UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

Nos. 1241, 2240 & 2384

September Term, 2015

AMERICAN HOUSING PRESERVATION, LLC, *et al.*

v.

HUDSON SLP LLC, *et al.*

Meredith,
Leahy,
Albright, Anne K.
(Specially Assigned),

JJ.

Opinion by Leahy, J.

Filed: December 20, 2016

This case concerns a financial dispute among the partners in a limited partnership formed to operate an affordable housing complex in Baltimore City that rapidly became plagued by cost-overruns and insufficient cash flow. Defendants below, American Housing Preservation, LLC ("AHP"), and its guarantors, Michael A. Liberty, David R. Burton, and James G. Stanley (collectively "Appellants"), appeal from a jury verdict in the Circuit Court for Baltimore City in favor of Hudson SLP, LLC and Hudson Lanvale, LLC, (collectively "Appellees" or "Hudson"), for breach of contract and breach of fiduciary duty. The jury found that AHP and its guarantors failed to fund Excess Development Costs incurred by the apartment complex in breach of an agreement between the parties, and awarded $1,958,409.00 in damages. After the verdict, Appellants filed a motion for judgment notwithstanding the verdict ("JNOV"), which the circuit court denied.

We have rephrased the first and second of the following four questions that Appellants present on appeal:[1]

1. Did the trial court err by failing to enter judgment in favor of Appellants because the applicable statute of limitations barred Appellees' claims?

2. Did the trial court err by denying Appellants' Motion for Judgment Notwithstanding the Verdict based upon the jury's finding of a prior material breach by Appellees?

[1] The first and second questions as presented by Appellants in their brief were:

"1. Did the Trial Court err by failing to dismiss Appellees' claims based upon Maryland's three (3) year statute of limitations?"

"2. Did the Trial Court err by denying Appellants' Motion for Directed Verdict based upon the jury's finding of "Prior Material Breach" by Appellees?"

3. "Did the [t]rial [c]ourt err by failing to dismiss Appellees' claims because there [were] no "Operating Deficits" and/or "Excess Development Costs" as those terms were used [in] the [Limited] Partnership Agreement?"

4. "Did the [t]rial [c]ourt err by [f]ailing to [a]pply the "Voluntary Payment Rule" to Appellees' [c]laims?"

For the reasons that follow, we conclude that (1) the trial court did not err in denying Appellants' motions for judgment on statute of limitations grounds because the Limited Partnership Agreement was a continuing performance contract and each time Appellants failed to pay the Excess Development Costs constituted a separate breach and started the statute of limitations anew; (2) the trial court did not err in denying Appellants' motion for JNOV because the jury's verdict was supported by evidence that either Hudson's breach was not so material to end the contract, or Appellants waived the prior material breach defense by acting inconsistently with the right to excuse its performance under the contract, or both; (3) the trial court correctly refused to dismiss Appellees' claims because the record demonstrates that Lanvale Housing had extensive Excess Development Costs that were the obligation of Appellants; and (4) the trial court did not err in declining to apply the voluntary payment rule because Hudson acted to protect its own interests and was not acting voluntarily or officiously. We affirm.

BACKGROUND

A. The Lanvale Affordable Housing Complex

The parties to this appeal were participants in Lanvale Housing LP ("Lanvale Housing"), a Maine limited partnership formed to acquire, rehabilitate, own, and manage

an affordable housing apartment and townhome complex in Baltimore City known as Lanvale Towers and Canal Court Apartments ("Lanvale Towers").

Prior to Lanvale Housing's acquisition of Lanvale Towers, Lanvale Towers participated in the U.S. Department of Housing and Urban Development's ("HUD") Section 8 housing subsidy program. Under the program, HUD provided rental subsidies for 164 of the 321 units at Lanvale Towers pursuant to a Housing Assistance Payment Contract (the "HAP Contract"). The HAP Contract was assigned to Lanvale Housing in the acquisition of Lanvale Towers in 2005, and Lanvale Housing continued participation in this program.

As an existing affordable housing property, Lanvale Towers qualified for HUD's Low-Income Housing Tax Credit Program ("LIHTC"). 26 U.S.C. § 42.[2] Lanvale Housing leveraged the tax credits received through participating in the LIHTC Program to finance the rehabilitation of Lanvale Towers. Under the Limited Partnership Agreement, AHP would receive $6,880,220.00 in tax credits to give to Hudson and its investor over a ten-year period in exchange for Hudson's $6,535,555.00 investment in Lanvale Towers.

[2] The LIHTC Program was created in 1986 to incentivize private investment in the development or rehabilitation of affordable housing. Marc Jolin, *Good Cause Eviction and the Low Income Housing Tax Credit*, 67 U. Chi. L. Rev. 521, 524 (2000). Under the LIHTC Program, developers of affordable housing properties receive federal tax credits for ten years. 26 U.S.C. § 42(f). The developers then partner with private investors who provide capital upfront to develop or rehabilitate the affordable housing properties in exchange for the ten-year stream of federal tax credits. Jolin, *supra*, at 526.

B. The Parties and the Limited Partnership Agreement

The parties' obligations were governed by the Lanvale Housing LP Amended and Restated Agreement of Limited Partnership dated December 1, 2005[3] (the "Limited Partnership Agreement"), and related agreements. The Limited Partnership Agreement is governed by the law of the State of Maine.

AHP, a Delaware limited liability company, served as the general partner under the Limited Partnership Agreement. By separate agreement between Lanvale Housing and AHP signed on the same day as the Limited Partnership Agreement, Lanvale Housing appointed AHP as developer to oversee and coordinate the rehabilitation of the Lanvale Towers for a fee of $2,464,502.00. Hudson SLP, LLC ("Hudson SLP"), and Hudson Lanvale, LLC ("Hudson Lanvale")—both Delaware limited liability companies—were limited partners under the Limited Partnership Agreement. Hudson Lanvale was the primary capital investor in Lanvale Housing, and Hudson SLP was the Special Limited Partner whose role included finding an institutional investor (J.P. Morgan in this case) to invest in Lanvale Housing.

[3] On January 5, 2005, AHP, as initial general partner, executed a Certificate of Limited Partnership to form Lanvale Housing LP under the State of Maine Revised Uniform Limited Partnership Act. Next, Housing Investments, LLC—a Maine limited liability company—joined AHP as the initial limited partners in Lanvale Housing under the Agreement of Limited Partnership. Later, pursuant to the provisions of the succeeding Amended and Restated Agreement of Limited Partnership, Housing Investments, LLC withdrew as limited partner from Lanvale Housing.

As general partner, AHP had "full, complete and exclusive discretion to manage and control the business of the Partnership [Lanvale Housing.]" Lanvale Housing contracted with Property Management Consultants, LLC ("CT Group"),[4] a property management company, to manage the maintenance and day to day operations at Lanvale Towers in 2007. Hudson, as limited partner, was expressly prohibited from taking part in the management and control of Lanvale Housing pursuant to Article X of the Limited Partnership Agreement.

AHP was also obligated to pay for all "Excess Development Costs" under Section 8.08(a)(ii) of the Limited Partnership Agreement, including "Operating Deficits" incurred by the Lanvale Towers prior to Breakeven Operations.[5] "Excess Development Costs" are defined under Article II of the Limited Partnership Agreement as:

> all funds in excess of the proceeds of the Mortgage Loan and Capital Contributions (as adjusted pursuant to this Agreement) which are required to (i) complete rehabilitation of the Apartment Complex, including paying all amounts due under and pursuant to the Construction Contract, all costs relating to the Relocation including any legal fees incurred by the Special Limited Partner, and any rehabilitation cost overruns and the cost of any change orders which have been approved by the Lender and the Special Limited Partner, if required, and which are not funded from proceeds of the Mortgage Loan, (ii) achieve Substantial Completion; . . . and ***(vi) pay any Operating Deficits incurred by the Partnership prior to Breakeven***

[4] Property Management Consultants, LLC, is an affiliate of Charles Tini & Associates, LLC, "CT Group." The management company is referred to as "CT Group" throughout the record, and so we adopt the same shorthand in this opinion.

[5] Breakeven Operations is defined in Article II of the Limited Partnership Agreement as the point when Lanvale Towers's net income equals or exceeds 111% of its annualized debt service payments and occupancy equals or exceeds 95% for three consecutive months. The parties are in agreement that Breakeven Operations never occurred.

> ***Operations***. Payment of all or a portion of the Development Fee may be deferred and paid pursuant to Section 7.03(a) so as to minimize Excess Development Costs so long as it can be demonstrated to the reasonable satisfaction of the Special Limited Partner at Final Closing that such deferred portion of the Development Fee can be fully paid within thirteen (13) years of the date of the Second Capital Contribution.

(Emphasis added). Article II of the Limited Partnership Agreement defines Operating Deficits as:

> ***the amount by which the revenues of the Partnership [Lanvale Housing] from rental payments made by tenants of the Apartment Complex*** [Lanvale Towers] (excluding security deposits until forfeited), ***and all other revenues of the Partnership*** [Lanvale Housing] (other than Capital Contributions, the proceeds of any loans to the Partnership and investment earnings on funds on deposit in the Reserve Fund for Replacements, and other such reserve or escrow funds or accounts) for a particular period of time, ***is exceeded by the sum of all the operating expenses, including*** all required debt service, ***operating and maintenance expenses,*** any fees to the Lender and/or any applicable mortgage insurance premium payments and all other Partnership obligations or expenditures, ***excluding payments for rehabilitation of the Apartment Complex*** and fees and other expenses and obligations of the Partnership to be paid from the Capital Contributions of the Limited Partners to the Partnership and disbursements from the Construction Loan pursuant to this Agreement, during the same period of time.

