Circuit Court for Baltimore County
Case No. 03-C-16-002086

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1468

September Term, 2020

STEPHEN A. GEPPI

v.

RICHARD S. PINEAU

Fader, C.J.,
Beachley,
Zic,

JJ.

Opinion by Zic, J.

Filed: July 20, 2021

Stephen A. Geppi, appellant, and Richard S. Pineau, appellee, formed a business venture for the purpose of developing a piece of real property located in Cecil County, Maryland. The land development project, referred to as Bracebridge, was governed by the Operating Agreement of Bracebridge Hall, LLC ("Operating Agreement"), which included provisions concerning, among other matters, capital contributions and the rights of members to withdraw from the company. After the development project failed, Mr. Pineau instituted this action against Mr. Geppi in the Circuit Court for Baltimore County and the case proceeded to trial in August 2017. The jury returned a verdict in favor of Mr. Pineau on his breach of contract claim. Mr. Geppi appealed and a panel of this Court, in an unreported opinion filed on November 14, 2019, vacated the judgment and remanded the case for further proceedings. In doing so, we instructed the trier of fact to determine whether the Operating Agreement was modified by the parties' conduct, thus rendering Mr. Geppi's earlier attempt to abandon the company effective notwithstanding that he did not comply with the withdrawal provisions. Following a bench trial in December 2020, the circuit court entered judgment for Mr. Pineau. Mr. Geppi moved to alter or amend the judgment, which was denied. This appeal followed.[1]

[1] Although Mr. Geppi's Notice of Appeal states that both the January 12, 2021 order entering judgment for Mr. Pineau and the February 17, 2021 order denying his Motion to Alter or Amend Judgment are the subject of this appeal, Mr. Geppi's brief focuses strictly on the former order. Based on our review of that filing, Mr. Geppi fails to make any argument about the impropriety of the circuit court's ruling on his motion. And he only provides the standard of review applicable to the January 12, 2021 order—there is no mention in his brief of the separate standard governing the review of a circuit court's decision on a motion to alter or amend a judgment. Thus, we view this appeal as solely challenging the January 12, 2021 order.

QUESTIONS PRESENTED

Mr. Geppi presents the following two questions for our review, which we have slightly rephrased[2]:

1. Did the circuit court err in finding that Mr. Geppi and Mr. Pineau by their conduct modified the withdrawal provisions of the Operating Agreement and thus that Mr. Geppi validly abandoned his membership interest in Bracebridge Hall, LLC as of December 31, 2013?

2. Did the circuit court err in finding that the payments made by Mr. Geppi after December 31, 2013 relating to the parties' common liability were not capital contributions?

For the reasons that follow, we answer the first question in the negative and, consequently, do not consider the second question. As such, we affirm the judgment of the circuit court.

[2] Mr. Geppi phrases the issues as follows:

I. Did the Circuit Court err in finding that Mr. Pineau and Mr. Geppi modified the Bracebridge Operating Agreement by their conduct to eliminate the prohibition on voluntary withdrawal by a member or the disposal of a member's interest without the prior written consent of the other member?

II. Did the Circuit Court err in finding that the payments made by Mr. Geppi to Rialto after December 31, 2013 were not capital contributions?

BACKGROUND[3]

Factual Background

In 2004, Mr. Geppi, Mr. Pineau, and a third business partner established a business venture to acquire and develop property located in Cecil County, Maryland. To pursue this project, the business partners formed two Maryland limited liability companies: Bracebridge Estates, LLC and Bracebridge Hall, LLC (collectively "Bracebridge LLCs").[4] Originally, the three partners each owned a one-third membership interest in Bracebridge Hall, LLC. In November 2007, after the third business partner, Edward St. John,[5] abandoned his ownership interest as detailed below, Mr. Geppi and Mr. Pineau became equal owners.

On approximately May 1, 2007, Mr. Geppi and Mr. Pineau, together with Mr. St. John, entered into the Operating Agreement, which was subsequently amended in November 2007 and again in October 2009. Notably, the Operating Agreement did not

[3] After the filing of Mr. Geppi's Notice of Appeal, the parties filed a joint election for this appeal to proceed on an expedited basis pursuant to Maryland Rule 8-207(b). In accordance with that Rule, the parties also jointly filed "an agreed statement of the case, including the essential facts." Md. Rule 8-207(b)(2). The below recitation of facts is primarily based on that statement, though we have supplemented the facts with additional information as necessary.

[4] Bracebridge Estates, LLC was formed to own and develop the property while Bracebridge Hall, LLC was formed for the purpose of owning the membership interests in Bracebridge Estates, LLC.

[5] In the Agreed Statement of the Case and Facts, the parties refer to the third partner as an individual (Edward St. John), but the Operating Agreement lists an entity (Edward St. John, LLC) as the parties' other partner. For purposes of this appeal, we will refer to that partner as Edward St. John.

require amendments to be in writing and instead provided that it "may be amended with the consent of all Members."

The Operating Agreement placed limits on a member's ability to dispose of his membership interest and to withdraw from the company. Specifically, Section 10 of the Operating Agreement stated, in relevant part, that:

> (a) No Member may transfer, sell, assign, alienate, encumber, mortgage, pledge or otherwise dispose of all or any portion of its interest in the Company without the prior written consent of the Manager[6] and the Required Majority[7] of non-transferring Members.
>
> . . . .
>
> (f) [Upon] [t]he transfer of a Member's entire interest in the Company . . . . the transferor shall be deemed to have withdrawn as a Member and shall have no further rights under this Agreement.
>
> (g) A Member does not have the right to voluntarily withdraw from the Company.

