

the first contract, S Coal Company (S Coal) was to be sold by John Gordon to a company owned by Charles Turner. However, after the contract was executed, the parties discovered that a necessary mining permit could not be transferred to Turner's company because of a previous violation by Turner. A second contract was therefore executed, under which S Coal was sold instead to a company owned by Turner's wife, Beverly Turner. Gordon filed a suit against Charles Turner's company, alleging that it breached the contract by failing to mine the coal reserve involved to completion. The court ruled against Gordon, based on its finding that the second contract (selling S Coal to Beverly Turner's company) extinguished any obligations under the first contract. On appeal, Gordon contends that this ruling was in error. Turner filed suit on behalf of S Coal and a trust set up by his wife (who died before the suits were filed), alleging breach of contract and breach of fiduciary duty. The court found that Turner failed to prove any of his claims. On appeal, Turner argues that these findings were against the manifest weight of the evidence. We affirm.

¶ 3 The process of putting together a mining project such as that involved in this case is complex and involved. In order to go forward, it is necessary to obtain coal leases, a mining permit, a mining operator, and a contract to sell the coal. Obtaining a permit alone involves a lengthy process. John Gordon began the process of obtaining a permit to mine the Cambria Reserve sometime in 1996 or 1997. At the time, he was the sole owner of S Coal. Gordon estimated that he spent approximately 1,500 hours of his time working on this process. The permit to mine the Cambria Reserve—permit No. 304—was issued to S Coal late in February 2001.

¶ 4 During the permitting process, Gordon was also looking for a mining operator. He testified at the trial that there were three or four miners interested in the project before he entered into the contracts at issue in this case. In 1999, Gordon entered into discussions with a company called Megawatt Management for a potential mining contract. Although a

memorandum of understanding was drafted, no deal was ever finalized.

¶ 5 In January 2001, the parties to the instant dispute began negotiations. On February 13, Charles Turner signed a document entitled "memo of understanding," which had been drafted by John Gordon. The document stated that it was an "outline" of the parties' "understanding concerning S Coal Company." The memo stated that Gordon would transfer his interest in S Coal—along with its "permits, leases, etc."—to Turner "or [his] designee" and that Turner (or his designee) would pay \$2.50 per ton in royalties to Gordon. Although not specified in the memorandum, the parties' intent was that Gordon would sell S Coal to Tiger Illinois, LLC (Tiger Illinois), a subsidiary of Tiger Industrial Transportation Systems, Inc. (Tiger Industrial), a corporation owned by Charles Turner. The same day, Gordon terminated a pending memorandum of understanding with Megawatt Management.

¶ 6 One or two days later, Gordon and Van Villines, an employee of Tiger Industrial, met with representatives of the Southern Illinois Power Cooperative (SIPC) to negotiate a contract to sell the Cambria Reserve coal to SIPC. Gordon and Villines offered to sell the coal to SIPC at a price of \$1.15 per MBTU. An MBTU is one million British thermal units, a unit of power generated from the coal. SIPC made a counteroffer to purchase the coal for \$1 per MBTU. Charles Turner indicated that this was acceptable and authorized Gordon and Villines to proceed with the sales contract at that price. The contract was not immediately reduced to writing, however. We note that at the time, the Department of Natural Resources had not yet issued the mining permit. That permit was issued on February 23, 2001, shortly after the negotiations with SIPC.

¶ 7 During the next few months, Gordon and Turner continued negotiations on the project. Meanwhile, Gordon simultaneously continued negotiations with Megawatt Management and began negotiations with Mike Moore. Moore represented a company called Cambria Resources. Cambria Resources was a subsidiary of Jader Fuel, a mining operator

that was owned by Megawatt Management. Gordon authorized Moore to bid the Cambria coal for S Coal. Moore negotiated a five-year coal sale contract with SIPC with a price of \$1.08 per MBTU. This resulted in purchase order number 01-4002 between SIPC and Cambria Resources.