(Emphasis added.) AHP's payment obligations under the Limited Partnership Agreement were guaranteed by Michael A. Liberty, David R. Burton, and James G. Stanley pursuant to an Unconditional Guaranty they signed on December 1, 2005.[6]

Hudson provided up-front capital to finance the mortgage and rehabilitation costs of Lanvale Towers. Hudson Lanvale agreed to make two capital contributions totaling

[6] The Unconditional Guaranty was signed by four guarantors, but Hudson dismissed without prejudice their claims against the fourth guarantor, Andrew R. Bedard, on February 12, 2014, after he filed for bankruptcy. The Unconditional Guaranty is governed by the laws of the State of Maine.

$6,535,555.00 to Lanvale Housing pursuant to Section 5.01(c)(i) of the Limited Partnership Agreement. These capital contributions were funded through an outside investor, J.P. Morgan.[7]

C. The Rehabilitation and Operation of Lanvale Towers

The project began incurring Operating Deficits shortly after its inception. AHP completed the rehabilitation of Lanvale Towers at the end of 2006. Upon inspection, however, Hudson learned that the main lobby had not been renovated. AHP and Hudson agreed that the lobby renovation was not within the scope of rehabilitation project. Nevertheless, Hudson decided the lobby required renovation and agreed to pay for it in part with $140,000.00 from the J.P. Morgan investor fund. Hudson renovated the lobby from 2007-2008, and the renovation ultimately cost $258,000.00.

The parties intended to reach Breakeven Operations, as defined in the Limited Partnership Agreement, by October 31, 2007, but the Lanvale Towers project never achieved Breakeven Operations. To the contrary, the rehabilitation, operation, and utility costs exceeded estimates and Lanvale Towers incurred Operating Deficits at an increasing

[7] Hudson Housing Capital LLC, the parent company of Hudson SLP, ("Hudson Housing Capital") matched J.P. Morgan with Lanvale Housing's affordable housing project in June 2006. Hudson Housing Capital was in the business of matching investors who invest in affordable housing developments with developers who receive tax credits under the LIHTC Program for their affordable housing projects, like Lanvale Towers. Hudson Housing Capital received a $250,000.00 fee for matching J.P. Morgan with Lanvale Housing's affordable housing project and managing that. Hudson Housing Capital was not a party to the lawsuit below.

rate every year after 2007.[8] On a monthly basis, CT Group prepared and sent Appellants and Hudson a financial analysis of accounts receivable (i.e. rent) and accounts payable and a funding request to pay for any Operating Deficits. Pursuant to the Limited Partnership Agreement, discussed in Section B *supra*, AHP was responsible for the payment of Operating Deficits.[9]

Adding additional strain to Lanvale Housing's financial circumstances and the parties' relationship, the property was subject to periodic HUD Real Estate Assessment Center Inspections.[10] In preparation for the 2009 HUD inspection, Hudson contacted AHP and CT Group to identify whether Lanvale Towers required any repairs. CT Group presented an estimate and, according to Hudson, AHP was not willing to pay for the repairs. As a result, Hudson became heavily involved with the preparation for the 2009 HUD inspection, including making site visits and coordinating repairs with CT Group. This revealed additional problems with the property. For example, Hudson learned that 30

[8] A report relied on by Hudson Housing Capital LLC at trial summarized the revenue and cost issues: "321-unit inner-city bond-financed property continues to experience significant operating shortfalls associated primarily with higher than underwritten operating and utility costs, coupled with higher-than-anticipated economic loss associated with turnover and incidence of bad debt. Year-to-date in 2013, the property's reported average physical occupancy and cumulative economic collections rate improved to 96% and 87% respectively . . . ."

[9] Email correspondence among the guarantors from 2009 through 2012 indicate that AHP and its guarantors acknowledged it was their obligation to pay the Operating Deficits and that they were having difficulty paying CT Group's funding requests.

[10] Lanvale Housing's mortgage was insured through HUD. The property was subject to an inspection every three years to verify that the condition of Lanvale Towers meets HUD standards.

apartment units were vacant and were not in rental condition. Hudson ultimately incurred $250,000.00 preparing Lanvale Towers for the 2009 REAC inspection.

D. Second Amendment and Disbursement Agreement

In 2010, AHP began discussions with Hudson and requested Hudson either release funds from the Completion Account or pay all or part of the Second Capital Contribution early (i.e., prior to Breakeven Operations and final closing) to help with the continued Operating Deficits.[11] In an attempt to work out the Operating Deficit shortfall, on January 1, 2011, the members of Lanvale Housing—AHP, Hudson SLP, and Hudson Lanvale—entered into a Disbursement Agreement to partially fund monthly Operating Deficits from the Completion Account. Under the Disbursement Agreement, Hudson agreed to disperse $100,000.00 of the $1,196,000.00 in the Completion Account over a twelve-month period in amounts up to $8,333.00 on a monthly basis.

Simultaneously, the parties executed the Second Amendment to the Limited Partnership Agreement, to "(i) continue the Partnership . . ., (ii) amend certain provisions

[11] Pursuant to Sections 4.01(k) and 5.01(c)(i) of the Limited Partnership Agreement, Hudson SLP funded the Completion Account from a portion of the initial capital contribution, and this account was held and controlled exclusively by HUD. In December 2007, HUD released the Completion Account funds in the approximate amount of $1,196,000.00 to Lanvale Housing. Hudson then held those funds in an account called the Hudson Completion Account where they were to remain on deposit until Hudson made the Second Capital Contribution. Hudson was to make the Second Capital Contribution to Lanvale Housing after certain specified conditions were met, including the certification of Breakeven Operations and final closing. However, in 2010, Lanvale Housing had not achieved Breakeven Operations or final closing. The Second Capital Contribution was significant to AHP because Lanvale Housing was to pay a portion of the Development Fee to AHP from the Second Capital Contribution.

of the [Limited] Partnership Agreement, and (iii) to ratify and confirm the provisions governing the Partnership." Andrew Clauer, the vice president of asset management at Hudson Housing Capital, testified that "[the Disbursement Agreement] came about as a good faith negotiation between Hudson and [AHP] to utilize funds that were available to fund operating shortfalls." Mr. Macari testified that Hudson ultimately paid $100,000.00 from the Completion Account during 2011 and an additional $50,000.00 in June 2011 to repair the HVAC unit.

Despite this, the Operating Deficits exceeded the funds dispersed from the Completion Account, and AHP's payments were "very delayed" and "not fully funded" according to Andrew Clauer. AHP's last payment was made in November 2011.

After the expiration of the Disbursement Agreement, Hudson stopped funding Operating Deficits for the first few months of 2012 to see whether AHP would honor its obligations. CT Group continued to send Operating Deficit funding requests on a monthly basis to Hudson and AHP. Once it was clear that AHP would not honor its obligation to pay the Operating Deficits, Hudson resumed paying the Operating Deficits to avoid recapture of the tax credits received through the LIHTC Program. Hudson Housing Capital[12] advanced funds totaling $1,958,409.00 to pay the Operating Deficits from March 2012 through October 2014. These funds were in addition to the funds disbursed from the Hudson Completion Account and they were not advanced pursuant to the Disbursement

[12] *See supra* note 7 explaining relationship between Hudson Housing Capital and Hudson SLP.

Agreement or any other contract. Along with each advance, Hudson Housing Capital sent a letter to AHP and its four guarantors explaining that AHP was neglecting its obligation to fund all Excess Development Costs, that the advance was made "to avoid a materially adverse situation," and that the advance shall be treated as a partner loan. Each letter included a demand for repayment. Hudson advanced the funds recognizing the need to do so as an "emergency" and its failure to do so would result in "danger to human lives [and] health and safety violations." Hudson expressly stated in their notices that "Operating Deficit Advances" were not advanced as capital contributions to Lanvale Housing, to fulfill any contractual obligation of the limited partners, or to discharge any of AHP's obligations to Lanvale Housing.

By the end of 2012, Mr. Clauer testified that Lanvale Towers had to write off $250,000 in uncollected rent. And by 2013, Lanvale Towers had an accounts receivable balance in the amount of $165,000.00 in rent.

E. The Complaint and Pre-Trial Proceedings

On July 9, 2013, Hudson brought a four-count complaint against Appellants for (1) breach of contract; (2) specific performance of AHP's obligation to repurchase;[13] (3) breach of fiduciary duty; and (4) breach of guarantors' unconditional guaranty. The complaint alleged that AHP breached the Limited Partnership Agreement and that the

[13] Pursuant to Section 5.05 of the Limited Partnership Agreement, Hudson had the right to require AHP to repurchase its interest in Lanvale Housing if Breakeven Operations and final closing did not occur by October 31, 2007.

Guarantors breached the Unconditional Guaranty by failing to pay the Excess Development Costs incurred by Lanvale Towers pursuant to Section 8.08(a)(ii) of the Limited Partnership Agreement.

