment contract. For the reasons discussed above, we cannot say that the circuit court clearly erred in concluding that B. Hooker is liable for material misrepresentations and omissions in the sale of the D Street contract.

Neither did the circuit court err in holding that J. Hooker materially aided B. Hooker's conduct. J. Hooker was a party to the D Street agreement, business partner to B. Hooker, and eventually broke escrow on D Street to fund B. Hooker's purchase of Oxman Road through Styles Unlimited, Inc. We therefore affirm the circuit court's finding of liability under the MSA for B. Hooker and J. Hooker.

II. THE CIRCUIT COURT DID NOT ERR IN CONCLUDING THAT B. HOOKER AND J. HOOKER FAILED TO PLEAD THE MSA'S TIME LIMITATION.

B. Hooker and J. Hooker argue that JN's securities claims are barred by the MSA's time limiting provisions. They contend that the time limitation applicable to fraud in the offer or sale of securities is a "statute of repose" and a "condition precedent to maintaining suit" that cannot be waived or tolled. JN responds that, following the Supreme Court's interpretation of time limitations applicable to federal securities laws, the MSA's three-year time limitation is a statute of repose, but is nonetheless waived if not affirmatively

pleaded. JN also argues that the time limitation, however it is classified, may be tolled for fraudulent concealment.

We first review the application of statutes of limitations, conditions precedent, and statutes of repose. Next, we consider whether the MSA time limiting provisions at issue are waived if not timely raised, as statutes of limitations, or whether they may be raised at any time, as either conditions precedent to maintaining suit or features of a statute of repose. We conclude that the applicable time limitations are statutes of limitations subject to Maryland Rule 2-323. We are aided in our analysis by the Court of Appeal's in-depth consideration in *Mathews* of the time limiting provisions at issue.

A. A Statute of Limitations Defense Is Waived Unless Affirmatively Pleaded; A Condition Precedent Cannot Be Waived.

Statutes of limitations balance competing interests of plaintiffs, defendants, and the public. *Pennwalt Corp. v. Nasios*, 314 Md. 433, 437 (1988). As the Court noted in *Pennwalt*, a statute of limitation

> . . . reflects a policy decision regarding what constitutes an adequate period of time for a person of ordinary diligence to pursue his claim. By creating a limitations period, the legislature determined that a plaintiff should have only so long to bring his action before he is deemed to have waived his right to sue and to have acquiesced in the defendant's wrongdoing. Limitations statutes therefore are designed to (1) provide adequate time for diligent plaintiffs to file suit, (2) grant repose to defendants when plaintiffs have tarried for an unreasonable period of time, and (3) serve society by promoting judicial economy.

Id. at 437–38 (internal quotation marks and citations omitted). Statutes of limitations do not bar "the plaintiff's right of action, but only the exercise of the right." *Foos v. Steinberg*, 247 Md. 35, 38 (1967); *CTS Corp. v. Waldburger*, 573 U.S. 1, 8 (2014). The rules

governing the assertion of a statute of limitations are strictly construed because the operation of the statute of limitation precludes a decision on the merits. *Newell v. Richards*, 323 Md. 717, 728 (1991); *Foos*, 247 Md. at 38.

Maryland Rule 2-323(a) requires that "[e]very defense of law or fact to a claim for relief in a complaint . . . shall be asserted in an answer . . . ." Rule 2-323(g) specifically enumerates statutes of limitations as an affirmative defense that must be raised in the defendant's answer. The party asserting the defense has the burden of pleading and proving its applicability. *Ver Brycke v. Ver Brycke*, 379 Md. 669, 699 (2004) (citing *Newell*, 323 Md. at 723–24). If not raised in the answer, a statute of limitations defense is waived. *Brooks v. State*, 85 Md. App. 355, 364–65 (1991).