¶ 8 On June 21, 2001, the parties to this appeal executed a written contract for the sale of S Coal to Tiger Illinois. However, the Illinois Department of Natural Resources would not transfer the mining permit to that entity. This was because Turner had an outstanding mining violation in Oklahoma. Because of this violation, the Department of Natural Resources would not issue or transfer a mining permit to any company in which Turner owned a 10% interest or more. As a result, the parties agreed to a new contract, pursuant to which S Coal would be sold to Beverly J. Turner & Associates. The terms of the two contracts were otherwise identical. The second contract was executed on July 10, and John Gordon transferred his shares in S Coal to Beverly Turner. We note that the parties were aware of Charles Turner's unresolved violation before executing either agreement. They tried to get around the problem by transferring shares of ownership of Tiger Illinois to other members of the Turner family. They did not know until they applied to transfer the permit that this would not be sufficient to satisfy Department of Natural Resources requirements.

¶ 9 Pursuant to the contract, the Turners were to pay Gordon \$2.50 per ton in royalties and an engineering fee of \$0.25 per ton. Although not addressed in the written contract, the other royalty holders—including Van Villines and the property owners—were to be paid their royalties from the \$2.50 per ton paid to Gordon.

¶ 10 During the period of time between the June 21 and July 10 contracts, SIPC terminated its purchase order with Cambria Resources and on July 3 executed purchase order number 01-4013 with S Coal. Aside from the substitution of S Coal as the seller, the terms of the two purchase orders were identical—S Coal would sell the coal from the Cambria Reserve to SIPC

over a five-year period for a price of \$1.08 per MBTU.

¶ 11 In September 2001, S Coal began shipping coal to SIPC under the contract. Money from the sales was deposited into an escrow account at South Pointe Bank. The account was a previously existing account in the name of Tiger Industrial. Bank officers required that the funds be held in the Tiger Industrial account because Tiger Industrial already had a \$3 million line of credit with the bank. Funds were then wired from the escrow account to Gordon, S Coal, and the various royalty holders. Because royalties to be paid to other royalty holders were to be paid by Gordon from his \$2.50-per-ton royalty amount, Gordon set up the wiring instruction sheet to direct the transfer of royalty payments and other funds. Among the instructions provided was an instruction to wire the disputed \$0.08 per MBTU to Gordon. Gordon prepared the wiring instruction sheet at some point during the summer of 2001. Both Beverly and Charles Turner signed it. Turner acknowledges he did not read it in its entirety.

¶ 12 On September 21, 2001, Charles Turner sent a letter to Gordon complaining about various aspects of the contract with SIPC. Specifically, the contract provided for minimum delivery guarantees, regarding both tons of coal and MBTUs. It also provided for maximum ash content. The contract included a schedule of penalties to be deducted from SIPC's payments to S Coal if these minimums and maximums were not met. Turner complained that this structure was unfair to S Coal. He also complained that Gordon was wrongfully retaining an additional \$0.08 per MBTU. (Both parties refer to this amount as the "disputed fee.") The parties resolved the issue with the penalty schedule but apparently did not resolve the issue of the disputed fee. Turner testified at the trial that he did not take this matter to court initially because he was afraid that litigation would impede his ability to meet his obligations to SIPC under the sales contract.

¶ 13 In December 2001, Gordon removed and sold timber on the land above the Cambria Reserve. He divided the proceeds from the sale with one of the property owners after the

property owner threatened legal action. Beverly Turner died in 2003. Upon her death, all of her assets, including S Coal, went into the Beverly J. Turner Revocable Trust. Charles Turner is the trustee and one of the beneficiaries of Beverly's trust. At some point in 2004, S Coal stopped mining operations in the Cambria Reserve. According to Turner, this was because the coal remaining in the Cambria Reserve was of such poor quality that S Coal could only meet its obligations to SIPC by finding a different source of coal.