Following discovery, Appellants filed a joint motion for summary judgment on November 7, 2014.[14] In their written motion, Appellants raised the following arguments relevant to this appeal: (1) Hudson's claims were barred by the statute of limitations; (2) Hudson Housing Capital's advances made between 2012 and 2014 to pay for the Excess Development Costs were capital contributions, not loans; (3) Hudson's prior material breach of Section 10.01 of the Limited Partnership Agreement excused Appellants from performance; and (4) Hudson voluntarily paid the advances and are barred from recovery pursuant to the voluntary payment rule. Appellants alleged that Hudson's involvement in preparing Lanvale Towers for the 2009 REAC inspection was a breach of Section 10.01 of the Limited Partnership Agreement, which prohibited Hudson from participating in the management and control of Lanvale Housing. At the conclusion of a hearing on the motions held on December 8, 2014, the trial court ruled from the bench, denying Appellants' motion.

The case proceeded to trial before a jury on December 8, 2014. At trial Hudson established, *inter alia*, that on January 1, 2011 the parties ratified the provisions of the Limited Partnership Agreement and that AHP failed to fund the Operating Deficits after

[14] Hudson also filed a motion for partial summary judgment on February 25, 2014, which the circuit court denied on September 30, 2014.

November 2011. Through their own witnesses, Appellants elicited testimony that Hudson had created problems at Lanvale Housing by actively interfering in the management of the property. Appellants moved for judgment at the end of Hudson's case-in-chief, incorporating all arguments made in Appellants' motion for summary judgment. The trial court denied the motion.

During closing, Appellants' counsel argued that to the extent that Hudson claimed AHP breached the Limited Partnership Agreement by failing to pay Excess Development Costs, that breach occurred well before July 2010 and, therefore, the statute of limitation had run and the case should be dismissed. Appellants also argued that, although under the Limited Partnership Agreement Appellants were liable for Excess Development Costs if Breakeven Operations had not occurred, the advances made by Hudson for Operating Deficits were not actually for necessary expenses, and to the extent that any of the expenses were necessary, any unpaid amounts were to be applied against the Developer's (AHP) $2.4 million dollar development fee, which AHP never received.

At the close of all evidence, Appellants made another motion for judgment, incorporating arguments made in the prior motion for judgment and motion for summary judgment.[15] The Court granted the motion in part, ruling against Hudson on their specific

[15] Although counsel asked to "renew the motion for directed verdict," the trial court properly treated it as motion for judgment under Maryland Rule 2-519. Effective July 1, 1984, the motion for judgment under Rule 2-519 replaced the motion for directed verdict under former Rule 522. *See Schroyer v. McNeal*, 323 Md. 275, 286 n.6 (1991); *Virgil v. Kash N' Karry Serv. Corp.*, 61 Md. App. 23, 29 n.1 (1984).

performance claim (Count II) in which they alleged AHP was obligated under the Limited Partnership Agreement to repurchase Hudson's interest in Lanvale Towers. Claims I (breach of contract—the Limited Partnership Agreement), III (breach of fiduciary duty), and IV (breach of contract—the Unconditional Guaranty) were submitted to the jury.

F. The Jury's Verdict

On December 19, 2014, the jury returned its verdict in favor of Hudson in the amount of $1,958,409.00, finding: 1) AHP materially breached the Limited Partnership Agreement by not funding Excess Development Costs; 2) AHP's breach did not occur prior to July 9, 2010; 3) the parties did not continue with the contract; 4) AHP's material breach occurred after July 9, 2010; 4) AHP materially breached its fiduciary duty to the Lanvale Housing; and 5) Hudson materially breached the contract by interfering with the management of Lanvale Towers. The damages awarded by the jury were for its finding that AHP breached the contract and not its finding of breach of fiduciary duty. Significantly, the amount awarded was an amount equal to the Excess Development Costs funded by Hudson in 2012, 2013, and 2014. The verdict sheet did not expressly show how the damages were calculated. The verdict sheet read as follows:

VERDICT SHEET

1. Do you find that the **PLAINTIFFS**, **HUDSON SLP, LLC AND HUDSON LANVALE, LLC**. have proven by a preponderance of the evidence, that the **DEFENDANT, AMERICAN HOUSING PRESERVATION, LLC**, materially breached the contract partnership agreement by not funding excess development costs

   ____X_____YES _____NO

If you answered "YES" to Question #1, answer Questions (a), (b) and (c). If you answered "NO" to Questions #1, skip to Question #2.

(a) Do you find, by a preponderance of the evidence, that the material breach in Question #1 occurred prior to July 9, 2010

_____YES _____X_____NO

(b) Do you find by a preponderance of the evidence that the **PLAINTIFFS, HUDSON SLP, LLC AND HUDSON LANVALE, LLC**. have proven that the parties continued with the contract?

_____YES _____X_____NO

If you answered "YES" to Question 1(a) and "NO" to Question 1(b), SKIP to Question #2. (Otherwise answer 1(c).)

(c) Do you find, by a preponderance of the evidence, that the material breach in Question #1 occurred after July 9, 2010?

____X_____YES _____NO

2. Do you find that the **PLAINTIFFS, HUDSON SLP, LLC AND HUDSON LANVALE, LLC.** have proven by a preponderance of the evidence, that the **DEFENDANT, AMERICAN HOUSING PRESERVATION, LLC**. materially breached its fiduciary duty to the partnership?

____X_____YES _____NO

3. Do you find that the **PLAINTIFFS, HUDSON SLP, LLC. AND HUDSON LANVALE, LLC.** materially breached the contract with the **DEFENDANT, AMERICAN HOUSING PRESERVATION, LLC.** by their interference at Lanvale Towers?

____X_____YES _____NO

If you answered "NO" to Questions #1 and #2, STOP HERE and NOTIFY THE CLERK.

If you answered "YES" to Questions #1(b) and 1(c) go to Damages on Page 3. If you answered "YES" to Question #1(a) and "NO" to Question #1(b), go to the Damages on Page 3.

If you answered "YES" to Question #2, go to the Damages on Page 3.

DAMAGES

4. What damages, if any, have the **PLAINTIFFS, HUDSON SLP, LLC. AND HUDSON LANVALE, LLC.** proven by a preponderance of the evidence against **DEFENDANT, AMERICAN HOUSING PRESERVATION, LLC**. for:

   (a) breach of the contractual agreement?
   $__1,958,409.00_____

   (b) breach of a fiduciary duty?
   $__0_____

   TOTAL $_1,958,409.00____

(Various emphasis in the original).

After the jury returned this verdict, counsel approached the bench, and Appellants' counsel requested the jury clarify which party materially breached first in order to "effectuate the prior material breach defense." Hudson's counsel objected on the grounds that the jury had been instructed on the prior material breach defense, and that the additional question would likely lead to more questions and allow Appellants to argue that the verdict was inconsistent. The trial court disagreed and presented the jury with an additional question: "Who does the jury find breached the contract first?" After a brief recess, the jury found Hudson breached first. Hudson's counsel then noted another objection, arguing that the jury's finding that Hudson breached first rendered the verdict inconsistent, and, therefore, defendants now had a ground to move the court to set aside the jury's verdict.

Hudson's counsel then requested the trial court ask the jury a follow up question to determine the date of Hudson's breach of contract. However, after a lengthy bench conference, the court declined to ask the jury any additional questions, reasoning that the specific date of Hudson's breach did not matter. Hudson's counsel renewed its objection for the record. The court then proceeded to dismiss the jury after concluding that this issue would be argued and decided in post-trial motions.

G. Post-Trial Motions

Appellants filed a motion for JNOV on December 29, 2014, within ten days of the jury verdict, asserting that because the jury found that Hudson breached the contract first, Appellants were excused from performance under the contract. Hudson argued that the jury was instructed on the effect of a prior material breach,[16] and that the jury's verdict could be reversed only if it was irreconcilably inconsistent.

The trial court held a hearing on July 23, 2015 and denied Appellants' motion, summarizing the reasons that would appear in the court's written memorandum and order entered on August 5, 2015. The court found that Appellants waived their right to rescind the contract "by continuing with the performance of the [Limited] Partnership Agreement and accepting further performance by [Hudson] who had committed a material breach

[16] The trial court instructed that:

> In order to find that one party's material breach of the contract excuses the other's, the other party's nonperformance, you must find that the breach is so material and important as to justify the injured party in regarding the whole transaction as at an end.

first." Additionally, the court concluded that the jury deliberately calculated the damages, awarding damages only in the amount equal to the Excess Development Costs Hudson paid in 2012, 2013, and 2014. AHP and Michael Liberty filed an appeal on August 3, 2015.[17] David Burton and James Stanley filed their appeals on September 2, 2015 and September 4, 2015, respectively.[18]

DISCUSSION

I.

Statute of Limitations

Appellants contend that Hudson's breach of contract claims are barred by the statute of limitations. They point out that the Operating Deficits and failure to reach Breakeven

[17] Although AHP and Mr. Liberty filed their notice of appeal on August 3, 2015, two days before the trial court's order was entered on the docket on August 5, 2015, Maryland Rule 8-602(d) permits this appeal as timely. Maryland Rule 8-602(d) provides

> A notice of appeal filed after the announcement or signing by the trial court of a ruling, decision, order, or judgment but before entry of the ruling, decision, order, or judgment on the docket shall be treated as filed on the same day as, but after, the entry on the docket.

[18] AHP and Michael Liberty filed a notice of appeal on August 3, 2015; this appeal was assigned Case No. 1241, Sept. Term 2015. David Burton filed a notice of appeal, separately, on September 2, 2015; this appeal was assigned Case No. 2384, Sept. Term 2015. James Stanley separately filed a notice of appeal on August 4, 2015; this appeal was assigned Case No. 2240, Sept. Term 2015. Mr. Stanley's appeal was dismissed by the Court in error in an order dated February 10, 2016. This Court then issued an order on April 27, 2016 consolidating the first appeal and Mr. Burton's appeal. Finally, on September 23, 2016, this Court issued an order withdrawing and vacating the mandate dismissing Mr. Stanley's appeal, as well as consolidating Mr. Stanley's appeal with the previously consolidated Case Nos. 1241 and 2384.

