2013 IL App (2d) 120157-U
No. 2-12-0157
Order filed August 20, 2013

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

GEORGE G. CLARKE, FREDERICK W. CLARKE, IV, and CLARKE LIMITED PARTNERSHIP,	)	Appeal from the Circuit Court of Winnebago County.
Plaintiffs-Counterdefendants-Appellees,	)	
v.	)	No. 07-MR-711
GARRETT G. CLARKE and LAUREN W. CLARKE,	)	
	)	Honorable
Defendants-Counterplaintiffs-Appellants.	)	Edward J. Prochaska, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Burke and Justice Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held:* (1) trial court did not apply incorrect burden of proof with respect to limited partners' duty of loyalty claims; (2) trial court's finding that general partners did not breach their duty of loyalty to partnership and its limited partners is not against the manifest weight of the evidence; (3) trial court's finding that general partners did not breach their duty of care to partnership and its limited partners is not against the manifest weight of the evidence; (4) trial court did not err in denying limited partners' request for an accounting; (5) trial court did not abuse its discretion in limiting discovery related to limited liability limited partnership; and (6) payment of litigation costs is authorized by partnership agreement.

¶ 2 This appeal arises from an order entered on January 12, 2012, in favor of plaintiffs and counterdefendants, George G. Clarke (George), Frederick W. Clarke IV (Fred), and the Clarke Limited Partnership (CLP or Partnership), and against defendants and counterplaintiffs, Garret G. Clarke (Garrett) and Lauren W. Clarke (Lauren W.), on counts I, II, and III, of counterplaintiffs' second-amended counterclaim seeking an accounting and derivative relief for breach of fiduciary duty. For the reasons set forth below, we affirm.

¶ 3 I. BACKGROUND

¶ 4 This litigation began in November 2007 when George and Fred filed a declaratory action to determine whether they could purchase assets from CLP. During the pendency of the declaratory action, Garrett and Lauren W. filed their initial counterclaim, which was later amended. The record in this case is voluminous, consisting of more than 11,000 pages. The background set forth below is taken from the testimony presented and evidence admitted at the trial on Garrett and Lauren W.'s second-amended counterclaim. Although lengthy, the background set forth below is intended only to give context to the ruling of the trial court and the issues raised on appeal. Additional facts will be developed as they relate to the individual issues before us.

¶ 5 A. Formation of CLP

¶ 6 The present controversy has its origins in the creation of CLP in 1998 by Frederick W. Clarke III (Fred III) and Mary G. Clarke (Mary) (collectively, the Founders), the parents of George and Fred and the grandparents of Garrett and Lauren W. The Founders contributed approximately $1.3 million to CLP, comprised primarily of life insurance proceeds and some lifetime gifts from Mary. The funds used to endow CLP were deposited in the form of cash and securities into an account with an entity now known as UBS Financial Services (UBS). The Founders created CLP with the assistance of their longtime legal counsel, Edward Enichen, and their tax advisor from the consulting firm of RSM McGladrey (McGladrey).

¶ 7 When CLP was founded, there were three general partners: Fred III (as trustee of the Mary G. Clarke Living Trust dated January 25, 1988), George, and Fred. Each general partner held a one percent interest in CLP. George and Fred were also limited partners. The remaining limited partners were Fred's two daughters (Lauren Elizabeth Clarke (Lauren E.) and Molly G. Clarke (Molly)) and George's three children (Garrett, Lauren W., and George C. Clarke (Carter)). Each limited partner held a 13.857% interest in CLP. At the time CLP was founded, Garrett was 15 years old and Lauren W. was 12 years old. Garrett testified that his grandfather, Fred III, told him that the purpose of the partnership was to avoid certain tax implications and to keep the family together after he and Mary pass away.

¶ 8 In conjunction with the formation of CLP, the general partners executed the CLP Partnership Agreement (Partnership Agreement), which sets forth the powers and authorities of the general partners. Among other things, the Partnership Agreement provides that the Partnership will have the authority to hold, acquire, and sell as investment property various types of assets, including "[l]and, improved and unimproved, whether presently income producing or held for potential appreciation in value." The Partnership Agreement further provides that the general partners "will have personal liability for the obligations of the Partnership except as may be specifically limited by the laws of the State of Illinois or any other jurisdiction in which the Partnership has qualified to do business." The Partnership Agreement also provides that the Partnership will expire in the year 2030 unless terminated on an earlier date as provided in the Partnership Agreement.

¶ 9 Fred III died in February 1999. At that time, Mary succeeded him as the third general partner. Mary remained a general partner until September 2003, when she resigned. Thereafter, George and Fred became the sole general partners of CLP.

¶ 10 Shortly after the death of Fred III, the general partners (Mary, George, and Fred) met with Enichen and tax advisors from McGladrey, who recommended that, for tax reasons, CLP should invest in real estate or an operating business, rather than passively holding securities. As explained in more detail below, the general partners followed this advice and invested in various real estate assets.

¶ 11 B. CLP Investments

¶ 12 Relevant to this litigation, CLP had five principal investments: (1) Mollauryn, LP; (2) Copeland real estate; (3) Sporting Club Memberships; (4) Snead real estate; and (5) Manning & Banks loans.

¶ 13 1. Mollauryn, LP

¶ 14 Mollauryn, LP (Mollauryn) was formed to acquire an interest in an operating dude ranch in Wyoming. In August 2000, CLP acquired a minority interest (48.75%) in Mollauryn for $195,000. Although CLP subsequently made additional capital contributions to Mollauryn, it opted not to participate in every capital call, and CLP's interest in Mollauryn was eventually diluted to approximately 30 percent. George acknowledged that this investment has not generated any cash income to CLP. The trial court dismissed with prejudice all claims related to CLP's investment in Mollauryn.

¶ 15 2. The Greenbrier and Copeland Real Estate

¶ 16 The Greenbrier is a resort located in White Sulfur Springs, West Virginia. In 1991, Fred III and Mary began a tradition of family gatherings at The Greenbrier. In 2000, work began on a residential development adjacent to the resort and called the Greenbrier Sporting Club (Sporting Club).

¶ 17 In November 2000, George became aware of an opportunity to invest in a rental cottage located in the Copeland Hill section of the Sporting Club. CLP signed a contract to purchase Copeland Hill #11 (Copeland) in February 2001 and the transaction closed in April 2001. CLP paid about $250,000 for the undeveloped lot and incurred additional costs for constructing and furnishing a residence thereon. The total capital expended on the Copeland property was approximately $875,000 and was financed primarily through a line of credit at UBS. The Copeland property was part of a program that guaranteed rental revenue of $10,000 per month for 36 months. After the expiration of the guaranteed rental program, CLP had an arrangement with a hotel at the Greenbrier resort to rent the property.

¶ 18 By November 2003, the Copeland property had been appraised at $1,301,000. In December 2003, CLP refinanced the line of credit used to purchase the Copeland cottage. To this end, CLP executed a promissory note in favor of City National Bank of West Virginia (City National) in the amount of $600,000, secured by a lien against Copeland. Interest accrued at a rate of four percent per year, and was to be paid by CLP quarterly until maturity on December 10, 2008, when the note was payable in full. This amounted to interest of about $24,000 per year.

¶ 19 The Copeland property was listed for sale in November 2008 for $1.325 million. The property was still for sale at the time of the trial, but at a reduced price ($1.2 million). No written offers have been received for the Copeland property. The trial court dismissed with prejudice claims related to CLP's acquisition and development of the Copeland property and any associated indebtedness.

¶ 20 3. The Greenbrier Sporting Club Memberships

¶ 21 The Sporting Club required purchasers of homesites in the community to submit a membership application for an available membership within 10 days after executing a purchase agreement to acquire property in the community. In February 2001, contemporaneous with the purchase of Copeland, George completed a "Resident Membership" application and signed it as a general partner of CLP. The application listed George's immediate family as designated users. The application was approved by the Sporting Club in March 2001, at which time, George executed a Membership Purchase Agreement in his representative capacity as a general partner of CLP. The price of the Resident Membership was $75,000 and was paid by CLP.

¶ 22 George testified that because the Sporting Club's rules did not allow for two families to use one membership simultaneously, CLP sought to acquire a "Founding Membership" in December 2001, naming Fred and his immediate family as its designated user. A Founding Member does not need to own property but is entitled to all of the privileges of a Resident Member. CLP acquired the Founding Membership for $100,000.

¶ 23 4. Snead

¶ 24 George testified that by the end of 2003, he and Fred were pleased with the performance of the Copeland investment as it generated positive cash flow and had appreciated in value. Based on that experience, the general partners explored the idea of purchasing an additional lot in the Sporting Club community. To this end, George testified that he maintained regular contact with the Sporting Club's sales office staff, local bankers, and other property owners. In addition, George conducted a review of closed sales transactions to measure the appreciation rate of properties in the Sporting Club. Based upon this research, George concluded that the Sporting Club was "coming into bloom" and that capital appreciation would continue.

¶ 25 Through a lottery, CLP was given the opportunity to purchase lot 37 in the Snead neighborhood at a 10% discount from list price. George testified that the purchase was discussed with Mary, who was supportive of the idea. The sale closed on or about December 12, 2003. The $855,000 purchase price of the lot was financed by executing a note in favor of City National, secured by a lien against the property. Interest on the note accrued at a rate of four percent per year and required CLP to make quarterly interest payments until maturity on December 10, 2008, when the note was payable in full. This amounted to interest of $34,200 per year.

¶ 26 George testified that when the Snead lot was purchased, CLP's plan was to hold it as an investment for appreciation. In mid-2004, however, the plan changed. In this regard, George testified that he and Fred continued to study market trends at the Sporting Club and determined that annual appreciation was in the range of 12 to 14 percent. George and Fred concluded that a lot with an approved design, if not a house, would provide enhanced appreciation. To that end, George and Fred hired an architectural firm to develop a plan that could be approved by the Sporting Club's architectural review board. George testified that at that time, the general partners intended to hold the property for three to six years, during which time they would either have an approved design plan and a lot to sell or they could proceed with construction and sell the lot with a completed home.

¶ 27 Design work began in 2004 and carried into 2005. George and Fred determined that the most marketable design would be one that was consistent with the neighborhood design and size restrictions at a price in the middle of the range of properties being sold in that section of the development, which ranged from $2 million to $4 million, inclusive of the lot. The design plan was approved by the architectural review board in mid-2005. According to George, at that time, the general partners again assessed the market and financial climate before making a final decision to construct a residence. George testified that among the factors considered were the suitability of the design, the strength of the local real estate market, the strength of the national economy, and whether real estate prices were continuing to appreciate. Construction of the residence began in September 2005. George testified that the general partners used a mix of bank funds, a liquidation of CLP assets, and use of funds from Gardner, LLLP (Gardner), an investment entity owned primarily by George, to cover development and carrying costs.

¶ 28 5. Manning & Banks

¶ 29 CLP entered into a commercial lending relationship with Manning & Banks (M&B), a directional boring company, in June 2006. To this end, on June 21, 2006, M&B executed a promissory note in favor of CLP for $75,000 to purchase boring equipment. Although CLP received a security interest in the equipment, it was subordinate to a security interest held by Caterpillar Finance (Caterpillar). Thereafter, CLP made three additional loans to M&B. CLP loaned $10,000 to M&B in September 2006, which M&B repaid in five weeks. CLP loaned $25,000 to M&B in March 2007, which M&B repaid within a few months. On March 4, 2008, M&B executed a promissory note in favor of CLP for $25,000, supported by a pledge of accounts receivable. CLP acquired the funds for both the June 21, 2006, and March 4, 2008, notes through a line of credit at UBS. Neither note was paid at maturity, and CLP sued M&B and Charles Manning (Manning), one of the principals of M&B, to collect on the notes. CLP obtained a judgment against M&B and

Manning in the amount of $122,101.70. On December 28, 2010, George and Fred purchased the judgment from CLP for $100,000.

¶ 30 C. November 25, 2005, partnership meeting

¶ 31 The general partners called a partnership meeting for November 25, 2005. According to George, the purpose of the meeting was to inform the limited partners, most of whom had attained the age of majority by that time, about CLP, their interest in it, the Founders' goals in forming CLP, and the activities of CLP during its first five years. George testified that CLP's financial structure, holdings, and debts were discussed at the meeting. According to George, there was also a discussion about the recent start of construction on the Snead lot and the fact that long-term care insurance had been acquired for him, Fred, and Fred's wife, Ryn. George, Garrett, Lauren W., Lauren E., Molly, Fred, Ryn, and Enichen (CLP's attorney) attended the meeting.

¶ 32 During the six-hour meeting, the general partners also discussed the possibility of purchasing the interests of the limited partners over age 18, including those of Garrett and Lauren W. George explained that this proposal was made to gauge whether the limited partners were interested in cashing out their investment in CLP earlier than the expiration of the Partnership in 25 years. To this end, George and Fred commissioned McGladrey to prepare an analysis and appraisal (2005 McGladrey appraisal) of each limited partner's 13.857% interest in CLP. The 2005 McGladrey appraisal, which was reviewed at the meeting, valued each limited partner's interest in CLP at $161,835.