Although not explicitly stated in the Agreed Statement of the Case and Facts or the parties' briefs, Mr. Geppi and Mr. Pineau seem to view Mr. Geppi's purported abandonment, which is discussed below, as implicating Sections 10(a) and 10(g).

[6] Under the original terms of the Operating Agreement, Mr. St. John was appointed Manager of Bracebridge Hall, LLC. Later, in response to his abandonment, Mr. Geppi and Mr. Pineau amended the Operating Agreement in November 2007 to appoint themselves as Co-Managers.

[7] "Required Majority" is defined in the Operating Agreement as "the holders of a majority of the Percentage Interests of the Members in question entitled to vote." Once Mr. Geppi and Mr. Pineau became equal owners, they both had to approve any action necessitating a "Required Majority."

Assuming, without deciding, that both sections are applicable, in the absence of a modification, the plain text of the Operating Agreement required Mr. Geppi to obtain Mr. Pineau's written consent to abandon his membership interest. Throughout this opinion, we refer to Sections 10(a) and 10(g) collectively as the withdrawal provisions.

The Operating Agreement also addressed capital calls and member capital accounts. "Capital" is described in Section 6(b) as member contributions needed "in order to pay liability or expenses of [Bracebridge Hall, LLC] or Bracebridge Estates, LLC." Section 6(b) also provided that in the event a member failed to meet his capital call obligation, any member who satisfied this obligation could elect to make a loan to Bracebridge Hall, LLC in the amount of the defaulting member's share of the additional capital contributed. Moreover, according to Section 7 of the Operating Agreement, a capital account was maintained for each member, which, as explained by Nancy Evans, the bookkeeper who maintained the Bracebridge capital accounts, was a "running tally" of the funds each member contributed to or for the benefit of the company. For instance, the capital accounts reflected payments made directly to vendors and mortgage payments made directly to the lender. Mr. Geppi and Mr. Pineau agreed that they would receive credit on their capital accounts for all payments they made relating to Bracebridge.

In November 2007, Mr. St. John abandoned his membership interest in Bracebridge Hall, LLC. His abandonment was memorialized in the first amendment to the Operating Agreement, which was signed by all three members. In pertinent part, the amendment stated that Mr. St. John "has shown an intention to abandon the Abandoned

Interest and, as evidenced by [his] signature hereto, has acted to affirmatively abandon the Abandoned Interest." It further stated that Mr. Geppi and Mr. Pineau "hereby acknowledge that this Amendment constitutes written notice by [Mr. St. John] to [Bracebridge Hall, LLC] of [Mr. St. John]'s abandonment" and that "[Bracebridge Hall, LLC] hereby acknowledges that [Mr. St. John] has taken all necessary steps to abandon the Abandoned Interest and withdraw from [Bracebridge Hall, LLC] as a member thereof."

About a month later, Mr. Geppi and Mr. Pineau acquired a $10,000,000 loan from Branch Banking & Trust Company ("BB&T") to refinance the existing debt on the Bracebridge property and pay other company expenses. They secured the loan by a "mortgage lien" on the Bracebridge property and on all personal property located on the premises. The loan was jointly and severally guaranteed by the Bracebridge LLCs, Mr. Pineau and his spouse, and Mr. Geppi and his spouse.

Because the Bracebridge property generated almost no revenue, Mr. Geppi and Mr. Pineau advanced funds to pay property-related expenses. By 2009, Mr. Geppi's financial condition deteriorated and he fell behind on his capital call obligations related to the property, resulting in an imbalance in the Bracebridge capital accounts. Consequently, pursuant to Section 6(b) of the Operating Agreement, one half of the additional capital contributed by Mr. Pineau automatically became member loans to Bracebridge Hall, LLC, which were personally guaranteed by Mr. Geppi.

By 2012, the Bracebridge project was in financial distress. Property-related expenses, such as payroll, insurance, utilities, and taxes, were not paid on a regular basis, and the company operating account was overdrawn. At the same time, the BB&T loan went into default. In May 2012, BB&T obtained confessed judgments against the six guarantors and then, in December 2012, sold the loan to RREF BB Acquisitions, LLC ("Rialto"). Rialto initiated foreclosure proceedings in April 2013, which resulted in the sale of the Bracebridge property at public auction in August 2013. Rialto purchased the property at the auction for $7,700,000 and claimed a deficiency in the amount of $4,096,904.

At the end of that year, the following letter from Mr. Geppi was sent to Mr. Pineau by email and certified mail ("Abandonment Letter"):

> December 29, 2013
>
> Mr. Richard Pineau
> Bracebridge Hall, LLC
> 5 Laurelford Court
> Cockeysville, MD 21030
>
> Dear Rick,
>
> I herewith abandon all of my right, title and interest in and to Bracebridge Hall, LLC and Bracebridge Estates, LLC effective midnight on December 31, 2013. I intend to have no additional dealings with Bracebridge Hall[,] LLC and Bracebridge Estates, LLC and expect no further benefit from Bracebridge Hall, LLC and Bracebridge Estates, LLC.
>
> Sincerely,
> [/s/]
> Stephen A. Geppi

The Abandonment Letter was attached to an email sent on December 31, 2013 at 7:39 p.m. from Mr. Geppi's Chief Financial Officer. Mr. Geppi was copied on that email. The subject of the email was "Abandonment Notification," and it contained a single sentence: "Attached is a letter from Steve confirming his abandonment of his interest in the Bracebridge LLC[]s as of today." Mr. Geppi did not discuss the Abandonment Letter with Mr. Pineau before or after it was sent, and Mr. Pineau did not respond. Unlike the St. John abandonment, no amendment to the Operating Agreement or other document memorializing Mr. Geppi's withdrawal was signed by the parties.