¶ 14 In January 2005, Gordon filed a petition against Tiger Illinois and Tiger Industrial, alleging that the companies had breached the June 21 agreement by failing to mine the Cambria coal to completion. In June 2006, S Coal and Charles Turner, as the trustee of Beverly Turner's trust, filed a separate lawsuit against Gordon, asserting various claims for a breach of contract, a breach of fiduciary duties, and fraudulent misrepresentation. He voluntarily dismissed the fraud claims prior to trial. The cases were consolidated for a bench trial, which took place over five days in December 2008. The court took the matter under advisement and issued a written judgment in March 2009. The court expressly found that (1) both Gordon and Turner were sophisticated businessmen with experience in the coal mining business, (2) all the contracts were drafted by John Gordon, and neither party sought legal advice, (3) the July 10 contract acted as a novation, thereby terminating the June 21 contract, and (4) Turner failed to meet his burden of proving any of his claims. The court therefore entered a judgment for the defendants in each suit.

¶ 15 Turner filed a notice of appeal, and Gordon filed a cross-appeal. Turner argues that the court's findings were against the manifest weight of the evidence because he met his burden of proving the following claims: (1) Gordon breached the contract by retaining a portion of the proceeds from the timber sales, (2) Gordon breached the contract by retaining the additional \$0.08 per MBTU negotiated by Mike Moore, and (3) Gordon breached the contract by retaining more money than he was entitled to for his engineering fees and royalty

payments. Turner further argues that he met his burden of proving that Gordon breached fiduciary duties based on the same conduct. Finally, Turner argues that in the event this court finds that Gordon was entitled to retain the disputed fee amount, we should find that the trial court erred by failing to find that Gordon breached fiduciary duties by refusing to pay sales tax on the disputed amount. Gordon argues that the court erred in finding that a novation occurred, thereby terminating the June 21 agreement. Gordon filed a motion to strike the statement of facts in Turner's brief, which we ordered taken with the case.

¶ 16 We first address Gordon's motion to strike the statement of facts in Turner's brief. He argues that the statement of facts violates Supreme Court Rule 341(h)(6) (eff. July 1, 2008) in that it is "neither accurate nor fair." He contends that Turner's statement recites only those facts helpful to his case while ignoring the facts that support Gordon's case. We note, however, that Gordon does not provide his own statement of facts. The record in this case is lengthy and complex, and having at least one statement of facts is helpful. Moreover, this court is quite capable of reviewing the record to determine what it shows, and we can disregard any statements that do not accurately reflect the record. See *Bollweg v. Richard Marker Associates, Inc.*, 353 Ill. App. 3d 560, 571-72, 818 N.E.2d 873, 883 (2004). We will therefore deny Gordon's motion to strike Turner's statement of facts.

¶ 17 In his cross-appeal, Gordon argues that the court erred in finding that a novation had occurred. We will address this argument first because a resolution of some of Turner's claims will depend on our resolution of this issue. As previously mentioned, the court's finding of a novation led the court to conclude that the June 21, 2001, contract between Gordon and the Tiger companies was terminated by the subsequent contract between Gordon and Beverly J. Turner & Associates. In turn, this led the court to rule against Gordon because he sued only those companies. We find no error.

¶ 18 A novation occurs where one contractual obligation is substituted for another by the

mutual agreement of the parties, thereby extinguishing the first obligation. *Printing Machinery Maintenance, Inc. v. Carton Products Co.*, 15 Ill. App. 2d 543, 552, 147 N.E.2d 443, 448 (1957). Although a novation can involve the substitution of any type of contract, the term is usually used to refer to the substitution of a debtor or creditor as a party. *Faith v. Martoccio*, 21 Ill. App. 3d 999, 1003, 316 N.E.2d 164, 167 (1974); *Printing Machinery Maintenance, Inc.*, 15 Ill. App. 2d at 552, 147 N.E.2d at 448. Whether a novation has occurred depends on the intentions of the parties. *Phillips & Arnold, Inc. v. Frederick J. Borgsmiller, Inc.*, 123 Ill. App. 3d 95, 101, 462 N.E.2d 924, 928 (1984). The party seeking to prove that a novation has occurred has the burden of proving that the parties intended a novation. *Phillips & Arnold, Inc.*, 123 Ill. App. 3d at 102, 462 N.E.2d at 929.