Operations date back to October 31, 2007.[19] According to Appellants, all of AHP's alleged failures to act in accordance with the Limited Partnership Agreement constituted a single breach, and, that even though Hudson had notice of Appellants' alleged failure to meet their obligations under the Limited Partnership Agreement in 2007, or at the very latest in 2009, Hudson nonetheless waited until July 9, 2013—outside the statute of limitations—to file a lawsuit.

In their brief on appeal, Appellants state that "[i]n both pre-trial proceedings and during the course of the merits trial, Appellants continuously raised the defense of limitations and asserted that Hudson knew and continuously alleged that more than three years prior to filing of the instant lawsuit that AHP was not meeting its obligations under the Agreement."

In response to Appellants' motions, Hudson presented argument disputing Appellants' assertion that all of AHP's failures to act in accordance with the Limited Partnership Agreement constituted a single breach beginning in October 2007. Hudson argued at trial, and now on appeal, that they asserted multiple breach of contract claims, including Appellants' continuous failure to fund Excess Development Costs between 2012 and the date of trial. These claims constituted separate and independent breaches, starting the statute of limitations anew for each breach. Hudson also maintains that even when the

[19] Appellants argue that the failure to fund Operating Deficits spawned from the failure to reach Breakeven Operations and maintain adequate capital—issues that Hudson knew of as early as 2007 and no later than 2009—and, therefore, constituted a single breach of contract.

initial violation occurs outside of the statute of limitations, when the violation is ongoing, recovery for damages incurred within the statute of limitations period is not time-barred.

A. Applicable Law

Neither party disputes the application of Maine law to the substantive legal issues raised in this appeal.[20] However, where a contract's governing law differs from that of the forum state, the court shall apply the laws of the forum to procedural matters. *See Ouellette v. Sturm, Ruger & Co., Inc.*, 466 A.2d 478, 482 (Me.1983) ("Under traditional choice of law rules, the forum state generally applies its own statute of limitations to a cause of action, even though it may apply the substantive law of another state.").

Both Maryland and Maine recognize that the "defense of limitations is a matter of procedure to be controlled by the law of the place where the suit is instituted.'" *Turner v. Yamaha Motor Corp.*, 88 Md. App. 1, 3 (1991) (citation omitted); *accord Ouellette*, 466 A.2d at 482 ("Under traditional choice of law rules, the forum state generally applies its own statute of limitations to a cause of action, even though it may apply the substantive law of another state."). Accordingly, pursuant to Maryland law, the applicable statute of limitations for civil actions is three years from the date the action accrues. Maryland Code (1973, 2013 Repl. Vol.), Courts & Judicial Proceedings Article ("CJP"), § 5-101.

For contract claims, the limitations period begins to run on the date of the breach of the contract. *Millstone v. St. Paul Travelers*, 183 Md. App. 505, 511–12 (2008). The trier

[20] Section 15.02 of the Limited Partnership Agreement, the governing law provision, provides that the agreement shall be construed and enforced in accordance with the laws of Maine.

of fact determines when an action has accrued. *Supik v. Bodie, Nagle, Dolina, Smith & Hobbs, P.A.*, 152 Md. App 698, 711–12 (2003).

Additionally, when "a contract provides for the continuing performance over a period of time, each breach of that obligation begins the running of the statute of limitations anew[.]" *Singer Co. v. Baltimore Gas & Elec. Co.*, 79 Md. App. 461, 475 (1989) (concluding that BG&E's contract to supply Singer with electrical power was a continuing performance contract and that the statute of limitations began anew with each successive breach). Failure to assert a claim on an earlier breach of contract that occurred outside of the limitations period does not preclude a plaintiff from bringing a claim for a subsequent, separate, and independent breach of the same contract that occurred within the limitations period. *Commercial Union Ins. Co. v. Porter Hayden Co.*, 116 Md. App. 605, 656–57 (1997) (holding that "[w]here the duty to defend and potentially to indemnify might attach, the failure to preform that duty with respect to each separate claim would constitute a distinct breach"). The breach of multiple provisions of a contract are separate and distinct breaches. *See Commercial Union*, 116 Md. App. at 650 (quoting *Luppino v. Vigilant Ins. Co.*, 110 Md. App. 372, 376 (1996) (distinguishing "an action for breach of the duty to defend and one from breach of duty to pay")).

B. Appellate Review of Motions for Judgment

Appellants raised the statute of limitations defense in their joint motion for summary judgment and in their motions for judgment made at the end of Hudson's case and at the close of all evidence. To the extent that Appellants challenge the trial court's denial of

their motion for summary judgment,[21] that ruling was mooted by the court's subsequent rulings denying Appellants' motions for judgment made during trial. *See Prince George's Cty v. Morales*, ___ Md. App. ___, ___, No. 1308, September Term 2014, slip op. at 13–14 (filed Nov. 30, 2016) (citing *Adams v. Manown*, 328 Md. 463, 472 n.4 (1992)). "Accordingly, the issue is whether [Appellants were] entitled to judgment . . . as a matter of law on the record as it stands at the conclusion of the trial." *Id.*

Maryland Rule 2-519, which governs motions for judgment, provides "[a] party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence." We review the denial of a motion for judgment *de novo*, applying the same standard as the circuit court. *Ayala v. Lee*, 215 Md. App. 457, 467 (2013) (citation omitted). We must "consider all evidence and inferences in the light most favorable to the party against whom the motion is made." Maryland Rule 2-519(b). "Consequently, if there is any evidence, no matter how slight, that is legally sufficient to generate a jury question, the case must be submitted to the jury for its consideration." *Lowery v. Smithsburg Emergency Med. Serv.*, 173 Md. App. 662, 683 (2007) (citation omitted).

[21] Appellants incorporated arguments made in their motion for summary judgment into their motion for judgment and renewed motion for judgment. *See Laubach v. Franklin Square Hosp.*, 79 Md. App. 203, 216 (1990) (holding that "upon 'renewal' of a motion for judgment at the close of all the evidence, reference to a memorandum, previously submitted to the court, which sets forth with particularity the arguments in support of the motion is sufficient compliance with Maryland Rule 2–519(a)").

C. Appellants Failed to Demonstrate that All Claims Were Barred by the Applicable Three-year Limitations Period.

We begin our analysis by determining that the Limited Partnership Agreement specifically provides that AHP was obligated to pay for all Excess Development Costs including Operating Deficits incurred by the Lanvale Housing prior to Breakeven Operations. The parties are in agreement that Breakeven Operations never occurred, and, therefore, Appellants' obligations to pay Excess Development Costs continued through the period at issue. Appellants affirmed their intention to continue under the Limited Partnership Agreement and their obligations thereunder by entering into the Second Amendment and Disbursement Agreement dated January 1, 2011. Also, email correspondence among the guarantors from 2009 through 2012 acknowledge their obligation to pay the Excess Development Costs and their difficulty in paying the management company's funding requests.

Hudson filed their complaint on July 9, 2013. Applying Maryland's three-year statute of limitation for civil claims, Hudson could bring suit and seek relief only for claims arising after July 9, 2010. CJP § 5-101. The record demonstrates that AHP's failure to pay these Excess Development Costs began in 2007, but they also continued into the years 2009, 2012, 2013, and 2014. Appellants paid some of the Lanvale Towers's Operating Deficits, but only until November 2011.

Appellants rely on *MacBride v. Pishvian*, in support of their argument that the trial court erroneously denied their motion for judgment because, as was the case in *MacBride*, the statute of limitation could not be tolled where the "continuing harm" was no more than

the "ill effects" of a single breach that predated the applicable statute of limitations period. 402 Md. 572, 585 (2007). Here, according to Appellants, Hudson's claim that Lanvale Housing suffered Operating Deficits stemmed from the failure to reach Breakeven Operations in 2007.

In *MacBride*, the plaintiff MacBride filed a civil action against her landlord, the defendant, for damages arising from poor living conditions. *Id.* at 575. The jury returned a verdict in favor of MacBride awarding $100,000.00 in damages, and, by a special verdict, the jury also found that MacBride knew or should have known of her claim more than six years before MacBride filed her complaint. *Id.* at 577. The circuit court entered a JNOV in favor of the defendant on the grounds that MacBride's claim was barred by the statute of limitations. *Id.* The Court issued a writ of certiorari *sua sponte* to determine whether the circuit court failed to find the statute of limitations had tolled either under the continuation of events theory or the continuing harm rule.[22] *Id.* at 575. The Court held

[22] "This Court recognizes the 'continuation of events' theory, in which the statute of limitations is tolled during the existence of a fiduciary relationship between the parties." *MacBride*, 402 at 582–83 (citing *Dual Inc. v. Lockheed Martin Corp.*, 383 Md. 151, 173 (2004)). "The common reasoning in cases where we have applied the continuation of events theory 'is that a relationship which is built on trust and confidence generally gives the confiding party the right to relax his or her guard and rely on the good faith of the other party so long as the relationship continues to exist.'" *Id.* at 583 (quoting *Frederick Rd. Ltd. P'ship v. Brown & Sturm*, 360 Md. 76, 97–98 (2000)).