After the foreclosure of the Bracebridge property, Mr. Geppi entered into a settlement agreement with Rialto. He paid a total of $1,930,000 to Rialto in separate installments from August 2013 to October 2015. His settlement payments prior to the date of the Abandonment Letter totaled $355,000 and his payments afterward totaled $1,575,000. Mr. Pineau also negotiated a settlement with Rialto, paying a total of $105,000. Notably, the debt owed to Rialto was a common debt owed by each of the loan obligors.

Under the terms of the Operating Agreement, any member making a capital contribution must notify the other within 30 days of the contribution. Mr. Pineau did not receive such notice from Mr. Geppi regarding any of his payments to Rialto. Neither party, however, expected or required adherence to the notice requirement set forth in the Operating Agreement.

Procedural History

In February 2016, Mr. Pineau filed suit against Mr. Geppi, asserting claims for breach of contract, detrimental reliance, negligence, gross negligence, and breach of fiduciary duty. The Bracebridge LLCs were later joined as plaintiffs. Mr. Geppi filed counterclaims against Mr. Pineau for contribution and breach of fiduciary duty.

A jury trial was held in August 2017. At the close of evidence, the circuit court dismissed all the claims except Mr. Pineau's breach of contract claim and Mr. Geppi's claim for breach of fiduciary duty. Thereafter, the jury awarded Mr. Pineau $1,327,230.04 in damages for Mr. Geppi's breach of the Operating Agreement. The jury also found that Mr. Pineau breached his fiduciary duty but awarded no damages to Mr. Geppi. By an order dated August 30, 2017, the court entered judgment in favor of Mr. Pineau and against Mr. Geppi.

Mr. Geppi appealed, contesting the court's dismissal of his contribution claim and its refusal to rule as a matter of law that his purported abandonment by way of the Abandonment Letter was ineffective under the Operating Agreement. In an unreported opinion, this Court held that, while the contribution claim was properly dismissed, the court erred with respect to the abandonment issue, seemingly overlooking its potential impact on the calculation of capital contributions and the subsequent jury award for Mr. Pineau's breach of contract claim. *Geppi v. Pineau*, No. 1363, Sept. Term 2017, 2019 WL 6040499, at *1, *6 n.7 (Md. App. Nov. 14, 2019). More specifically, this Court explained that the relevant breach "consisted of [Mr.] Geppi's failure to continue making

capital contributions to the Bracebridge project." *Id.* at *3. We further explained that if Mr. Geppi's abandonment was invalid and thus he remained a member, his payments to Rialto after December 2013 could have potentially qualified as capital contributions for which he deserved compensation. *Id.* at *5. This would then affect the damages awarded to Mr. Pineau as the jury award precisely corresponded to the difference between the parties' capital contributions at the time of Mr. Geppi's abandonment—the award did not appear to give Mr. Geppi credit for any payments made to Rialto after December 2013. *Id.* at *3, *5. Recognizing that the abandonment issue was not put directly before the jury, this Court vacated the judgment and remanded the case for further proceedings. *Id.* at *1, *7. This Court stated that the trier of fact should determine "the question of whether the Operating Agreement was in fact modified . . . and, thus, whether [Mr.] Geppi's abandonment was valid" and that a reconsideration of damages could be in order if there was no such abandonment. *Id.* at *7.

In December 2020, the case was tried on remand in a bench trial. On January 12, 2021, the circuit court entered judgment in Mr. Pineau's favor in the amount of $1,526,914.89. The award was based on Mr. Pineau's damage calculation, which did not credit Mr. Geppi for the settlement payments made after the date of the Abandonment Letter. In its Opinion and Order, the court identified the issue on remand as "whether the parties had modified the withdrawal requirements of the Operating Agreement by their behavior." It found that Mr. Geppi's Abandonment Letter was effective, reasoning that "there was a meeting of the minds between [the parties] that Mr. Geppi had abandoned

his interest . . . and Mr. Pineau had acce[p]ted such abandonment." The court also found that, if Mr. Geppi's abandonment was invalid, his post December 2013 payments to Rialto were not capital contributions as they were made solely for his benefit rather than as "an economic investment in the partnership."[8]

Mr. Geppi filed a Motion to Alter or Amend Judgment, which was denied by an order dated February 17, 2021. He then filed this appeal on February 24, 2021. Additional facts are provided as necessary below.