¶ 33 George testified that a few days after the 2005 meeting, he took Garrett to dinner to answer more questions and to provide additional information. He also gave Garrett the 2005 McGladrey appraisal and a copy of the Partnership Agreement and encouraged Garrett to obtain independent legal counsel of his choosing at George's expense. Garrett accepted his father's offer to pay for independent counsel and retained Attorney Gant Redmon. George testified that at no time did counterplaintiffs or Redmon ask George for any additional information. After reviewing the appraisal with his attorney, Garrett decided to retain his interest in the Partnership. Similarly, the other limited partners declined to sell their interests in CLP.

¶ 34 D. Construction of the Snead House

¶ 35 As noted previously, construction on the Snead house began in September 2005 and lasted for about 18 months. Financing for the construction was initially funded by loans from Gardner. In January 2006, CLP secured construction financing from City National. The amount of the construction loan was $1,612,000 and was based upon the contractor's estimate of construction costs. The initial interest rate on the loan was variable with an initial rate of 6.75%. Thus, the annual interest on the loan was $108,810. City National required a pledge of securities from Gardner in the amount of $1.1 million to securitize the loan. In addition, securities from the UBS account were sold during the construction process and used to fund construction of the Snead residence. George testified that construction costs ran about $31,000, or two percent, over the contractor's estimate.

¶ 36 The general partners also retained Barbara Gisel as the interior designer for the Snead house. In addition to providing design work, Gisel sourced materials and furniture. Fred testified that his wife, Ryn, also participated in the interior design of the Snead residence. George estimated that the "product" purchased through Gisel for the Snead residence was around $482,000. Interior design and architecture costs were paid from the UBS account.

¶ 37 E. CLP Funding from City National and Gardner

¶ 38 As referenced above, to finance construction of the Snead home, CLP relied upon funding from several sources, including loans from Gardner. The relationship between Gardner and CLP was reflected in an agreement executed in November 2005. Pursuant to that agreement, Gardner charged a guarantor fee of 0.75% on funds borrowed from City National that were guaranteed by Gardner and its pledge of $1.1 million. George testified that this was similar to an arrangement his family had used in the past whereby his father personally guaranteed loans for a business George and Fred had launched. In addition, the agreement obligated CLP to pay Gardner a loan administration fee of 0.75% per annum on the "outstanding margin balance," which, according to George, represented the amount that Gardner had loaned to CLP. According to George, the latter arrangement enabled Gardner to loan money to CLP at a reduced rate of 4.85% (Gardner's UBS margin rate of 4.1% plus 0.75%) as compared to the rate of 6.75% charged by City National. George testified that between 2005 and 2009 only about $7,800 of the administrative and guarantor fees were actually paid to Gardner and a balance of $49,456 has been accrued. Similarly, only about $7,500 of the interest was actually paid to Gardner and a balance of $227,276 has been accrued.

¶ 39 On March 11, 2008, CLP executed a promissory note in favor of Gardner in the amount of $1.2 million. The promissory note from CLP to Gardner was secured by a mortgage lien on the Snead property. George testified that prior to this date, CLP had not executed any promissory notes payable to Gardner for the borrowed funds. Rather, Gardner had loaned CLP funds pursuant to the memorandum of agreement signed in November 2005. The March 2008 promissory note provides for an interest rate of five percent per annum, or $60,000 per year on a balance of $1.2 million. The note further provides that interest payments were to be paid monthly with a final balloon payment of the unpaid interest and principal on April 20, 2008. If the note was extended beyond April 20, 2008, the interest rate would rise to eight percent per year, with a final balloon payment on April 30, 2009. George testified that in 2005 and 2006, interest payments were made to Gardner by CLP. George also testified that neither balloon payment was made. George testified that the unpaid interest payments were not rolled into the principal balance owed to Gardner. Rather, it was separately accounted for on CLP's general ledger and the unpaid interest and guarantor fees were "booked" as an accrued liability, while Gardner's books show an unpaid receivable from CLP.

¶ 40 F. August and September 2007 Meetings and Buyout Offers

¶ 41 George testified that he and Fred continued to monitor sales activity at the Sporting Club and noted that by mid-2007, list prices were beginning to drop. George testified that in response to these circumstances, he and Fred consulted Enichen, who endorsed another proposal to buyout the limited partners. This led to a second partnership meeting, which was held on August 4, 2007. The attendees at the August 2007 partnership meeting were George, Fred, Garrett, Molly, Lauren E., and Ryn. In addition, Enichen and Manning also attended the meeting. Lauren W., who was on vacation, did not attend the meeting.

¶ 42 George testified that the purpose of the August 2007 meeting, which lasted five hours, was to update the partners on the progress and activities of the Partnership and to address issues that were of concern to the general partners regarding CLP's capital structure. For instance, the general partners indicated that the partnership was over-leveraged and that a large inventory of homes for sale was depressing home prices at the Sporting Club. In addition, the general partners identified Gardner and City National as "the sources of the borrowed funds" throughout the meeting and in a handout provided to attendees. According to George, the general partners also disclosed that the M&B loans were in default. George further testified that the general partners reviewed capital restructuring options at the meeting and observed that the expectation of continued appreciation most likely would not extend long enough to cover Snead's development and carrying costs. The general partners related that a "quick sale" was unlikely to be at an attractive price and that one option would be for the general partners "to come in and act as a willing buyer at a fair price in order to purchase the real estate from the partnership and help pay off the debt quickly before there was any more decline in real estate values." In addition, George stated that the general partners discussed a buyout proposal that would allow all limited partners to sell their interests before a significant decline in their value. A formal offer was not presented at the meeting because McGladrey had not yet issued an updated appraisal.

¶ 43 A "make up" meeting with Lauren W., which Garrett also attended, was held at George's house on August 18, 2007, and lasted three hours. By that time, McGladrey had completed its updated appraisal of CLP as of June 30, 2007 (2007 appraisal), and the general partners finalized a formal buyout proposal. On September 12, 2007, George also attended a meeting with Garrett and his attorney (Redmon) to answer questions about the Partnership and to provide additional information, but no follow-up requests were extended.

¶ 44 The 2007 appraisal determined that each 13.857% limited partnership interest had a fair market value of $81,301. George testified that the general partners offered to provide a "markup" to the limited partners, offering each limited partner $105,000 for his or her 13.857% interest. The funds would be paid out over eight years, with a five percent interest rate compounded quarterly on the unpaid portion. George testified that the total value of the offer was $142,400. Fred's two daughters accepted the buyout offer. Garrett and Lauren W. rejected the general partners' offer in September 2007 and, with the assistance of his attorney, Garrett made a counterproposal to not only retain his interest, but to increase his holdings in CLP by buying the interests of the other limited partners. Garrett's offer valued a limited partnership interest at $105,000, the same amount as the general partners' offer, but provided for a cash payment upfront versus an eight-year payout.

¶ 45 G. Long-Term Health Care Insurance

¶ 46 The 2007 appraisal included schedules that provided counterplaintiffs with multiple years of historical balance sheet and income statement data. Among other things, the 2007 McGladrey appraisal disclosed premium payments for long-term care health insurance for the period 2005-07. The insurance was purchased for George, Fred, and Ryn. The total amount of long-term health care insurance premiums was $49,826.72, of which $14,500 was attributable to Ryn.

¶ 47 H. The General Partners File a Declaratory Action in November 2007

¶ 48 On November 21, 2007, the general partners filed a complaint for declaratory judgment against Lauren E., Molly, Garrett, Lauren W., and Carter, to determine whether they could purchase assets from CLP without violating their obligations to the limited partners.[1] On September 19, 2008, the trial court, while reserving any specific findings on the Snead sale, held generally that, depending upon the circumstances, the general partners could purchase assets owned by CLP without breaching their fiduciary duties to the limited partners. The order memorializing the September 19, 2008, ruling was entered on January 28, 2009. As noted earlier, during the pendency of the declaratory action, Garrett and Lauren W. filed their initial counterclaim.

¶ 49 I. The Sale of Snead and the Sporting Club Memberships

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[1] Subsequent to the initial filing, defendants Lauren E., Molly, and Carter were dismissed from the litigation. The only named defendants in this cause are now Garrett and Lauren W.

¶ 50 After the trial court's September 2008 ruling, the general partners obtained a written opinion letter from attorney Enichen dated October 9, 2008, with respect to the sale of Snead. On November 28, 2008, on the advice of Enichen, Willamette Enterprises, LLC (Willamette), an entity owned by the general partners, contracted to purchase Snead from CLP for $2,104,960 plus an additional $125,112 for the personal property. The sale was completed on January 20, 2009. George testified that, consistent with Enichen's advice, the purchase price paid for the Snead real estate was the average of two current appraisals less an eight percent "assumed commission" which was equal to the standard commission charged on the sale of properties within the Sporting Club.

¶ 51 At the time of the sale of the Snead real estate, there were three liens on the property: (1) a mortgage lien in favor of City National for $855,000; (2) a second mortgage in favor of City National for the construction loan; and (3) a third lien in favor of Gardner to secure the $1.2 million note. Willamette borrowed a sum equal to the amount of money CLP owed to City National ($2,463,120.17). George testified that Gardner's lien on the Snead residence was released in conjunction with the closing and sale. In exchange for the release, Gardner was granted additional security on the Copeland property as well as an encumbrance on CLP's interest in Mollauryn.

¶ 52 George testified that the price of the Sporting Club Memberships changed over time. By 2008, the price of a Resident Membership had risen to $140,000 from the $75,000 paid by CLP in 2001. In an effort to reduce the debt of CLP, Fred and George purchased both memberships from CLP in December 2008 for the sum of $224,000 based upon a value of $112,000 each (80% x $140,000) as established by the Sporting Club. George testified that the discount on the purchase price for the memberships was set pursuant to the Sporting Club's Membership Plan, which provided that a resigning member had to sell his membership at a price set at 80% of the then-current sales price. George calculated that the $224,000 in proceeds from the sale of the two memberships resulted in a gain of $49,000 ($224,000 minus $175,000) in excess of the original purchase price and a profit to CLP of 28%. George testified that the $49,000 profit covered the expenses associated with CLP's ownership of those memberships.

¶ 53 George testified that the sale of Snead and the Sporting Club Memberships benefitted CLP in at least three ways. First, it reduced CLP's debt by $2.4 million. Second, it reduced CLP's carrying costs by at least $186,000 per year. Third, it avoided further declines in the market value since 2009.

¶ 54 J. Findings and Judgment of the Trial Court

¶ 55 After a one-week bench trial and following submission of written closing arguments by the parties, the trial court announced its decision from the bench on December 29, 2012. In ruling for counterdefendants on all counts, the court noted that it considered all of the evidence, arguments, and submissions of the parties and that the failure to comment or reflect on contrary evidence should not be viewed as if it did not consider it. The court found that the Partnership Agreement gave the general partners great latitude in making investments, but also held them accountable by making them personally liable for all debts of CLP. The court rejected any attempt to view the investments from the benefit of hindsight.

¶ 56 The court determined that the decision to invest CLP assets in real estate was proper. It noted that the Partnership Agreement specifically allowed real estate investments and that at the time the decision was made to do so, everyone was in agreement that real estate was a prudent investment. Moreover, the court pointed out that there were concerns how the Internal Revenue Service would view having all funds invested in the stock market or mutual funds and there was advice from

Enichen that the partnership diversify. Further, he noted that all three general partners at that time (Mary, George, and Fred) approved CLP's investments in real estate and that the evidence showed that Garrett, although not a general partner, was aware of these investments.

¶ 57 The court found the general partners' decision to purchase the Snead lot and then subsequently build a house on the property did not breach any duties owed to CLP. The court noted that in 2003, when the Snead lot was purchased, "all was rosy concerning the partnership's real estate investments and the real estate market in general." The Copeland investment had appreciated in value considerably and it generated positive cash flow. Further, all properties at the Sporting Club were appreciating in value. The court found George to be a "very credible witness when it came to his keeping an eye on the real estate market at the [Sporting Club]." Further, the court described George and Fred as follows:

> "[They] both struck me as being very experienced and wise business people based upon their education, training and experience. And George Clarke, in particular struck me as being very detailed [*sic*] oriented in terms of his management of the books and also his detailed evaluation of the Greenbrier market. Fred also struck me as being a very competent, serious, experienced and good businessman."

¶ 58 The court determined that the general partners developed a business plan that they felt would be needed to support the Snead investment. The business plan involved obtaining loans from Gardner until the home could be sold, hopefully at a profit, in three to six years. The court explained:

> "That was a legitimate business plan. Yes, the partnership was taking on a lot of debt. There's no question about that. But looking at it under the facts and circumstances that

> were in existence at that time, that was a legitimate business plan. Maybe a little risky, certainly burdening the partnership with debt; but it was based upon good numbers. It was based upon good projections. I felt that the partners did their homework.
>
> And, yes, they were taking on a lot of debt for the partnership; but this business plan, had the real estate market continued as it had been for several years, probably would have worked out to everyone's benefit. That didn't come to pass, but I find that the plan and decision to purchase the lot and to make that investment and to build a home was sound when it was made and did not violate any duties owed by the general partners to the limited partners."