¶ 19 The four essential elements of a novation are as follows: (1) a prior valid agreement, (2) a subsequent agreement to a new contract, (3) the extinguishment of the previous contractual obligation, and (4) the validity of the new contract. *Phillips & Arnold, Inc.*, 123 Ill. App. 3d at 101, 462 N.E.2d at 928. Only one of these elements is at issue here—whether the parties intended the second contract to extinguish the obligation of the Tiger entities under the first contract.

¶ 20 Gordon argues that there was no evidence that he intended to relieve either company of its obligations under the first contract. He contends that Tiger Industrial was the only party to either contract that was solvent and argues that there was no evidence that he "intended to release the only solvent entity." We first note that this argument mischaracterizes the evidence. Turner testified that the funds from the sale of coal under the SIPC contract were wired into a preexisting account in the name of Tiger Industrial because the bank required the transactions to be handled this way. This was because Tiger Industrial already had a \$3 million line of credit with the bank. Turner further testified that the proceeds of Tiger Industrial and S Coal were kept separate in the accounting records of both

companies. He also testified that S Coal had no tangible assets other than the mining permit.

¶ 21 Gordon correctly notes that in a more typical novation situation—where one party agrees to assume the debt of another—the new debtor will be seen as an additional debtor rather than a substitute debtor unless it is clearly shown that the parties intended a novation. *Phillips & Arnold, Inc.*, 123 Ill. App. 3d at 102, 462 N.E.2d at 929. Here, the contractual obligation was not to repay a debt, but to mine the coal from the Cambria Reserve. Beverly J. Turner & Associates was substituted as a party precisely because neither Tiger Illinois nor Tiger Industrial could fulfill that obligation due to Charles Turner's outstanding violation. Under these circumstances, it makes little sense to conclude that the parties intended the Tiger companies to remain bound to an obligation they could not fulfill.

¶ 22 Moreover, the requisite intent for a novation can be inferred if the new contract is inconsistent with the earlier contract. *Printing Machinery Maintenance, Inc.*, 15 Ill. App. 2d at 552, 147 N.E.2d at 448. Here, the contract called for the sale of S Coal and the subsequent mining of the Cambria Reserve. As Turner points out in his brief, Gordon could only sell S Coal once. Thus, the two contracts were inherently inconsistent, which further supports the court's finding of a novation.

¶ 23 Gordon, however, also points to the signature lines on the contract. Beverly Turner signed both on behalf of Beverly J. Turner & Associates and as the 100% owner of Tiger Industrial. Charles Turner signed as the president of Tiger Industrial. Gordon argues that this is further evidence that the parties did not intend a novation. We are not persuaded. The contract expressly states that it is between "John Gordon, d/b/a Gordon & Price" and "Beverly J. Turner & Associates." Moreover, while the contract imposes obligations on Beverly J. Turner & Associates as the operator, it does not impose any obligations on Tiger Industrial. We conclude that the court's finding is supported by the evidence.

¶ 24 We will now turn to Turner's claims. He first argues that the court erred in

determining that he had failed to prove his breach-of-contract claims. He contends that Gordon breached the contract by (1) retaining the proceeds from the sale of timber on the land involved in three coal leases, (2) retaining an additional \$0.08 per MBTU on coal sold to SIPC, and (3) retaining other funds in addition to what he was owed. As previously noted, the court found that Turner failed to meet his burden of proving each of these claims. On appeal, he argues that this finding was against the manifest weight of the evidence with regard to each claim.

¶ 25 We will reverse a trial court's findings of fact only if they are against the manifest weight of the evidence. *Eychaner v. Gross*, 202 Ill. App. 3d 228, 251, 779 N.E.2d 1115, 1130 (2002). Findings are against the manifest weight of the evidence only if they are arbitrary or unreasonable or not based on the evidence before the court or if the opposite conclusion is clearly apparent. *Eychaner*, 202 Ill. 2d at 252, 779 N.E.2d at 1130. However, we review the court's legal conclusions *de novo*. *Eychaner*, 202 Ill. 2d at 252, 779 N.E.2d at 1131. We will consider each of Turner's breach-of-contract claims separately.