DISCUSSION

Mr. Geppi challenges the circuit court's judgment, arguing that it erred in finding that the parties modified the Operating Agreement by their conduct and so permitted Mr. Geppi's abandonment to become effective and in finding that Mr. Geppi's settlement payments made after the purported abandonment were not capital contributions. We affirm the judgment of the circuit court, holding that there is legally sufficient evidence to support its finding on the modification issue. In light of that conclusion, we do not address the second issue presented by Mr. Geppi.[9]

[8] The circuit court also addressed an additional issue raised by Mr. Geppi for the first time on remand—whether Mr. Pineau was barred from seeking contribution because he expressly waived the right to contribution when he signed the guaranty agreement to the BB&T loan. The court concluded that this argument was not preserved as Mr. Geppi failed to raise it during the original trial and before this Court in the first appeal. This determination is not challenged by either party in the present appeal.

[9] In other words, by upholding the finding that a valid contract modification occurred and Mr. Geppi's abandonment was effective, we need not determine whether the subsequent payments made by Mr. Geppi when he was no longer a member were capital contributions. During oral argument, Mr. Geppi conceded that such a resolution of the first question presented renders the second moot.

I. STANDARD OF REVIEW

In an appeal from a judgment entered after a bench trial, "the appellate court will review the case on both the law and the evidence" and "will not set aside the judgment of the trial court on the evidence unless clearly erroneous." Md. Rule 8-131(c). "A trial court's findings are not clearly erroneous if 'any competent material evidence exists in support of the trial court's factual findings[.]'" *Plank v. Cherneski*, 469 Md. 548, 568 (2020) (alteration in original) (quoting *Webb v. Nowak*, 433 Md. 666, 678 (2013)). Importantly, the issue presented in this appeal—whether the parties' conduct amounts to a modification of the Operating Agreement—is a factual question, *Hovnanian Land Inv. Grp., LLC v. Annapolis Towne Ctr. at Parole, LLC*, 421 Md. 94, 122 (2011), and as such the court's determination is "afforded significant deference." *Jackson v. 2109 Brandywine, LLC*, 180 Md. App. 535, 567 (2008). The appellate court "will give due regard to the opportunity of the trial court to judge the credibility of the witnesses." Md. Rule 8-131(c). And it will "not evaluate conflicting evidence but assume the truth of all evidence, and inferences fairly deducible from it, tending to support the findings of the trial court, and, on that basis, simply inquire whether there is any evidence legally sufficient to support those findings." *Mid S. Bldg. Supply of Md., Inc. v. Guardian Door & Window, Inc.*, 156 Md. App. 445, 455 (2004); *see also Yacko v. Mitchell*, 249 Md. App. 640, 679 (2021) ("The fact finder 'may believe or disbelieve, credit or disregard, any evidence introduced, and a reviewing court may not decide on appeal how much

weight must be given to each item of evidence.'" (quoting *Qun Lin v. Cruz*, 247 Md. App. 606, 629 (2020))).

II. GOVERNING LEGAL PRINCIPLES

Maryland courts have consistently recognized that parties may modify or waive[10] contractual provisions by subsequent conduct notwithstanding any clause mandating that such alterations be in writing. *See, e.g., Univ. Nat'l Bank v. Wolfe*, 279 Md. 512, 522-23 (1977) ("[I]t cannot be assumed, as matter of law, that the contract governed all that was done until it was renounced in so many words, because the parties had a right to renounce it in any way and by any mode of expression they saw fit." (quoting *Hoffman v. Glock*, 20 Md. App. 284, 289 (1974))). To modify a contract, both parties must assent to the particular change. *Allstate Ins. Co. v. Stinebaugh*, 374 Md. 631, 650 (2003); *see also Hovnanian*, 421 Md. at 120 (noting that Maryland caselaw "require[s] mutual knowledge and acceptance, whether implicit or explicit, of the non-conforming action"); *Cole v. Wilbanks*, 226 Md. 34, 38 (1961) ("Assent to . . . modify or change a contract may be implied and found from circumstances and the conduct of the parties showing acquiescence or agreement."). Additionally, the modification must be supported by sufficient consideration, which is present by virtue of the parties' "compromise and

[10] The Court of Appeals in *Hovnanian Land Investment Group, LLC v. Annapolis Towne Center at Parole, LLC*, 421 Md. 94 (2011), endorsed similar evidentiary requirements for contract modifications and waivers in that both require "mutual knowledge and acceptance." *See id.* at 119-21. The Court also stated that contractual limitations on either of these types of alterations are not dispositive. *See id*. at 120-21. Thus, for purposes of this appeal, we view Maryland caselaw concerning waiver by oral agreement or subsequent conduct as instructive on the modification issue before us.

mutual agreement . . . to vary the terms and enter into a new contract." *Richard F. Kline, Inc. v. Shook Excavating & Hauling, Inc*., 165 Md. App. 262, 279 (2005). In determining whether a valid modification occurred, the court will look to "the totality of a party's actions." *Hovnanian*, 421 Md. at 122.

III. ANALYSIS

We find no error in the circuit court's determination that Mr. Geppi and Mr. Pineau modified the Operating Agreement such that the Abandonment Letter was effective and ended Mr. Geppi's membership interest in Bracebridge Hall, LLC. We explain, starting with an overview of the relevant testimony and other evidence adduced at the trial on remand.