The court further found that George had "done an extreme amount of research into the real estate market at the Greenbrier, both in terms of the initial purchases of Copeland, the purchase of the *** Snead lot *** [and] the business plan he developed."

¶ 59 The court remarked that it found the two partnership meetings "really important meetings." The court described the November 2005 meeting as a "thorough meeting" which lasted over six hours and featured "very frank and full disclosure." The court found that there was no evidence that the general partners were trying to "mislead or take advantage" of the limited partners and a "very high level of disclosure" occurred during the meeting. The court described the 2005 McGladrey appraisal as "extensive," "straightforward," and "not one-sided or biased."

¶ 60 The court noted that things changed between the 2005 and 2007 partnership meetings. In particular, "storm clouds were gathering on the real estate front" and the economy "was faltering." The court noted that these circumstances prompted the general partners to call the 2007 partnership meeting and offer the limited partners another opportunity to sell their interest in CLP. The court commented on the full disclosure by the general partners at the 2007 meeting and described the 2007 McGladrey appraisal as "very detailed, very fair, very unbiased," and not "low-ball in any way." The court described the buyout offer of the general partners as one made in "very good faith," and noted that the offer was accepted by Fred's daughters and rejected by Garrett and Lauren W. In summing up its findings about the 2005 and 2007 meetings, the court remarked:

> "And I felt like these meetings were significant in that they're almost the exact opposite of what I would expect to see if general partners were, in fact, trying to hide the ball or trying to somehow mismanage partnership assets or self-serve. I thought it was the opposite of that. I thought it was really up front and detailed disclosures to the limited partners."

¶ 61 The court noted that the sale of the Snead property to Willamette occurred "while the real estate market was going from soft to in the tank." The court remarked that "with the crash of the real estate market, the general partners' plan of selling the property at a profit also crashed." The court found "significant" that a lot of decisions with respect to the sale of Snead were made in consultation with Enichen, CLP's attorney. The court noted, for instance, that Enichen advised the general partners how to proceed with appraising the property. The court did not find any evidence that the appraisals relied upon were "somehow biased or somehow improper or not worthy of belief or not worthy of following." The court found that the purchase price was "fair, reasonable and appropriate at the time that it was made." Further, the court concluded that the purchase of Snead benefitted CLP by reducing debt by $2.4 million, reducing annual expenses by about $186,000 per year, and avoiding further declines in value. Ultimately, the court described the investment in Snead as "prudent" at the time it was made and "in the best interest of all the partners."

¶ 62 As to the Sporting Club Memberships and the long-term health insurance benefits, the judge specifically found no violation of any duty owed to the limited partners. Finally, as to the loans to M&B, the judge found that the transaction, while "[p]robably not the best investment," was not self-serving, and did not result in a profit to the general partners or any damage to CLP.

¶ 63 After denying the duty-of-loyalty and duty-of-care claims, the court addressed the accounting claim, and ruled that there was no need for an accounting because of the "voluminous discovery" and the fact that "there's probably not a stone that's been left unturned in terms of discovery in this particular case." A written judgment order was filed on January 12, 2012. This appeal followed.

¶ 64 II. ANALYSIS

¶ 65 On appeal, Garrett and Lauren W. raise a variety of issues. They allege that the trial court erred in finding that George and Fred did not violate any fiduciary duty to CLP and its limited partners. Further, Garret and Lauren W. complain that the trial court erred in denying their request for an accounting. Garrett and Lauren W. also argue that the trial court abused its discretion by denying them discovery regarding the finances of Gardner. Finally, Garrett and Lauren W. contend that George and Fred must pay their own litigation costs. We address each issue in turn. Prior to doing so, however, we briefly address counterdefendants' claim that the statement of facts in Garrett's and Lauren W.'s opening brief is improper and should be disregarded.

¶ 66 Counterdefendants' argue that Garrett's and Lauren W.'s statement of facts should be disregarded because it fails to accurately and fairly represent the salient facts necessary for an understanding of the case and thus violates Illinois Supreme Court Rule 341(h)(6) (eff. July 1, 2008) (requiring the appellant's statement of facts to contain "the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment"). In support of this claim, counterdefendants cite various examples of what they categorize as "a skewed, argumentative and incomplete version of the facts." Garrett and Lauren W. respond in their reply brief that their factual recitation is supported by the record and complies with Rule 341(h)(6). In addition, Garrett and Lauren W. cite several examples of what they contend are distortions of the record and the testimony by counterdefendants in their statement of facts. After reviewing both parties' statements of facts in conjunction with the record, we find that they both violate Rule 341(h)(6) in certain respects. As such, we will ignore the offending portions. See *Gauger v. Hendle*, 2011 IL App (2d) 100316, ¶ 95; *Technology Solutions, Co. v. Northrop Grumman Corp.*, 356 Ill. App. 3d 380, 382-84 (2005). We now turn to the merits of the appeal.

¶ 67 A. Breach of Fiduciary Duties

¶ 68 Garrett's and Lauren W.'s first argument on appeal is that the trial court erred in finding that counterdefendants did not breach their fiduciary duties to CLP and its limited partners. The fiduciary duties that a general partner has to the limited partnership and the other partners include the duty of loyalty and the duty of care. 805 ILCS 215/408(a) (West 2006); see also *Bandringa v. Bandringa*, 20 Ill. 2d 167, 174 (1960) ("In a partnership, each partner is a fiduciary of the other."); *ARTRA Group, Inc. v. Salomon Brothers Holding Company, Inc.*, 288 Ill. App. 3d 467, 470 (1997) (same). To prevail on a claim for breach of fiduciary duty, Garrett and Lauren W. were required to prove the existence of a fiduciary duty, a breach of that duty by George and Fred, and damages proximately caused by the breach. *Neade v. Portes*, 193 Ill. 2d 433, 444 (2000); *1515 North Wells, L.P. v. 1513 North Wells, L.L.C.*, 392 Ill. App. 3d 863, 874 (2009). As the trier of fact, the trial court was responsible for resolving any factual disputes, assessing the credibility of the witnesses, determining the weight to be afforded the witness's testimony, and resolving any conflicts in the evidence.

Bernstein & Grazian, P.C. v. Grazian & Volpe, P.C., 402 Ill. App. 3d 961, 976 (2010). We review the trial court's determination as to the alleged breaches of fiduciary duty pursuant to the manifest-weight-of-the-evidence standard. *Lawlor v. North American Corporation of Illinois*, 2012 IL 112530, ¶ 70. A trial court's findings of fact are not against the manifest weight of the evidence merely because the record might support a contrary decision or we disagree with them. *Bernstein & Grazian, P.C.*, 402 Ill. App. 3d at 976. Rather, a judgment is against the manifest weight of the evidence only when an opposite conclusion is clearly apparent or the trial court's findings appear to be unreasonable, arbitrary, or not based upon the evidence. *Lawlor*, 2012 IL 112530, ¶ 70.

¶ 69 1. Duty of Loyalty

¶ 70 Garrett and Lauren W. allege that George and Fred violated their duty of loyalty to CLP and its limited partners by: (1) buying Snead for less than fair market value; (2) purchasing the Sporting Club Memberships; (3) obtaining long-term care insurance for themselves and Ryn; (4) purchasing the consent judgment related to the M&B loans; and (5) causing Gardner to assess CLP with loan administration and guarantor fees.

¶ 71 With respect to the duty of loyalty, the Uniform Limited Partnership Act (2001) (Act) (805 ILCS 205/0.01 *et seq*. (West 2006)) provides as follows:

> "(b) A general partner's duty of loyalty to the limited partnership and the other partners includes the following:
>
> (1) to account to the limited partnership and hold as trustee for it any property, profit, or benefit derived by the general partner in the conduct and winding up of the limited partnership's activities or derived from a use by the general partner

> of limited partnership property, including the appropriation of a limited partnership opportunity;
>
> (2) to act fairly when dealing with the limited partnership in the conduct or winding up of the limited partnership's activities as or on behalf of a party having an interest adverse to the limited partnership; and
>
> (3) to refrain from competing with the limited partnership in the conduct or winding up of the limited partnership's activities." 805 ILCS 215/408(b) (West 2006).

Moreover, a general partner shall discharge his or her duties consistent with the obligation of good faith and fair dealing. 805 ILCS 215/408(d) (West 2006). However, a general partner does not violate any duty "merely because the general partner's conduct furthers the general partner's own interest." 805 ILCS 215/408(e) (West 2006).

¶ 72 Before addressing the merits of Garrett's and Lauren W.'s contentions, we discuss their separate claim that the trial court improperly determined that they had the burden of proof with respect to the duty-of-loyalty claims.

¶ 73 a. Burden of Proof

¶ 74 Garrett and Lauren W. argue that the trial court, in ruling on their duty-of-loyalty claims, erroneously allocated the burden of proof to them. In particular, Garrett and Lauren W. assert that the trial court held them to an incorrect burden of proof when, upon ruling on their claim, it stated, "And, finally, obviously, the Court is focused on the counterplaintiff's [*sic*] burden of proof in establishing that the general partners violated their duties of care and loyalty to the limited partners as alleged in the complaint." Garrett and Lauren W. argue that the trial court's statement constituted a "plainly prejudicial error of law" which "taints each and every duty of loyalty claim." According to Garrett and Lauren W., contrary to the decision of the trial court, when a general partner engages in self-dealing involving a breach of the duty of loyalty, the burden of proof shifts to the general partner to prove by clear and convincing evidence that the transactions were equitable and just. See *Labovitz v. Dolan*, 189 Ill. App. 3d 403, 413 (1989). Thus, they maintain, it was the general partners that had the burden to prove by clear and convincing evidence that each of their transactions were equitable and just. In light of this alleged error, Garrett and Lauren W. urge this court to reverse all of the trial court's duty of loyalty claims as a matter of law. Questions regarding the burden of proof are questions of law and are therefore reviewed *de novo*. *1350 Lake Shore Associates v. Healey*, 223 Ill. 2d 607, 627 (2006).

¶ 75 As noted above, to state a claim for breach of fiduciary duty, a plaintiff must establish a fiduciary duty on the part of the defendant, the defendant's breach of that duty, and damages that were proximately caused by the defendant's breach. *Neade*, 193 Ill. 2d at 444; *1515 North Wells, L.P.*, 392 Ill. App. 3d at 874. Once a plaintiff establishes that the fiduciary has engaged in self-dealing involving a breach of the duty of loyalty, however, the burden of proof shifts to the fiduciary to prove by clear and convincing evidence that the transactions were equitable and just. *Labovitz v. Dolan*, 189 Ill. App. 3d 403, 413 (1989).

¶ 76 Garrett and Lauren W. imply that under *Labovitz*, they do not have the initial burden of proof. However, *Labovitz* relies upon *Bandringa*, 20 Ill. 2d 167. In *Bandringa*, the supreme court held that before any burden falls upon the fiduciary to establish the fairness of any transaction with the party dominated, the plaintiff first has the burden of establishing that one party was dominant over the other and that the dominant party enjoyed some gain or advantage at the expense of the other.

Bandringa, 20 Ill. 2d at 174. Thus, in the absence of proof of the fiduciary's profit at the expense of the party dominated, the fiduciary does not bear the burden of proving the fairness of the transaction. *Bandringa*, 20 Ill. 2d at 174-75; see also *Karris v. Water Tower Trust & Savings Bank*, 72 Ill. App. 3d 339, 354 (1979) ("[W]here a plaintiff asserts that a fiduciary breached his duty of loyalty by profiting in a transaction involving the one to which he owed the duty, it is incumbent upon the plaintiff to first establish that the fiduciary, in fact, profited from the transaction.").

¶ 77 *Coduti v. Hellwig*, 127 Ill. App. 3d 279 (1984), *overruled on other grounds by Schirmer v. Bear*, 174 Ill. 2d 63, 72-76 (1996), is instructive. In that case, a minority shareholder brought an action against a controlling shareholder for an accounting of benefits allegedly received in breach of his duty of loyalty. Following a bench trial, the circuit court found in favor of the defendants. The plaintiff appealed, claiming in part that the judgment should be reversed because the trial court erroneously assigned the burden of proof to him when it stated that "[p]laintiff's evidence *** bears the burden." *Coduti*, 127 Ill. App. 3d at 292. The reviewing court rejected this argument and noted that the trial court's articulation of the burden of proof was correct. *Coduti*, 127 Ill. App. 3d at 292-93. The court explained:

> "It is not enough *** to show merely that a fiduciary has entered into a transaction with the corporation to which he owes the duty of loyalty in order to shift the burden of proof. Rather, the one asserting the breach of the duty of loyalty must first establish that the fiduciary profited from the transaction." *Coduti*, 127 Ill. App. 3d at 292.