Statutory time limitations may also be conditions precedent to maintaining suit, which are distinct from "ordinary procedural statute[s] of limitations." *Anderson v. Sheffield*, 53 Md. App. 583, 586 (1983). The Court of Appeals has, for example, historically construed the time limitation contained in Maryland's wrongful death statute as a condition precedent. *Georgia-Pacific Corp. v. Benjamin*, 394 Md. 59, 82 (2006). The Court, in reviewing Maryland's first wrongful death statute, reasoned that the statute created a cause of action not available under the common law and that the time limitation fixed in the statute was therefore a substantive part of the right. *State v. Parks*, 148 Md. 477, 480 (1925). ("The statute[] create[s] a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within the time limit, and not otherwise. . . . The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right." (quoting *The Harrisburg*, 119 U.S.

199, 214 (1886)). Conditions precedent are not waived by failure to plead the limitation. *Waddell v. Kirkpatrick*, 331 Md. 52, 59–60 (1993). Under the common law rules of pleading, plaintiffs had to indicate compliance with a condition precedent in their initial declaration. *State v. Cobourn*, 171 Md. 23, 27 (1936).

In determining whether a particular time limitation is an "essential element" or "substantive limitation" on the cause of action, courts have looked to the history of the cause of action and the text of the time limitation and any amendments. *See Griggs v. C & H Mechanical Corp.*, 169 Md. App. 556, 570–71 (2006) (finding a condition precedent where the workers' compensation statute stated that "the claim is completely barred" upon failure to timely file and remedies for accidental work place injury are "purely statutory"); *Mullins v. Thorne*, 254 Md. 434, 440 (1969) (finding a condition precedent and reasoning that "[t]he right to collect an unsatisfied judgment from the public fund . . . is a right unknown to the common law and this newly created statutory right is governed by the specific provisions of the Act creating that right" and that the Act "provides that the giving of 180 day notice is 'a condition precedent to the right thereafter to apply for the payment from the fund,' and this language is clear and unambiguous.").

Last, recent cases have distinguished statutes of limitations from statutes of repose. This distinction has primarily arisen in the context of whether a particular time limitation may be tolled, but some authorities suggest that defenses based upon statutes of repose may be raised outside of an answer. *See e.g.*, *Chang-Williams v. United States*, 965 F.Supp.2d 673, 694 n.9 (D. Md. 2013) (noting that "the prevailing rule is that a statute of repose is not an affirmative defense that needs to be pleaded in a defendant's answer to avoid

waiver."). A statute of repose is a "special statute with a different purpose and implementation than a statute of limitation." *Anderson v. United States*, 427 Md. 99, 118 (2012). "The purpose of a statute of repose is to provide an absolute bar to an action or to provide a grant of immunity to a class of potential defendants after a designated time period." *Id.* As to timing, "statutes of limitations begin to run when the cause of action accrues, while statutes of repose begin to run on the date of the last culpable act or omission of the defendant." *ANZ Sec. Inc.*, 137 S. Ct. at 2045 (internal quotation marks omitted); *see CTS Corp.*, 573 U.S. at 8 ("The statute of repose limit is not related to the accrual of any cause of action; the injury need not have occurred, much less have been discovered."). Generally, "statutes of limitation are tolled often by fraudulent concealment, but . . . statutes of repose are not because the latter are an absolute time bar, after which liability no longer exists[.]" *Anderson*, 427 Md. at 121 (quoting *First United Methodist Church of Hyattsville v. U.S. Gypsum Co.*, 882 F.2d 862, 866 (4th Cir. 1989)). In determining whether a time limitation for medical malpractice claims in CJP § 5-109 was a statute of limitations or repose, the Court of Appeals reviewed the provision's plain language and found that it "struck a balance" between the class of potential defendants and the rights of plaintiffs. *Id.* at 125. No one feature was dispositive. *Id.* at 123–25.

