

IN THE SUPREME COURT OF MISSOURI

GARY S. HEIFETZ, JEFFREY S. GERSHMAN, )  
STEVEN B. SPEWAK, JEAN MAYLACK, )  
FALLON MAYLACK, STEVEN M. STONE, )  
Individually and as Personal Representatives of )  
THE ESTATE OF SIDNEY L. STONE, and )  
SIDNEY M. STONE, )  
Respondents, )  
) )  
vs. ) Case No. SC96514  
) )  
APEX CLAYTON, INC., )  
Appellant. )

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Appeal from the Circuit Court of St. Louis County  
Twenty-First Judicial Circuit  
The Honorable Robert S. Cohen, Circuit Judge

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APPELLANT’S SUBSTITUTE OPENING BRIEF

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Argument

I. The trial court erred in submitting Limited Partners’ breach of fiduciary duty claim to the jury and overruling Apex’s motion for judgment notwithstanding the verdict because Limited Partners failed to demonstrate the existence of any “fiduciary duty” separate and independent of contractual obligations, in that their fiduciary duty claim arose out of an alleged obligation to make annual cash distributions from Available Cash Flow under Section 9.2A of the Partnership Agreement ..... 29

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notwithstanding the verdict because (1) punitive damages are not available for Limited Partners’ breach of contract claim; and (2) they did not have another cause of action for which punitive damages are available (and, even if they did, they failed to recover actual damages on any such claim—a pre-condition to recovering punitive damages), in that, as explained in Points I and II above, they did not have a submissible breach of fiduciary duty claim and, in any event, sought and received only nominal damages on that claim ..... 36

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## JURISDICTIONAL STATEMENT

This is an appeal from a final judgment entered by the Circuit Court of St. Louis County on October 26, 2015. (Legal File (“LF”) 924-26; A37-39.) In this case, certain limited partners (“Limited Partners”) of a Missouri limited partnership sued the general partner Apex Clayton, Inc. (“Apex”), alleging they were entitled to recover compensatory damages under a breach of contract theory and to recover the same compensatory damages under a breach of fiduciary duty theory. (LF 21-25; A16-20.) Limited Partners also sought contract-based attorneys’ fees and assessment of punitive damages against Apex for breach of fiduciary duty. (LF 23-25; A18-20.)

The final judgment from which Apex appeals required Apex to pay Limited Partners: (1) contract damages totaling \$2,804,689, (2) contract-based attorneys’ fees and expenses totaling \$313,030.85, (3) nominal damages for breach of fiduciary duty, and (4) punitive damages for breach of fiduciary duty totaling \$2,800,000. (LF 924-26; A37-39.) While Apex’s appeal was being briefed before the Court of Appeals, Eastern District, Apex satisfied the contract damages and attorneys’ fee portions of the judgment, without prejudice to its rights to seek review of the judgment’s award of nominal damages and \$2,800,000 in punitive damages. (*Heifetz, et al. v. Apex Clayton, Inc.*, Case No. ED104026, Notice of Partial Settlement of Appeal, filed Sept. 9, 2016; A43-44.)

After briefing and oral argument, the Court of Appeals issued an opinion dismissing Apex’s appeal on grounds that Apex filed its notice of appeal too late. *Heifetz, et al. v. Apex Clayton, Inc.*, 2017 WL 1323923, Case No. ED104026 (Mo. App.



E.D. April 11, 2017). This Court granted transfer and has jurisdiction under Article V, Section 10 of the Missouri Constitution.

This Court has jurisdiction to hear the merits of the appeal because Apex timely filed its notice of appeal. As relevant here, the general statute dealing with civil appeals, provides, “Any party to a suit aggrieved by any judgment of any trial court in any civil cause ... may take his or her appeal to a court having appellate jurisdiction from any ... (5) [f]inal judgment in the case....” § 512.020, RSMo. A “final judgment” is a “judgment adjudicating all the claims and the rights and liabilities of all the parties.” *State ex rel. Koster v. ConocoPhillips Co.*, 493 S.W.3d 397, 401 (Mo. banc 2016) (quoting Rule 74.01); *Sanford v. CenturyTel of Missouri, LLC*, 490 S.W.3d 717, 719 (Mo. banc 2016) (“An appealable judgment resolves all issues in a case, leaving nothing for future determination.”) (quoting *Gibson v. Brewer*, 952 S.W.2d 239, 244 (Mo. banc 1997)).

On June 26, 2015, following a jury trial, the trial court entered an order entitled “Judgment” (the “June 26 Judgment”), which did not mention or otherwise dispose of Limited Partners’ claim for attorneys’ fees. (LF 11-12, 593-94.) In addition, the June 26 Judgment did not include a Rule 74.01(b) “no just reason for delay” determination.<sup>1</sup> (LF 593-94.) As a result, the claim for attorneys’ fees remained pending, the action was

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<sup>1</sup> Rule 74.01(b) provides, “When more than one claim for relief is presented in an action ..., the court may enter a judgment as to one or more but fewer than all of the claims ... only upon an express determination that there is no just reason for delay.”

not terminated, and the June 26 Judgment was not an appealable judgment and was subject to revision at any time. *See* Rule 74.01(b) (“In the absence of such determination...the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.”); *Koster*, 493 S.W.3d at 401; *Sanford*, 490 S.W.3d at 719.<sup>2</sup>

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<sup>2</sup> For Court of Appeals cases holding that an order, though titled a judgment, is not a judgment from which an appeal lies if it does not resolve a request for attorneys’ fees, see *State ex rel. Kinder v. Dandurand*, 261 S.W.3d 667, 671 (Mo. App. W.D. 2008) (an amended judgment that did not address a motion for attorneys’ fees and an attorney’s lien “did not dispose of all the issues pending between the parties” and, therefore, “was not a final judgment”); *Rheem Mfg. Co. v. Progressive Wholesale Supply Co.*, 28 S.W.3d 333, 343 (Mo. App. E.D. 2000) (judgment failing to dispose of “requests for prejudgment interest and attorney’s fees” was not final, and trial court retained jurisdiction to enter a subsequent order and amended judgment); *Bituminous Cas. Corp. v. Moore*, 64 S.W.3d 356, 357 (Mo. App. S.D. 2002) (“Because the portion of Bituminous’s declaratory judgment count seeking attorney fees is left open for future determination, and the trial court did not make the appealability determination under Rule 74.01(b), a final and appealable judgment does not exist; consequently, this court is without jurisdiction.”); *Ackerson v. Runaway II, Inc.*, 961 S.W.2d 933, 934-35 (Mo. App. S.D. 1998) (“judgment” was not appealable because third-party claims for attorneys’ fees were left open, and trial court did not invoke exception stated in Rule 74.01(b)).