"This Court and the Court of Special Appeals have recognized the 'continuing harm' or 'continuous violation' doctrine, which tolls the statute of limitations in cases where there are continuous violations." *Id.* at 584 (citing *Shell Oil Co. v. Parker*, 265 Md. 631, 636 (1972); *Edwards v. Demedis*, 118 Md. App. 541, 562 (1997)). "Under this theory, violations that are continuing in nature are not barred by the statute of limitations merely because one or more of them occurred earlier in time." *Id.* at 584 (citing *Shell Oil*, 265 Md. at 636; *Duke Street Ltd. P'ship v. Bd. of Cty. Comm'rs*, 112 Md. App. 37, 50 (1996)).

that neither tolling theory applied because MacBride's complaint only alleged "continuing ill effects from the original alleged violation, and not a series of acts or course of conduct that would delay the accrual of a cause of action to a later date," and even if the continuing harm doctrine applied, it did not toll the statute of limitations in a situation in which the claimant had actual or constructive knowledge of the claim. *Id.* at 585. The Court noted that MacBride had notice of her claim over six years before filing her complaint, and accordingly, held that the circuit court correctly entered a JNOV for the defendant. *Id.* at 576.

Five years later, the Court of Appeals in applying the continuing harm doctrine to toll the statute of limitations in *Litz v. Maryland Dept. of Env't*, distinguished *MacBride* by pointing out that in *MacBride* "although the plaintiff may have suffered from an 'ongoing harm,' namely the 'deteriorating condition of her apartment,' her complaint alleges 'merely the continuing ill effects from the original alleged violation,'" whereas the continuing harm doctrine may have applied in *Litz* because the tortious conduct may have been "a series of acts or course of conduct that would delay the accrual of a cause of action to a later date.'"[23]

[23] On a different point not argued by the parties, the *MacBride* Court said in *dictum* that the discovery rule applied to the continuing harm doctrine, 402 Md. at 586, and as a consequence precluded recovery of damages resulting from violations that occurred within the statute of limitations period if the claimant had knowledge of the first violation outside of the statute of limitations. The *Litz* Court acknowledged that the "*dictum* in *MacBride* effectively—and inadvertently—eliminated the continuing harm doctrine." *Litz*, 434 Md. at 647–48 n.9 (2013). The Court clarified that the discovery rule in that context "is hereby disavowed and is not applicable to the continuing harm analysis." *Id.* (noting the Court's *ultimate* holding in *MacBride* did not rely on the dictum because the Court correctly held the continuing harm doctrine was not applicable in that case).

434 Md. 623, 647 (2013) (quoting *MacBride*, 402 Md. at 585). Litz owned a campground business on Lake Bonnie. *Id.* at 631. Litz filed a complaint against the town of Goldsboro and Caroline County for negligence, trespass, and other claims for failure to comply with a consent order requiring the defendants to take specific actions to clean up waste water pollution in Lake Bonnie that posed serious health threats, decreased Litz's property value, and destroyed her campground. *Id.* at 631–33. The circuit court dismissed Litz's complaint on statute of limitations grounds because Litz filed her suit in 2010, even though she had notice of her claim in 1996. *Id.* at 629. This Court affirmed. *Id.* at 636–37, 642. The Court of Appeals reversed in part and remanded, holding that a plaintiff may recover damages where the initial violation occurred outside of the statute of limitations, if the trier of fact finds the violations were ongoing and such violations fell within the three-year period prior to filing the lawsuit under the continuing harm doctrine. *Id*. at 646–47.

Hudson asserts that *Litz*, *MacBride*, and *Singer*, *supra*, all support a finding that Appellants' obligation to pay Excess Development Costs was a continuing contract obligation and each breach resulted in the statute of limitations starting anew.

In *Singer*, the Court of Appeals examined the application of the statute of limitations to breach of contract and negligence claims based on successive power outages occurring between June 8, 1984 and September 9, 1986. *Singer*, 79 Md. App. at 465. Singer, a high technology software engineering firm, contracted with BG&E for its electrical power. *Id.* at 467. Singer first experienced eight successive power outages of one to two minutes each in 1983. *Id.* at 467 n.2. The power outages stopped for eight months before they resumed

again in June 8, 1984 and continued through September 9, 1986. *Id.* at 468–69. These power outages lasted from one minute to a maximum of seven hours and caused significant disruption to Singer's operations. *Id.* Singer reported the power outages between June 8, 1984 and September 9, 1986 to BG&E when they occurred. *Id.* at 469. Finally, in August 1986, after experiencing service interruptions since 1983, BG&E notified Singer that equipment failure caused the frequent services interruptions. *Id.* Singer filed a breach of contract and negligence action against BG&E on June 7, 1987. *Id.* at 465. The trial court applied the discovery rule, found that the claims accrued immediately after the August 29, 1983 power interruption, and dismissed Singer's breach of contract and negligence claims as time-barred under the statute of limitations. *Id.* at 472. On appeal, this Court vacated the judgment, stating that when "a contract provides for the continuing performance over a period of time, each successive breach of that obligation begins the running of the statute of limitations anew." *Id.* at 475. We held that BG&E's contract to supply Singer with electrical power was a continuing performance contract and that the statute of limitations began anew with each successive breach. *Id*. at 462.

Returning to the case at bar, we hold that the Limited Partnership Agreement was a continuing contract and that each time Appellants received a funding request for Operating Deficits and failed to pay them, Appellants breached the Limited Partnership Agreement again and started the statute of limitation anew. *See Singer*, 79 Md. App. at 475. We agree with Hudson that *MacBride* is distinguishable. Unlike in *MacBride*, 402 Md. at 576, the damages incurred by Hudson were not merely "continuing ill effects from the original

alleged violation" in 2007 and, instead, the damages incurred—advances for the Excess Development Costs—were a result of Appellants' repeated and separate breaches of the Limited Partnership Agreement. The jury awarded damages for Appellants' breaches between 2012 through 2014 on Hudson's claims which fell within the three year statute of limitations period. Accordingly, the trial court's decisions denying Appellants' motions for judgment were proper because Hudson produced sufficient evidence that Appellants' breached the Limited Partnership Agreement within the applicable three-year statute of limitations period.

II.

Prior Material Breach

A. Motion for Judgment Notwithstanding the Verdict

On December 29, 2014, Appellants moved for judgment notwithstanding the verdict under Maryland Rule 2-532, contending that the jury's factual findings precluded Hudson from recovery. "A motion for judgment notwithstanding the verdict tests the legal sufficiency of the evidence and is reviewed under the same standard as a motion for judgment made during trial." *Nationwide Mut. Fire Ins. Co. v. Tufts*, 118 Md. App. 180, 190 (1997) (citing *Houston v. Safeway Stores, Inc.*, 109 Md. App. 177, 182–83 (1996)). We explained the role of the trial court in considering a motion under Rule 2-532(b) in *Blue Ink, Ltd. v. Two Farms, Inc.*:

> On review of a circuit court's decision to grant or deny a motion for JNOV, we are concerned with the dichotomy between the role of the judge, to apply the law, and the role of the jury, to decide the facts. As we explained in *Pickett v. Haislip,* 73 Md. App. 89, 98, 533 A.2d 287 (1987), "[o]nly where

> reasonable minds cannot differ in the conclusions to be drawn from the evidence, after it has been viewed in the light most favorable to the plaintiff, does the issue in question become one of law for the court and not of fact for the jury." Although we review the circuit court's legal findings *de novo, MBC Realty, LLC v. Mayor & City Council of Balt.,* 192 Md. App. 218, 233, 993 A.2d 1190 (2010), we must determine "whether on the evidence presented a reasonable fact-finder could find the elements of the cause of action by a preponderance of the evidence." *Univ. of Md. Med. Sys. Corp. v. Gholston,* 203 Md. App. 321, 329, 37 A.3d 1074 *cert. denied,* 427 Md. 65, 46 A.3d 406 (2012).

218 Md. App. 77, 91, *cert. denied*, 440 Md. 462 (2014). We review "'the trial court's decision to allow or deny judgment or JNOV to determine whether it was legally correct [,]' *Saville II,* 190 Md. App. at 343, 988 A.2d at 1065 (citing *Houghton v. Forrest,* 183 Md. App. 15, 26, 959 A.2d 816, 823–24 (2008)), while viewing the evidence and the reasonable inferences to be drawn from it in the light most favorable to the non-moving party[.]" *Scapa Dryer Fabrics, Inc. v. Saville*, 418 Md. 496, 503 (2011) (citing Maryland Rule 2-519). "We will reverse the denial of a motion for judgment notwithstanding the verdict 'only if the facts and circumstances permit but a single inference as relates to the appellate issue presented.'" *Exxon Mobile Corp. v. Albright*, 433 Md. 303, 333 (2013) (quoting *Jones v. State*, 425 Md. 1, 31 (2012)).

Here, the jury found that: (1) AHP "materially breached the contract partnership agreement by not funding excess development costs[;]" (2) this material breach occurred after July 9, 2010; (3) Hudson "materially breached the contract with [AHP] by their interference at Lanvale Towers[;]" and (4) the parties did not continue with the contract. The jury then awarded Hudson $1,958,409.00 in damages for breach of contract. Appellants requested that the trial court clarify the jury's verdict, and the court presented

the jury with the supplemental question: "Who does the jury find breached the contract first?" The jury found that Hudson breached first.