Thus, the plaintiff must first demonstrate that the fiduciary profited at the plaintiff's expense, in which case the burden shifts to the fiduciary to prove that the transaction he or she profited from was fair and equitable.

¶ 78 In the present case, the record suggests that the trial court was aware of the shifting burden as it applies to the duty-of-loyalty claims. Garrett and Lauren W. made clear their reliance upon *Labovitz* in their closing argument. Similarly, George and Fred acknowledged their burden of proof. For instance, they stated in their pretrial memorandum that "the evidence *put forth by the [counter]Defendants will show* that each of the aforementioned transactions were conducted by the general partners fairly and in the utmost good faith." (Emphasis added.) In addition, during George's testimony regarding the Sporting Club Memberships, counterdefendants' counsel remarked that George and Fred "have the burden of proof to show that [their] transactions were fair." More important, in its decision, the trial court stated that it had "considered all the evidence," including, but not limited to, "the exhibits, the [trial] transcript [and] the written closing arguments submitted to the court." Accordingly, we are not persuaded by Garrett's and Lauren W.'s assertion that the trial court held them to an incorrect burden of proof.

¶ 79 Before proceeding further, we note that Garrett and Lauren W. frame their duty-of-loyalty claims on the premise that they presented sufficient evidence to shift the burden of proof to counterdefendants and that counterdefendants failed to establish by clear and convincing evidence that the transactions were equitable and just. See *Labovitz*, 189 Ill. App. 3d at 413. For purposes of our analysis, we therefore presume, without deciding, that Garrett and Lauren W. met their initial burden, and address Garrett's and Lauren W.'s claims that the counterdefendants failed to meet their burden by clear and convincing evidence. As set forth below, in light of the applicable law, the record on appeal, and the deferential standard of review applicable to duty-of-loyalty claims, we conclude that the trial court's findings that George and Fred did not breach their fiduciary duty of loyalty to CLP and its limited partners is not against the manifest weight of the evidence.

¶ 80 b. Snead

¶ 81 On the merits, Garrett and Lauren W. first argue that George and Fred breached their duty of loyalty because they purchased Snead for less than fair market value. Regarding the circumstances surrounding the sale of Snead, the record discloses the following. In September 2008, after the trial court orally ruled on the declaratory action, George and Fred sought advice from attorney Enichen regarding the sale of Snead. In response, Enichen issued an opinion letter dated October 29, 2008. In the letter, Enichen advised George and Fred to average their current appraisals and a valuation by the county tax assessor, "reduced by a seven percent assumed real estate commission, and further reduced by secured debt, which [George and Fred] will be assuming." Enichen further recommended that George and Fred "conclude such a purchase at an early date, since the assets to be purchased are decreasing in value."

¶ 82 At trial, George testified that on November 28, 2008, he and Fred, through Willamette, entered into a purchase agreement with CLP to purchase "Sam Snead Realty" for $2,104,960. The purchase agreement also provided for the sale of "Sam Snead Personalty" for an additional $125,112. In establishing the sales price of the real property, George testified that he and Fred relied on Enichen's advice and prepared a "two point vs. three point" purchase price calculation. George explained that the two-point calculation is the average of two appraisals he and Fred obtained for the Snead property. One appraisal was prepared by McQuade Appraisal Services (McQuade) on July 21, 2008, and the other appraisal was prepared by Hodges, Judy and Associates (Hodges) on October 24, 2008. The McQuade appraisal valued Snead at $2,175,500. The Hodges appraisal valued the Snead property at $2,400,000. The average of these two appraisals ($2,287,750) was rounded up to $2,288,000. George testified that the three-point calculation is the average of the aforementioned appraisals and the county assessor's appraised value of the property. The county assessor valued Snead at $2,249,600. Thus, under the three-point calculation, the average appraised value of Snead is $2,275,000. George testified that he and Fred ultimately elected to use the two-point average to value Snead, explaining:

> "[W]e knew that the–and had confidence that the two real estate appraisers were completing their work at a recent time and in common philosophy and principles and whatever.
>
> We did not necessarily know for sure when the [county] assessor's market value was estimated and whether it was necessarily done in the same fashion.
>
> And, therefore, because the 2 point average was higher than the 3 point average, we elected to just use the County Assessor's value as kind of a benchmark, but we did not include it in the calculation [as] we used the higher number."

¶ 83 George further testified that if the Partnership were to sell the property to a third party, it would have to be listed with the Sporting Club and the Sporting Club would charge an eight-percent commission. Thus, as part of the calculation, and consistent with Enichen's advice, the sales price of Snead was reduced by an "assumed" commission of eight percent ($2,288,000 x .08=$183,040).[2] This resulted in a net sales price of $2,104,960. With respect to the reduction for the real estate Commission, George acknowledged on cross-examination that if a person were to sell his or her home to a third party without a real estate broker, there would be no real estate commission. George

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[2] George stated that the rate of the assumed real estate commission was higher than what Enichen provided in his letter because he and Fred obtained updated information from the Sporting Club.

also admitted that the eight percent fee was waived by the Sporting Club in this case. Ultimately, the sale of Snead closed in January 2009.

¶ 84 In ruling on Garrett's and Lauren W.'s claim, the trial court stated that the purchase of the Snead lot, the building of a house on the lot, and the subsequent sale of that property to Willamette was "at the heart of this litigation." The trial court reflected that had the valuation been fixed a year earlier, "it probably would have been significantly higher than 2.1 million because the economy tanked [between 2007 and 2008]." Nevertheless, the trial court found that the $2.1 million sale price for Snead was "fair, reasonable and appropriate at the time that it was made." The court found "significant" that in purchasing the property and setting the sale price, George and Fred relied on the advice of Enichen and obtained two appraisals which were averaged to establish the fair market value of the Snead property. The court found no evidence that either the McQuade or Hodges appraisals were "biased or somehow improper or not worthy of belief." Further the court did not see "any problem" in averaging the two appraisals in determining fair market value.

¶ 85 Under this backdrop, Garrett and Lauren W. submit that the record does not establish that the purchase of Snead was fair, that the consideration paid was adequate, or that George and Fred materially followed Enichen's advice. In support of their claim that the purchase price of the Snead property was not fair, Garrett and Lauren W. initially assert that George and Fred, through Willamette, paid "substantially less" than the property's fair market value "as determined by *every* appraisal in the record." (Emphasis in original.) As Garrett's and Lauren W.'s argument suggests, in addition to the McQuade appraisal from July 2008 (valuing Snead at $2,175,500), the Hodges appraisal from October 2008 (valuing Snead at $2,400,000), and the county assessor's valuation ($2,249,600), the record includes several other appraisals. These appraisals were prepared at various times between June 2007 and July 2010, and valued the Snead real estate at between $2.4 million and $3.4 million. Thus, the record supports Garrett's and Lauren's claim that George and Fred paid less for Snead than each of the appraisals. Yet, comparing the appraisals in isolation, only serves to ignore evidence regarding why the trial court found the $2.1 million sales price paid for Snead to be "fair, reasonable, and appropriate *at the time it was made*." (Emphasis added.)

¶ 86 In particular, the appraisals establish a general downward trend in the value of Snead, from a high of $3.4 million in June 2007 to lows of between $2.175 and $2.4 million in mid-to-late 2008. This comports with testimony provided by George regarding real estate prices in general at the Sporting Club. George testified that he obtained sales data from the Sporting Club's sales office for the period from 2002 through 2010. During this period 96 homes were sold. George testified that the average sales price of homes in the Sporting Club climbed from approximately $1.2 million in 2002 to $2.65 million in 2007. Thereafter, the average sales price of a home in the Greenbrier began to fall. By 2010, no sale exceeded about $1.9 million.

¶ 87 Garrett and Lauren W. acknowledge George's analysis of real estate at the Sporting Club. They claim, however, that he "indiscriminately lumps together all sales of improved properties at the resort, including irrelevant non-contemporaneous sales," and that he "identifies categories of purported comparables *** that materially contradict the comparables his appraisers chose." However, the trial court described George as "a very credible witness when it came to his keeping an eye on the real estate market at Greenbrier" and found that he "had done more than due diligence." It was within the province of the trial court to assess the credibility of the witnesses and determine the weight to be given their testimony. *Bernstein & Grazian, P.C.*, 402 Ill. App. 3d at 976. Garrett and Lauren W. speculate that the trial court's comments regarding George's testimony "may have been based upon the misapprehension that he had conducted detailed market research prior to Willamette's purchase of Sam Snead." According to Garrett and Lauren W., however, George's testimony was based upon data that he received from the Greenbrier *after* the sale. The facts, however, show otherwise. George testified that over a course of 10 years, he visited the Greenbrier sales office between 40 and 50 times. George further testified that he received a variety of information during these visits, including current sales listings and actual closed sales.

¶ 88 An anomaly in the downward trend of real estate prices at the Sporting Club is an appraisal prepared by Jeffrey Eisenbeiss and commissioned by Garrett and Lauren W. in July 2010. While Eisenbeiss valued Snead at $2.765 million as of January 20, 2009, this was a "retrospective" appraisal, commissioned approximately a year and a half after George and Fred contracted to buy Snead. Moreover, George and Fred introduced evidence of a "review appraisal" they commissioned that was prepared by an appraiser at McQuade. She noted many flaws in the Eisenbeiss appraisal, including, for instance, that several forms mandated by the federal government were not included or were out of date. Thus, the trial court was faced with conflicting evidence regarding the validity of the Eisenbeiss appraisal.

¶ 89 Garrett and Lauren W. further complain that the appraisals used by George and Fred "are simply not credible." They insist that the appraisals must understate the value of Snead because the appraisers' valuations of the property "decline markedly leading up to the sale to Willamette, while those of [the] Copeland [property] have remained static." According to Garrett and Lauren W., if the appraisals used by George and Fred are to be believed, "the real estate bubble burst in the *** Snead neighborhood creating a buyers' market there, while somehow remaining inflated [in] the Copeland neighborhood." George, however, testified that he and Fred selected McQuade and

Hodges to prepare the appraisals because both firms were approved by City National, CLP's lender. Moreover, the trial court found no evidence that either the McQuade or Hodges appraisals were "biased or somehow improper or not worthy of belief." Garrett and Lauren W. cite no evidence to contradict this finding. In fact, John Renner, the forensic accountant they retained, even referenced an appraisal prepared by McQuade and had no dispute with the firm's qualifications.

¶ 90 Garrett and Lauren W. further assert that other evidence confirms that a fair price was not paid for Snead. They cite evidence that: (1) in August 2007, George and Fred stated that, unfurnished, Snead would "fetch" $2.6 million; (2) the county assessor valued Snead at $2,249,600; (3) in January 2007, a "dead-ringer" for Snead sold for $2.5 million because the president of the Greenbrier "got a deal," paying about $900,000 less than the $3.4 million list price; and (4) Willamette bought title and property insurance for Snead in the amount of $2,463,120, thereby evidencing that the insurable property interest in Snead was at least that amount. While this evidence certainly supports Garrett's and Lauren W.'s position, we simply cannot say that it is sufficient to overturn the trial court's decision. We note, for instance, that the valuations referenced by Garrett and Lauren W. (January 2007 and August 2007) were not proximate to November 2008, when the agreement to sell Snead was executed. There was also testimony that the property referred to as a "dead-ringer" was sold again in July 2010 for $1.8 million, about $304,000 *less* than the sales price of Snead in January 2009. In addition, there was no evidence whether the method employed by the county assessor was consistent with that of the other appraisers and the frequency with which the county assessor appraised the property is unclear from the record. In this regard, we note that Snead was appraised at the same exact value ($2,249,600) in 2007, 2008, and 2009. In 2010 and 2011, the assessor *reduced* the valuation of the property to $1,907,600.

¶ 91 The trial court found "significant" that in purchasing Snead and setting the sales price, George and Fred relied on the advice of attorney Enichen. Garrett and Lauren W. question George's and Fred's motive in obtaining Enichen's advice. In this regard, Garrett and Lauren W. insist that George and Fred "simply did not rely in 'good faith' on counsel, because they sought Enichen's advice to attempt to skirt proving the fairness of their actions to the Court." The trial court, however, determined that "the evidence supports their (George's and Fred's) statement and their argument that they really relied on Attorney Enichen's legal advice both in terms of purchasing the property and also how to value it." As the trier of fact, the trial court was responsible for judging the credibility of the witnesses. *Bernstein & Grazian, P.C.*, 402 Ill. App. 3d at 976 (2010). As a court of review, we will not retry issues of intent and second-guess the trial court's assessment of the parties' credibility. *Schulenburg v. Signatrol, Inc.*, 37 Ill. 2d 352, 356 (1967). As such, we are not persuaded by this argument.