B. The MSA's Three-Year Time Limitation Is Neither a Statute of Repose Nor a Condition Precedent to Suit.

We conclude that the MSA's time limitation is a procedural limitation subject to the pleading requirements of Maryland Rule 2-323(g). We begin with the *Mathews* decision. The Court of Appeals in *Mathews*, 435 Md. at 612, did not need to decide whether the

MSA's time limitations in CA § 11-703(f)(1) and (2)(ii) are statutes of limitations or repose—and apparently was not asked to consider whether it was a condition precedent—but its detailed discussion of the provisions aids our analysis.

The MSA states that a person "may not sue" for fraud or misrepresentations in the sale or offer of securities "after the earlier to occur of 3 years after the contract of sale or purchase or the time specified in paragraph (2) of this subsection." CA § 11-703(f)(1). Under paragraph (2):

> An action may not be maintained: . . . To enforce any liability created under subsection (a)(1)(ii) or (2) of this section, unless brought within one year after the discovery of the untrue statement or omission, or after the discovery should have been made by the exercise of reasonable diligence.

CA § 11-703(f)(2)(ii).

In *Mathews*, the Court described the provisions as "indistinguishable from a one year statute of limitations running from the time of sale with a statutory discovery rule that may toll its expiration for up to two years." 435 Md. at 616. It held that the *Poffenberger* discovery rule, which permits equitable tolling beyond three years, does not apply to actions under CA § 11-703(a). *Id.* at 617; *see Poffenberger v. Risser*, 290 Md. 631, 636 (1981) (declaring the "discovery rule to be applicable generally" such that "[a] cause of action accrues when the claimant in fact knew or reasonably should have known of the wrong").[12] The Court also held that the General Assembly intended for the time limitations

[12] The more flexible *Poffenberger* rule does not apply to the MSA because the General Assembly retained the statutory rule after *Poffenberger* and because application of the open-ended rule "would render the more limited statutory discovery rule meaningless . . . ." *Mathews*, 435 Md. at 617.

to be subject to tolling for fraudulent concealment, pursuant to Courts and Judicial Procedure ("CJP") § 5-203 (2021 Repl. Vol.). *Mathews*, 435 Md. at 617–18.[13] The Court noted that the predecessor to § 5-203 long predated the MSA. *Id.* at 617–18. Indeed, "[t]he drafters of the Uniform Securities Act of 1956, on which the Maryland Securities Act was originally based, indicated that a 'general law' that provided for tolling based on a defendant's fraudulent concealment of a violation would apply to cases under a state securities law." *Id.* at 618 n.37.

The Court of Appeals also noted in *Mathews* that the Supreme Court had interpreted the time limitation on certain federal securities actions to preclude tolling for fraudulent concealment. *Mathews*, 435 Md. at 618 n.37 (citing *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 374–79 (1991) (Kennedy, J., dissenting)). The Supreme Court has since reiterated that the time limitation applicable to § 13 of the 1933 Securities Act, 15 U.S.C. § 77m, is not subject to equitable tolling. *Cal. Pub. Emps. Ret. Sys. v. AZN Sec. Inc.*, 137 S. Ct. 2042, 2049 (2017) (noting that the time limitation "admits of no exception and on its face creates a fixed bar against future liability."). The Supreme Court also definitively classified the three-year outer limit in § 13 as a statute of repose. *Id.*

First, we conclude that the MSA's time limitations are not conditions precedent to suit. Unlike the cases B. Hooker and J. Hooker rely on, a common law remedy existed for

[13] CJP § 5-203 states: "If the knowledge of a cause of action is kept from a party by the fraud of an adverse party, the cause of action shall be deemed to accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered the fraud."