¶ 26 Turner first argues that Gordon breached the contract by retaining the proceeds from the sale of timber. Turner argues that the right to remove and sell the timber was included in the three coal leases that were transferred to Beverly J. Turner & Associates when Gordon sold S Coal. Gordon, by contrast, argues that the purpose of the contract between the parties was to facilitate the mining of coal. Thus, he contends, the timber rights were not included. We find that the timber rights never belonged to Gordon or S Coal and, therefore, were never transferred to Beverly Turner under the contract.

¶ 27 At the trial, Gordon testified that he thought that the coal leases gave him the right to remove and sell the timber. He testified, however, that he also thought that when he transferred the coal leases along with the company, he was transferring only the mining rights. Asked to explain this apparent inconsistency, he replied: "[I] just felt like [I] did. [I]

thought [I] had the timber rights ***." Turner points to this testimony in support of his contention that the timber rights were a part of the coal leases transferred to Beverly Turner with S Coal. The record does not support this claim. Gordon might have believed that the coal leases gave him timber rights, but the leases themselves do not include timber rights.

¶ 28 There are three coal leases involved: the Midwest Resources lease, the Graham lease, and the Hall lease. All three leases gave S Coal, as a lessee, the right to remove timber or growing crops on the land to the extent necessary to facilitate mining. However, the leases did not give S Coal the right to take possession of or sell any timber or crops that had value. The leases specifically provided that these rights remained with the property owners as the lessors.

¶ 29 Gordon testified that nearly all the usable timber was located on the property owned by Midwest Resources. The Graham property had only "scrub" timber, and the Hall property had only a few trees. Gordon further testified that he did not pay the Grahams anything for their timber (presumably because it had no commercial value), and he paid the Halls something for their timber, but he did not specify how much. After Gordon sold the more valuable timber on the Midwest Resources property, however, an attorney for that company sent him a letter demanding that he immediately stop selling timber from the Midwest Resources land and provide an accounting for any previous timber sales. Gordon eventually worked out a deal with a representative of Midwest Resources, pursuant to which Midwest Resources and Gordon divided the proceeds from the timber sales. Because the timber rights belonged to the lessors, not to S Coal or the Turners, we find no error in the court's conclusion that Turner failed to prove his contract claim based on the timber sale.

¶ 30 Turner next argues that Gordon breached the contract by retaining the additional \$0.08 per MBTU Mike Moore negotiated with SIPC. He argues that the court's finding to the contrary was against the manifest weight of the evidence. We disagree.

¶ 31 Turner argues, without citing authority, that the purchase order is an asset of the corporation and that, therefore, all the income derived from it is a corporate asset as well. An introductory paragraph to the contract does state that the buyer wishes to purchase S Coal and all of its assets, including any "coal sale contracts." However, the contract does not address the disputed fee amount, and it does not spell out the sale price for the coal or how much various royalty holders are to be paid, with the exception of John Gordon.

¶ 32 Gordon argues that the Turners got exactly what they expected and bargained for—\$1 per MBTU. The record supports this contention. Although the contract itself was silent regarding the sale price of the coal, written communications between the parties reflect an anticipation of \$1 per MBTU, and the undisputed testimony of both parties was that Charles Turner agreed to accept that price from SIPC. Ordinarily, damages for breach of contract are limited to the benefit of the plaintiff's bargain. That is, a party claiming breach is entitled to be placed in the same position he would have been in absent the breach. *Cruthis v. Firststar Bank, N.A.*, 354 Ill. App. 3d 1122, 1131, 822 N.E.2d 454, 463 (2004). Because there is no evidence that the Turners expected to receive more than \$1 per MBTU, the court correctly found that they failed to prove their claim for breach of contract based on the disputed additional fee.

¶ 33 Turner's final breach-of-contract claim was based on his allegation that Gordon retained \$19,582.48 in addition to the royalties he was entitled to under the contract and an additional \$1,958.24 in engineering fees. He argues that the court's finding that he failed to prove this claim was against the manifest weight of the evidence. We disagree.