¶ 92 Garrett and Lauren W. further claim that Enichen's advice was "problematic" for other reasons. They note, for instance, that in his October 2008 letter, Enichen references a report by Warren Russell (Warren Report). Enichen retained Warren to, *inter alia*, assess the financial condition and restructuring needs of CLP and the reasonableness of a proposed purchase of Snead and Copeland by CLP's general partners. The Warren Report states that "[t]he value of CLP real estate holdings is likely to recover value, but only over, say, a five year period." Garrett and Lauren W. assert that despite this fact, Enichen and Warren endorsed the sale of CLP's real estate to George and Fred depriving CLP of the benefit of the expected appreciation. Garrett's and Lauren W.'s focus on only one portion of the Warren Report ignores evidence why Warren, and subsequently Enichen, recommended that CLP divest itself of its real estate holdings. The Warren Report explained that in the absence of a quick sale, there was a risk of foreclosure. The Warren Report also states that a sale would benefit CLP in that it would eliminate the partnership's mortgage debt and free itself from on-going carrying costs. In fact, the trial court found these latter two points salient in making its ruling, noting that the sale of Snead reduced CLP's debt by $2.4 million and its carrying costs by $186,000 per year. In other words, CLP saved close to $1 million in carrying costs alone by selling Snead instead of holding onto the property for an additional five years.

¶ 93 Garrett and Lauren W. further complain that, without analysis or citation to authority, Enichen endorsed discounting the sales price by an "assumed" real estate commission. According to Garrett and Lauren W., Enichen's advice cannot be squared with the fact that "[t]he normal practice in real estate transactions is for the seller to pay the broker's commission." See *Thorne v. Elmore*, 79 Ill. App. 3d 333, 342 (1979). Garrett and Lauren W., however, cite no authority in support of their claim that Enichen's advice was required to be supported by authority. Moreover, there was evidence at trial to explain why Enichen advised George and Fred to reduce the sales price by an assumed sales commission. As detailed above, George testified that if the partnership were to sell the property to a third party, it would have to be listed with the Sporting Club, which, in turn, would have charged an eight-percent commission.

¶ 94 Garrett and Lauren W. also maintain that the record contradicts the trial court's conclusion that George and Fred actually relied on Enichen's legal advice. As noted above, in rendering his advice, Enichen relied in part upon the Warren Report. According to Garrett and Lauren W., the Warren Report advised that CLP sell Snead for $2,275,000 *and* Copeland for $1,302,000, using the proceeds to retire *all* of its debt to City National and all but about $500,000 of CLP's other debt ($1.1 million to Gardner and $100,000 to UBS). The remaining Gardner debt would then be converted to equity in CLP, leaving CLP "solvent." Garrett and Lauren W. further note that Enichen advised CLP to sell Snead and Copeland, with their purchase prices "reduced by secured debt, which [the general partners] will be assuming." Enichen added that it was not "of material significance[] whether you assume debt or pay 'cash' to the partnership with which it would thereupon retire the debt." Garrett and Lauren W. claim that George and Fred did not follow Enichen's or Warren's advice because: (1) they purchased only Snead (for less than Warren's stated price); (2) failed to address CLP's insolvency; (3) failed to retire $600,000 of secured debt to City National relating to Copeland; and (4) failed to retire or assume all of the secured debts encumbering Snead by failing to pay or assume $1,154,823.87 of secured debt to Gardner which encumbered Snead and still encumbers CLP's interest in Mollauryn and Copeland. Garrett and Lauren W. argue that George and Fred cannot "cherry pick" parts of an attorney's advice while ignoring other parts and still claim good faith reliance on their counsel. Counterplaintiffs' argument on this point misses the mark.

¶ 95 First, Enichen never mandated that George and Fred purchase both properties. Rather, in response to George's and Fred's proposal to purchase both properties, Enichen stated in his October 2008 letter that the general partners "may" purchase the Snead and Copeland properties. In fact, the Copeland property was listed for sale in November 2008, but has yet to be sold. Second, the Warren Report did not recommend a price at which Snead should be sold. It merely reviewed various estimates and appraisals of the property obtained between June 2007 and July 2008 and concluded that the property had declined in value during that time. In addition, we point out that Warren is not a real-estate appraiser. Rather he specializes in corporate finance. Third, we find that, contrary to Garrett's and Lauren's claim, the purchase of Snead did "address" CLP's financial condition by reducing its debt by $2.4 million and eliminating its carrying costs on the Sam Snead property.

Fourth, although CLP failed to retire $600,000 of secured debt to City National relating to Copeland, the partnership has the property for sale and this debt will presumably be retired once a sale is closed. Finally, we note that all of the liens against *Snead* were released in conjunction with the sale of the property. The record shows that at the time of the sale of Snead to Willamette, there were three liens against the property, including two liens held by City National for more than $2.4 million, which were paid off. George testified that the third lien, which was held by Gardner, was also released in conjunction with the closing of the sale for "additional security," consisting of a mortgage or trust deed on the Copeland property and a lien against CLP's interest in Mollauryn.

¶ 96 Garrett and Lauren W. further contend that the trial court also disregarded that the general partners, through Willamette, paid "substantially less" than the fair market value for Snead's furnishings. For purposes of trial, the parties entered into a stipulation that "new furniture depreciates substantially once it is in place in a residence and that, with respect to any furniture that was new when it was acquired to furnish the residence located upon the Sam Snead Real Estate, 75% of is acquisition cost is a reasonable approximation of its fair market value as of January 2009." According to Garret and Lauren W., George and Fred "caused" CLP to pay approximately $562,199.67 to furnish Snead, as reflected in CLP's general ledger. Therefore, based upon the stipulation, they calculate that the furnishings were worth $421,649.75. Yet, they note, CLP was paid only $125,112, an underpayment of $296,537.75.

¶ 97 At trial, George explained that, based upon his review of invoices, he compiled one list consisting of "unattached" furniture acquired for Snead and a second list consisting of "attached" fixtures acquired for Snead. George calculated that the cost of the unattached furniture was $166,816.00, 75 percent of which is $125,112. Renner, Garrett's and Lauren W.'s expert, acknowledged that when real estate is sold, built-in items and fixtures "typically go with the purchase price of the home regardless of how it's accounted for in [an accounting] program." In addition, Layton, counterdefendants' expert, testified that all of the furniture, fixtures, and personal property were accounted for.

¶ 98 Garrett and Lauren W. contend that George's and Fred's explanation that some of the personal property was affixed to the real estate is refuted by CLP's general ledger, which treated all of the furnishings as personalty rather than as construction costs. At most, however, this created a conflict for the trial court to resolve. See *Bernstein & Grazian, P.C.*, 402 Ill. App. 3d at 976. Given the evidence cited above, including Renner's testimony, there was evidence from which trial court could have reasonably conclude that Willamette paid fair market value for the Snead personalty. As such, we cannot say that the trial court's finding is against the manifest weight of the evidence.

¶ 99 In short, the trial court was faced with conflicting testimony regarding whether the purchase of Snead was fair, whether the consideration paid was adequate, and whether the general partners materially followed Enichen's advice. Given the trial court's role in resolving any factual disputes, judging the credibility of the witnesses, determining the weight to afford their testimony, we simply cannot say that an opposite conclusion is clearly apparent or that the court's finding was unreasonable, arbitrary, or not based on the evidence. As such, the trial court's finding that George and Fred did not breach their fiduciary duty of loyalty to CLP and its limited partners with respect to the purchase of Snead is therefore not against the manifest weight of the evidence.

¶ 100 c. Sporting Club Memberships

¶ 101 Next, Garrett and Lauren W. contend that George and Fred breached their duty of loyalty to CLP and the limited partners by purchasing two memberships to the Sporting Club. As noted previously, all purchasers of real estate in the Sporting Club are required to apply for a "Resident Membership," which must be purchased if the application is approved. George related that the Sporting Club's Membership Plan allows a membership to be held in the name of an entity such as a partnership, but the entity must designate one individual or family who will have the right to use the membership. George testified that in February 2001, contemporaneous with the purchase of Copeland, he completed an application for a Resident Membership and signed it as a general partner of CLP. The application was also signed by Diane Clarke, the mother of Garrett and Lauren W. and George's wife at the time. The application listed George and his immediate family (including Garrett and Lauren W.) as the designated users of the Resident Membership. The application was approved by the Sporting Club in March 2001, at which time, George executed a Membership Purchase Agreement in his representative capacity as a general partner of CLP. The price of the Resident Membership was $75,000 and was paid by CLP.

¶ 102 George testified that because the Sporting Club's rules did not allow for two families to use the same membership simultaneously, CLP sought to acquire a "Founding Membership" in December 2001, naming Fred and his immediate family as its designated users. According to the Sporting Club's rules, a Founding Member does not need to own property but is entitled to all of the privileges of a Resident Member. George noted that a Founding Membership also provides certain advantages. For instance, a Founding Membership has no dues for the first five years. Further, after the initial five-year period, the dues for the Founding Membership are only one-third of the cost of a Resident Membership. CLP acquired the Founding Membership for $100,000. George testified that the Sporting Club Memberships were at all times listed on the books and records as assets of CLP.

¶ 103 George testified that consistent with a discussion at the 2007 partnership meeting to sell assets to reduce the debt of CLP, he and Fred purchased both memberships from CLP in December 2008. George noted that the price of the Sporting Club Memberships changed over time. George explained that the price for Sporting Club Memberships was set pursuant to the Sporting Club's Membership Plan, which provide that a resigning member had to sell his membership at a price set at 80% of the then-current sales price. By 2008, the price of a Resident Membership had risen to \$140,000 from the \$75,000 paid by CLP in 2001. Thus, the two memberships were purchased from CLP by George and Fred for \$224,000 based upon a value of \$112,000 each (80% x \$140,000). George testified that the \$224,000 in proceeds from the sale of the two memberships resulted in a gain of \$49,000 over the original purchase price (\$224,000 minus \$175,000), which was a profit to CLP of 28%. George further testified that the profit on the sale was sufficient to cover CLP's carrying costs (\$48,210) for the memberships.

¶ 104 George testified that after he and Fred purchased the Sporting Club Memberships, the Resident Membership was contributed to Willamette to comply with the Sporting Club's rules that the Resident Membership be titled in the same name as the owner of Snead. George further testified that a note in the amount of \$175,000 payable by Willamette to him for the Resident Membership was executed. He stated, however, that the note was intended as "a record in order to accomplish that ownership and relationship" and that the note was "never actually going to be paid."

¶ 105 Based on the foregoing evidence, the trial court rejected Garrett's and Lauren W.'s claim that the purchase of the Sporting Club Memberships violated any fiduciary duty. The court cited two principal reasons. First, the court found that the purchase of two memberships was "in line with the purpose of the partnership." The court noted that the purposes of the partnership included "foster[ing] family togetherness and *** foster[ing] joint family use of the Greenbrier properties" and that no one, including Garrett, complained about the purchase of the memberships. The court concluded that holding only the Resident Membership would "cut Fred and his family out." Thus, the court reasoned, "having two memberships was in the best interest of everyone because then it allowed both families at whatever time they wanted use of the sporting club facilities." Second, the trial court determined that CLP did not sustain any damages as a result of buying the Sporting Club Memberships because the memberships were purchased back from the Partnership at a higher price than what the Partnership had paid for them.

¶ 106 According to Garrett and Lauren W., George and Fred breached their duty of loyalty by "causing" CLP to purchase a Resident Membership for George and a Founding Membership for Fred. Garrett and Lauren note that the Partnership Agreement provides in relevant part that "[t]he parties seek to assure that the assets of the partnership will be continuously managed for the benefit of all of the partners." Garrett and Lauren W. complain, however, that these "personal memberships in the [Sporting Club] were certainly not for the benefit of all the partners ***, since CLP, at most needed to apply for (not purchase) one such membership to acquire property at the Greenbrier."

¶ 107 As set forth above, however, the trial court found that having the two Sporting Club Memberships "was in the best interests of everyone" in that it furthered some of the goals of the Partnership. The trial court noted that the purposes of the partnership included "foster[ing] family togetherness and *** foster[ing] joint family use of the Greenbrier properties." Garrett even acknowledged at trial that his grandfather, Fred III, told him that one of the purposes of the partnership was to keep the family together after the Founders' deaths. The evidence further established that the purchase of only one Sporting Club Membership would not allow both George's and Fred's families to use the facilities because the Sporting Club's rules did not allow for more than one family to simultaneously use the same membership. As a result, CLP sought to acquire a second membership naming Fred and his immediate family as its designated users. In other words, the evidence supports a finding that by promoting the goals of the partnership, the purchase of the Sporting Club Memberships benefited all of the partners.