JN's complained-of wrong. *See e.g., Parks*, 148 Md. at 478 ("At common law no recovery could be had for the negligent killing of a person[.]"). The provisions of the MSA that JN relies on replicate a common law action for fraud or certain types of restitution. The MSA's private cause of action allows for the return of consideration paid in the sale of a security which occurred by means of an "untrue statement of a material fact." *See* CA §§ 11-301, 703. The common law action for fraud "encompasses, among other things, theories of fraudulent misrepresentation, fraudulent concealment, and fraudulent inducement." *Sass v. Andrew*, 152 Md. App. 406, 432 (2003) (quoting *Iverson v. Johnson Gas Appliance Co.*, 172 F.3d 524, 529 (8th Cir. 1999)); *see also Benjamin v. Erk*, 138 Md. App. 459, 471, 482 (2001) (describing equitable rescission, the unmaking of a contract for a legally sufficient reason which may include incidental damages). These provisions of the MSA did not create a new liability, and do not fall within the ambit of the rule recognized in *Griggs*, *Waddell*, and like cases. 169 Md. App. at 571; 331 Md. at 59; *see also Cobourn*, 171 Md. at 25 (noting that the reason for interpreting time limitations on rights not found in common law as conditions precedent is the rule that statutes which derogate the common law must be strictly construed). Additionally, the text of the time limitations at issue does not evoke a substantive limitation on the right to sue. *Compare* CA § 11-703(f)(1) *with Griggs*, 169 Md. App. at 570–71 ("[I]f a covered employee fails to file a claim within 2 years after the date of the accidental personal injury, the claim is completely barred."). Seeing no indication that the General Assembly intended the "limitation of actions" in CA § 11-703(f)(1) and (2)(ii) to be conditions precedent to suit, we conclude that they are procedural limitations.

Second, we conclude that the three-year limit in the MSA is not a statute of repose. As in *Anderson v. United States*, the text and purpose of the MSA time limitations at issue suggest that the General Assembly intended to strike a balance between the victims of fraudulent securities transactions and potential defendants. 427 Md. at 125. The text of the time limitation—stating that a plaintiff "may not sue"—does not contain language emphasizing an absolute bar or creating a substantive right to be free from suit. *Compare* CA § 11-703(f)(1) *with* 15 U.S.C. § 77m ("In no event shall any such action be brought . . . ."); CJP § 5-108(a) & (b) (". . . no cause of action for damages accrues and a person may not seek contribution or indemnity for damages incurred . . . ."). The MSA was enacted to offer broad protection to purchasers of securities. *Mathews*, 435 Md. at 605. Given the MSA's broad definition of security, and the anti-fraud provision's application to buyers and sellers, it is doubtful that the General Assembly intended to immunize any particular class of defendants through the time limitation. Furthermore, the MSA provides a remedy once the purchase or sale by means of material misrepresentation is complete. *Mathews*, 435 Md. at 614.[14] The sale by means of material misrepresentation is the wrong targeted by the statute, and, accordingly, we conclude that the cause of action accrues upon completion of the purchase or sale. *See Supik v. Bodie, Nagle, Dolina, Smith & Hobbs, P.A.*, 152 Md. App. 698, 713 (2003) ("Historically, a cause of action accrued on the date the wrong occurred."); *c.f. Mathews*, 435 Md. at 605 ("The scheme is indistinguishable

[14] The anti-fraud provisions of the MSA do not require a plaintiff to suffer economic loss. A plaintiff may sue for recovery of the security or consideration paid upon tender of the other. CA § 11-703(b).

from a one year statute of limitations running from the time of sale with a statutory discovery rule that may toll its expiration for up to two years."). Finally, as discussed above, the General Assembly intended the limitation be subject to tolling for fraudulent concealment. *Id.* at 617–18. Based on these factors, we conclude that CA § 11-703(f)(1) and (2)(ii) are not statutes of repose.

B. Hooker and J. Hooker did not file an answer to JN's complaint until the day of trial. Their answer did not assert a statute of limitations defense. The circuit court did not err in finding that the defense "was not properly pled or timely pled." *See Liberty Mut. Ins. Co.*, 121 Md. App. at 477–78. Because we conclude that B. Hooker and J. Hooker failed to affirmatively raise the statute of limitations defense, we do not consider whether the time limit would be tolled for fraudulent concealment.