The record includes seemingly contradictory testimony from Mr. Geppi concerning his understanding as to the effectiveness of the Abandonment Letter. At a deposition taken before the 2017 jury trial, Mr. Geppi provided the following testimony:

> [COUNSEL FOR MR. PINEAU]: Is [Deposition] Exhibit 4 a letter that you signed dated December 29, 2013 addressed to Mr. Richard Pineau, Bracebridge Hall, LLC, is that correct?
>
> [MR. GEPPI]: Yes.
>
> [COUNSEL FOR MR. PINEAU]: And is this the letter where you notified Mr. Pineau that you were herewith abandoning all of your right, title and interest in and to Bracebridge Hall, LLC and Bracebridge Estates, LLC effective on December 31, 2013?
>
> [MR. GEPPI]: Yes.
>
> [COUNSEL FOR MR. PINEAU]: So as of December 31, 2013, you were no longer a member of either company?

> [MR. GEPPI]: Correct.
>
> [COUNSEL FOR MR. PINEAU]: And I should correct myself when I said either company. You were no longer a member of Bracebridge Hall, LLC because neither you nor Mr. Pineau were actually members of Bracebridge Estate[s], LLC is that correct?
>
> [MR. GEPPI]: That's correct.

But, during the 2020 bench trial, Mr. Geppi apparently changed his position on his membership status:

> [COUNSEL FOR MR. GEPPI]: [T]his is a letter that you sent to Mr. Pineau indicating that you were abandoning your interest in the Bracebridge companies. Why did you send the letter?
>
> [MR. GEPPI]: I was trying to elicit a response. I declared that I wanted to abandon my interest, and I knew that based on our experience with Ed St. John that I couldn't just arbitrarily do that, so I had to say I want to, and then hope that they would respond.
>
> * * *
>
> [COUNSEL FOR MR. GEPPI]: And when you sent the letter did you believe you could just walk away from the Bracebridge investment?
>
> [MR. GEPPI]: Of course not.
>
> [COUNSEL FOR MR. GEPPI]: You still owed money to Rialto?
>
> [MR. GEPPI]: Quite a bit.
>
> [COUNSEL FOR MR. GEPPI]: You still were making settlement payments, weren't you?

> [MR. GEPPI]: Yes, sir.
>
> [COUNSEL FOR MR. GEPPI]: And you still knew of the imbalance in the capital accounts with Mr. Pineau, didn't you?
>
> [MR. GEPPI]: Yes, sir.
>
> [COUNSEL FOR MR. GEPPI]: Did you consider your interest abandoned?
>
> [MR. GEPPI]: No, sir.
>
> [COUNSEL FOR MR. GEPPI]: And why not?
>
> [MR. GEPPI]: Why would they be, I had no permission to do it.
>
> [COUNSEL FOR MR. GEPPI]: Now, you remember the agreement with Mr. St. John, don't you?
>
> [MR. GEPPI]: Very well.
>
> [COUNSEL FOR MR. GEPPI]: What was your understanding at the time the St. John amendment was entered into in 2007 as to what was required for an abandonment?
>
> [MR. GEPPI]: It had to be done in writing. It had to be done with the consent of the other partners, the majority.

Additionally, Mr. Geppi testified that he continued to be a member of Bracebridge Hall, LLC after 2013 and even as of the 2020 bench trial. But when asked whether he listed "Bracebridge Hall, LLC as one of [his] holdings on [his] financial statement," Mr. Geppi answered, "I'd have to ask my tax accountant, but doubt it."

As for Mr. Pineau's stance on the Abandonment Letter, he gave the following testimony during the original trial in 2017:

> [COUNSEL FOR MR. GEPPI]: It's your position that Mr. Geppi abandoned his interest in Bracebridge at the end of 2013, is that correct?
>
> [MR. PINEAU]: Well, that's the way it certainly appeared. I got -- I got an email and a certified letter to that effect.
>
> * * *
>
> [COUNSEL FOR MR. GEPPI]: But you never responded to the [Abandonment Letter], did you?
>
> [MR. PINEAU]: Didn't ask for -- didn't ask for a response.
>
> [COUNSEL FOR MR. GEPPI]: And you certainly never consented to Mr. Geppi withdrawing from the Bracebridge companies, did you?
>
> [MR. PINEAU]: Didn't ask for me to consent.

He also stated, when asked if he was impacted by the Abandonment Letter, that he was "not certain about how [he] was affected."

Later, during the bench trial, Mr. Pineau further elaborated on his reaction to Mr. Geppi's correspondence:

> [COUNSEL FOR MR. PINEAU]: What did you do after you received [the Abandonment Letter]?
>
> [MR. PINEAU]: I wasn't particularly surprised because of the fact that [Mr. Geppi], at this particular point, had been a no show. I mean, he didn't assist me at all. And it was -- it was pretty much futile. I mean, I was carrying or shouldering the entire project myself.
>
> * * *
>
> [COUNSEL FOR MR. PINEAU]: Well, regardless of whether he asked you to [consent], . . . why didn't you just call him up and say, I'm not letting you out?

> [MR. PINEAU]: Because the role that he had played up to that particular time, I was pretty much disgusted with his -- with his lack of participating. And this didn't -- didn't particularly surprise me, totally, that I would receive a letter like [the Abandonment Letter].
>
> [COUNSEL FOR MR. PINEAU]: Did you think you could change his mind?
>
> [MR. PINEAU]: No.