¶ 34 Turner presented several pages worth of payment records as evidence of his claim that Gordon wrongfully retained these funds. He argues that Gordon presented no evidence to rebut them. However, Turner acknowledged at the trial that the records did not reflect all the coal that was shipped and sold to SIPC. In fact, records were missing for entire months

during which both parties acknowledge that coal was shipped to SIPC. Because Gordon was to be paid both royalties and his engineering fee on a per-ton basis, he was entitled to both royalties and engineering fees for this additional coal. Because it was Turner's burden to prove that the overpayment occurred, we find no error in the court's resolving this factual issue against him.

¶ 35 Turner next challenges the court's finding that he failed to meet his burden of proving his claims for breach of fiduciary duty. These claims are based on the same allegations that formed the basis of his contract claims. At the outset, we may dispose of Turner's claim based on his allegation that Gordon retained more money than he was entitled to for both his royalty payments and his engineering fees. We have already found that the evidence in the record supports the court's factual finding that Turner failed to prove that Gordon retained the money. In light of this finding, Turner's claim for breach of fiduciary duty based on the same conduct must likewise fail. We will consider the two remaining claims in more detail.

¶ 36 Turner argues that Gordon breached a fiduciary duty by retaining the proceeds from the timber sales. He points out that Gordon remained an officer of S Coal after the sale, and he correctly argues that the officers of a corporation owe a fiduciary duty to the corporation and its shareholders (*Romanik v. Lurie Home Supply Center, Inc.*, 105 Ill. App. 3d 1118, 1128, 435 N.E.2d 712, 719 (1982)). At the time Gordon sold the timber, he was an officer of a corporation owned by Beverly J. Turner & Associates. Thus, we agree that he had fiduciary duties to S Coal and Beverly Turner. The question is whether Turner demonstrated that Gordon breached these duties.

¶ 37 Officers of a corporation have a duty, as fiduciaries of the corporation, "to act with undivided loyalty." *Romanik*, 105 Ill. App. 3d at 1128, 435 N.E.2d at 719. This requires that any dealings or transactions must be fair to the corporation, and the officer has the burden of showing that his dealings are fair. *Romanik*, 105 Ill. App. 3d at 1128-29, 435 N.E.2d at

719. In addition, under the "corporate opportunity doctrine," a fiduciary may not take advantage of a business opportunity developed with corporate assets that "belong" to the corporation. *Anest v. Audino*, 332 Ill. App. 3d 468, 477-78, 773 N.E.2d 202, 210 (2002). A corporate opportunity is a business opportunity that " 'is reasonably incident to the corporation's present or prospective business and *** in which the corporation has the capacity to engage.' " *Anest*, 332 Ill. App. 3d at 478, 773 N.E.2d at 210-11 (quoting *Dremco, Inc. v. South Chapel Hill Gardens, Inc.*, 274 Ill. App. 3d 534, 538, 654 N.E.2d 501, 505 (1995)).

¶ 38 Here, the only claim that the timber sale was unfair to the corporation is Turner's contention that timber rights were included in the coal leases, which belonged to S Coal. As previously explained, the leases did not give S Coal the right to sell the timber; that right belonged to the property owners. Because there was no reason for the Turners to expect to profit from the sale of timber, there is no basis here to conclude that the transaction was not fair to them. Moreover, the timber sales were not incident to S Coal's business of coal mining and were thus not corporate opportunities. We also note that if anyone had a claim against Gordon for the timber proceeds, it was the property owners, not the Turners. We find no error in the court's ruling that Turner failed to prove his claim.

¶ 39 Finally, Turner contends that Gordon breached a fiduciary duty by retaining the disputed \$0.08 per MBTU. We disagree.

¶ 40 Turner argues that Gordon was an officer of S Coal at all the relevant times and, thus, owed fiduciary duties to the company and to Beverly Turner. See *Romanik*, 105 Ill. App. 3d at 1128, 435 N.E.2d at 719. He then reiterates his argument that the SIPC purchase order was an asset of the company and that, therefore, he breached his duty to the company by retaining the disputed fee amount which belonged to the company.