III. THE CIRCUIT COURT DID NOT ERR IN CONCLUDING THAT B. HOOKER AND J. HOOKER ARE LIABLE FOR COMMON LAW FRAUD.

B. Hooker and J. Hooker argue that the circuit court erred in finding them liable for common law fraud. They argue that the fraudulent statements the court identified are limited to the Oxman Road transaction, the statements that the court found to be fraudulent are "future promises," JN did not present evidence of its justified reliance on the statements, and B. Hooker's statements did not cause JN's damages.

Although we affirm the circuit court's judgments based on B. and J. Hooker's liability under the MSA, we shall nonetheless address their appellate arguments relating to the circuit court's findings of common law fraud. We first explain that the circuit court had an adequate basis to find by clear and convincing evidence that B. Hooker is liable for

common law fraud and J. Hooker liable for aiding and abetting that fraud. We distinguish the material misrepresentations relating to the D Street venture and those relating to Oxman Road.

A party must prove fraud by clear and convincing evidence. *Md. Env. Trust v. Gaynor*, 370 Md. 89, 97 (2002). A plaintiff must show:

> (1) that the defendant made a false representation to the plaintiff; (2) that its falsity was either known to the defendant or that the misrepresentation was made with reckless indifference as to its truth, (3) that the misrepresentation was made for the purpose of defrauding the plaintiff, (4) that the plaintiff relied on the misrepresentation and had a right to rely on it, and (5) that the plaintiff suffered compensable injury resulting from the misrepresentation.

Nails v. S & R, Inc., 334 Md. 398, 415 (1994). "A material fact" for common law fraud "is one on which a reasonable person would rely in making a decision." *Sass v. Andrew*, 152 Md. App. 406, 430 (2003). "A misrepresentation is generally immaterial if the party to whom it is made reasonably could have ascertained the true facts." *Id*. at 440. Additionally, "statements which are merely promissory in nature and expressions as to what will happen in the future are not actionable as fraud." *Finch v. Hughes Aircraft Co.*, 57 Md. App. 190, 232 (1984). Such promises are actionable, however, when made with a present intent not to perform. *Id.*

Generally, aiders and abettors may be liable for tortious conduct. *Alleco Inc. v. Harry & Jeanette Weinberg Found., Inc.*, 340 Md. 176, 199–200 (1995). Where another directly perpetrated the tort, one who "knowingly and substantially assisted[ed] the principal violation" may be liable as an aider and abettor. *Sutton v. FedFirst Fin. Corp.*, 226 Md. App. 46, 91–92 (2015).

A. The D Street Venture

On appeal, B. Hooker and J. Hooker focus their arguments on B. Hooker's statements relating to the formation of a limited liability company to renovate and sell the Oxman Road property. However, as discussed in Section I.B, the circuit court's findings of material misrepresentation reach the D Street venture. B. Hooker's misrepresentations relating to the D Street investment, including regarding the parties' roles and the nature of the venture, are sufficient support for the circuit court's conclusion that B. Hooker is liable for common law fraud.

B. Hooker made these misrepresentations to induce JN to execute the D Street agreement and first wire $60,000 in November 2013 and to make its second payment of $41,500 in February 2014. J. Hooker was not a passive credit investor, JN was not involved in decision-making, and B. Hooker testified that she believed the project should have been done in six to nine months. The evidence supports a finding, by the clear and convincing standard, that B. Hooker made the contrary representations in order to secure JN's funding and that she was at least recklessly indifferent as to their truth. For his part, Jemisin reasonably relied on B. Hooker's misrepresentations—Jemisin could not have known that B. Hooker and J. Hooker would disregard their agreement almost entirely or that B. Hooker doubted the six-month term underpinning her profitability assessments. There was no indication that the funds would be used to take over another transaction in which B. Hooker and J. Hooker were involved. These representations induced JN to invest. JN suffered an injury as a result of the investment.