And during cross examination by Mr. Geppi's counsel, the following colloquy occurred:

> [COUNSEL FOR MR. GEPPI]: It's your position, sir, that Mr. Geppi abandoned his interest at the end of 2013; is that -- is that a fair statement of your position?
>
> [MR. PINEAU]: It is.
>
> * * *
>
> [COUNSEL FOR MR. GEPPI]: You never said one word to [Mr. Geppi] about the [Abandonment] [L]etter, did you?
>
> [MR. PINEAU]: No, because it was futile. . . . [I]t was extremely frustrating that I was working on deaf ears.
>
> * * *
>
> [COUNSEL FOR MR. GEPPI]: You never expressed in any way to Mr. Geppi your consent to the abandonment, did you?
>
> [MR. PINEAU]: No, but he didn't ask me to.

In an apparent effort to discredit Mr. Pineau's testimony, Mr. Geppi's counsel cross-examined Mr. Pineau about his assertion in his Second Amended Complaint that Mr. Geppi's act of sending the Abandonment Letter was a material breach of the

Operating Agreement. And, at closing, counsel for Mr. Geppi argued that this was evidence that Mr. Pineau did not agree to any modification.[11]

Evidence was also presented concerning Mr. Geppi's and Mr. Pineau's respective role in the Bracebridge project and their working relationship. Although the Operating Agreement provided that the parties were co-managers, Mr. Pineau handled the day-to-day operation of the business and, as testified by Mr. Geppi, Mr. Pineau "worked 24/7 on the Bracebridge project." Mr. Pineau frequently sent communications to Mr. Geppi about the project, but Mr. Geppi seldom responded. Eventually, Mr. Pineau grew frustrated with Mr. Geppi's lack of responsiveness and his lack of participation in the business. By the time of the foreclosure in August 2013, the relationship between the parties was strained. According to Mr. Geppi's bench trial testimony, in the month or so prior to December 29, 2013, he and Mr. Pineau did "not ha[ve] a lot of communication," though they did exchange emails from time to time. But after that date, Mr. Geppi did not "ha[ve] any discussions with Mr. Pineau."

Mr. Geppi did, however, receive two emails from Ms. Evans following the issuance of the Abandonment Letter. On January 12, 2014, Ms. Evans emailed both Mr. Pineau and Mr. Geppi informing them of outstanding balances on the Bracebridge

[11] This iteration of Mr. Pineau's complaint was part of the record when the case was originally tried in 2017 and was included in the joint record extract submitted to this Court in connection with the first appeal. After the case was remanded, but prior to the bench trial, Mr. Pineau filed a Third Amended Complaint and later a Fourth Amended Complaint. In addition to removing the claims that were dismissed in the original trial and removing the Bracebridge LLCs as plaintiffs, these two filings each omitted the material breach allegation.

Citibank credit card account and stating that "this . . . along with a few other items[] need to be addressed." Mr. Pineau responded, without copying Mr. Geppi, that "[he] w[ould] call [Ms. Evans] later to discuss." Additionally, on September 23, 2014, Ms. Evans sent an email to Mr. Geppi and Mr. Pineau attaching a letter from a collection agency engaged by Citibank.

Another relevant piece of evidence is the Bracebridge Hall, LLC Schedule K-1 (Form 1065) that was issued to Mr. Geppi for the year 2013 and on which the "Final K-1" box was checked ("Final Schedule K-1").[12] Mr. Geppi testified at the bench trial that he received the Final Schedule K-1 from Bracebridge Hall, LLC and was "sure" he submitted the statement with his tax return. According to Mr. Pineau's testimony, the Final Schedule K-1 was delivered to Mr. Geppi after the Abandonment Letter in October 2014 by the accounting firm that handled Bracebridge Hall, LLC's tax filings. Notably, when asked whether he also received a Final Schedule K-1, Mr. Pineau responded: "I suppose so. I'm not exactly [sure]."

The record indicates that Mr. Pineau was the member responsible for overseeing the filing of Bracebridge Hall, LLC's taxes. For instance, when asked by Mr. Pineau's counsel which of the two members ensured that the tax returns for Bracebridge Hall, LLC

[12] A Schedule K-1 "report[s] [each partner's] share of the partnership's income, deductions, credits, etc." Internal Revenue Serv., U.S. Dep't of the Treasury, *Partner's Instructions for Schedule K-1 (Form 1065)* 1 (2014), https://www.irs.gov/pub/irs-prior/i1065sk1--2013.pdf. "Generally, [a] partnership is required to prepare and give a Schedule K-1 to each person who was a partner in the partnership at any time during the year." Internal Revenue Serv., U.S. Dep't of the Treasury, *Instructions for Form 1065* 24 (2014), https://www.irs.gov/pub/irs-prior/i1065--2013.pdf.

were filed, Mr. Geppi confirmed that it was not him. Moreover, an email dated August 14, 2013 from the accounting firm was admitted into evidence. The email was sent solely to Mr. Pineau and explained that the firm could "not prepare the Bracebridge tax return for 2012 without full payment first of the fee from last year . . . that [wa]s still outstanding." It also informed Mr. Pineau that the accounting firm had not yet received the Bracebridge tax data for 2012.

Finally, we note that during the bench trial Mr. Pineau confirmed that Bracebridge Hall, LLC filed a 2013 tax return, though he was unsure whether tax returns for 2014 and 2015 were also filed. And in response to Mr. Geppi's counsel's question regarding whether the company filed any tax returns for 2016 up to the date of trial, he answered "[w]ell, there was no activity." Bracebridge Hall, LLC forfeited its charter in October 2013, but it was reinstated in August 2016 after Mr. Pineau filed papers and paid the necessary arrearages.