On July 24, 2015, Limited Partners moved for award of attorneys' fees and expert costs. (LF 12.) On July 27, 2015, Apex moved for judgment notwithstanding the verdict or for new trial. (LF 13.) On October 26, 2015, the trial court denied Apex's motion for judgment notwithstanding the verdict or for new trial and granted Limited Partners' motion for attorneys' fees and expert costs in an "Order," which stated that "[a]n Amended Judgment is entered separately adding Judgment for attorneys' fees and expenses." (LF 14, 921-23.) On the same day, the trial court separately entered an "Amended Judgment" (the "October 26 Amended Judgment"). (LF 924-26; A37-39.)

The October 26 Amended Judgment included the same language as the June 26 Judgment and added three paragraphs awarding attorneys' fees and expert costs in favor of Limited Partners and against Apex (*id.*), thus resolving all claims of the parties and constituting the first and only true "judgment" in the case within the meaning of Rule 74.01. *See Koster*, 493 S.W.3d at 401; *Sanford*, 490 S.W.3d at 719.

On November 10, 2015, less than 30 days after entry of the October 26 Amended Judgment, Apex timely moved for judgment notwithstanding the verdict, for new trial, or to amend the judgment. (LF 16, 927-59.); Rule 78.04 ("Any motion for new trial and any motion to amend the judgment shall be filed not later than thirty days after the entry of judgment."); Rule 72.01(b) ("Not later than thirty days after entry of

judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside...”).<sup>3</sup>

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<sup>3</sup> Even if the June 26 Judgment had been a “judgment” within the meaning of Rule 74.01, Apex’s November 10 after-trial motion would still have been authorized and timely filed. The October 26 Amended Judgment did not specify that it should be treated as anything other than a new judgment (LF 924-26; A37-39) and therefore would be deemed “a new judgment for all purposes” under the plain language of Rule 78.07(d). *See* Rule 78.07(d) (“Unless an amended judgment shall otherwise specify, an amended judgment shall be deemed a new judgment for all purposes.”). Thus viewed, the October 26 Amended Judgment would have replaced the June 26 Judgment and rendered it a “nullity.” *See State ex rel. Missouri Parks Ass’n v. Missouri Dept. of Natural Resources*, 316 S.W.3d 375, 382 (Mo. App. W.D. 2010) (“the Initial Judgment was rendered a nullity with the entry of the First Amended Judgment”). And “the trial court again [would have had] 30 days in which to open, vacate, set aside, or amend the new judgment, and any party may again file any authorized after-trial motion within that same 30-day period.” 17 Mo. Prac., Civil Rules Practice § 78.07:5 (2015 ed.); *see also id.* (discussing the history and rationale of the amendments to what is now Rule 78.07(d); noting that the amended rule is intended to avoid significant uncertainty resulting “from case to case and depending in large part upon the appellate court’s perception of whether the changes in the trial court’s ruling were of such significance that the amended judgment was a new judgment or a now final amended version of the original judgment”).

The trial court never ruled on Apex's November 10, 2015 motion. (LF 16.) Because the trial court never ruled on Apex's November 10, 2015 authorized, after-trial motion, it was deemed overruled, and the October 26 Amended Judgment became final on February 8, 2016, 90 days after Apex's last timely motion was filed. Rule 81.05(a)(2)(A). Apex filed its notice of appeal on February 17, 2016. (LF 16, 966-67.) Apex's appeal is effective under Rule 81.04(a) because its notice of appeal was filed not later than 10 days after the October 26 Amended Judgment became final.

## STATEMENT OF FACTS

### *Parties to this Appeal*

Plaintiffs/Respondents are Gary Heifetz, Jeffrey Gershman, Steven Spewak, Jean Maylack, Fallon Maylack, S.M. Stone, and S.L. Stone (“Limited Partners”). Defendant/Appellant is Apex Clayton, Inc. (“Apex”), a Missouri corporation and the general partner of the 8182 Maryland Associates Limited Partnership (“8182 Partnership”). (Ex. 100 at LF 691.)

The instant appeal is the final chapter of a long-running dispute between the parties over their respective rights and obligations in 8182 Partnership.

### *8182 Partnership and Agreement*

8182 Partnership was formed in 1984. (Ex. 100 at LF 691.) Its purpose is to acquire, construct, lease, and operate various structures, including an office building and parking garage in the downtown Clayton business district. (*Id.* at LF 692.)<sup>4</sup>

In forming 8182 Partnership, Apex entered into a limited partnership agreement (“Partnership Agreement”) that included several limited partnerships, including PS Maryland Avenue Associates (“PSMI”) and PS Maryland Avenue Associates II

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<sup>4</sup> 8182 Partnership owns a 14-story office building and 11-story parking garage at 8182 Maryland Avenue and a significant interest in another limited partnership that owns an adjoining office building at 8235 Forsyth Boulevard known as Forsyth Centre. (LF 17-18; A12-13.)

(“PSMII”).<sup>5</sup> (LF 691.) Limited Partners originally were limited partners in both PSMI and PSMII. (Ex. 101-105 at LF 743-97.) Collectively, the Limited Partners’ ownership interest in 8182 Partnership totaled approximately 5.79%. (LF 18; A13.)

Two provisions of the Partnership Agreement are particularly relevant for purposes of this appeal. Section 9.2(A) of the Partnership Agreement provides that “Available Cash Flow shall be distributed at such reasonable intervals during the fiscal year as shall be determined by the General Partner and in any event shall be distributed within ninety (90) days after the close of each fiscal year.” (LF at 700.)

The Partnership Agreement also contained a forced sale clause, Section 18, which provided in relevant part as follows:

18.1 First Option - General Partner. If, after September 1, 2005, [PSMI] and [PSMII], collectively, Limited Partners hereunder, (hereinafter “PSMs”) desire that the Partnership liquidate and sell the Project, PSMs shall so notify the General Partner. Thereafter, the General Partner shall be obligated to purchase all of PSMs’ interests for the purchase price determined in the manner and upon the terms and conditions hereinafter set forth....

(LF 724-25.)

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<sup>5</sup> PSMI originally owned a 15% interest and PSMII owned a 7.5% interest. (LF 741.) Exhibit 252 shows the breakdown of partnership interests at the time of trial in June 2015. (LF 803-04.)

In June 1993, PSMI and PSMII were dissolved. (Ex. 104 and 105 at LF 773-97.) In 1993, the Partnership Agreement was amended with regard to PSMI, substituting Heifetz and S.M. Stone, among others, as limited partners in place of PSMI and referring to them as the PS I & II Partners. (Ex. 102 at LF 752-59.) The Partnership Agreement was simultaneously amended with regard to PSMII, substituting Heifetz, the Stones, and others as limited partners in place of PSMII and referring to them as the PS II Partners. (Ex. 101 at LF 743-51.) Later, in July 1993, under yet another amendment to the Partnership Agreement, Gershman, Spewak, the Maylacks, and others became substituted limited partners in 8182 Partnership. (Ex. 103 at LF 760-72.)

Years later, on September 9, 2005, Heifetz sent a certified letter to Apex stating that he wished to exercise the forced sale rights under Section 18 of the Partnership Agreement; thereafter Chervitz, Gershman, Michelman,<sup>6</sup> Spewak, and the Stones likewise requested a buyout. (LF 20, 671-72; A15.) Apex declined the demands as inconsistent with the Partnership Agreement. (*Id.*)

### ***The Prior Related Lawsuit and Court of Appeals' 2010 Decision***

In 2007, Heifetz, Chervitz, Gershman, Michelman, Spewak, and the Stones (“the 2007 Plaintiffs”) sued Apex. They alleged that Apex had breached the Partnership Agreement and a “fiduciary duty” to them in connection with Section 18’s forced sale provision. (LF 672; A6.)

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<sup>6</sup> Michelman is not a party to this lawsuit.



The trial court granted Apex's motion for partial summary judgment, finding the 2007 Plaintiffs did not have the right to a forced buyout of their interests in 8182 Partnership. (LF 672-673; A6-7.)

The 2007 Plaintiffs appealed. (LF 674; A8.) In a February 9, 2010 unpublished memorandum decision, the Court of Appeals affirmed. (LF 666-77; A1-11.) The Court of Appeals did not decide whether the 2007 Plaintiffs acquired forced sale rights. It held it need not reach that issue because the record showed "that not all of the limited partnership expressed a desire to invoke Section 18" to pursue a forced sale "collectively." (LF 675; A9.)

### *The Current Lawsuit*

On August 4, 2010, Limited Partners sent a demand letter to Apex stating that they wished to exercise the forced sale rights in Section 18. (LF 98.) Apex again declined. (*Id.*)

On December 3, 2010, Limited Partners filed a Petition in the Circuit Court of St. Louis County against Apex alleging breach of contract (Count I) and breach of fiduciary duty (Count II).<sup>7</sup> (LF 17-27; A12-22.) The Petition alleged Apex was required but failed to make cash distributions under Section 9.2(A) of the Partnership Agreement: "Upon information and belief, 8182 has generated substantial net profits [but] ... has never made

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<sup>7</sup> Count III alleged civil conspiracy against Apex and former defendant Paul Novelly; both Count III and Novelly were dismissed on June 19, 2015 and are not at issue in this appeal. (LF 11, 540-41.)

a cash distribution to Plaintiffs....” (LF 19; A14.) The Petition also alleged Apex was required but failed to purchase the Limited Partners’ interests in 8182 Partnership: “Section 18 of the Partnership Agreement provides that after September 1, 2005, the PSMs have the right to force the sale of 8182 should Apex be unwilling to buy their interests.... As the only remaining substituted limited partners for the PSMs, Plaintiffs have the ‘collective’ right to enforce Section 18....” (LF 20; A15.)

***A. The Limited Partners’ Breach of Contract Claim***

As relevant here, Count I alleged that by failing to make distributions and “refusing to comply with the ‘forced sale’ provision,” Apex breached the Partnership Agreement. (LF 22; A17.) Limited Partners sought compensatory damages in the following amounts:

**Gary Heifetz:** at least \$192,814 in undistributed income and at least \$1,342,972.50 as the fair market value of his interest in 8182;

**Jeffrey S. Gershman:** at least \$41,521.18 in undistributed income and at least \$289,200 as the fair market value of his interest in 8182;

**Jean and Fallon Maylack:** at least \$42,559.20 in undistributed income and at least \$296,430 as the fair market value of their interest in 8182;

**Steven Spewak:** at least \$6,228.16 in undistributed income and at least \$43,380 as the fair market value of his interest in 8182;

**Steven Stone:** at least \$87,453.99 in undistributed income and at least \$609,127.50 as the fair market value of his interest in 8182;

**Sidney Stone:** at least \$30,362.36 in undistributed income and at least \$211,477.50 as the fair market value of his interest in 8182.

(LF 23; A18.)

Limited Partners also requested legal fees in connection with their breach of contract claim. (LF 23; A18.)

***B. The Limited Partners' Breach of Fiduciary Duty Claim***

Count II alleged that Apex breached a purported fiduciary duty in not making cash distributions “out of Available Cash Flow as required by Paragraph 9.2(A) of the Partnership Agreement” and also by “refusing to comply with the ‘forced sale’ provision of the Partnership Agreement.” (LF 24; A19.)<sup>8</sup>

Count II alleged that “each Plaintiff has been damaged in the amounts stated above,” an apparent reference to the contract damage amounts listed under Count I. (LF 24; A19.) The prayer for relief under Count II requested exactly the same undistributed income and fair-market-value amounts that Limited Partners requested as

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<sup>8</sup> The fiduciary duty claim was ultimately submitted only on the alleged failure to make cash distributions (*see* Instruction No. 9, LF 557; A28), not on the alleged failure to purchase Limited Partners’ partnership interests.

compensatory damages under Count I, plus punitive damages that were approximately 10 times the requested compensatory damages. (LF 25; A20.)

With respect to the basis for punitive damages, the Petition alleged that “Apex’s breaches of fiduciary duty were both intentional and willful” and that “Apex’s conduct was extreme and outrageous because of its evil motive or reckless indifference to the rights of Plaintiffs.” (LF 24; A19.)

***C. Apex’s Answer***

Apex’s Answer, and subsequently filed Amended Answer, denied any breach of contract or breach of fiduciary duty. (LF 523-31.) Apex alleged, among other things, that the Petition failed to state a claim for punitive damages. (LF 527.)

***D. Cross Motions for Partial Summary Judgment for Liability for Breach of Contract***

The parties filed cross motions for partial summary judgment on liability for the alleged breach of Section 18’s forced sale provision; the trial court resolved the issue in Limited Partners’ favor. (LF 87-89, 305-11, 520-21; A23-24.) Its order stated:

The Court finds that Plaintiffs have the right to demand that their interests in the 8182 Maryland Associates Limited Partnership be bought out pursuant to Section 18 of the Partnership Agreement as amended. The Plaintiffs succeeded to that right as substitute limited partners in the place of [PSMI] and [PSMII].

The Court finds that Plaintiffs have made the effective collective demand required by Section 18 of the Partnership Agreement....

The Court finds that Defendant Apex Clayton, Inc., as general partner, has failed to act on its obligation to buy out Plaintiffs' interests, thereby breaching the Partnership Agreement as amended.

(LF 520-21; A23-24.)

### ***Trial and Verdicts***

On June 16, 2015, a four-day jury trial began in St. Louis County. During the first phase of trial, Limited Partners sought jury determinations on: (1) contract damages measured as the valuation of their ownership interests in 8182 Partnership (Instruction No. 7) (LF 553; A25); (2) Apex's liability for breach of fiduciary duty in failing to make cash distributions (Instruction No. 9) (LF 557; A28); and (3) Apex's liability for punitive damages (Instruction No. 11) (LF 559; A29). A second phase of trial addressed the amount of punitive damages.

#### ***A. The Limited Partners' Contract Damages***

During the first phase of trial, the parties presented competing evidence regarding the valuation of the Limited Partners' ownership interests in 8182 Partnership, primarily through appraisals from each side's valuation experts. (Tr. 253-320; 521-624.)

Verdict Form A required the jury to make findings as to the value of each ownership interest. (LF 555; A26.) The jury's findings on Verdict Form A were generally consistent with the Limited Partners' valuation evidence:

<b>Gary Heifetz:</b>	\$1,348,793
<b>Jeffrey S. Gershman:</b>	\$290,453
<b>Jean and Fallon Maylack:</b>	\$297,714
<b>Steven Spewak:</b>	\$43,568
<b>Steven Stone:</b>	\$611,767
<b>Estate of Sidney Stone:</b>	\$212,394

(LF 555; A26.)

***B. The Limited Partners' Breach of Fiduciary Duty Claim***

***1. Basis for liability***

On the breach of fiduciary duty claim, Limited Partners submitted evidence and made liability arguments based on Apex's alleged obligation to make cash distributions under the Partnership Agreement.

With respect to their breach of fiduciary duty claim:

- In opening statement, Limited Partners' counsel stated:

One of the main issues in this case is ... [w]hen there's available cash flow, that the general partner, who I've mentioned by name several times, ***they have an obligation once a year to determine the amount of the available cash flow.... And then to make a distribution of payments ... to the limited partners who have invested in this limited partnership organization.***

(Tr. 43.) (emphasis added)

- As to the basis for the alleged fiduciary duty, Limited Partners' counsel elicited from an expert:

*10.5F [of the Partnership Agreement] requires the general partner to distribute the available cash flow of the partnership and the net proceeds upon sale or exchange of all or substantially all of the assets of the partnership, in accordance with the terms of Section 9.2 of the [Partnership] agreement, that we already looked at.*

So 9.2 of the agreement says, there shall be distributions of available cash flow annually, and then 10.5F says it's the *general partner's duty to do that.*

(Tr. 100-01.) (emphasis added)

\* \* \*

Q. All right. Do you have any additional opinions for the jury?

A. Yes. *I believe that Paragraphs 9.2A and 10.5F of the 8182 Maryland partnership agreement require the general partner to determine and to distribute available cash flow at least every year.*

(Tr. 125.) (emphasis added)

- From Plaintiff Heifetz, Limited Partners elicited:

*Paragraph 9.2 of the limited partnership agreement requires distributions to the partners of available cash flow.*

(Tr. 183.) (emphasis added)

- The breach of fiduciary duty verdict director (Instruction No. 9) allowed the jury to find liability if:

First, Defendant did not make distributions to Plaintiffs from the 8182 Maryland Associates Limited Partnership in 2005 or thereafter when there was cash available for distribution ...

(LF 557; A28.)

- In closing argument, Limited Partners' counsel stated with respect to the fiduciary duty claim:

*They did not follow the agreement.* The letter of the partnership agreement said, for example, that *they were to calculate available cash flow, at least annually....*

(Tr. 770.) (emphasis added)

During trial, Apex objected that Limited Partners did not have a submissible breach of fiduciary duty claim. At the close of plaintiff's evidence, Apex moved for directed verdict based on *Peterson v. Continental Boiler Works, Inc.*, 783 S.W.2d 896, 905 (Mo. banc 1990)'s holding that a breach of fiduciary duty claim cannot arise out of a duty created in an agreement. (LF 534-35.)

Apex renewed this point after all the evidence had been submitted. During the instruction conference, Apex stated that there was no basis to submit fiduciary duty to the



jury in light of *Peterson* because the evidence that had been presented grounded the alleged fiduciary duty on a contractual provision.<sup>9</sup> (Tr. 759-760.)

## ***2. Damage evidence***

With respect to the breach of fiduciary duty claim, it was undisputed at trial that if cash distributions should have been made as Limited Partners alleged, then the value of the ownership interests the jury needed to assess on Limited Partners' breach of contract claim would need to be reduced dollar for dollar for such cash distributions.

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<sup>9</sup> Apex's counsel stated:

The only testimony in this case about distributions is about available cash flow. And the plaintiff has now taken that out of the submission because they are worried about the ruling in the -- here somewhere -- in the *Peterson* versus *Continental Boiler* case, which said that a breach of fiduciary duty claim cannot arise out of a duty created in an agreement.

And that still is, based on the testimony. Their own witness on fiduciary duty testified that his opinion on breach of the fiduciary duty to make distribution was based on the definition in 9.1. That's what he testified to.

....

The only duty Apex Clayton had was to follow the wording of the partnership agreement on available cash flow. And accordingly, there is no basis to submit fiduciary duty.

(Tr. 759-760.)

For example, on cross examination, Limited Partners' valuation expert agreed that:

- “distributions to the partners always decrease the net worth of the partnership by the amount of the distribution”

(Tr. 437) and

- “any available cash flow that [the expert said] should be paid out would be a direct deduction from the net worth of the partnership and from the value of each partner's interest”

(Tr. 443-44).

Apex's accountant agreed that “any time you distribute money out of a partnership, each partner's interest, they get the distribution, but then their value of their partnership goes down by the amount of the distribution.” (Tr. 694.)

The trial court instructed on Verdict B that the jury should award “nominal damages” if the jury found in favor of Limited Partners on their claim for breach of fiduciary duty. (LF 560; A30.)

In closing argument, Limited Partners' counsel told the jury that the verdict form listed “nominal damages” for the breach of fiduciary duty claim because “the fiduciary duty claim relates to the distributions. You heard Mr. Prost, our expert accountant, say, well, every dollar that goes out in distribution reduces the value of the whole partnership.” (Tr. 785.)

Ultimately the jury found in favor of Limited Partners on their breach of fiduciary duty claim and awarded nominal damages of \$1,000 to each plaintiff. (LF 560; A30.)

### *C. Punitive Damages*

The trial court's punitive damage Instruction No. 11 (LF 559; A29) was based on Apex's conduct in failing to make distributions as submitted in Instruction No. 9 (LF 557; A28).<sup>10</sup>

After the conclusion of the evidence, Apex, having already contested the submissibility of the predicate breach-of-fiduciary-duty claim for punitive damages, advised the trial court of another objection to submissibility of punitive damages. (Tr. 759.)

Apex explained that Limited Partners would recover all contract damages under Verdict A, which would compensate them for the value of any allegedly undistributed cash distributions that were the subject of Limited Partners' breach of fiduciary duty claim. (Tr. 760-61.) And since Limited Partners would be fully compensated by the Verdict A award, Apex objected that Limited Partners were being allowed to pursue punitive damages for breach of fiduciary duty without having proved they suffered any separate harm.<sup>11</sup>

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<sup>10</sup> Instruction No. 11 provided: "If you find the issues in favor of Plaintiffs, and if you believe the conduct of Defendant Apex Clayton, Inc. as submitted in Instruction Number 9 was outrageous because of Defendant's evil motive or reckless indifference to the rights of others, then, in Verdict B, you may find that Defendant Apex Clayton, Inc. is liable for punitive damages." (LF 559; A29.)

<sup>11</sup> Apex stated:

The punitive damage liability instruction was given over Apex's objection, and the jury found Apex liable for punitive damages on Verdict B. (LF 560; A30.)

After the jury returned Verdicts A and B, a second phase of trial ensued, consisting only of closing arguments on punitive damages. (Tr. 818-824.) During closing, Limited Partners' counsel stated:

I think our case for punitive damages was pretty clear. It was about the failure to make distributions.

(Tr. 823.)

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the courts are clear that under all circumstances, the conduct [for punitive damages] is supposed to be egregious, and how -- what the conduct was to be egregious, when it is only submitted as to the failure to make distributions and, by definition now, as the parties agree, all the value of those distributions is in the value of their partnership interest. And the Court has directed that they're going to get the value of their partnership interest. That's Verdict A. ...

Under these factors, [Limited Partners are] getting one hundred percent of their damages [under Verdict A], and now we have punitive damage about something where they have no suffering.

And that, I mean, constitutionally, just seems wrong, where you can get punitive damages where there's, in fact, no actual damages to the plaintiff.

(Tr. 761.)

The jury assessed Apex a total of \$2.8 million in punitive damages on Verdicts C through H. (LF 561-66; A31-36.) The punitive damage assessment essentially doubled Limited Partners' breach-of-contract recovery on Verdict A, which had totaled \$2,804,689. (LF 555-56; A26-27.)

### ***Post-Trial Filings and Judgment***

The trial court entered a document labeled "Judgment" on June 26, 2015 that did not resolve Limited Partners' claim for attorneys' fees or invoke the "no just reason for delay" language of Rule 74.01(b). (LF 593-94.) On July 24, 2015, Limited Partners moved for a contract-based award of attorneys' fees and expert costs. (LF 608-14.) On July 27, 2015, Apex filed an after-trial motion for judgment notwithstanding the verdict or for new trial. (LF 642-65.)

On October 26, 2015, the trial court granted Limited Partners' fee motion and denied Apex's initial motion for judgment notwithstanding the verdict or for new trial. (LF 921-23.) On the same day, the trial court separately entered an "Amended Judgment" signed by Judge Cohen. (LF 14, 924-26; A37-39.) The "Amended Judgment" resolved all claims of the parties in that it included a total of \$313,030.85 in attorneys' fees and expenses awarded by the trial court and the verdict amounts for the claims tried to the jury, *i.e.* a total of \$2,804,689 in contract damages and a total of \$6,000 in nominal damages and \$2,800,000 in punitive damages for breach of fiduciary duty. (LF 924-26; A37-39.)

On November 10, 2015, less than 30 days after entry of the "Amended Judgment" that resolved all claims of the parties, Apex filed a motion for judgment notwithstanding

the verdict, for new trial, or to amend the judgment. (LF 16; 927-59.) The trial court never ruled on Apex's November 10, 2015 motion. (LF 16.) The motion was deemed overruled on February 8, 2016. Rule 81.05(a)(2)(A). Apex timely filed its notice of appeal on February 17, 2016, less than 10 days after the "Amended Judgment" became final. (LF 16, 966-67.)

### *Apex's Appeal*

Apex appealed to the Court of Appeals. (LF 966-67.) After Apex filed its Appellants' brief, but before Limited Partners filed their Respondents' brief, the parties settled the breach of contract claim in this case. The settlement is agreed to constitute full satisfaction of the judgments in favor of Limited Partners on their claims for breach of contract and attorneys' fees and expert witness fees. (*Heifetz, et al. v. Apex Clayton, Inc.*, Case No. ED104026, Notice of Partial Settlement of Appeal ¶2, filed Sept. 9, 2016; A43-46.) Limited Partners agreed in their Respondents' brief filed with the Court of Appeals that the only issues left on appeal concerned whether Limited Partners may recover for the breach-of-fiduciary-duty claim alleged in Count II of their Petition for which they received jury awards for nominal and punitive damages. (Resp. Br. 1.)

After briefing and oral argument, the Court of Appeals issued an opinion dismissing Apex's appeal on grounds that Apex filed its notice of appeal too late. *Heifetz, et al. v. Apex Clayton, Inc.*, 2017 WL 1323923, Case No. ED104026 (Mo. App. E.D. April 11, 2017).

This Court granted transfer.

POINTS RELIED ON

- I. **The trial court erred in submitting Limited Partners’ breach of fiduciary duty claim to the jury and overruling Apex’s motion for judgment notwithstanding the verdict because Limited Partners failed to demonstrate the existence of any “fiduciary duty” separate and independent of contractual obligations, in that their fiduciary duty claim arose out of an alleged obligation to make annual cash distributions from Available Cash Flow under Section 9.2A of the Partnership Agreement.**

*Peterson v. Continental Boiler Works, Inc.*, 783 S.W.2d 896 (Mo. banc 1990)

**II. The trial court erred in overruling Apex’s motion for judgment notwithstanding the verdict on Limited Partners’ breach of fiduciary duty claim for the additional, independent reason that Limited Partners failed to prove the essential element of pecuniary damages stemming from a breach of fiduciary duty, in that they sought and received a nominal damage award and admitted they sustained no damages separate and apart from the alleged failure to make annual cash distributions from Available Cash Flow under the Partnership Agreement—an alleged damage for which they have been made whole through their recovery on their breach of contract claim.**

*Henry v. Farmers Ins. Co., Inc.*, 444 S.W.3d 471 (Mo. App. W.D. 2014)

*MECO Sys., Inc. v. Dancing Bear Entm’t, Inc.*, 42 S.W.3d 794 (Mo. App. S.D. 2001)

*Agnello v. Walker*, 306 S.W.3d 666 (Mo. App. W.D. 2010)



**III. The trial court erred in submitting Limited Partners’ claim for punitive damages to the jury and overruling Apex’s motion for judgment notwithstanding the verdict because (1) punitive damages are not available for Limited Partners’ breach of contract claim; and (2) they did not have another cause of action for which punitive damages are available (and, even if they did, they failed to recover actual damages on any such claim—a precondition to recovering punitive damages), in that, as explained in Points I and II above, they did not have a submissible breach of fiduciary duty claim and, in any event, sought and received only nominal damages on that claim.**

*Peterson v. Continental Boiler Works, Inc.*, 783 S.W.2d 896 (Mo. banc 1990)

*Mischia v. St. John’s Mercy Med. Center*, 30 S.W.3d 848 (Mo. App. E.D. 2000)

*Marquis Financial Serv. of Indiana Inc. v. Peet*, 365 S.W.3d 256 (Mo. App. E.D. 2012)

## SUMMARY OF ARGUMENT

Apex has made Limited Partners whole for all their pecuniary losses by satisfying the portions of the judgment assessing contract damages totaling \$2,804,689 and contract-based attorneys' fees and expenses totaling \$313,030.85. The only portions of the judgment at issue on appeal are those awarding nominal damages to Limited Partners for breach of fiduciary duty and \$2.8 million in punitive damages.

As explained in Point I, this Court's precedent in *Peterson v. Continental Boiler Works, Inc.*, 783 S.W.2d 896 (Mo. banc 1990), requires a breach of fiduciary duty claim to be independent from a contractual obligation. Here, Limited Partners' breach of fiduciary duty recovery should be reversed because they failed to plead and prove any breach independent of an alleged breach of Apex's contractual obligations. Limited Partners' breach of fiduciary duty claim was based on Apex's alleged violation of paragraph 9.2(A) of the Partnership Agreement.

As explained in Point II, damages are an essential element of a breach of fiduciary duty claim. Limited Partners' breach of fiduciary duty recovery should be reversed for the independent reason that they failed to establish the necessary element of actual, pecuniary damages stemming from any alleged breach. Limited Partners sought and recovered only nominal damages on this claim and admitted that any damages they may have suffered for their tort claim are duplicative of their contract damages, for which they have already been made whole.

As explained in Point III, the portion of the judgment awarding Limited Partners \$2.8 million in punitive damages should be reversed for several reasons. The gravamen

of Limited Partners' claim against Apex is breach of contract, and *Peterson v. Continental Boiler Works*, 783 S.W.2d at 905, held that punitive damages are not available for an alleged breach of contract even if the breach is willful, wanton, or malicious. In addition, even if Limited Partners were not foreclosed by *Peterson*, their failure to recover actual damages on the underlying breach of fiduciary duty claim dooms their punitive damage claim. A punitive damage claim is not a separate cause of action; when the underlying tort for a punitive damage claim requires proof of actual damage, the punitive damage claim must be brought in conjunction with an award of actual damages on the underlying tort claim. Limited Partners did not meet this requirement because they sought and received only nominal damages for their underlying claim for breach of fiduciary duty.

## ARGUMENT

- I. The trial court erred in submitting Limited Partners’ breach of fiduciary duty claim to the jury and overruling Apex’s motion for judgment notwithstanding the verdict because Limited Partners failed to demonstrate the existence of any “fiduciary duty” separate and independent of contractual obligations, in that their fiduciary duty claim arose out of an alleged obligation to make annual cash distributions from Available Cash Flow under Section 9.2A of the Partnership Agreement.**

### *Standard of Review*

A trial court’s decision on a motion for judgment notwithstanding the verdict is reviewed to determine whether a submissible case was made. *Jungerman v. City of Raytown*, 925 S.W.2d 202, 204 (Mo. banc 1996) (citations omitted). Appellate courts review the evidence in the light most favorable to the plaintiff, with the benefit of all reasonable inferences. *Id.* Issues of law are reviewed *de novo*. *Id.*

### *Argument*

To establish a claim for breach of a fiduciary duty, a plaintiff “must aver that the duty which he alleges is breached arises from fiduciary responsibilities,” and the “fiduciary duty must exist separately from and independently of contractual obligations.” *Peterson*, 783 S.W.2d at 905. In *Peterson*, a defendant appealed from a jury verdict awarding actual and punitive damages in an action for breach of a stock restriction agreement. This Court addressed largely the same issue on appeal as here regarding whether the plaintiff had stated a cause of action for breach of a fiduciary duty separate

from contractual obligations. *Id.* at 905. The Court explained that a fiduciary duty arises from the duty of loyalty to avoid conflicts of interest and identified 10 substantive areas in which the duty of loyalty is subject to breach. *Id.* at 904-05. After examining in detail the relevant fiduciary duty averments in the plaintiff's petition, the Court found the petition did not allege any breach of fiduciary duty in any of the 10 substantive areas; instead, it alleged breaches of fiduciary duty emanating from obligations imposed by the contract, which were inadequate foundation for a tort. *Id.*

Here, Limited Partners likewise failed to specifically plead or prove any fiduciary duty separate from and independent of Apex's contractual obligations. Limited Partners' fiduciary duty claim in their First Amended Petition is *expressly* based on Apex's alleged contractual obligation. Paragraph 47 states:

47. ***Apex has breached its fiduciary duty to the Plaintiffs by arbitrarily, unreasonably, capriciously and intentionally failing and refusing to make distributions to Plaintiffs out of Available Cash Flow as required by Paragraph 9.2(A) of the Partnership Agreement.*** At all material times, there was available cash flow from which to make such distributions, but Apex, ignoring its fiduciary duties to the Plaintiffs, failed, refused and neglected to make said distributions.

(LF 24; A19.) (emphasis added).

At trial, as outlined in the Statement of Facts above, Limited Partners presented evidence and made arguments about a breach of fiduciary duty based on the alleged

*contractual* obligation—under Section 9.2 of the Partnership Agreement—to make cash distributions. *See, e.g.*, Tr. 183 (“Paragraph 9.2 of the limited partnership agreement requires distributions to the partners of available cash flow”); Tr. 100-01 (referencing the Partnership Agreement), Tr. 131 (same), Tr. 770 (same). The verdict directed given to the jury similarly referenced the failure to make cash distributions when cash was available. (LF 557; A28.)

Paragraph 9.2(A) of the Partnership Agreement addresses Apex’s obligation to make annual cash distributions from Available Cash Flow. (LF 700.) Limited Partners’ alleged breaches of fiduciary duty emanate from this contractual obligation and do not exist separately and independently of the Partnership Agreement. (LF 24; A19.) As in *Peterson*, this Court should conclude that Limited Partners failed to plead, prove, and submit a viable breach of fiduciary duty claim. *See Peterson*, 783 S.W.2d at 905.

The trial court’s judgment in favor of Limited Partners on their “fiduciary duty” claims should be reversed and judgment entered in Apex’s favor. *See* Rule 84.14; *Hilton v. Davita, Inc.*, 302 S.W.3d 157, 159-160 (Mo. App. E.D. 2009) (where dispute on appeal relates to legal significance of undisputed facts, appellate court can enter appropriate judgment rather than remanding for correction).

**II. The trial court erred in overruling Apex’s motion for judgment notwithstanding the verdict on Limited Partners’ breach of fiduciary duty claim for the additional, independent reason that Limited Partners failed to prove the essential element of pecuniary damages stemming from a breach of fiduciary duty, in that they sought and received a nominal damage award and admitted they sustained no damages separate and apart from the alleged failure to make annual cash distributions from Available Cash Flow under the Partnership Agreement—an alleged damage for which they have been made whole through their recovery on their breach of contract claim.**

*Standard of Review*

The submissibility of Limited Partners’ fiduciary duty claim in the absence of actual pecuniary damages is a pure legal issue; for this reason, the trial court’s decision to submit that claim to the jury and to overrule Apex’s motion for judgment notwithstanding the verdict on this point is reviewed *de novo*. *Jungerman*, 925 S.W.2d at 204.

*Argument*

There is a second, independent reason besides this Court’s precedent in *Peterson v. Continental Boilerworks* that judgment should be entered in Apex’s favor on Limited Partners’ claim for breach of fiduciary duty. This second reason follows from Limited Partners’ recovery of nominal damages and failure to prove they suffered any actual damages from the alleged breach for which they have not already been compensated.

Under Missouri law, a fiduciary duty claim requires pecuniary damages. *Henry v. Farmers Ins. Co., Inc.*, 444 S.W.3d 471, 480 (Mo. App. W.D. 2014). Nominal damages

cannot be awarded on a breach of fiduciary duty claim because pecuniary damages are “an intrinsic element of a breach of fiduciary duty claim and ... essential to recovery.” *Id.* at 481. Here, Limited Partners did not seek to have the jury award them any actual damages allegedly caused by a breach of fiduciary duty; rather, Limited Partners sought nominal damages on their claim. (LF 560; A30.) Because nominal damages cannot be awarded on a breach of fiduciary duty claim, *see id.* (emphasizing the requirement of actual damages), the breach of fiduciary duty judgment in Limited Partners’ favor should be reversed for the independent reason that they failed to prove the essential element of damages for a breach of fiduciary duty claim.

Notably, this is not a case in which a plaintiff proved that he or she suffered actual damages as a result of an alleged breach but voluntarily asked the jury to award less than the damages actually suffered. Limited Partners acknowledged that any actual damages they were claiming based on Apex’s failure to make annual cash distributions were *redundant* in connection with the damages Limited Partners were seeking for breach of contract. Specifically, they admitted that any undistributed cash income was already included in the value of Limited Partners’ ownership interests to be awarded in connection with the breach of contract claim.<sup>12</sup> (Tr. 764-65, 785.)

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<sup>12</sup>For example, Limited Partners’ valuation expert Michael Prost agreed that “distributions to the partners always decrease the net worth of the partnership by the amount of the distribution” (Tr. 437), because “any available cash flow that ... should be paid out, would be a direct deduction from the net worth of the partnership and from the



It is a fundamental principle of Missouri law that a party cannot be compensated twice for the same injury. *MECO Sys., Inc. v. Dancing Bear Entm't, Inc.*, 42 S.W.3d 794, 810-11 (Mo. App. S.D. 2001); *Agnello v. Walker*, 306 S.W.3d 666, 677 (Mo. App. W.D. 2010) (plaintiff “cannot recover in Count II what [plaintiff] has already recovered in [plaintiff’s] award of damages under Count I”). As the Court of Appeals stated in *R.J.S. Sec., Inc. v. Command Sec. Services, Inc.*, 101 S.W.3d 1 (Mo. App. W.D. 2003):

It is true that a party may pursue multiple theories of liability, however, a party may not recover duplicative damages for the same wrong. While entitled to be made whole by one compensatory damage award, a party may not receive the windfall of a double recovery, which is a species of unjust enrichment and is governed by the same principles of preventive justice.

*Id.* at 17 (citing *Inauen Packaging Equip. Corp. v. Integrated Indus. Serv.*, 970 S.W.2d 360, 368 (Mo. App. W.D. 1998)).

If the breach of fiduciary duty judgment were allowed to stand, however, this fundamental principle would be violated, and Limited Partners would be unjustly

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value of each partner’s interest” (Tr. 443-44). In closing argument, Limited Partners’ counsel explained to the jury that the verdict form listed “nominal damages” for the breach of fiduciary duty claim because “the fiduciary duty claim relates to the distributions. You heard Mr. Prost, our expert accountant, say, well, every dollar that goes out in distribution reduces the value of the whole partnership.” (Tr. 785.)

enriched at Apex's expense. The jury's verdict awarding Limited Partners the value of their ownership interests on their breach of contract claim already included the value of any allegedly undistributed cash distributions. Having been compensated by the contract award, Limited Partners had zero additional damages for their claimed breach of fiduciary duty to make cash distributions. And any extra amounts awarded to Limited Partners on their breach of fiduciary duty claim are impermissible, redundant, and duplicative recoveries that should be reversed. *See Kincaid Enterprises, Inc. v. Porter*, 812 S.W.2d 892, 901 (Mo. App. W.D. 1991) (\$35,000 verdict for breach of contract was duplicative of \$36,000 verdict for fraudulent misrepresentation; \$35,000 verdict was set aside); *Agnello*, 306 S.W.3d at 677 (\$1,743 award for fraudulent misrepresentation was duplicative of \$53,300 award for breach of contract; duplicative damage award of \$1,743 was stricken).

**III. The trial court erred in submitting Limited Partners’ claim for punitive damages to the jury and overruling Apex’s motion for judgment notwithstanding the verdict because (1) punitive damages are not available for Limited Partners’ breach of contract claim; and (2) they did not have another cause of action for which punitive damages are available (and, even if they did, they failed to recover actual damages on any such claim—a precondition to recovering punitive damages), in that, as explained in Points I and II above, they did not have a submissible breach of fiduciary duty claim and, in any event, sought and received only nominal damages on that claim.**

*Standard of Review*

The purpose of motions for directed verdict and for judgment notwithstanding the verdict is to challenge the submissibility of the plaintiff’s case. *Marquis Financial Services of Ind. v. Peet*, 365 SW 3d 256, 259 (Mo. App. E.D. 2012). “A case is not to be submitted to the jury unless each fact essential to liability is predicated upon legal and substantial evidence.” *Id.* When the denial of a judgment notwithstanding the verdict is based upon a conclusion of law, an appellate court reviews the trial court’s decision *de novo*. *Trinity Lutheran Church v. Lipps*, 68 S.W.3d 552, 557 (Mo. App. E.D. 2001).

*Argument*

**A. This case did not involve a tort; the jury’s punitive damage award improperly arose out of an alleged breach of contract.**

In Missouri as elsewhere, the general rule is that punitive damages may not be recovered in breach of contract actions. *Peterson*, 783 S.W.2d at 902. From this general

rule, courts have carved two narrow exceptions. *Id.* The first exception is found “where the breach amounts to an independent, willful tort and there are proper allegations of malice, wantonness, or oppression.” *Id.* at 903. Absent an independent tort, “punitive damages are not available where the basis of the complaint is breach of contract, even where the breach is intentional, willful, wanton or malicious.” *Id.*

The second exception permits recovery of punitive damages when the breach of contract is coupled with violations of a fiduciary duty that breach a “public trust.” *Brown v. Mercantile Bank of Poplar Bluff*, 820 S.W.2d 327, 340 (Mo. App. S.D. 1991) (citing *Peterson*, 783 S.W.2d at 903). Under either exception, to recover punitive damages a plaintiff must specifically plead “proper allegations” of an “independent tort.” *Peterson*, 783 S.W.2d at 903.

Here, Limited Partners’ breach of fiduciary duty claim alleged a failure to make annual cash distributions based on Section 9.2 of the Partnership Agreement; they failed to allege an independent tort to support their punitive damages claim. (LF 24; A19.) Apart from contractual obligations to make cash distributions, there is no separate, independent fiduciary duty. Limited Partners themselves reiterated this point while Apex’s appeal was pending before the Court of Appeals. In another filing with the Court of Appeals, Limited Partners admitted their punitive damage claim was based on alleged contractual obligations:

***The case below was a non-tort action.*** The judgments in favor of the respondents for their ownership interests were based on a limited partnership agreement and related contracts. ***The fiduciary duty***

*upon which the punitive damages judgments were awarded to the respondents arose out of the same contractual relationship.*

(*Heifetz, et al. v. Apex Clayton, Inc.*, Case No. ED104026, Respondent's Consent to Appellant's Motion for Leave to Post Supersedeas Bond, filed April 28, 2016 at p. 2; A41) (emphasis added).

In addition, Limited Partners failed to adequately plead either exception to the general rule that punitive damages are not available in a breach of contract action. *See Peterson*, 783 S.W.2d at 905. Though Limited Partners generally alleged willful and outrageous conduct (LF 24; A19), "punitive damages are not available for breaches of contract, even where the breach is willful, wanton or malicious." *Peterson*, 783 S.W.2d at 905. Limited Partners cannot recover punitive damages based on Apex's refusal to purchase their stock or ownership interests or refusal to make distributions because any such refusals concerned contractual provisions. *Id.* Based on the pleadings and the evidence at trial, the Court's conclusion here should be the same one reached in *Peterson*: due to a failure to state and submit a claim on which punitive damages may be awarded, the punitive damage award should be reversed. *Id.* at 905.

**B. The award of punitive damages should be reversed for the additional reason that even if Limited Partners had a submissible tort claim, they were awarded no actual damages on such claim.**

A punitive damage claim is not a separate cause of action; it must be brought in conjunction with a claim for actual damages. *Mischia v. St. John's Mercy Med. Center*, 30 S.W.3d 848, 866 (Mo. App. E.D. 2000); *Kelly v. State Farm Mut. Auto. Ins. Co.*, 218

S.W.3d 517, 526 (Mo. App. W.D. 2007) (“Because Plaintiffs failed to prove an underlying cause of action that could support a punitive damages award, the award of punitive damages in the judgment must be reversed”). Except for certain torts such as trespass and assault that are not at issue here, punitive damages cannot be assessed if a jury does not award actual damages on the underlying tort claim on which the plaintiff is basing its claim for punitive damages. *Marquis*, 365 S.W.3d at 262; *Williams v. Williams*, 99 S.W.3d 552, 556 n.1 (Mo. App. W.D. 2003). As explained in *Marquis*, “There can be no award of punitive damages absent an award of actual damages.” 365 S.W.3d at 262. Moreover, because damages are assessed separately for each claim tried, actual damages must be awarded on the particular count on which punitive damages are sought; otherwise, they are improper. *Id.*

Here, as explained in Points I and II above, Limited Partners have no viable fiduciary duty claim against Apex. Accordingly, their claim for punitive damages fails. But even if their fiduciary duty claim were viable, the award of punitive damages could not have been predicated on such claim in light of the jury’s award of nominal damages. (LF 560, 924-26; A30, 37-39.)

If a jury awards (1) no actual damages on a particular claim in which actual damages are an intrinsic element of the claim and (2) punitive damages, the trial court should grant a judgment notwithstanding the verdict. *Marquis*, 365 S.W.3d at 262. In the context of a claim for breach of fiduciary duty, an award of nominal damages cannot support an award for punitive damages. *See Henry*, 444 S.W.3d at 481. The punitive damage verdict rendered by the jury, therefore, is inconsistent because it awards punitive

damages in the absence of actual damages on a breach of fiduciary duty claim. After the improper verdict was returned, Apex was entitled to judgment as a matter of law. *Marquis*, 365 S.W.3d at 262. And the trial court erred in failing to grant Apex's motion for judgment notwithstanding the verdict. *See id.*

### CONCLUSION

Apex has already made Limited Partners whole for all their pecuniary losses and paid Limited Partners' attorneys' fees and expenses. Unless the remaining disputed portions of the judgment are reversed, Limited Partners will receive a double recovery or otherwise be unjustly enriched in excess of \$2.8 million at Apex's expense. As explained in Points I and II, the trial court erred in submitting to the jury Limited Partners' breach of fiduciary duty claim because they failed to plead and prove any breach independent of Apex's alleged breach of its contractual obligations; moreover, Limited Partners failed to submit evidence showing they suffered any actual, pecuniary damages stemming from any such alleged breach. In addition, the punitive damage award cannot stand because, as set forth in Point III, punitive damages are not available for an alleged breach of contract and cannot be predicated on a nominal damage award under the facts at issue here. Apex respectfully requests that the Court reverse the October 26, 2015 Amended Judgment with respect to these issues and either exercise its discretion to enter judgment in favor of Apex or remand the cause to the trial court with instructions to enter judgment in favor of Apex.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing was filed electronically with the Clerk of the Court on this 8th day of September, 2017, to be served by operation of the Court's electronic filing system on all counsel of record.

/s/ Heidi Doerhoff Vollet  
Heidi Doerhoff Vollet

## CERTIFICATE OF COMPLIANCE

Pursuant to Supreme Court Rule 84.06(b) and Rule 55.03, the undersigned hereby certifies the following:

1. This brief includes the information required by Rule 55.03.
2. This brief complies with the limitations contained in Rule 84.06(b) and contains 8,818 words.
3. Microsoft Word 2010 was used to prepare Appellant's Brief.

/s/ Heidi Doerhoff Vollet

SIGNATURE