¶ 108 In a related contention, Garrett and Lauren W. contend that George and Fred were "enriched" by the memberships, which granted access to the Sporting Club's facilities and amenities, while Garrett was never permitted access to the facilities. According to Garrett, he was a " nonmember *** without access to the sporting club facilities." However, there was conflicting evidence regarding Garrett's membership status and his access to the Sporting Club's facilities. At the time the Resident Membership was purchased in 2001, Garrett was living at home with his parents and Garrett was listed as a designated user on the membership application. Although Garrett testified that he never personally used the Sporting Club's facilities, he acknowledged that there were numerous times when he was invited to family events at the Greenbrier and he declined. In this regard, George recalled inviting Garrett and some of his friends to use the facilities at the Sporting Club. At that time, Garrett asked whether it was necessary for George to be present. George responded that it was not consistent with his family's "mode of operating" or the Sporting Club's regulations that Garrett use the facilities in the absence of the "nominal member," and Garrett ultimately declined the invitation. The record also shows that Garrett declined multiple invitations to join George at the Greenbrier for the annual celebration of Mary's birthday on New Year's Eve, choosing instead to pursue other plans.

¶ 109 Garrett and Lauren W. also dispute whether CLP actually owned the Sporting Club Memberships. Although Garrett and Lauren W. acknowledge that entities such as CLP can own a Resident Membership, they note that the certificate for the Resident Membership was issued to "Mr. and Mrs. George Clarke" and makes no mention of CLP. Further, they assert that pursuant to Sporting Club rules, a Founding Membership can never be owned by an entity and it cannot be sold, transferred, or assigned except to a surviving spouse upon death. There was evidence, however, that at all relevant times, both Sporting Club Memberships were listed in the general ledger and in the McGladrey appraisals as assets of CLP. Indeed, even Renner, the forensic accountant retained by Garrett and Lauren W., described the Sporting Club Memberships as assets of CLP in his report. To the extent that there was evidence otherwise, it merely presented a conflict for the trial court to decide as the trier of fact. *Bernstein & Grazian, P.C.*, 402 Ill. App. 3d at 976.

¶ 110 Garrett and Lauren W. also dispute the trial court's finding that Garrett did not object to the purchase of the Sporting Club Memberships. They claim that there is no evidence in the record that, prior to discovery in this litigation, either of them knew any specific details about the memberships. Garrett, however, acknowledged that he was aware of the purchase of the Sporting Club Memberships, and there is no evidence that he complained about the memberships. To the contrary, there is evidence of record that in 2005, Garrett even asked George if the general partners would cause CLP to purchase a separate membership for his own use.

¶ 111 Garrett and Lauren W. further complain that the trial court's finding of no breach of fiduciary duty with respect to the Sporting Club Memberships is erroneous because CLP paid dues, fees, and assessments on the Sporting Club Memberships in the approximate amount of $102,010.67, which have never been reimbursed by George and Fred. Garrett and Lauren W. argue that George and Fred have attempted to limit their exposure to damages by arguing that certain fees, such as “regime fees,” are not connected to the Sporting Club Memberships, but rather are connected to the specific properties. According to Garrett and Lauren W., however, regime fees and community association fees are connected to the Sporting Club Memberships and accounted for in CLP’s general ledger as “Dues, Fees and Assessments.” The assertion that regime fees and community association fees were somehow expenses tied to the Sporting Club Memberships is contradicted by testimony presented at trial. George testified that the a regime fee “is like a community common area fee for that neighborhood. It’s for the costs for those properties to take care of the common areas in that neighborhood.” As such, George stated, the regime fees are attributable to the ownership of real property. Similarly, George testified that annual assessments are related to the real estate. George stated that the only fees associated with owning the Sporting Club memberships are membership dues.

¶ 112 Garrett and Lauren W. also allege that George and Fred charged personal meals to CLP. In support of this claim, Garrett and Lauren W. cite to entries in CLP’s general ledger that food expenses were charged to the Partnership. George, however, expressly denied that he or Fred charged personal expenses to the Partnership. He testified that when members of his family or members of Fred’s family used the Sporting Club’s facilities, he and Fred “paid for that personal use separately, individually.” Moreover, Renner, the forensic accountant retained by Garrett and Lauren W., had access to CLP’s general ledger. He never indicated that George or Fred had embezzled or “improperly diverted” funds from CLP. We also note that no witness was questioned about the ledger entries cited by Garrett and Lauren W.

¶ 113 In short, the trial court was faced with conflicting testimony regarding the circumstances of the original purchase of the Sporting Club Memberships. Given the trial court's role in resolving any factual disputes, judging the credibility of the witnesses, determining the weight to afford their testimony, we simply cannot say that an opposite conclusion is clearly apparent or that the court's finding was unreasonable, arbitrary, or not based on the evidence. As such, the trial court's finding that George and Fred did not breach their fiduciary duty of loyalty to CLP and its limited partners with respect to the original purchase of the Sporting Club Memberships is therefore not against the manifest weight of the evidence.

¶ 114 Next, Garrett and Lauren W. dispute the trial court's determination that George and Fred did not breach their fiduciary duties by subsequently purchasing the two Sporting Club Memberships for $224,000, from CLP. Garrett and Lauren W. argue that (1) the purchase price was "unfair" because it was only 80% of the current value of the two memberships, and (2) at best it only partially reimbursed the costs associated with the memberships. The trial court determined that CLP did not sustain any damages as a result of selling the Sporting Club Memberships because the memberships were purchased from the Partnership at a higher price than what the Partnership paid for them. The manifest weight of the evidence supports this finding. With respect to Garrett's and Lauren W.'s former argument, there was evidence from which the trial court could have determined that CLP could not have obtained a price higher than 80% of the current value of the two memberships. As George explained, the price for Sporting Club Memberships was set pursuant to the Sporting Club's Membership Plan, which provide that a resigning member had to sell his membership at a price set at 80% of the then-current sales price. Moreover, as the trial court found, CLP actually showed a profit of $49,000 on the sale, and Renner observed that the sales proceeds were used to pay off Partnership debt.

¶ 115 With respect to the claim that the purchase price only partially reimbursed CLP for the costs associated with the memberships, Garrett and Lauren W. do not explain why CLP should be reimbursed for any expenses incurred for and related to the Sporting Club Memberships at the time the memberships were owned by CLP. Garrett and Lauren W. assert that the partial reimbursement "constitutes a tacit acknowledgment by the General Partners of the misappropriation of funds used to acquire the Memberships." In support of this position, Garrett and Lauren W. cite to *Daiwa Bank v. LaSalle National Trust, N.A.*, 229 Ill. App. 3d 366, 376 (1992), and *Ross v. 311 North Central Avenue Building Corp.*, 130 Ill. App. 2d 336, 347 (1970). These two cases, however, are distinguishable. They both involved defendants who admittedly stole money or undisputedly owed money and then tried to avoid a claim by paying the funds back. As noted above, there was no evidence here that George or Fred embezzled any funds from the partnership or "improperly diverted" funds from CLP.

¶ 116 Accordingly, there was evidence to support the trial court's finding that the purchase of the Sporting Club Memberships and their subsequent sale by CLP to the general partners did not constitute a breach of George's and Fred's fiduciary duty of loyalty to CLP and the limited partners. As such, we cannot say that an opposite conclusion is clearly apparent or that the court's finding was unreasonable, arbitrary, or not based on the evidence. The trial court's finding is therefore not against the manifest weight of the evidence.

¶ 117 d. Long-Term Care Insurance

¶ 118 Next, Garrett and Lauren W. contend that George and Fred breached their duty of loyalty to CLP and the limited partners by purchasing long-term care insurance for themselves and Ryn. The record discloses the following regarding the purchase of the long-term care insurance. The 2007 appraisal by McGladrey disclosed the payment of premiums for long-term care insurance between 2005 and 2007. The insurance was for George, Fred, and Ryn. George testified that the total amount of premiums for the long-term care insurance was $49,826.72, of which $14,500 was attributable to Ryn. According to George, CLP paid the long-term care insurance premiums for him and Fred because the Partnership Agreement allows CLP to purchase insurance on behalf of and for the benefit of a general or limited partner and it allows a general partner a reasonable salary or other compensation for services rendered. George added that other than the long-term care insurance benefit, he and Fred never drew a salary or other form of compensation in their roles as general partner.

¶ 119 George acknowledged that Ryn is not a general partner. He explained, however, that the long-term care insurance for her was authorized under a provision of the Partnership Agreement allowing CLP to employ individuals. According to George, Ryn "expended an exhaustive amount of time in working with [the interior designer of the Snead residence] identifying items and furnishings for the house and frequently identifying alternate sources for like items, so that she was able to in a number of cases identify cost savings for alternate items." Thus, he stated, long-term care insurance was provided to Ryn as compensation for her services in assisting in the design of the Snead residence. George admitted that the long-term care insurance was purchased in February 2005, before construction of the Snead residence began. Fred testified, however, that Ryn had committed to assisting in the design and development of Snead prior to the commencement of construction. Fred explained that Ryn's involvement began late in the summer of 2004, after the partnership started working with an architect. Subsequently, the Partnership decided to hire an interior designer and Ryn visited various homes at the Greenbrier, took the names of the interior designers, and, along with the general partners, began interviewing interior designers.

¶ 120 The trial court acknowledged it did not "know why" George and Fred purchased long-term care insurance for themselves and Ryn. Nevertheless, the court concluded that it did not violate the Partnership Agreement or George's and Fred's fiduciary duties to CLP and the limited partners. The court noted that George and Fred did a lot of work over the years for CLP, but neither man received a salary or any other form of compensation. The court also found that Ryn did a lot of work on behalf of CLP, particularly with respect to the design and furnishing of the Snead property. The court found that Ryn's work benefited CLP in that "her services [were] done for free as opposed to a design professional or other professional who would have certainly charged for the services that she provided." Thus, the trial court concluded, the decision to purchase long-term care insurance was authorized by the Partnership Agreement, which allows the general partners to draw salary or receive compensation for their services and it allows the general partners to employ agents or other persons to carry out partnership business.

¶ 121 Against this backdrop, Garrett and Lauren W. insist that George and Fred breached their duty of loyalty to CLP and the limited partners by purchasing personal long-term care insurance for themselves and Ryn. Initially, Garrett and Lauren W. assert that in ruling to the contrary, the trial court incorrectly determined that the policies were compensation for otherwise uncompensated services rendered. According to Garrett and Lauren W., this finding is refuted by representations made in the handout distributed at the August 2007 partnership meeting, which indicated that the general partners intended to "draw income" from CLP "beginning in 2008" and an August 2007 letter from Fred to Garrett in which he states that "we [the general partners] have taken no income since 1999." Garrett and Lauren W. also claim that the trial court's determination was improper because neither George nor Fred claimed the premiums paid by CLP as income on their tax returns. The trial court, however, could have reasonably viewed the payment of long-term care insurance as "other compensation" and not a draw of income. As the court noted, the Partnership Agreement states that a general partner "shall receive a reasonable salary or other compensation for services rendered." In addition, in accordance with George's testimony, the Partnership Agreement expressly allows the partnership to "purchase life, accident, disability, medical *or other insurance* on behalf of and for the benefit of the General Partner or any Limited Partner." (Emphasis added.) To the extent that the evidence cited by Garrett and Lauren W. contradicts the testimony presented by counterdefendants, it merely created a factual dispute for the trial court to resolve. See *Bernstein & Grazian, P.C.*, 402 Ill. App. 3d at 976.

¶ 122 Garrett and Lauren W. further assert that the Act prohibits limited partnerships from making "distributions" to partners that impair the partnership's ability to pay their debts as they become due (805 ILCS 215/508(b)(1) (West 2006)), which "distributions" encompass any "transfer of money or other property from a limited partnership to a partner in the partner's capacity as a partner" (805 ILCS 215/102(7) (West 2006)). According to Garrett and Lauren W., CLP was insolvent at the time the premiums were paid, so the payment of the insurance premiums was prohibited. This argument ignores the trial court's finding that the payment of the insurance premiums was compensation for services rendered by George and Fred, not a "distribution" to the general partners in their capacity as such. Thus, we find misplaced Garrett's and Lauren W.'s reliance on these statutory provisions.

Moreover, Garrett's and Lauren W.'s claim that these insurance payments impaired CLP's ability to pay its other debts is unsupported by any citation to evidence of record. See Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008) (noting that the appellant's brief shall contain argument section shall be accompanied by citation of the authorities and the pages of the record relied on). Accordingly, considering the entirety of the evidence presented at trial on this matter, we cannot say that the trial court's finding that George and Fred did not breach their fiduciary duty of loyalty to CLP and the limited partners by purchasing long-term care insurance for themselves was against the manifest weight of the evidence.