With these facts in mind, we turn to the parties' arguments. Mr. Geppi argues that the court erred in finding a valid contract modification because there is "no evidence of any unequivocal acts or language establishing that the parties intended to modify the Operating Agreement to permit Mr. Geppi to freely abandon his interest." More specifically, he asserts that the record is devoid of facts establishing that Mr. Pineau assented to any such modification and that his "silence and inaction do not constitute the type of unequivocal conduct necessary to support" the court's finding. Mr. Geppi points to Mr. Pineau's allegation in his Second Amended Complaint that the Abandonment

Letter constituted a material breach as an "admission by Mr. Pineau" and "confirm[ing] beyond any doubt that the parties never agreed to modify the Operating Agreement." He further argues that there was no showing of the parties' knowledge of the modification, highlighting the fact that they never discussed such an alteration or the Abandonment Letter itself.

Mr. Pineau argues that the court's finding on the modification issue is not clearly erroneous because there is sufficient evidence of the parties' conduct supporting that decision. He points to the "unequivocal" Abandonment Letter, Mr. Geppi's deposition testimony disclaiming his membership as of December 31, 2013, Mr. Geppi's testimony that he continued to be a member as of the bench trial but "doubt[ed]" that Bracebridge Hall, LLC was listed as one his holdings, and Mr. Geppi's acceptance of his Final K-1 Schedule for the year 2013. Mr. Pineau also references prior instances where the parties allegedly modified the Operating Agreement, such as Mr. Pineau acting as the sole manager despite the contractual provision appointing both parties as co-managers. As for his own conduct, Mr. Pineau relies on his bench trial testimony explaining his lack of opposition to Mr. Geppi's withdrawal as demonstrating his consent. Additionally, in response to Mr. Geppi's argument concerning Mr. Pineau's Second Amended Complaint, he contends that the breach allegation was "withdrawn and no longer a part of the case" when he filed his Fourth Amended Complaint, which removed that allegation and was the basis on which the case was tried on remand. Lastly, citing to *Romm v. Flax*, 340 Md.

690 (1995), as supporting authority, Mr. Pineau claims that Mr. Geppi is improperly attempting to benefit from his own failure to comply with the Operating Agreement.

We hold that the circuit court was not clearly erroneous in finding that the parties by their conduct modified the withdrawal provisions of the Operating Agreement and, consequently, that Mr. Geppi's Abandonment Letter was effective. The evidence, when viewed in a light most favorable to the prevailing party, supports the conclusion that both Mr. Geppi and Mr. Pineau assented to such an alteration to permit Mr. Geppi to freely abandon his membership interest in Bracebridge Hall, LLC.

Mr. Geppi's Abandonment Letter used unequivocal language, stating that he "herewith abandon[s] all of [his] right, title and interest in and to Bracebridge Hall, LLC," and provided a specific date and time on which the abandonment became effective. As the circuit court noted in its opinion, the Abandonment Letter did not request a response from Mr. Pineau. And, based on its plain language, there was no indication that Mr. Geppi's withdrawal was contingent upon another's actions. Consistent with this interpretation of the Abandonment Letter, Mr. Geppi testified in a deposition prior to the 2017 trial that he was no longer a member of Bracebridge Hall, LLC as of December 31, 2013. While he took a contrary position during the trial on remand claiming that he sent the letter to "elicit a response,"[13] he also testified in that

[13] We note that the court found this portion of Mr. Geppi's testimony "to be incredible." It is the function of the trial court to assess the credibility of witnesses, *see* Md. Rule 8-131(c), and we will "not substitute our judgment . . . for that of the trial court so long as [its] conclusions are supported by the evidence." *Bausch & Lomb Inc. v. Utica Mut. Ins. Co.*, 355 Md. 566, 587 (1999) (quoting *Murphy v. 24th St. Cadillac Corp.*, 353

same proceeding that he had no further communication with Mr. Pineau, not even after time passed and Mr. Pineau still had not responded. These actions by Mr. Geppi support the conclusion that he intended to modify the Operating Agreement to allow his voluntary abandonment without Mr. Pineau's prior written consent.

We disagree with Mr. Geppi's assertion that "there is no evidence that the parties had knowledge of, let alone assented to, a modification of the Operating Agreement that would permit Mr. Geppi to freely abandon his interest." Mr. Geppi's Abandonment Letter was addressed to "Mr. Richard Pineau" and received by Mr. Pineau by email and certified mail. *See Hovnanian Land Inv. Grp., LLC v. Annapolis Towne Ctr. at Parole, LLC*, 421 Md. 94, 120 (2011) (citing, in support of the proposition that waiver and modification "require mutual knowledge and acceptance," the holding of *Myers v. Kayhoe*, 391 Md. 188, 206-07 (2006), that there was no waiver based on one party's statement when that statement was not communicated to the other party). Moreover, Mr. Geppi personally signed the Abandonment Letter and was copied on the email sending that correspondence to Mr. Pineau. Mr. Geppi also testified that, at the time of his withdrawal, he recalled the process by which Mr. St. John abandoned his interest, thereby suggesting that he was aware that his abandonment, unlike the St. John abandonment, did not conform with the terms of the Operating Agreement and thus required a modification

Md. 480, 497 (1999)); *see also Loyola Fed. Sav. Bank v. Hill*, 114 Md. App. 289, 307 (1997) ("It is rare that a credibility battle can be won on appeal after it has been lost below.").