¶ 41 Gordon, by contrast, argues that he still owned S Coal when he negotiated the new

purchase order because the July 10 contract had not yet been executed. He points out that the court found that this contract extinguished the earlier contract, a finding that Turner did not appeal. (We note that this contention is somewhat disingenuous considering that Gordon has challenged the court's finding that the second contract extinguished the first.) He further argues that parties negotiating at arm's length generally do not owe fiduciary duties to each other because they are presumed capable of looking after their own interests. *Yokel v. Hite*, 348 Ill. App. 3d 703, 706, 809 N.E.2d 721, 725 (2004).

¶ 42 As we have already concluded, the trial court correctly determined that the controlling contract was the July 10 agreement selling S Coal to Beverly J. Turner & Associates. All the negotiations leading up to the \$1.08 per MBTU sales contract had taken place prior to that date. Thus, Gordon was not an officer of a corporation owned by Beverly Turner during the relevant time period.

¶ 43 It is also worth noting that prior to the July 10 sale of S Coal, Gordon was under no obligation to sell the company to Charles and Beverly Turner. The February 13 memorandum of understanding did not bind either party to go through with the deal. We acknowledge that a memorandum of understanding can act as an enforceable contract. *Chicago Principals Ass'n v. Board of Education of the City of Chicago*, 84 Ill. App. 3d 1095, 1098, 406 N.E.2d 82, 84 (1980) (explaining that "the legal effect of [a] document is not determined by the label which it bears" (citing *Bonde v. Weber*, 6 Ill. 2d 365, 128 N.E.2d 883 (1955))). However, in this case it is clear both from the wording of the memorandum and the actions of both parties that it was not intended to bind them to the proposed sale.

¶ 44 The memorandum specifically states that it is an outline of the parties' understanding, is not signed by John Gordon and does not even specify a buyer, referring instead to "you or your designee." At the time the memorandum of understanding was signed, the parties had not yet secured a mining permit or a coal sales contract, and only one of the three coal leases

was in place. It is self-evident that the parties did not intend to be bound by the terms outlined in the memorandum unless and until all the necessary elements were in place.

¶ 45 Moreover, the parties did not treat the memorandum of understanding as a binding contract. On March 5, 2001, three weeks after the memorandum was signed, Gordon sent Turner a letter in which he stated, "If you intend to pursue our project, we need to reduce to writing an agreement that is workable for both parties." Gordon further stated, "We are continuing to work on the project and will do so until such time that you, *or an operating company*, assumes our position." (Emphasis added.) Courts should give a document the same "practical construction placed upon [it] by the parties themselves." *Chicago Housing Authority v. United States Fidelity & Guaranty Co.*, 49 Ill. App. 2d 407, 417, 199 N.E.2d 217, 222 (1964). Because the parties themselves did not treat the memorandum of understanding as an obligation to enter into a contract, Gordon was under no obligation to sell S Coal to the Turners or enter into any contract on their behalf. He was free to contract with any other mining operator. We conclude that this evidence was sufficient to support the court's finding that Turner failed to prove this claim.

¶ 46 Finally, Turner argues, "pleading in the alternative," that the court erred in denying his claim for breach of fiduciary duty "for recovery of the sales taxes paid by S Coal Company on the 'disputed fee' portion" of the proceeds from the coal sales. He argues that while Gordon retained the \$0.08 per MBTU, S Coal paid the sales tax on it. The problem for Turner is that he did not make this claim to the trial court. Although he did bring to the court's attention the fact that S Coal paid sales tax on the disputed fee, he did so only in response to Gordon's claim for damages in his suit against the Tiger companies. As mentioned earlier, Gordon claimed that the companies breached the contract by failing to mine the Cambria Reserves to completion. He sought damages for the amounts he contended would have been paid to him on the remaining coal had it been mined. Gordon argued that

this included the disputed \$0.08 per MBTU on the unmined coal. In response, Turner argued that (1) Gordon was not entitled to the \$0.08 per MBTU and (2) if he was, his recovery should at least be reduced by the sales tax that S Coal had paid on the disputed amount. Turner never presented a claim for breach of fiduciary based on S Coal's payment of the sales tax. Because this issue was not raised in the trial court, Turner has forfeited the consideration of the claim on appeal.

¶ 47 For the reasons stated, we affirm the court's judgment in both suits.

¶ 48 Motion denied; judgment affirmed.