¶ 123 Garrett and Lauren W. also challenge the trial court's finding that Ryn, a non-partner, could receive her premiums as compensation for decorating Snead. They argue that this finding was improper because Ryn's alleged work was duplicative of the efforts of the interior designer hired to work on the property, the work was performed for her own benefit as Fred referred to Snead as his and Ryn's "last home," and there is no evidence that Ryn was ever an employee or an independent contractor of CLP. We are not persuaded by any of these arguments. First, as the trial court noted, the Partnership Agreement provides that the partnership "may employ agents, employees, managers, accountants, attorneys, consultants, and other persons necessary or appropriate to carry out the business and affairs of the Partnership, whether or not any such persons so employed are Affiliated Persons, or are employed by Affiliated Persons." The Partnership Agreement defines "Affiliated Person" to include a member of a partner's immediate family. Contrary to Garrett's and Lauren W.'s claim, there *was* evidence that Ryn rendered services for CLP for which the partnership received a benefit. In particular, the testimony of George and Fred established that Ryn became involved in the construction and design of Snead in 2004. At that time, she began working with an architect and searching for interior designers. George testified that Ryn's work resulted in cost savings. Second, Garrett and Lauren W. do not explain how Ryn's work was duplicative of the work of the interior designer. To the contrary, the evidence demonstrates that she worked in conjunction with the interior designer and identified cost savings, which ultimately benefitted CLP. For these reasons, we find that the trial court's finding that the general partners did not breach their fiduciary duty of loyalty to CLP and its limited partners by purchasing long-term care insurance for Ryn is not against the manifest weight of the evidence.

¶ 124 e. Manning & Banks

¶ 125 Next, Garrett and Lauren W. argue that George and Fred breached their duty of loyalty to CLP and the limited partners by purchasing for $100,000 the consent judgment relating to loans made to M&B. The record discloses the following with respect to the M&B loans and the consent judgment.

¶ 126 Fred was acquainted with Manning, who, as noted above, was one of the principals at M&B. Fred testified that he had two or three meetings with Manning "and it evolved into needing some help." To this end, CLP entered into a commercial lending relationship with M&B in June 2006. Manning presented Fred with proposed terms for an agreement, but Fred stated that this document "was not in a format that [he] felt was reasonable for protecting [CLP and the partners]," so he asked an attorney to help draft a document. On June 21, 2006, M&B executed a promissory note in favor of CLP for $75,000 (2006 Note), payable in full at maturity on June 21, 2007. CLP acquired the $75,000 for the loan through a line of credit at UBS. According to Fred, this line of credit was secured by non-partnership assets. The purpose of the loan was to allow M&B to make a down payment on boring equipment. M&B had financed part of the purchase of the equipment with another entity, Caterpillar, and the loan by CLP was for the balance of the purchase price. CLP was to receive a security interest or lien in the equipment that was subordinate to Caterpillar.

¶ 127 Thereafter, CLP made three additional loans to M&B. CLP loaned $10,000 to M&B in September 2006, which M&B repaid within five weeks. CLP loaned $25,000 to M&B in March 2007, which M&B repaid within a few months. On March 4, 2008, M&B executed another promissory noted in favor of CLP for $25,000 (2008 Note). The 2008 Note was payable in 90 days. The loan was for a directional boring project and the pledge for the loan was accounts receivable. CLP acquired the $25,000 for the loan through a line of credit at UBS. Fred cited two reasons for lending M&B additional money even though they were having problems collecting the 2006 Note. First, M&B promptly repaid the September 2006 and March 2007 loans. Second, Manning represented that with additional help, he would be able to secure a project in Colorado that would allow M&B to start repaying the 2008 Note. However, neither the principal on the 2006 Note nor the 2008 Note was ever paid.

¶ 128 George testified that prior to CLP making the initial $75,000 loan to M&B, he did not request any financial statements from M&B or Manning, he did not perform a UCC search, he did not do a tax-lien search, he did not ask for any cash flow or profit-and-loss statements, he did not review income-tax returns from M&B or Manning, and he did not perform a background check on Manning or M&B. For his part, Fred testified that Manning indicated that the equipment would be used for several projects for which Manning had already provided a quote or was soon to start work. Fred further testified that he received a *pro forma* "project statement" from Manning, which consisted of an analysis of project revenues. Fred explained that, in his mind, the transaction was "equipment financing," an area in which he had prior experience and they therefore did not need to inspect all tax, legal, and financial documents. Fred further testified that a search of any outstanding judgments against Manning revealed that there were none. Fred stated that during the time when CLP was having trouble getting paid, he continued to meet with Manning, trying to determine the status of his business and when CLP could expect payments. He acknowledged, however, that pursuant to a conversation with Manning, he became aware that on December 11, 2006, Manning and M&B had been sued for fraud, conversion, and breach of fiduciary duty. Ultimately, CLP sued Manning and M&B to collect on the 2006 and 2008 notes. CLP obtained a judgment in the amount of $122,101.70 against M&B and Manning as guarantor. Fred testified that he learned about other judgments against Manning, which were obtained after CLP's judgment had been filed and recorded. On December 28, 2010, George and Fred purchased the judgment from CLP for $100,000.

¶ 129 The trial court did not find the M&B transactions and the purchase of the judgment resulted in a breach of fiduciary duty. The court acknowledged that the M&B transactions were "[p]robably not the best investment," adding that it was "[p]robably not the most due diligence that [it had] ever seen." The court found that the transaction was likely influenced by Fred's friendship with Manning. Nevertheless, the court stated that it "can see why he did it" and that "this was not a situation where he just blindly threw money at Charles Manning." The court found that Fred "did certain things to try to perform due diligence." The court noted, for instance, that Fred had several meetings with Manning prior to making the loans. In addition, Fred obtained a *pro forma* project statement from Manning reflecting a projected cash-flow analysis and the proposed agreement was reviewed by legal counsel. Further, during the time when additional loans were made, Fred met with Manning on a regular basis to discuss the status of the loans and the repayment. With respect to the decision to purchase the judgment from CLP, the trial court concluded that "any damages to the partnership went away when George and Fred decided to purchase this judgment and put the cash back in the partnership." The court therefore found that was not "a self-serving deal" and that George and Fred did not profit from the deal.

¶ 130 Garrett and Lauren W. argue that the purchase of the consent judgment was a tacit acknowledgment by George and Fred of their wrongdoing. They insist that George and Fred failed to fully compensate CLP for the costs associated with CLP funding the loans with borrowed money, which they calculate as $19,893. Garrett and Lauren W. further maintain that the accrued post-judgment interest on the consent judgment was $48,401.18, thereby making the "true value" of the consent judgment $170,502.88. We conclude that the manifest weight of the evidence supports the trial court's finding that George's and Fred's purchase of the consent judgment for $100,000 did not breach any duty of loyalty they owed to CLP and its limited partners.

¶ 131 First, as George and Fred point out, there was no evidence that the judgment was actually worth anything. In this regard, Renner, the forensic accounting expert retained by Garrett and Lauren W., indicated that he would not have personally paid $100,000 for the judgment and that he did not believe that a third party would pay that amount. Additionally, there was evidence to refute Garrett's and Lauren W.'s claim that CLP was not fully compensated for the costs associated with funding the loans. George and Fred purchased from CLP the judgment against M&B for $100,000, the face value of the outstanding loans to M&B. Further, Robert Layton, the certified public accountant retained by counterdefendants, related that during the entire lending relationship with M&B, CLP received $25,327 in interest payments, which was in excess of CLP's borrowing costs and other expenses. Thus, contrary to Garrett's and Lauren W.'s argument, there was evidence from which the trial court could find that CLP actually profited from its relationship with M&B. Based on this evidence, we cannot say that a conclusion opposite to that of the trial court is clearly apparent or that the court's finding was unreasonable, arbitrary, or not based on the evidence. Quite simply, there was evidence from which the trial court could reasonably conclude that the purchase of the consent judgment by George and Fred eliminated any damages and "put the cash back in the partnership." As such, the trial court's ruling was not against the manifest weight of the evidence.

¶ 132 f. Gardner Debt

¶ 133 Garrett and Lauren W. also argue that George and Fred breached their fiduciary duty of loyalty by causing Gardner to assess CLP with loan administration and guarantor fees. The record discloses the following evidence regarding this claim. CLP received loans from Gardner during the development and carrying phases of the Snead project. The relationship between CLP and Gardner was reflected in an agreement dated November 2005. George testified that the purpose of the November 2005 agreement was two-fold. First, it was to pledge funds that City National required for approval of the construction loan on Snead. Second, it anticipated that Gardner would occasionally provide additional funds to CLP to build and furnish Snead.

¶ 134 To this end, the agreement executed in November 2005 noted that Gardner had provided margined funds from its UBS account to CLP for the purpose of making progress construction payments to the general contractor. The agreement also pledged $1.1 million in liquid assets requested by City National as additional security to fund the construction loan. In exchange for its pledge, Gardner charged a guarantor fee of 0.75% on funds borrowed from City National that were guaranteed by Gardner with its pledge of $1.1 million. The agreement further provided for an administrative fee of 0.75% for loans made from Gardner to CLP. According to George, this arrangement enabled Gardner to loan money to CLP at the reduced rate of 4.85% (Gardner's UBS margin rate of 4.1% plus 0.75%), as compared to the rate of 6.75% charged by City National. The trial court, although not expressly referencing this transaction in its ruling, stated that it considered all of the evidence and the arguments presented by the parties.

¶ 135 Garrett and Lauren W. claim that Gardner's assessment of loan administration and guarantor fees constituted "a material act of self-dealing." Devoting just one brief paragraph to this claim, they argue that as CLP's general partners, George and Fred were already jointly and severally liable for CLP's indebtedness. See 805 ILCS 215/404(a). Therefore, they reason, it was improper for George and Fred to assess these charges against CLP and in favor of Gardner, their *alter ego*. Other than a citation to the Act, Garrett and Lauren W. do not support this argument with any evidence or authority that the fees charged in the November 2005 Agreement between CLP and Gardner were inconsistent with commercially reasonable rates. Moreover, as George and Fred point out in their response, the Act allows a partner to lend money to and transact business with a limited partnership. See 805 ILCS 215/112 (West 2006). The Act further provides that a general partner does not violate any duty "merely because the general partner's conduct furthers the general partner's own interest." 805 ILCS 215/408(e) (West 2006). Accordingly, we find the manifest weight of the evidence supports a finding that the assessment of administration and guarantor fees did not violate the general partners' duty of loyalty to CLP and its limited partners.

¶ 136 2. Duty of Care

¶ 137 Next, Garrett and Lauren W. charge that George and Fred breached their duty of care to CLP and its limited partners by: (1) causing CLP to incur unserviceable debt that cannot be repaid; (2) buying Snead; (3) making loans to M&B without performing due diligence; and (4) misrepresenting and failing to fully disclose to Garrett and Lauren W. all material facts relating to CLP's indebtedness to Gardner. In addition, Garrett and Lauren W. argue that George's and Fred's breaches of their duty of loyalty also constitute breaches of their duty of care. The Act provides that a general partner's duty of care "is limited to refraining from engaging in grossly negligent or reckless misconduct, or a knowing violation of the law." 805 ILCS 215/408(c) (West 2006). Gross negligence or reckless conduct has been described as conduct "without the bounds of reason." *Sherman v. Ryan*, 392 Ill. App. 3d 712, 732 (2009) (noting that gross negligence violations "are rarely found"). The Act further provides that a general partner shall discharge his or her duties consistent with the obligation of good faith and fair dealing. 805 ILCS 215/408(d) (West 2006). However, a general partner does not violate any duty "merely because the general partner's conduct furthers the general partner's own interest." 805 ILCS 215/408(e) (West 2006). As set forth below, in light of the applicable law, the record on appeal, and the deferential standard of review applicable to duty-of-care claims, we conclude that the trial court's findings that George and Fred did not breach their fiduciary duty of care to CLP and its limited partners is not against the manifest weight of the evidence.

¶ 138 a. Debt

¶ 139 Garrett and Lauren W. first argue that George and Fred breached their duty of care to CLP and its limited partners because the construction of the Snead residence "ensured the financial demise of CLP by causing CLP to incur debt it could not service or repay."

¶ 140 George noted that by the end of 2003, CLP had owned the Copeland property for almost three years. George testified that Copeland had appreciated in value (appraised at $1.3 million versus a cost of $875,000) and had a positive return because of the guaranteed rental program. As such, the partners discussed the acquisition of additional property at the Sporting Club. George testified that

Mary was involved in the discussions and was supportive of the idea. George testified that prior to purchasing the lot, he did some research regarding the potential resale value of any property. George noted, for instance, that any time the general partners were visiting the Greenbrier, they would stop in the Sporting Club's sales office "to get a gauge of the community and the interest in it and what the prices were of properties, how many had sold, whatever." George testified that based on the information presented, the prices of properties in the Sporting Club were increasing over time, and "that gave us expectation that it would continue." George testified that in addition to staying in regular contact with the Sporting Club's sales office, the general partners also spoke with members of the banking community locally and other property owners. George explained why he believed that Snead was an appropriate investment for CLP:

> "It was a–I guess an extension of the success that we had seen so far in the development of the [Sporting Club] community. It was coming into bloom, if you will, according to the plans, which isn't the case with all residential developments, but this one was progressing along their plans. And there had been appreciation in lots. So we were–we were interested in it because capital appreciation seemed to be still a good opportunity here in excess of what we saw in the stock market and what have you."