B. Potential Investment in Oxman Road

The evidence was also sufficient for the circuit court to conclude that B. Hooker committed fraud by representing that she would draft an operating agreement with JN for investment in Oxman Road. After the D Street property sold, JN insisted that any further investment using the D Street funds should occur as a joint investment. B. Hooker informed Jemisin by email on October 20, 2014, that she would form a limited liability company for investment in the "property in Hyattsville" and was "still working on a final operating agreement." Yet, on October 9, 2014, B. Hooker had created a separate entity, Styles Unlimited, Inc., without JN's knowledge or involvement. On October 10, Styles Unlimited, Inc. took over the short sale contract on Oxman Road. B. Hooker emailed Jemisin again in November 2014, attaching a blank agreement template and saying that she was in the process of editing the agreement. In May 2015, without JN's authorization, B. Hooker and J. Hooker transferred the D Street proceeds and purchased the Oxman Road property through Styles Unlimited, Inc. B. Hooker did not notify Jemisin that the property was purchased or that she used the D Street funds. These facts support the circuit court's finding of fraud.

B. Hooker and J. Hooker's arguments to the contrary are unavailing. On appeal, they argue (1) the statements were not material because they were future promises; (2) JN could not have justifiably relied on the statements because JN failed to follow up on the completion of an operating agreement; and (3) JN's damages did not result from B. Hooker's statements because JN had tacitly consented to the investment in Oxman Road.

First, we conclude that the statements were material, despite being prospective. At the time B. Hooker made the statements, she had already incorporated Styles Unlimited, Inc. to pursue the investment that she and Jemisin were discussing. This blatant falsehood indicates a present intent not to perform. *See Finch*, 57 Md. App. at 232. Next, JN's reliance was justified. Although JN apparently did not follow up with B. Hooker about the operating agreement after B. Hooker's November 2014 email, B. Hooker had previously assured Jemisin in an October 2, 2014, email that "[f]rom here, the funds will be split according to the contract." A reasonable person could justifiably have relied on these assurances to believe that the funds would be returned if not carried into a joint investment with an operating agreement. Last, JN's injury, the transfer of its proceeds from the D Street escrow, resulted from B. Hooker's statements. When B. Hooker made the statements, JN had not yet committed to invest any funds from D Street into the Oxman Road property. As the circuit court found, these statements lulled JN into a false sense of security that enabled B. Hooker to use the funds for the unilateral investment.

The evidence additionally supports the circuit court's finding that J. Hooker aided and abetted B. Hooker's fraud. J. Hooker was the title holder to the D Street property, the broker of record on the Oxman Road sale, and, according to the circuit court, she was aware of B. Hooker's actions at all relevant times. At B. Hooker's direction, J. Hooker forwarded the funds from the D Street escrow without JN's approval, substantially assisting B. Hooker's fraud. Accordingly, we affirm the circuit court's findings as to fraud.

IV. THE CIRCUIT COURT DID NOT ERR IN CONCLUDING THAT B. HOOKER AND J. HOOKER WERE NEGLIGENT.

B. Hooker and J. Hooker challenge the circuit court's conclusion that they were negligent. They argue that they did not owe a duty to JN and that JN failed to prove it suffered actual injury. They argue that even if they are liable for negligence, the finding of negligence cannot support the damages award. JN responds that B. Hooker and J. Hooker made negligent misrepresentations about the D Street investment. At trial, counsel for JN clarified that JN was proceeding on a general theory of negligence, rather than negligent misrepresentation specifically. At trial, JN identified B. Hooker and J. Hooker's negligent act as the transfer of the D Street proceeds to Styles Unlimited, Inc. We shall review the trial court's conclusion that JN "satisfied its burden of proof, production, and persuasion" for negligence based on this act. As we explain, evidence in the record supports the circuit court's ruling.