of those terms to be effective.[14] The fact that the parties did not discuss modifying the Operating Agreement or the Abandonment Letter does not bar a finding that both parties knowingly assented to the modification by their behavior. *See, e.g.*, *Richard F. Kline, Inc. v. Shook Excavating & Hauling, Inc*., 165 Md. App. 262, 277 (2005) (emphasis added) (recognizing that parties may modify a contract "by subsequent oral agreement *or* conduct"). And even though Mr. Pineau did not respond, orally or in writing, to the Abandonment Letter, he expressed his consent to Mr. Geppi through his conduct as explained further below.[15]

Mr. Geppi is correct that silence alone is generally insufficient to show assent to a modification. *See Cambridge Techs., Inc. v. Argyle Indus., Inc*., 146 Md. App. 415, 432-34 (2002) (holding that buyer's silence following seller's failure to comply with the delivery schedule did not establish consent to a modification of the delivery deadline).

[14] Although Mr. Geppi referenced the St. John abandonment during his bench trial testimony as support for his position that his Abandonment Letter was not effective, the circuit court as the factfinder was entitled to "believe part of a particular witness's testimony but disbelieve other parts." *Qun Lin v. Cruz*, 247 Md. App. 606, 629 (2020) (quoting *Hollingsworth & Vose Co. v. Connor*, 136 Md. App. 91, 136 (2000)).

[15] We note that Mr. Geppi devotes a portion of his brief to the contention that Mr. Pineau's breach allegation in his Second Amended Complaint is an "admission" and "confirms beyond any doubt that the parties never agreed to modify the Operating Agreement." But, in that section, Mr. Geppi does not cite any legal authority to substantiate that claim. Although we could decline to consider Mr. Geppi's argument on this basis, s*ee, e.g., HNS Dev., LLC v. People's Couns. for Baltimore County*, 425 Md. 436, 458-60 (2012), we note that any pleading admission by Mr. Pineau would merely constitute a piece of the overall evidence in the circuit court's weighing and evaluation of the evidence. "[I]t [is not] our function to weigh conflicting evidence," *Goss v. C.A.N. Wildlife Tr., Inc.*, 157 Md. App. 447, 456 (2004), and "we may not substitute our judgment for that of the fact finder." *B & P Enters. v. Overland Equip. Co.*, 133 Md. App. 583, 602 (2000).

But here the evidence of Mr. Pineau's conduct amounts to more than his lack of response to the Abandonment Letter. Rather, the record also demonstrates that after December 29, 2013 he had no further discussions with Mr. Geppi concerning the operation of Bracebridge and, at the same time, was winding down the business. The latter point is evidenced by the two emails Mr. Pineau received from Ms. Evans in January 2014 and September 2014 regarding unpaid company expenses. Mr. Pineau responded to the January 2014 email, saying "I will call you later to discuss." Importantly, Mr. Geppi was also included on Ms. Evans's emails, suggesting that he was aware that Mr. Pineau was handling these remaining company matters following the Abandonment Letter. Mr. Pineau's assent is further evidenced by the issuance of the Final Schedule K-1 to Mr. Geppi for the year 2013. As the member responsible for ensuring that Bracebridge's taxes were timely filed, it is reasonable to infer that Mr. Pineau instructed the accounting firm to deliver that statement to Mr. Geppi. The statement was marked as the "Final K-1," indicating that this was the last Schedule K-1 Mr. Geppi would receive, and was delivered to him in October 2014 after the Abandonment Letter was sent. In addition to the above conduct, Mr. Pineau's trial testimony confirmed his acceptance of the Abandonment Letter as effective and thus his consent to the modification.

To the extent Mr. Pineau argues that the parties' other modifications of the Operating Agreement demonstrate that the withdrawal provisions were also altered, we disagree. A valid contract modification requires a showing that the parties consented to the specific change. *See Hovnanian*, 421 Md. at 120. Thus, the parties' assent to alter

other terms of the Operating Agreement would not establish that there was a meeting of the minds as to a modification of the withdrawal provisions. We also believe that Mr. Pineau's reliance on *Romm v. Flax*, 340 Md. 690 (1995), is misplaced. In that case, the Court of Appeals was asked to interpret a statutory provision, specifically § 10-702 of the Real Property Article, which required the seller of a single family residential real property to deliver a particular disclosure to the purchaser prior to entering into the sales contract and provided that the seller's failure to do so rendered the contract "void." 340 Md. at 693-94. Ultimately, the Court rejected an interpretation of "void" that would allow sellers to avoid a contract by refusing to comply with their statutorily prescribed duty. *Id.* at 698. It reasoned that such a reading was inconsistent with the legislative history, which indicated an intent to grant rescission rights to purchasers only, and Maryland caselaw where courts declined to interpret "null and void" contract provisions in a manner that would permit one party to void a contract by preventing a condition precedent. *Id.* at 694-98. In our view, *Romm* has no relevancy to this appeal—there is no claim that the statutory duty at issue in *Romm* applies to Mr. Geppi and Mr. Geppi is not attempting to void the Operating Agreement.

In sum, we affirm the circuit court's judgment, concluding that there is competent evidence supporting its finding that the parties intended to modify the Operating

Agreement so that Mr. Geppi's Abandonment Letter served to end his membership interest.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.