Appellants argue the trial court erred when it declined to "either disregard or revise the jury verdict based upon the purely legal issue – [Hudson's] . . . prior material breach." Asserting that under the governing Maine law, "a material breach of a contract by one party excuses performance by the other party," Appellants contend "[o]nce the jury found—as it did—that [Hudson] had first materially breach[ed] the Parties' contract and otherwise failed to prove that the Parties continued with it, Appellees were not entitled to recover for AHP's alleged non-performance because no performance was due." In their reply brief, Appellants state that they agree the jury's verdict is not inconsistent and can be reconciled with the evidence, but emphasize that the jury made factual findings that precluded recovery by Hudson as a matter of law.[24]

Hudson points out that the $1,958,409.00 verdict equals the exact amount Hudson advanced to Lanvale Housing from 2012 through 2014 to pay the Operating Deficits or Excess Development Costs after the parties signed the Disbursement Agreement and Second Amendment to the Limited Partnership Agreement on January 1, 2011. Hudson contends the jury understood when a prior material breach can excuse the other party's

[24] We note that Appellants raised the prior material breach defense in their motion for summary judgment, and both of their motions for judgment. According to Appellants, their assertion of the prior material breach defense was strengthened after the jury found that Hudson breached the contract first.

contract obligations under Maine law because, as was stated *supra*, the court instructed that:

> In order to find that one party's material breach of the contract excuses the other's, the other party's nonperformance, you must find that the breach is so material and important as to justify the injured party in regarding the whole transaction as at an end.

In awarding the $1,958,409.00 in damages, Hudson urges, the jury obviously found that Hudson's prior breach (which Appellants point out, according to the verdict sheet, was before July 9, 2010) did not excuse AHP from meeting its obligations to fund Excess Development Costs from 2012 through 2014. Hudson offers three different grounds upon which we can find the jury's verdict is consistent with the facts and the law: (1) Hudson's breach was for the benefit of the Lanvale Housing and, therefore, even if it was a material breach, it was not so material under Maine law to justify Appellants' non-performance; (2) Appellants continued to act under the Limited Partnership Agreement through 2012 after Hudson's 2009 breach and entered into a Second Amendment to the Limited Partnership Agreement dated January 1, 2011; and (3) the jury could have found that the prior breach by Hudson was not "material," because if the jury awarded damages "it must have found that whatever breach Hudson committed prior to AHP's breach did not excuse AHP's failure to fund Operating Deficits." We determine that Hudson's last contention is a restatement of the first, and conclude, as explained in the following analysis, that the jury could have reasonably found by its verdict that Hudson's breach was not so material as to end the contract, or that Appellants waived the prior material breach defense by acting

inconsistently with the right to excuse its performance under the Limited Partnership Agreement, or both.

As the trial court correctly instructed the jury in this case, under Maine law "[a] material breach of contract 'is a non-performance of a duty that is so material and important as to justify the injured party in regarding the whole transaction as at an end.'" *Cellar Dwellers, Inc. v. D'Alessio*, 993 A.2d 1, 5–6 (Me. 2010) (quoting *Jenkins, Inc. v. Walsh Bros., Inc.*, 776 A.2d 1229, 1234 (Me. 2001)) (affirming a finding of material breach and excusing the contractor's performance under the contract where the homeowner *prevented* the contractor's performance) (emphasis added); *but see Jenkins, Inc. v. Walsh Bros., Inc.*, 776 A.2d at 1235 (affirming the trial court's finding of the general contractor's material breach for failing to provide working conditions and excusing subcontractor for failing to complete performance under the agreement). "Whether a material breach has occurred is a question of fact" properly submitted to the fact-finder. *Jenkins*, 776 A.2d at 1234–35 (appealing a judgment after a bench trial on the merits; therefore, we do not apply the same standard of review applied to factual findings as in *Jenkins*).

In *Associated Builders, Inc.*, retail business owners, William and Benjamin Coggins (the "Cogginses"), contracted with Associated Builders to perform construction work. 722 A.2d 1278, 1279 (1999). The parties resolved a dispute over Associated's compensation by entering into an agreement in which Associated would forfeit $20,005.54 if the Cogginses paid $50,000.00 in two equal payments on two specified dates. *Id.* The Cogginses made the first payment on time but made the second payment three days late.

Id. Associated accepted the second payment and then sued the Cogginses for the $20,005.54, alleging that the Cogginses materially breached the agreement. *Id.* On appeal, the Supreme Judicial Court held that the Cogginses' late payment was not a material breach because Associated was not prejudiced or "deprived of the benefit it reasonably expected." *Id.* at 1281.

In the case *sub judice*, Hudson breached Article X of the Limited Partnership Agreement—which expressly prohibited limited partners from taking part in the management and control of Lanvale Housing—in 2009 when it coordinated with CT Group to prepare Lanvale Towers for the 2009 HUD inspection, and the jury found as much. In preparation for the 2009 HUD inspection, Hudson contacted AHP and CT Group to identify whether Lanvale Towers required any repairs. CT Group presented an estimate and, according to Hudson, AHP was not willing to pay for the repairs. As a result, Hudson became heavily involved with the preparation for the 2009 HUD inspection including making site visits and coordinating repairs with CT Group. Hudson continued discussions to prepare a budget for the repairs with CT Group, which revealed additional problems with the property.

Although the jury found that Hudson materially breached the contract, its finding does not mandate that the trial court vacate the jury's verdict upon Appellants' assertion of a prior material breach defense. The jury could reasonably have found that Hudson's breach was not so egregious so as to mark the end of the Limited Partnership Agreement. Moreover, even where a party materially breaches a contract such that the other party's

nonperformance may be excused, the non-breaching party waives its right to end its performance by "do[ing] something inconsistent with the right or that party's intention to rely on it." *Id.* at 1281.

In *Associated Builders, Inc.*, although the Supreme Judicial Court held that the Cogginses' breach was not material, the court went further to state that even if the breach were material, Associated waived its right to enforce the forfeiture of $20,005.54 when it accepted the late payment. *Id.* The court determined that accepting the late payment constituted waiver because Associated acted "inconsistent with [its] right" to enforce the forfeiture. *Id.*

Similarly, in the present case, Appellants acted inconsistent with their right to terminate the contract after Hudson's 2009 breach by continuing to act as general partner, thereby waiving their right to assert a prior material breach defense. *See id.* at 1281. Appellants took no action to withdraw as general partner or issue a notice of default after Hudson's 2009 breach. The record demonstrates that AHP continued to act as general partner and Appellants acknowledged their obligations under the Limited Partnership Agreement through 2012 despite Hudson's 2009 material breach. As late as October 2012, Appellant Liberty acknowledged Appellants' collective obligation to pay "all past amounts due to . . . Hudson" and expressed the intention to "work with [Hudson] to get this solution finalized."

Generally we will not reverse a jury verdict that is inconsistent unless there is proof of "actual irregularity." *Eagle–Picher v. Balbos,* 84 Md. App. 10, 35–36 (1990). Although

Appellants insist that they are not challenging the jury verdict because it is "inconsistent," they cannot cast loose the applicable case law with this distinction in nomenclature. Clearly, in arguing that the jury made factual findings that precluded recovery by Hudson as a matter of law, Appellants are also contending that the jury's award of damages to Hudson for Appellants' breach is inconsistent with the jury's finding that the parties did not continue with the contract and that Hudson breached first.

In *Edwards v. Gramling Eng'g Corp*., the Court of Appeals upheld a verdict ordering the return of certain property, even though the jury found for the defendant on the tortious interference and conversions claims. 322 Md. 535, 542–52 (1991). In its analysis, the Court explained as a guiding principle that, "[i]n reconciling a jury's answers to specific interrogatories, we should assume that the jury was rational and consistent, rather than irrational or inconsistent. Our quest should be for a view of the case which would make the jury's findings consistent." *Id.* 322 Md. at 547-48.

The Court of Appeals's decision in *Turner v. Hastings*, 432 Md. 499 (2013), is instructive. There, the jury completed a verdict sheet with four questions, determining that (1) the defendant was negligent; (2) the plaintiff was not contributorily negligent; and (3) the plaintiff sustained no injuries. *Id*. at 502–03. The instruction at the end of the third question directed the jury not to answer question 4 if the jury's response to 3 was "no." Question 4 asked "what damages has the Plaintiff proven by a preponderance of the evidence?" Nevertheless, the jury answered question 4, awarding plaintiff damages for medical expenses, loss of income, and property damage. *Id.* The defendant argued that

the verdict in that case was irreconcilably inconsistent and could not be allowed to stand because the jury found that the plaintiff had not suffered any injury, which should have required a verdict for the defendant and ended deliberations. Instead, the jury awarded the plaintiff damages. *Id.* at 516.

The Court held that the jury's answers to questions 3 and 4 were not irreconcilably inconsistent, explaining that the jury's answer to question 3 could have meant the jury did not find the plaintiff sustained any personal physical injury. *Id.* at 517–18. "Such an interpretation is consistent with how the jury subsequently awarded damages." *Id.* at 517. The Court instructed that "we have specifically instructed that we will attempt to reconcile a jury's answers because '[o]ur quest should be for a view of the case which would make the jury's findings consistent.'" *Id*. (citing *Edwards*, 322 Md. at 548).

In affirming the trial court's revision of the jury verdict to permit the jury's damage award, Judge Adkins, writing for the Court, observed that "it was apparent to the trial judge that the numbers revealed a deliberate thought process by the jury in awarding a specific amount of damages that the jury believed to be proper based on the evidence of the case." *Id*. at 515. So too, the trial court in the case *sub judice* recounted at the end of the hearing on the JNOV:

> I think the jury knew exactly what they [were] doing and I think that the verdict should remain. . . . I tried to figure out where they got the number from, and in finding out where they got the number from that told me what the intent of the jury was. They thought about it. They did not summarily give the Plaintiff[s] what they asked for, . . .but first place to look was what did they give them and how did they get that number. That told me what facts they believed.