The elements of negligence are: "(1) that the defendant was under a duty to protect the plaintiff from injury, (2) that the defendant breached that duty, (3) that the plaintiff suffered actual injury or loss, and (4) that the loss or injury proximately resulted from the defendant's breach of the duty." *100 Investment Ltd. P'ship v. Columbia Town Ctr. Title Co.*, 430 Md. 197, 213 (2013). The duty giving rise to the tort action must have a basis in law independent from a contractual obligation. *Mesmer v. Md. Auto Ins. Fund*, 353 Md. 241, 252–53 (1999) (citing *Wilimington Trust Co. v. Clark*, 289 Md. 313, 328–29 (1981) and *Heckrotte v. Riddle*, 224 Md. 591, 595–96 (1961)). In other words, "[n]ot every duty assumed by contract will sustain an action sounding in tort." *Id.* at 252. Generally, there

may be tort liability from a defendant's "misperformance" of a contract that involves unreasonable, foreseeable risk of harm to a plaintiff. *Id.* at 255–56. However, where a party has not undertaken any attempt at performance, the action must be for breach of contract. *Id.*

"Where the failure to exercise due care creates a risk of economic loss only, courts have generally required an intimate nexus between the parties as a condition to the imposition of tort liability." *100 Investment Ltd.*, 430 Md. at 213 (quoting *Jacques v. First Nat'l Bank of Md.*, 307 Md. 527, 534–35 (1986)). "This intimate nexus is satisfied by contractual privity or its equivalent." *Id.*

The circuit court did not explicitly address the elements of negligence, but the evidence in the record sustains its conclusion. Here, B. Hooker, J. Hooker, and JN were in contractual privity through the D Street agreement. Moreover, as a general partner to the D Street venture, B. Hooker owed JN a duty of loyalty and care. CA § 9A-404(c) (A partner's duty of care "is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law"). The agreement required net profits from the sale of D Street be divided proportionally. J. Hooker, as the title holder to the property, was responsible for distributing the funds. B. Hooker and J. Hooker intentionally used the proceeds for another transaction on which they were serving as realtors and, in B. Hooker's case, a principal. JN suffered a loss when the D Street proceeds were distributed without its authorization. Accordingly, we affirm the circuit court's finding as to negligence.

V. THE CIRCUIT COURT DID NOT ERR IN CALCULATING DAMAGES.

B. Hooker and J. Hooker also contend that the circuit court erred in calculating JN's damages and attorneys' fees. They argue that, even assuming JN prevails on its MSA claim, its damages are limited to its pro rata share, or forty-two percent, of the D Street proceeds. They argue that the circuit court's specific finding of fraud—that B. Hooker stated she would draft an operating agreement for the Oxman Road investment despite having no intention of doing so—cannot create any liability relating to the D Street investment because B. Hooker made those statements only after the D Street sale settled. However, as discussed above, B. Hooker made material misrepresentations relating to the D Street investment, which support liability under the MSA. As we explain, the circuit court's award of damages comports with the MSA.

Under the MSA, a buyer of securities may sue for damages "[i]f he no longer owns the security." CA § 11-703(b)(1)(ii). "[D]amages are the amount that would be recoverable on a tender less the value of the security when the buyer disposed of it and interest at the rate provided for in § 11-107(a)." CA § 11-703(b)(3). If the buyer still owns the security, the buyer may tender that security, and the amount recoverable is "the consideration paid for the security, together with the interest rate provided for in § 11-107(a) . . . from the date of payment, costs, and reasonable attorney's fees, less the amount of any income received on the security." CA § 11-703(b)(1)(i).

The circuit court awarded JN $101,500, the amount of the consideration paid for the D Street investment contract. This figure includes the $40,000 invested in Ames Street and the $1,500 profit on that transaction that rolled into the D Street investment as well as the

$60,000 that JN wired before Ames Street settled. The security was effectively disposed of when the proceeds were transferred without JN's consent. JN has no interest in that investment contract left to tender and is entitled to its consideration under CA § 11-703(b)(3).

B. Hooker and J. Hooker also requested a remand with instructions for the circuit court to reconsider the amount of attorneys' fees in light of any reduction in the damages award. Because we sustain the award for damages, there is no need for the circuit court to reconsider the award for attorneys' fees.

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANTS.