STATE OF MICHIGAN

COURT OF APPEALS

ELLEN M. JACOB and JAMES E. FULLER as Trustees of the LIQUID ASSET MARITAL TRUST,

Plaintiffs-Appellees,

v

BALD MOUNTAIN WEST,

Defendant,

and

STEVEN E. JACOB,

Defendant-Appellant.

UNPUBLISHED
September 30, 2014

No. 312390
Oakland Circuit Court
LC No. 2007-085876-CZ

ELLEN M. JACOB and JAMES E. FULLER as Trustees of the LIQUID ASSET MARITAL TRUST,

Plaintiffs-Appellants,

v

BALD MOUNTAIN WEST and STEVEN E. JACOB,

Defendants-Appellees.

No. 312469
Oakland Circuit Court
LC No. 2007-085876-CZ

Before: BOONSTRA, P.J., and METER and SERVITTO, JJ.

PER CURIAM.

In docket no. 312390 defendant, Steven E. Jacob ("Jacob"), appeals as of right a trial court order and a judgment compelling him to return certain monies to the Bald Mountain West ("BMW") partnership. In docket no. 312469 plaintiffs, Ellen M. Jacob and James E. Fuller, as

trustees of the Liquid Asset Marital Trust ("LAMT"), appeal by leave granted the trial court's denial of their motion to amend the judgment or, in the alternative, for relief from judgment as to a certain amount the trial court declined to order Jacob to return to the partnership. In docket no. 312390, we remand to the trial court for amendment of the judgment to reflect that Jacob be ordered to repay only $150,000 to the partnership for management fees. We affirm in all other respects. In docket no. 312469, we remand to the trial court to determine whether the $141,325.75 paid as a consulting fee should be repaid to the BMW partnership. We do not retain jurisdiction.

BMW is a partnership whose partners consist of James A. Jacob, the Steven E. Jacob Revocable Trust and the LAMT, and it is managed by Jacob. In September 2007, plaintiffs filed an action for an accounting, asserting that BMW and Jacob failed to make the financial books and records of the partnership available for inspection as requested and as required, and seeking dissolution of the partnership. Following a bench trial, the trial court found that Jacob violated the Michigan Uniform Partnership Act, MCL 449.1 *et seq*., and the partnership agreement. The trial court further found that plaintiffs were entitled to a formal accounting under the Act and ordered the same as well as dissolution of the partnership and the appointment of a receiver to carry out the necessary steps for dissolution.[1]

Plaintiffs thereafter moved the trial court to direct the receiver to pursue the return of partnership assets from Jacob that he had allegedly wrongfully taken from partnership funds. The trial court authorized the receiver to pursue and collect $389,000.00 from Jacob, which represented six $50,000.00 management fee payments Jacob had allegedly collected for himself and $89,000.00 Jacob had paid from partnership funds for the demolition of a garage on partnership property without consulting with or receiving the consent of other BMW partners.

The trial court held an evidentiary hearing to address other monies alleged to have been wrongfully taken/used by Jacob from partnership funds. The trial court found that Jacob had inappropriately used partnership funds to pay over $94,000.00 in legal fees for his own defense in the matter at hand and ordered repayment to the partnership for the same, as well as an additional payment of over $5,000 to account for the actual cost of the garage demolition. The trial court denied plaintiffs' request for the return of approximately $25,000 in legal fees paid for environmental legal work and approximately $141,000 in other fees paid to Jacob. The trial court ultimately ordered that Jacob return $488,000 to the partnership.

On appeal, Jacob first contends that the trial court erred in awarding any monetary relief against him when plaintiffs never requested such an award in any pleading. We disagree.

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[1] BMW and Jacob filed a claim of appeal, challenging the trial court's findings of fact and conclusions of law following trial. This court affirmed the trial court's ruling that a formal accounting was appropriate, and opined that there was substantial evidence to justify dissolution of the partnership, and that the trial court did not abuse its discretion in appointing a receiver. *Jacob v Bald Mountain West*, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2011(Docket No 291224).

A trial court's equitable decision presents a question of law that this Court reviews de novo. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 371; 761 NW2d 353 (2008). We review a trial court's findings of fact for clear error. *Madison Dist Pub Schs v Myers*, 247 Mich App 583, 588; 637 NW2d 526 (2001). This includes its determination of damages. *Sands Appliance Servs, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000). "Clear error exists where, after a review of the record, the reviewing court is left with a firm and definite conviction that a mistake has been made." *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002).

In *Nogueras v Maisel & Associates of Michigan*, 142 Mich App 71, 80; 369 NW2d 492 (1985) this Court noted that an accounting is described as follows:

> A formal account or (as it is sometimes called) an accounting is more than a presentation of financial statements. It encompasses a review of all transactions, including alleged improprieties, which should be reflected in the financial statements. It resembles a trustee's accounting.
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> If a partner asks his co-partners for an account and does not get it, or is not satisfied with it, he may bring an action for an accounting. This is a comprehensive investigation of transactions of the partnership and the partners, and an adjudication of their relative rights. It is conducted by the court or, more commonly, by an auditor, referee or master, subject to the court's review. Equitable throughout most of its long history, this action is well adapted to the complexity of partners' relations. But its origins lie in the mutual fiduciary obligations of the partners.
>
> *An accounting action is designed to produce and evaluate all testimony relevant to the various claims of the partners.*" (Emphasis added in original, quoting Crane & Bromberg, Law of Partnership (1968), chapter 7, § 72, p 410).

In this Court's prior affirmance of the trial court's bench trial rulings that an accounting, dissolution of the partnership and the appointment of a receiver were appropriate, we noted that "[t]he primary purpose of a receiver is to preserve property and to dispose of it under the order of the court." *Jacob v Bald Mountain West*, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2011 (Docket No. 291224). We also held that "[t]he trial court dissolved the partnership, and it could resolve any difficulties in winding up the partnership's affairs by applying equitable remedies." *Slip op*., page 5. Winding-up of partnership affairs entails gathering the assets, paying and settling debts, and distributing any net surplus to parties entitled to it. *Urbain v Beierling*, 301 Mich App 114, 130; 835 NW2d 455 (2013).

In its May 27, 2009, order appointing the receiver in this case, the trial court granted the receiver the possession and control over the partnership and all of its assets and directed that the receiver "shall collect and receive all earnings, revenues, rents, profits, and income of the Partnership and Property" and "may take any other action he deems necessary for the care, preservation and protection of the partnership, the property, and any other assets of the Partnership." In its May 13, 2011, order the trial court stated:

> The Receiver is authorized at this time to pursue and collect from Defendant Steven E. Jacob the amount of $389,000.00, which represents six $50,000.00 management fee payments and $89,000.00 for the demolition of the garage all wrongfully taken by Defendant Steven E. Jacob as set forth in the Court's Opinion and Order of March 10, 2009. As to any other monies to be collected from Defendant Steven E. Jacob by the Receiver, an evidentiary hearing shall be scheduled to determine the same. The parties shall call the Court to schedule a mutually agreeable date.

Notably, in this Court's affirmance of the trial court's opinion, we found that the trial court correctly ruled that Jacob's taking a $50,000 per year management fee modified the partnership agreement without the approval of all of the partners, violated the partnership agreement and violated MCL 449.18(e), and (f). *Slip op*, page 1. Note that MCL 449.18(f) provides that a partner is not entitled to remuneration for acting in the partnership business. Implicit in our ruling that Jacob was not entitled to the fees that he took from the partnership was that the fees rightly belonged to the partnership. Jacob was thus indebted to the partnership for the fees that he had no right to have taken in the first place. "Under the law-of-the-case doctrine, this Court's determination of an issue in a case binds both the trial court on remand and this Court in subsequent appeals." *Augustine v Allstate Ins Co*, 292 Mich App 408, 425; 807 NW2d 77 (2011). Because this Court already affirmed the trial court's finding that Jacob was not entitled to the management fees and implicitly found that the fees belonged to the partnership, the law of the case precludes Jacob from arguing that the trial court could not order Jacob to return the $300,000 in management fees to the partnership. Jacob took the fees to which he was not entitled out of the partnership funds and the partnership could be made whole by Jacob returning the funds to the partnership. They were an asset of the partnership and could be gathered by the receiver as part of the winding up of the partnership. *Urbain*, 301 Mich App at 130.

Additionally, a partnership accounting claim can include unpleaded claims based upon a breach of fiduciary duty. This is necessarily so, given that the Partnership Act contains language that requires partners to account to the partnership as fiduciaries. For example, MCL 449.21 states that every partner "must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property." A breach of the above provision would be the breach of a fiduciary duty which may form the basis for an accounting action. See, e.g., *Bondy v Davis*, 40 Mich App 153; 198 NW2d 418 (1972) (the plaintiff filed an action for a partnership accounting arguing that the defendant partner had defrauded plaintiff by appropriating partnership funds to defendant's own use). See also, Crane and Bromberg, Law of Partnership, Right To An Account, § 72, "Since all activities related to the partnership are subject to scrutiny, a wide variety of matters may be determined, for example . . . [q]uestions of fiduciary duty, such as whether a partner must account for profits from an outside transaction . . . ." The remedy for a partner's breach of its fiduciary duties to its partners involves placing the wronged partners in the economic position that they would have enjoyed but for the breach. *Gilroy v Conway*, 151 Mich App 628, 637; 391 NW2d 419 (1986).

As to the $89,000 that the trial court found Jacob to have wrongfully expended out of partnership finds for the demolition of the garage on the property, this Court previously

concluded that Jacob withheld information from the LAMT regarding demolition of the garage in violation of MCL 449.20, MCL 44921(1) and MCL 449.18(e) and the partnership agreement. *Jacob v Bald Mountain West*, supra, at page 2. Had Jacob not withheld information regarding the demolition or sought the LAMT's input regarding the demolition cost when the partnership was receiving no income, it is presumed that the demolition cost would not have been expended. A return of the demolition cost to the partnership would thus place the wronged partners in the economic position they would have been in but for Jacob's breach of fiduciary duties.

Jacob next contends that the trial court erred in disregarding his jury demand. Jacob filed a jury demand prior to the evidentiary hearing. He asserts that because plaintiffs were now seeking money damages, and not equitable relief, he was entitled to have a jury determine the legal issue of how much he owed. Whether one has the right to a jury trial presents a question of constitutional law that we also review de novo. *People v Antkoviak*, 242 Mich App 424, 430; 619 NW2d 18 (2000).

The constitutional right to trial by jury under Const. 1963, art. 1, § 14 applies to civil actions at law that were triable by a jury at the time the constitutional guarantee was adopted. *In re Forfeiture of $1,159,420*, 194 Mich App 134, 154-155; 486 NW2d 326 (1992). Because there was no right to a jury trial in equitable matters, matters in equity are not entitled to jury trials unless so preserved or created by the Legislature. *Id*. An action for an accounting is an equitable matter (see *Bondy*, 40 Mich App at 158-159).

On dissolution of a partnership, its assets are to be distributed to the partners. MCL 449.40; MCL 449.38. Obviously, in order to do so, the assets must be accounted for. It is proper for an equity court to determine the disposition of a fund on the winding up of a partnership. *Kranz v Kranz*, 323 Mich 680, 686; 36 NW2d 179 (1949). The purpose of appointing a receiver is to preserve property and to dispose of it under the order of the court. *Reed v Reed*, 265 Mich App 131, 162; 693 NW2d 825 (2005). The receiver in this case was not awarded damages from Jacob and neither were plaintiffs. Instead, the receiver was collecting property that the trial court determined Jacob had wrongfully taken from the partnership.

Jacob relies on *Dobson v Whitker*, 242 Mich 308; 218 NW 770 (1928) in support of his argument that when one partner in a partnership seeks money from another partner as a result of alleged wrongdoing involving the partnership, the relief is not automatically granted as part of an action for an accounting and that instead a legal action and remedy are appropriate. However, in *Dobson*, the plaintiff was a former partner who sold his shares in the partnership to the two other partners based upon an agreement with one of the partners that the business would be incorporated and he would assign the plaintiff shares of his stock. *Id*. at 309-310. The plaintiff had thus been induced to sell his shares of the partnership by the partner, who thereafter failed to fulfill his agreement with the plaintiff. The plaintiff sued the inducing partner for an accounting. Our Supreme Court held that the promise and agreement made by the inducing partner was contractual in nature and made between the two men as individuals, not as partners, and that the plaintiff no longer being a partner, he was not entitled to an accounting. *Id*. at 311-312. *Dobson* clearly varies from the case at hand where there is no agreement or contract at issue between partners or former partners in the partnership, all parties remained partners in the partnership at all relevant times, and the monies at issue concern partnership funds that were taken and used by one member of the partnership without the consent or knowledge of another member.

Jacob's reliance on *Marshall Lasser*, and *Davis v Chatman*, 292 Mich App 603; 808 NW2d 555 (2011), are also misplaced. *Marshall Lasser* involved a statutory conversion claim, a legal claim seeking damages in which there was a right to a jury trial and *Davis* similarly involved a legal claim for which there was a right to a jury trial (quo warranto). As previously indicated, there were no jury triable matters at issue in the instant case and no *damages* were collected. Instead, the receiver undertook its appointed duty to collect and account for the partnership's assets in winding up the partnership and this included recouping monies that the trial court determined were wrongfully taken or used by Jacob.

Jacob next contends that the trial court made several evidentiary errors. We review a trial court's decision to admit evidence for an abuse of discretion. *Campbell v Sullins*, 257 Mich App 179, 196; 667 NW2d 887 (2003). A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *Davis v Detroit Financial Review Team,* 296 Mich App 568, 612; 821 NW2d 896 (2012).

Jacob's first assertion with respect to the trial court's evidentiary decisions is that the trial court disregarded undisputed evidence that the expenditures from partnership funds for the garage demolition and for defense of this action were approved by a 2/3 majority of the partners and benefitted the partnership. According to Jacob, the approval precluded a finding that he should have to repay the funds to the partnership.

As previously indicated, the trial court ruled after a bench trial that Jacob's actions concerning the garage demolition violated the Partnership Act and the partnership agreement because he took over complete control of the partnership and did not allow the LAMT to express its voice in the management decisions of the partnership. This Court affirmed that decision, opining:

> The record also shows that Steven withheld information from plaintiffs regarding partnership affairs, including . . . the demolition of the garage . . . . See MCL 449.20 ("Partners shall render on demand true and full information of all things affecting the partnership to any partner . . . ."). . . . It is undisputed that Steven did not communicate with Ellen and Fuller after their failure to attend the June 7, 2004 partnership meeting. At trial, Steven admitted that he did not inform plaintiffs about the trespass action, condemnation action, the demolition of the garage, the environmental issues related to the partnership's real property, and the promissory notes between the partnership and his other business entity. . . . Such conduct amounted to a violation of MCL 449.20, and also excluded plaintiffs from participating in the partnership because they were denied their "equal voice in the determination of the policies of the Partnership and the management thereof." MCL 449.20. *Jacob v Bald Mountain West*, supra, at page 2.

Because this Court has already affirmed that Jacob's failure to apprise LAMT of the garage demolition or seek its approval amounted to a violation of MCL 449.20, the law of the case precludes Jacob from arguing that approval of two of the partnership members of the garage demolition renders the trial court's repayment of this item an error. *Augustine*, 292 Mich App at 425.

Concerning the attorney fees that Jacob was ordered to repay to the partnership, Jacob testified at the evidentiary hearing that he and the partnership were both named defendants in the instant lawsuit and that he hired the Carson Fischer law firm to represent both him and the partnership. He testified that he was named in the lawsuit but averred that the claims were against the partnership. He testified that all of the legal fees that were paid to Carson Fisher between the time the lawsuit was initiated and the receiver took over the partnership came from the partnership funds. Jacob admitted that he did not apprise LAMT of the expenditure but testified that he did not do so because he did not think it was a material matter, and that the only other partner in BMW, James Jacobs, concurred in using partnership funds to defend this matter.

The fact that both Jacob and the other partner in BMW, his brother, approved payment of the defense legal fees is of no consequence, as this fact was of no consequence in ordering repayment of the other fees that Jacob and his brother approved. MCL 449.20 imposes a duty on all partners "to render on demand" true and full information of all things affecting the partnership to *any* partner. MCL 449.18(e) provides that *all* partners have equal rights in the management and conduct of the partnership business and MCL 449.21 requires that every partner account to the partnership for any benefit and hold as trustee for it any profit derived by him without the consent of the partnership, or from any use by him of its property. Jacob improperly excluded the LAMT from the management decision of the partnership concerning payment of the attorney fees associated with the defense of the instant action. His conduct violated MCL 449.18(e), MCL 44921, and MCL 449.20 as well as the partnership agreement. Repayment of the fees to the partnership was thus the appropriate equitable remedy to properly wind up the partnership. Consequently, the trial court's denial of Jacob's motion for directed verdict with respect to the repayment of the garage demolition fees and the legal fees was not in error.

Repayment of the legal fees was also not, as Jacob contends, contrary to the evidence. Jacob contends that because BMW was a co-defendant with him, and the complaint was directed at both him and the partnership and sought only an accounting and dissolution, the legal fees could *only* have been incurred in defending the partnership. However, a partnership accounting claim can include claims based upon a breach of fiduciary duty. See, e.g., *Bondy*, 40 Mich App 153 (the plaintiff filed an action for a partnership accounting arguing that the defendant partner had defrauded plaintiff by appropriating partnership funds to defendant's own use). See also, Crane and Bromberg, Law of Partnership, Right To An Account, § 72, "Since all activities related to the partnership are subject to scrutiny, a wide variety of matters may be determined, for example . . . [q]uestions of fiduciary duty, such as whether a partner must account for profits from an outside transaction . . . ."

It was Jacob's actions alone which prompted the action against him and the partnership, but to prompt the accounting to determine the extent to which the partnership's assets had been misused by Jacob, the partnership was a necessary party. Thus, the trial court did not clearly err in finding that the legal fees were for the defense of Jacob, acting individually.

Jacob also contends that the trial court disregarded evidence showing that any actual damages were less than that which he was ordered to repay. Jacob further takes issue with the fact that the trial court barred him from presenting evidence at the evidentiary hearing relating to the amounts the trial court had previously ordered him to repay on the basis that the court's prior

order was not subject to re-litigation, and then it nevertheless re-opened one of those awards to increase the amount Jacob was to pay.

According to Jacob, the garage demolition made the property more marketable. The garage was dilapidated and past its useful life, and its demolition benefitted the property and thus the partnership, such that ordering a return to the partnership of the demolition costs was in error. Again, the trial court found, and this Court affirmed the finding, that Jacob's demolition of the garage without advising, informing, or consulting with the LAMT was a violation of the parties' partnership agreement and of the Partnership Act. Thus, the factual finding that Jacob was liable to the partnership for a breach of his fiduciary duties was a foregone conclusion and the law of the case. *Augustine*, 292 Mich App at 425.

As to the actual amount Jacob was ordered to repay to the partnership for the garage demolition, there is no dispute that the garage demolition cost approximately $94,000. Jacob testified as to the cost at the evidentiary hearing. It is true that the trial court initially ordered that Jacob return $89,000 to the partnership for the garage demolition and increased that amount based upon evidence at the evidentiary hearing. However, in its order for an evidentiary hearing, the trial court stated that the purpose of the evidentiary hearing was to determine "any other monies to be collected from Defendant Steven E. Jacob by the Receiver." That is, monies other than the $300,000 for the six $50,000 management fee payments and $89,000 for the demolition of the garage that the trial court had already ordered. Based on the explicit language in the order, Jacob was well aware that the evidentiary hearing would not address those amounts. Yet, Jacob affirmatively testified that the demolition actually cost $94,037, rather than the $89,000 that he had previously thought. The trial court could have reasonably taken Jacob's testimony into consideration in ordering Jacob to repay the additional "other monies" that represented the difference between the prior demolition repayment and the actual demolition cost.

With respect to the management fees, there is no dispute that Jacob was not entitled to the same. The dispute lies with the amount actually collected by Jacob and thus the amount ordered to be repaid. Contrary to Jacob's assertion, he was allowed to present testimony to challenge the $300,000 amount.

Jacob contends that the trial court erroneously ordered repayment of $300,000 in management fees when Kristine Ryber, the CPA who prepared BMW's tax returns for over ten years, testified that the ledgers for BMW showed that Jacob collected only $200,000 in management fees, and returned $50,000 of that for a total of only $150,000 in management fees actually collected. According to Jacob, there is no admissible evidence that supports an award of $300,000 in management fees. We agree.

The trial court did not award the repayment of $300,000 in management fees post-evidentiary hearing in its August 2, 2012, opinion and order. Instead, it ordered the repayment of management fees post-trial and pre-evidentiary hearing. In May 2011, the LAMT moved the trial court to direct the receiver to pursue the return of partnership assets, including the management fees. As part of its May 13, 2011, order, the trial court authorized the receiver to pursue and collect from defendant $300,000 representing six $50,000 management fee payments. This repayment was likely based, in part, on Jacob's testimony at trial that beginning in 2004, he began taking a $50,000 per year management fee. However, on cross-examination, Jacob

testified that from 2004 forward, he received only $200,000 for management fees. There appear to be no documents submitted to the trial court to verify the amount of payments actually taken.

The trial court did not allow Jacob to again testify at the evidentiary hearing that he only received four $50,000 management fee payments and returned one, and thus to argue that the $300,000 return of management fees award should be reduced. However, the trial court allowed defense counsel to make a record that had Jacob been allowed to testify concerning the issue, he would have testified that he received only four payments and he paid one of those $50,000 fees back to the receiver. Thus, Jacob was allowed to place the testimony he sought to have introduced before the trial court. And, Jacob introduced the testimony of Kristine Ryber, BMW's tax preparer, who testified that in her review of BMW ledgers and bank reconciliations for purposes of preparing BMW's taxes over the relevant years, she noted only four $50,000 management fee payments to Jacob, one of which had been returned. There was no testimony at the evidentiary hearing that Jacob had actually received $300,000 in management fees.

Based upon the above, the trial court's order directing the repayment of $300,000 in management fees was clearly erroneous. There was no testimony or documentary evidence indicating that Jacob collected $300,000 in management fees from the partnership. At best, there is a June 2004 resolution from the partnership authorizing Jacob to begin taking a yearly $50,000 management fee. But there is no testimony or documentary evidence to suggest that he actually took more than $200,000. And, the testimony indicates that Jacob returned $50,000 of that $200,000. There is absolutely nothing to support an award of $300,000 to the partnership. Thus, we are left with the firm and definite conviction that a mistake has been made. *Marshall Lasser, PC*, 252 Mich App at 110. The judgment must be amended to reflect that Jacob be ordered to repay only $150,000 to the partnership for management fees.

Jacob next argues that the trial court erred in denying his motion in limine seeking to preclude the introduction of evidence relating to any claims barred by the law of the case and by a 2005 release signed by the parties. Jacob also contends that the trial court erred in allowing plaintiffs to conduct the evidentiary hearing as the receiver's proxy. We disagree.

This Court reviews the trial court's decision to grant a motion in limine for an abuse of discretion. *Bartlett v Sinai Hosp of Detroit*, 149 Mich App 412, 418; 385 NW2d 801 (1986). Whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998). Any error in the admission or exclusion of evidence does not require reversal unless a substantial right of the party is affected. MRE 103(a); MCR 2.613(a).

Generally, evidence is admissible if it is relevant and inadmissible if it is not. MRE 402. "As defined in MRE 401, 'relevant evidence' is 'evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.' " *Dep't of Transportation v Haggerty Corridor Partners Ltd Partnership*, 473 Mich 124, 165 n. 62; 700 NW2d 380 (2005). A fact of consequence is a fact that is material. *Morales v State Farm Mut Auto Ins Co*, 279 Mich App 720, 731; 761 NW2d 454 (2008). "If the evidence is offered to help prove a proposition which is not a matter in issue, the evidence is immaterial." *People v Mills*, 450 Mich 61, 67; 537 NW2d 909 (1995), quoting 1 McCormick, Evidence (4th ed), § 185, p 773.

According to Jacob, when the trial court entered its March 10, 2009, opinion and order after trial, it declined the LAMT's explicit request that Jacob be ordered to pay monetary compensation and this ruling became the law of the case. Jacob contends that his motion in limine filed prior to the evidentiary hearing sought to preclude any evidence relating to claims barred by the law of the case—specifically, those claims seeking monetary compensation as previously ruled upon by the trial court.

First, the trial court did not address any monetary compensation by Jacob in its opinion and order. It simply ordered an accounting and dissolution without mention of monetary compensation. Second, as we previously determined, at no time did the trial court ever order Jacob to pay any "damages." Instead, it ordered Jacob to repay monies to the partnership that it found him to have wrongfully taken. In other words, to return partnership assets to the partnership so that the partnership could be dissolved and its assets distributed. Finally, Jacob misconstrues the concept of the law of the case.

Under the law of the case doctrine, an appellate court's decision on a particular issue binds both the trial courts and other appellate panels in subsequent appeals of the case. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). The law of the case applies to issues actually decided, either implicitly or explicitly, in the prior appeal. *Id.* *This Court* did not previously decide the issue of whether, as Jacob phrases it, plaintiffs are barred from seeking monetary relief. *This Court* also did not decide the issue of whether the trial court could properly allow the receiver, as part of an accounting and dissolution, to collect monies from a partner who had been found to have taken/used partnership monies in violation of the partnership agreement and the Partnership Act. The law of the case doctrine thus provided no basis for Jacob's motion in limine.

Jacob further argues that his motion in limine should have been granted based upon a November 17, 2005, release signed by the parties in a settlement concerning the estate of Harold Jacob. The release was signed by Ellen Jacob and James Fuller as trustees of the LAMT, Steven Jacob in his individual capacity and as trustee of "AMT", Thomas Jacob, Jon Jacob, James Jacob, and other individuals and provides, in relevant part:

> 2. **Mutual Releases.**
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> A. Subject to Sections 2.B. and 2.C. each Releasor, on such Releasor's own behalf, and on behalf of such Releasor's respective predecessors, affiliates, successors, beneficiaries, heirs, assigns and any other person or entity claiming by or through such Releasor, or any other person or entity controlled by such Releasor, hereby releases, remises, acquits, and forever discharges each Releasee from any and all Claims arising or accruing at any time prior to and through the date of this Release or otherwise based on any facts in existence as of the date of this Release, and further covenants not to sue any Releasee in regard to any Claim released by the Release.

"Claim" is defined in the release as "collectively all claims, demands, liabilities, obligations, damages, debts, liens, losses, causes, causes of action of whatever kind or nature and description,

in law or in equity, whether known or unknown, or known in the future, fixed or contingent, suspected or unsuspected, disclosed or undisclosed."

The partnership, BMW, did not sign the release. While the LAMT could be construed as having released any claims it had against Jacob, the LAMT did not release any claims it had against the partnership. And, the partnership did not release any claim it may have had against Jacob. In the instant case, the LAMT asserted claims against the partnership for an accounting and for dissolution of the partnership. The trial court appointed a receiver, who then stepped into the shoes of the partnership for purposes of winding up the partnership. The receiver was directed, by the court, to collect the assets of the partnership, which included retrieval of monies that were taken/misused by Jacob. The release did not govern the partnership's assets or the receiver's collection of monies that the trial court determined that Jacob had appropriated from the partnership. The trial court did not abuse its discretion in denying Jacob's motion in limine.

Jacob next contends that the trial court erred in allowing the LAMT to prosecute the evidentiary hearing as the receiver's proxy. Jacob has cited no authority in support of his position. Moreover, a receiver derives his authority from statutes and court rules and from the order of appointment and specific orders which the appointing court may make. *Band v Livonia Associates*, 176 Mich App 95, 108; 439 NW2d 285 (1989). In its May 13, 2011, order regarding the evidentiary hearing, the trial court stated, "As to any other monies to be collected from Defendant Steven E. Jacob by the Receiver, an evidentiary hearing shall be scheduled to determine the same. The parties shall call the Court to schedule a mutually agreeable date." Given that the *parties* were to call the trial court regarding a date, it was understood that the LAMT would at least be participating in the evidentiary hearing. And, in *Westgate v Westgate*, 294 Mich 88, 91; 292 NW 569 (1940), our Supreme Court stated:

> A receiver is sometimes said to be the arm of the court, appointed to receive and preserve the property of the parties to litigation and in some cases to control and manage it for the persons or party who may be ultimately entitled thereto. A receivership is primarily to preserve the property and not to dissipate or dispose of it.
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> ***
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> The duty of a receiver is not to litigate as between the adverse parties, but, under the order of the court, to preserve and care for the property and turn it over to the person who is ultimately decided to be entitled thereto.

Because the receiver was not an adverse party but instead, an arm of the Court, it was more appropriate for the LAMT to conduct the evidentiary hearing across the table from Jacob than the receiver.

In docket no. 312469, plaintiffs contend that in its evidentiary hearing ruling, the trial court erred in failing to order Jacob to return $141,325.75 to the BMW partnership. Plaintiffs contend that the trial court mischaracterized this amount, which was a consulting fee taken by Jacob, as an attorney fee, and further erroneously concluded that the LAMT failed to request the

return of this consulting fee and that the trial court should have granted their motion for relief from judgment on this basis.

We review for clear error the trial court's findings of fact following an evidentiary hearing. *People v Buie*, 491 Mich 294, 304; 817 NW2d 33 (2012). While the trial court's factual findings are reviewed for clear error, its legal conclusions are reviewed de novo. *Book-Gilbert v Greenleaf*, 302 Mich App 538, 542; 840 NW2d 743 (2013). We review a trial court's decision to grant or deny a motion for relief from judgment for an abuse of discretion. *Driver v Hanley (After Remand)*, 226 Mich App 558, 564-565; 575 NW2d 31 (1997).

In its August 2, 2012, opinion and order, the trial court opined, "Previously, Plaintiff had requested return of an attorney fee paid in regard to a condemnation action initiated by the Oakland County Road Commission. However, Plaintiff did not pursue this issue in their proposed findings of fact and conclusions of law. Accordingly, this issue is considered abandoned."

As pointed out by the LAMT and uncontested by Jacob, there was no attorney fee in regard to a condemnation action for which the LAMT requested the return. In its proposed findings of fact and conclusions of law, Jacob identified five items which the LAMT asserted Jacob wrongfully took from the partnership: (1) a yearly management fee for himself; (2) a consulting fee paid to Jacob Properties (of which Jacob is the sole owner) for consulting services rendered in connection with the condemnation action of partnership property; (3) attorney fees paid to Buztel Long in connection with DEQ and EPA issues for BMW partnership and other property; (4) fees paid for the demolition of a garage on partnership property; and, (5) attorney fees paid to Carson Fischer for the defense of the present action. Plaintiffs also identified only those five items as those they were seeking to have returned to the partnership. The trial court's reference to "an attorney fee paid in regard to a condemnation action initiated by the Oakland County Road Commission" was thus an error as no such attorney fee was sought.

Additionally, in its proposed findings of fact and conclusions of law filed after the evidentiary hearing, the LAMT indicated that Jacob answered under oath that the partnership paid a $141,325.75 consulting fee to Jacob or an entity under his control. Under its proposed findings of fact, plaintiffs stated, "That while acting as the so-called managing partner of the Partnership, Steven Jacob paid or caused to be paid $141,325.75 of Partnership funds for a consulting fee to Jacob properties, an entity under the sole and exclusive ownership and control of the alleged managing partner Steve Jacob." Plaintiffs further stated, "That Steve Jacob did not notify the LAMT or seek the LAMT's consent to make the $141,325.75 payment." Plaintiffs went on to indicate that the LAMT had no knowledge of and did not consent to the payment and was not afforded the opportunity to express its voice concerning the payment. In their proposed conclusions of law, plaintiffs further indicated that Jacob's failure to advise, consult with or allow the LAMT to participate in the management of the partnership in connection with payment of the $141,325.75 of partnership funds as a consulting fee was a violation of MCL 449.18(e) and Article VII of the partnership agreement.

Clearly, plaintiffs did pursue the issue regarding the consulting fee in their proposed findings of fact and conclusions of law. The trial court's finding to the contrary was clearly erroneous. Because the trial court erred in its description of the consulting fee as an attorney fee

and further erred in its finding that plaintiffs abandoned pursuit of the recoupment of the consulting fee, remand to the trial court is necessary for its determination of whether the fee should, in fact, when properly characterized and addressed, should be repaid to the partnership.

In docket no. 312390, we remand to the trial court for amendment of the judgment to reflect that Jacob be ordered to repay only $150,000 to the partnership for management fees. We affirm in all other respects. In docket no. 312469, we remand to the trial court to determine whether the $141,325.75 paid as a consulting fee should be repaid to the BMW partnership. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Patrick M. Meter
/s/ Deborah A. Servitto