The trial court elaborated further in her memorandum opinion:

> [Hudson]'s witnesses testified that after November 2011, AHP stopped funding those [O]perating [D]eficits, and from the period March 2012 until the trial in 2014, Hudson funded the deficits, totaling $1,958,409.00. [Appellants] did not reject the payment.
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> * * *
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> [T]he jury in this case did not award all what Plaintiffs' requested. In 2009, Plaintiffs asked for damages in the amount of $250,000, but were only awarded damages for 2012, 2013 and 2014 which is the exact amount of Excess Development Costs funded by Hudson since 2012 when Defendants materially breached the contract. . . . The jury recognized Plaintiffs' right to recover and their intention was to reimburse Plaintiffs for the amount they paid to fund the Excess Development Costs[.]

Clearly, the trial court found that the specific award of damages by the jury in this case "revealed a deliberate thought process[,]" *Turner*, 432 Md. at 515; namely, that despite Hudson's prior breach, Appellants were not excused from performing under the Limited Partnership Agreement.

Appellants also argue that the jury's finding that the parties did not continue with the contract cannot support a determination that Appellants then breached the contract. But the record establishes several very different explanations that render the verdict simply inconsistent, and not irreconcilably inconsistent. *Id.* at 516.

As the trial court found in its memorandum, the jury could have found that Hudson failed to prove that the parties continued the contract by ratifying the provisions of the Limited Partnership Agreement in a Second Amendment entered in 2011. That would not, according to the court, "negate the parties' ongoing recognition and responsibilities of the original agreement."

The verdict sheet could also support Hudson's contention that even if the jury found that the parties did not continue the contract at the time Hudson initially breached the Limited Partnership Agreement, the parties were free to enter into a new agreement via the Second Amendment to the Limited Partnership Agreement ("Second Amendment") and Disbursement Agreement on January 1, 2011. At a minimum, Appellants acted inconsistently with the right to excuse its performance under the Limited Partnership Agreement. Indeed, the record demonstrates that AHP continued to act as general partner and that Appellants acknowledged their obligations under the Limited Partnership Agreement through 2012 despite Hudson's 2009 material breach. As late as October 2012, Appellant Liberty acknowledged Appellants' collective obligation to pay "all past amounts due to . . . Hudson" and expressed the intention to "work with [Hudson] to get this solution finalized."

Alternatively, as Hudson points out, the jury could have reasonably understood the question of whether the parties continued with the contract to ask whether both parties continued performing, and given that in the answer to the prior question they found that AHP breached, AHP did not "continue" with the contract. All of these interpretations demonstrate that it is possible to find "'a view of the case which would make the jury's findings consistent.'" *Turner*, 432 Md. at 517 (citing *Edwards*, 322 Md. at 548).

Finally, Appellants argue that the instructions to the jury did not specifically explain the effect of a finding of a prior material breach. Appellants appear to be arguing that the trial court should have instructed specifically that if the jury were to find that Hudson

breached the contract first and that the parties did not continue the contract, then Appellants could not recover as matter of law. We disagree and find this argument unavailing for several reasons. First, we conclude that the jury instructions were clear, and we assume the jury followed those instructions. *Collins v. Nat'l R.R. Passenger Corp*., 417 Md. 217, 252 (2010) (quoting *State v. Moulden*, 292 Md. 666, 678 (1982) ("Jurors are presumed to have followed the instructions provided to them by the court, "[o]ur legal system necessarily proceeds upon" that presumption."). Clearly here, as in *Associated Builders*, *supra*, the jury did not find that Hudson's material breach of the Limited Partnership Agreement was "'so material and important as to justify [Appellants] in regarding the whole transaction [was] at an end.'" 722 A.2d at 1280 (citing *Down East Energy Corp. v. RMR, Inc.*, 697 A.2d 417, 421 (1997)). As set out above, there was sufficient evidence in the record to support a jury's finding and verdict that either (1) Hudson's breach was not so material as to end the contract, or (2) Appellants waived the prior material breach defense by acting inconsistently with the right to excuse its performance under the contract, or both. Plainly, the verdict demonstrates the jury found that Appellants acted "inconsistent with the right" to end their performance under the Limited Partnership Agreement. *See id.* at 1281.

We hold that the jury's verdict did not require, as a matter of law, that Hudson's prior material breach precluded recovery by Hudson. We affirm the circuit court's denial of Appellants' motion for JNOV.

III.

Excess Development Costs

Appellants contend that they did not breach Section 8.08(a)(ii) of the Limited Partnership Agreement by failing to pay the Excess Development Costs because there were no Excess Development Costs within the meaning of the term as defined in the Limited Partnership Agreement. Furthermore, Appellants maintain that Hudson's advances were actually capital contributions.

Appellants argue that Hudson's advances cannot be construed as loans under the Limited Partnership Agreement because the agreement provides the partners only two means—by loan or Special Additional Capital Contribution—to contribute money to Lanvale Housing. The Limited Partnership Agreement provides for three types of loans—Mortgage Loans,[25] Operating Deficit Loans, and Partner Loans. Appellants eliminate Operating Deficit Loans as a possibility because such loans can only be made by the general partner after Breakeven Operations (because the general partner is obligated to make those payments prior to Breakeven Operations). Appellants then argue that the advances cannot be characterized as Partner Loans because the Limited Partnership Agreement requires that the parties execute a loan document with the terms of the loan

[25] Appellants' brief did not analyze why Hudson's advances were not a Mortgage Loan, but a review of the definition explains why. Article II of the Limited Partnership Agreement narrowly defines Mortgage Loan as "the mortgage loan in the anticipated principal amount of $16,135,000.00 to be made to the Partnership by the Lender which will be evidenced by the mortgage note or deed of trust notes to be given by the Partnership to the Lender[.]"

(e.g., interest rate and time period of the loan) and no such documents were executed.[26] Appellants then leap to the conclusion that the only other means available to Hudson to contribute money to Lanvale Housing under the Limited Partnership Agreement was through Special Additional Capital Contributions. Appellants maintain that their conclusion is supported by the Limited Partnership Agreement's definition of Excess Development Costs as "all funds in excess of the proceeds of the Mortgage Loan and Capital Contributions." Appellants deduce from this definition that there were no Excess Development Costs because Hudson's advances must have been capital contributions and Excess Development Costs are defined as funds in excess of revenue plus capital contributions. Appellants' argument undertakes to prove too much. We agree with Hudson's assertion that Appellants' logic is circular and starts from a false premise—that the payments could only be a loan or a capital contribution.

Hudson contends that their payments were advanced to mitigate losses from Appellants' breach of contract. Hudson asserts that Appellants' breach put them at risk of losing future LIHTC tax credits. Hudson points out that the trial court gave the jury instructions on the requirements to mitigate losses[27] and that the jury awarded Hudson

[26] Appellants also contend that Hudson's advances cannot be construed as loans under the common law because Hudson failed to offer any proof of two elements required to establish a loan under the common law—mutual assent between the parties and consideration.

[27] The trial court instructed the jury:

> A person who has been injured or suffered a loss, has a duty to exercise reasonable care to reduce the extent of injuries or damages resulting

damages in the amount of their advances for Excess Development Costs incurred between 2012 and 2014.

"The doctrine of mitigation of damages, or avoidable consequences, encourages plaintiffs to take reasonable steps to minimize losses caused by a defendant's negligence by prohibiting recovery for any damages that the plaintiff could reasonably have avoided." *In re Hannaford Bros. Co. Customer Data Sec. Breach Litig.*, 4 A.3d 492, 496 (Me. 2010). "As a general rule, a plaintiff has a 'duty' to use reasonable efforts to mitigate his or her damages." *Marchesseault v. Jackson*, 611 A.2d 95, 99 (Me. 1992) (footnote omitted) (citing *Lindsey v. Mitchell*, 544 A.2d 1298, 1301 (Md. 1988)); *see also Doughty v. Sullivan*, 661 A.2d 1112, 1122 (Me. 1995).

In *Marchesseault*, a contractor entered into an oral agreement to construct the foundation for a homeowner's new home. 611 A.2d at 96. After learning of defects in the contractor's work, the homeowner refused to allow the contractor to fix or complete his work. *Id.* at 96-97. The homeowner, instead, hired another contractor to complete the original contractor's unfinished work. *Id.* at 97. Upon completion of the home, the

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> from the injury and to take such steps as are reasonable to affect or cure or reduce their severity. When a duty to reduce damages is asserted, the damages that would have otherwise been awarded to the Plaintiff may be reduced when the Defendant proves, more likely than not that, A, the Plaintiff could have reduced his damages, and, B, the amount by which damages – I'm sorry – the amount by which the damages would otherwise be awarded the Plaintiff should be reduced because the Plaintiff failed to reduce damages.
>
> The Plaintiff may recover a reasonable sum to [compensate] the Plaintiff for any losses to the Plaintiff incurred during a reasonable effort to reduce damages than might have otherwise occurred.

homeowner filed a negligence action seeking damages in the amount of the cost to repair the defects and complete the work. *Id.* The trial court found for the homeowner and awarded damages for the cost expended to repair and complete the work. *Id.* The contractor challenged the award of damages, arguing that the homeowner failed to mitigate damages, which is an affirmative defense to recovery. *Id*. The Supreme Judicial Court of Maine held that the homeowner properly mitigated damages by hiring another contractor to remedy the major construction defects and complete construction on the house before filing suit to recover damages from the first contractor. *Id*. at 99.

First, we address Appellants' argument that the advances were, by deductive reasoning, capital contributions, and we flatly disagree. Appellants' argument that the advances were not loans is a non sequitur because Hudson did not assert that the advances were Partner Loans and made no efforts to structure the payments as Partner Loans. Pursuant to Section 5.01(c)(iv) of the Limited Partnership Agreement, a Limited Partner "may, *in its sole and absolute discretion*, make a special additional Capital Contribution to the Partnership [Lanvale Housing]" and such contributions are only when "[i]f, in any fiscal year of the Partnership, a Limited Partner's Capital Account balance may be reduced to or below zero." (Emphasis supplied). Along with each advance, Hudson sent a letter to Appellants explaining that AHP was neglecting its obligation to fund all Excess Development Costs; that the advances were made "to avoid a materially adverse situation;" and that Hudson expected repayment for all amounts advanced. Most importantly, Hudson expressly stated in those letters that neither the "Operating Deficit Advances nor the

March 2012 Advance[] has been advanced as a capital contribution to the Partnership, nor to fulfill any contractual obligation of the limited partners, nor to discharge any of [Appellants'] obligations to the Partnership." (Emphasis added). Hudson as limited partner had the "sole and absolute discretion" to make a Special Additional Capital Contribution, and Hudson expressly notified Appellants with each advance that it was not exercising such discretion and that the advance was not a capital contribution. Additionally, there was no evidence in the record to suggest that Hudson's Capital Account balance was at or below zero, the second of two conditions required to effect the provision for Special Additional Capital Contributions.

Next, it is clear from the record that Lanvale Housing had extensive Excess Development Costs, which were unequivocally the obligation of Appellants. On a monthly basis, CT Group provided a financial analysis and funding request to Appellants and Hudson.[28] Under the Limited Partnership Agreement, Excess Development Costs include Operating Deficits, which are defined as "the amount by which revenues of the Partnership from rental payments made by tenants of [Lanvale Towers], and all other revenues of the Partnership (other than Capital Contributions . . .), *is exceeded by the sum of all the operating expenses*, *including . . . operating and maintenance expenses*[.]" (Emphasis added.) Mr. Tini and Mr. Clauer testified that the funding requests were for electricity and

[28] As mentioned *supra*, CT Group's financial analysis detailed Lanvale Towers's accounts receivable (i.e., rent) and accounts payable (i.e., bills) and a funding request to pay for any Operating Deficits—the amount that the accounts payable exceeded the accounts receivable.

water bills and to pay Lanvale Towers's employees—in other words, operating expenses and necessities for any housing complex. Hudson's advances were in the form of wire transfers made directly to CT Group to cover those funding requests.

We agree with Hudson that the jury viewed the advances as Hudson's loss mitigation efforts and awarded Hudson damages accordingly. As *Marchesseault* demonstrates, Maine common law plainly requires a plaintiff to mitigate damages in order to recover, *see id.* 611 A.2d at 99, and that is what Hudson did here. Hudson's concerns and swift action were warranted: CT Group received multiple utility shut-off notices. If not acted upon, the utility shut-off may have led to other unintended consequences—loss of compliance with future REAC inspections, loss of future LIHTC tax credits, risk to Hudson's investor—and further financial peril. When it became clear that Appellants would no longer fund the Operating Deficits in February 2012, Hudson began advancing funds to CT Group to cover the Operating Deficits. Hudson's operating account records and related testimony demonstrate that Hudson advanced funds in direct response to CT Group's funding requests to cover the Excess Development Costs. The record also establishes that Hudson funded Excess Development Costs totaling $1,958,409.00 from February 2012 through 2014. Along with each advance, Hudson sent a letter to Appellants explaining that AHP was neglecting its obligation to fund all Excess Development Costs; that the advances were made "to avoid a materially adverse situation;" and that Hudson expected repayment for all amounts advanced. Hudson advanced the funds recognizing the need to do so as an "emergency" and that failure to do so would result in "danger to

human lives, [and] health and safety violations." Hudson expressly stated that neither the "Operating Deficit Advances nor the March 2012 Advance[] has been advanced as a capital contribution to the Partnership, nor to fulfill any contractual obligation of the limited partners, nor to discharge any of [Appellants'] obligations to the Partnership." We hold that, contrary to Appellants' argument, the trial court and jury treated the advances as mitigation of damages. The trial court provided the jury with instructions on mitigation of damages and in answering question 4 on the verdict sheet, the jury awarded "damages" in the amount of the Excess Development Costs funded by Hudson in 2012, 2013, and 2014. Accordingly, we conclude there was sufficient evidence in the record to support the damages award.

IV.

Voluntary Payment Rule

Finally, Appellants argue that Hudson was barred from recovering the advances for Lanvale Towers's Operating Deficits pursuant to the voluntary payment rule because (1) Hudson was not obligated to advance the funds under the Limited Partnership Agreement and (2) Hudson made the payments voluntarily. To support their argument, Appellants point to Section 8.08(a)(iii) of the Limited Partnership Agreement which authorized the Special Limited Partner, Hudson SLP, LLC, in the event the General Partner, AHP, failed to pay any Excess Development Costs, to "use its sole discretion to cause the Partnership to use the Investment Partnership's Capital Contributions in an amount not in excess of the total of any remaining unpaid installments of the Development Fee due . . . to meet such

obligations of the General Partner[.]" In the context of this case, we understand Appellants to be challenging the trial court's denial of their Renewed Motion for Judgment in which Appellants raised the voluntary payment rule defense.

In response, Hudson argues that they were not acting voluntarily, and instead, had an obligation to mitigate damages to preserve their ability to recover. Hudson argues that Appellants' failure to fund the Operating Deficits placed Hudson in a position where they were required to act to avoid safety violations that posed a danger to human lives, as well as to avoid incurring a dramatically greater penalty, including the inability to recapture tax credits received through the LIHTC Program.

The voluntary payment rule provides that "money voluntarily paid cannot be recovered back." *Parker v. Lancaster*, 24 A. 952, 952 (Me. 1892); *see also Inhabitants of City of Biddeford v. Benoit*, 147 A. 151, 156 (Me. 1929) (quoting Williston on Contracts, vol. III, § 1590) ("Recovery may be had for money paid under a mistake of fact but not when paid under a mistake of law[.]"). However, the Supreme Judicial Court of Maine "[has] said that a person satisfying the debt of another is not acting voluntarily or officiously if he has an interest to protect." *Nappi v. Nappi Distributors*, 691 A.2d 1198, 1200 (Me. 1997) (quoting *North East Ins. Co. v. Concord Gen. Mut. Ins. Co.*, 433 A.2d 715, 719 (Me. 1981)).

In *Nappi,* Nicholas Nappi made two loans to Nappi Distributors—a company he co-founded—and unrelated to those loans, Mr. Nappi authorized construction work on a house. 691 A.2d at 1199. Mr. Nappi died, and Nappi Distributors continued to pay for the

construction on the house after his death. *Id.* The personal representative for Mr. Nappi's estate notified Nappi Distributors that she had not authorized further work, requested Nappi Distributors not make further payments, and warned that any additional payments were at the risk of the company. *Id.* Six months later, Nappi Distributors made a partial repayment of the loans to Mr. Nappi's estate but claimed "it was entitled to a setoff for the remaining amount because of various payments" it made, including continued payments on the construction on the house. *Id.* The personal representative disputed the setoff and filed an action to recover the balance on the loans. *Id.* The trial court found that Nappi Distributors was entitled to a setoff by equitable subrogation for the construction payments. *Id.* On appeal, the court addressed whether the voluntary payment rule precluded Nappi Distributors from receiving a setoff under equitable subrogation. *Id.* at 1200. The court defined the voluntary payment rule in this context as "a party is not entitled to subrogation when a party "'voluntarily or officiously satisfies another's obligation[] under no legal or moral obligation to do so or with no interest of his own to protect.'" *Id.* (quoting *North East*, 433 A.2d at 719). The court noted that "one is not a volunteer if he pays 'under a mistaken belief that he had an obligation to pay or interest or protect.'" *Id.* The appellate court affirmed the judgment, determining that Mr. Nappi was primarily liable on the house construction debt and that Nappi Distributors did not act voluntarily or officiously in making the payments to complete the construction because the payments were "in an attempt to support its own reputation and interest." *Id.* at 1200.

Here, the trial court correctly declined to apply the voluntary payment rule defense. As discussed, *supra*, Appellants were obligated to fund the Excess Development Costs under the Limited Partnership Agreement. Like Nappi Distributors, Hudson was not acting voluntarily or officiously; instead Hudson was acting to protect its own interest by mitigating its damages as a result of Appellants' non-payment. *See id*. Hudson's duty to mitigate damages necessarily vitiates Appellants' application of the voluntary payment rule. Hudson cannot simultaneously have a duty to mitigate damages and be barred from recovering damages under the voluntary payment rule for paying Appellants' debts. Therefore, we conclude the voluntary payment rule does not apply to the advances made by Hudson to pay the Excess Development Costs between 2012 and 2014, and the trial court correctly denied Appellants' motion for judgment on this ground.

JUDGMENT AFFIRMED. COSTS TO BE PAID BY APPELLANTS.