In December 2003, CLP purchased the Snead property, an unimproved lot. According to George, the initial plan was to hold the lot while it appreciated and sell it in the future at a profit. George testified that the price of the lot was $855,000, and was financed through City National.

¶ 141 George further testified that following the purchase of the Snead lot, he continued to visit the Sporting Club's sales office. As a result of these visits, he learned that the annual appreciation of properties there "was well over 10 percent" and "[p]robably on the order of 12, 14 percent per year."

George added that his opinion of the performance of the Copeland property was still positive as of the summer of 2004. George testified that he and Fred then spoke with residents of the community who had erected homes on their lots. Based upon these conversations, he and Fred "started to understand and believe that a lot with an approved design for a house, if not a house, was another way to further enhance your appreciation and the possibility of sale by differentiating yourself just from the several hundred lots all around the community that were just dirt." As such, the general partners began talking to architects. At that point, George testified, the plan was to hold the property for three to six years at which time they would either sell the lot with an approved architectural plan or with a completed home. Regarding the general partners' strategy, George testified as follows:

> "Our expectation was, as had been the case in several other activities or business ventures that we've been involved in, that we could invest for capital appreciation, not for income but for capital appreciation, and with sufficient financing we would be able to carry it until the time that we'd sell and the appreciated value would cover the cost of our development plus our carrying costs."

¶ 142 Regarding financing construction of a house on the Snead lot, George explained:

> "But our process of this was both–both general partners had sufficient capital and resources to support this project. The ownership of the asset would be in the [CLP].
>
> The deficit, if you will, in terms of actual capital was in the control of the general partners, and they were willing and supportive of following through with this project, and they would be able to provide the capital necessary to cover the additional development costs. We would provide that capital as it was necessary as the project progressed in order

to be able to fund it and complete the project. Ultimately, at some point–and in the interim, yes, you do have interest charges for the loans at that point.

At some point in the future, based on future appreciation in the project–mind you, the project and real estate values were growing at double-digit rates. 10, 12, 14 percent based on our history.

So the appreciation of the capital is going to–on the total amount of the asset is going to give you a profit that will ultimately be able to repay the debt and the development costs. And that was our–that was our strategy."

George testified that the general partners wanted a home consistent with the neighborhood in which it would be located and they settled upon a design that was "in the middle range of the properties that were being sold," which was between $2 million and $4 million (including the $855,000 cost to acquire the lot). The architect fees were paid by CLP through the sale of securities.

¶ 143 George testified that once the design was complete, he and Fred reviewed the suitability of their design, as well as the strength of the local market and the national economy. In September 2005, construction on the Snead residence began. George testified that construction was principally financed with a loan from City National, but noted that the bank required some additional security. To this end, Gardner agreed, prior to the commencement of construction, "to provide additional loans to [CLP] in order to complete the construction and the necessary carrying costs." George noted that his family had been involved in similar financing arrangements in the past whereby one family member would obtain a loan and another family member, not actually invested in the business, would guarantee the loan.

¶ 144 George testified that despite the fact that CLP would not be able to immediately repay the funds provided by Gardner, he expected to make a profit for the Partnership. He explained:

> "[U]ltimately upon the sale of the partnership–or excuse me–of the property, we anticipated that there–the rate of appreciation in real estate through–from 2000 through 2005 as we were making this decision was well in excess of all our borrowing costs and our costs of financing as far as we were concerned and were expecting to achieve. And there's a gain on that total asset increase that we expected and by our, you know, estimations would exceed the cost of development plus the cost of–carrying costs."

In this regard, George pointed out that according to the 2005 appraisal by McGladrey, as of June 2005, the net asset value of the CLP was $2.111 million, an increase of over 60%, primarily based on the Copeland investment. George acknowledged that if he had a crystal ball at the time he was breaking ground in 2005 and could have foreseen the state of the economy in 2007 and 2008, he would not have proceeded with the construction of Snead. He testified, however, that at the time construction began, the economy was "very strong *** very positive" and there was no indication that it would change.

¶ 145 The trial court noted that in evaluating the evidence, it relied on the Partnership Agreement and considered the investments "as they would have appeared to a reasonable person at the time that they were made rather than looking at them how they appeared after the economic and real estate market collapse." Ultimately, the trial court determined that George's and Fred's decision to purchase and construct a house on Snead did not breach any fiduciary duties owed to CLP. The court noted that Enichen specifically recommended that the partnership diversify its holdings, all of the general partners at that time (Mary, George, and Fred) approved of the real estate investments, and Garrett was aware of the real-estate investments.

¶ 146 With respect to the Snead property in particular, the trial court emphasized that in 2003, when the lot was purchased, "all was rosy" concerning CLP's real estate investments and the real estate market in general. The trial court also noted that the Copeland investment had appreciated in value and had generated positive cash flow and the general partners felt that the Sporting Club was "coming into bloom at that time and would continue to appreciate in value." The court noted George's testimony that developments in the Sporting Club had appreciated at a rate of 12 to 14 percent per year and that there was no reason at that point in time to think that the appreciation was going to end anytime soon. The trial court further determined that the general partners' engagement of architects and home designers was "a very prudent thing to do," because the general partners testified that, in their opinion, the property would have "a lot more ability to be resold" if it was improved.

The trial court also referenced what it referred to as the general partners' "business plan":

> "The general partners developed a business plan that they felt would be needed to support this investment, and specifically the business plan would have been to support the investment—the partnership investments with loans from Gardner until the home could be hopefully sold at a profit in three to six years.
>
> That was a legitimate business plan. Yes, the partnership was taking on a lot of debt. There's no question about that. But looking at it under the facts and circumstances as they were in existence at that time, that was a legitimate business plan. Maybe a little risky,

certainly burdening the partnership with debt; but it was based on good numbers. It was based upon good projections. I felt that the Partners did their homework.

And, yes, they were taking on a lot of debt for the partnership; but this business plan, had the real estate market continued as it had been for several years, probably would have worked out to everyone's benefit. That didn't come to pass, but I find the plan and decision to purchase the lot and to make that investment and to build a home was sound when it was made and did not violate any duties owed by the general partners to the limited partners."

¶ 147 As noted above, according to Garrett and Lauren W., the construction of the Snead residence ensured the financial demise of CLP by causing CLP to incur debt it could not service or repay. According to Garrett and Lauren W., the trial court "failed to meaningfully engage [their] main argument: that the General Partners' knowing disregard for the interests of the limited partners in CLP's solvency, equity and capital reserves is a textbook example of gross negligence or recklessness." In support of their claim, Garrett and Lauren W. assert that as early as November 2003, George and Fred had become aware of the existence of a "bubble" in the real estate market. Nevertheless, they maintain, George and Fred proceeded to break ground on the Snead residence, with Gardner becoming the primary source to cover all of CLP's expenses, including interest payments to City National, while contemporaneously causing CLP to liquidate most of its securities in the UBS investment account. Garrett and Lauren W. maintain that the purported "business plan" referenced by the trial court was illusory as no documentary evidence supports such a claim. They also dispute any suggestion that CLP's financial problems were attributable to the decline in real-estate values rather than the indebtedness incurred by CLP.

¶ 148 Initially, we disagree with Garrett and Lauren W. that the trial court failed to meaningfully engage their main argument. The trial court spent almost 20 pages of its oral decision explaining why the Snead development did not breach any fiduciary duty. Moreover, despite the evidence cited above, the trial court was presented with other evidence from which it could reasonably conclude that the general partners' decision to incur debt to purchase and develop Snead was not "without the bounds of reason" and therefore did not constitute a breach of the fiduciary duty of care. In particular, there was evidence from which the trial court could have found that the general partners did not cause CLP to take on debt that they knew could not be repaid. George testified extensively about the general partners' thought process at each stage of the purchase and development of the Snead property. He noted, for instance, that by the end of 2003, CLP's Copeland investment had appreciated in value, so the general partners discussed the acquisition of additional property at the Sporting Club. To this end, George researched the market and determined that the Sporting Club was "coming into bloom" and that real estate prices continued to appreciate. As George explained, "we were interested in it because capital appreciation seemed to be still a good opportunity here in excess of what we saw in the stock market and what have you." Thereafter, George and Fred conducted additional research. They believed that they could enhance the appreciation of the property by having an approved house design, if not a house itself. When the general partners decided to incur the expense of creating an architectural plan, they again assessed the market and learned that year over year annual appreciation at the Sporting Club was in double digits. At that point, George testified, the plan was to "invest for capital appreciation, not for income," by holding the property for three to six years at which time they would either sell the lot with an approved architectural plan or with a completed home.

¶ 149 The evidence further establishes that before making the decision to commence construction in the fall of 2005, the general partners again reviewed the suitability of their design, as well as the strength of the local market and national economy. George noted that by that point in time, the value of CLP's assets had increased by sixty percent, largely based upon the appreciation of the Copeland. Ultimately, the general partners decided to begin construction of a residence on the Snead lot. The general partners identified three funding sources that would carry the project through the holding period: (1) conventional financing from City National; (2) liquidation of CLP assets; and (3) loans from Gardner. George noted that his family had been involved in similar financing arrangements in the past whereby one family member would obtain a loan and another family member, not actually invested in the business, would guarantee the loan. George acknowledged that CLP would not be able to repay the funds loaned by Gardner "on a routine basis." Nevertheless, he expected to make a profit for the partnership, explaining that, at the time the decision was made, the appreciation in real estate was expected to exceed the borrowing and carrying costs of the property. In short, while the general partners took on debt to purchase and develop Snead, this decision was not made blindly. As the trial court noted, it was backed by extensive research and prior experience in similar financing arrangements. As such, we simply cannot say that a conclusion opposite to that of the trial court is clearly apparent or that the court's finding was unreasonable, arbitrary, or not based on the evidence.

¶ 150 b. Snead

¶ 151 Garrett and Lauren W. also contend that George and Fred breached their duty of care by buying Snead from CLP. The circumstances surrounding the sale of Snead are set forth in section II(A)(1)(b) above. The trial court concluded that the purchase of Snead did not violate any fiduciary duty because CLP received three benefits from the transaction: (1) a reduction of its debt by $2.4

million; (2) a reduction in the carrying expenses of CLP relating to Snead by about $186,000 a year by taking debt off of CLP's books; and (3) avoidance of any further declines in the real estate market. The evidence supports the findings of the trial court.

¶ 152 Significantly, the record shows that at the time of the sale of Snead to Willamette, there were three liens against the property, including two liens held by City National for more than $2.4 million, which were paid off as a result of the sale. George testified that the third lien, which was held by Gardner, was also released in conjunction with the closing of the sale for "additional security," consisting of a mortgage or trust deed on the Copeland property and a lien against CLP's interest in Mollauryn. George also testified that for 2008, the last year that CLP owned the Snead property, the carrying costs amounted to almost $186,000 per year. As recounted in section II(A)(1)(b) above, George and Fred also presented evidence that Snead had declined in value since the market peak in 2006 or 2007 and that it continued to decline after George and Fred purchased the property in 2009. Thus, the sale of Snead to George and Fred shielded CLP from further loss of value in a declining market. Accordingly, the manifest weight of the evidence therefore supports a finding that George's and Fred's actions were not "without the bounds of reason." As such, the trial court's finding that George and Fred did not breach their fiduciary duty of loyalty to CLP and its limited partners by buying Snead from CLP is not against the manifest weight of the evidence.

¶ 153 Nevertheless, Garrett and Lauren W. dispute the findings of the trial court. They argue that far from benefiting the partnership, the sale of Snead "stripped CLP of its most valuable asset." Garrett and Lauren W. again emphasize the statement by Warren in his report that he expected Snead to appreciate within the next five years. Therefore, they reason, CLP was permanently deprived of any opportunity to "ride out" the current real estate market and reap the benefits of an arm's length sale of Snead on the open market. As noted above, however, this argument ignores the significant costs CLP would incur to "ride out" the real estate market over five years, including almost $1 million in carrying costs. Further, there was no indication from Warren that the increase in value over five years would exceed the additional carrying costs. In fact, Enichen advised George and Fred to have CLP to sell its real property as soon as possible in light of declining real estate values. The trial court could have reasonably found that it was preferable to sell Snead as soon as possible to avoid these additional costs and in light of the then-declining real estate market.

¶ 154 Garrett and Lauren W. further assert that in connection with the sale of Snead, Copeland and CLP's interest in Mollauryn were left encumbered to secure repayment of the indebtedness to Gardner, debt which Warren and Enichen expressly advised George and Fred to satisfy in connection with the purchase of property from CLP. According to Garrett and Lauren W., George and Fred ignored this advice. They assert that the sale of Snead did not remedy CLP's insolvency and its ability to service more than $1.8 million of principal indebtedness to City National and Gardner that remained after the transaction. There was evidence from which the trial court could reasonably conclude that George and Fred did not ignore Enichen's advice. Notably, George testified that the liens in question were placed on Copeland and Mollauryn to extinguish the liens on Snead. Further, as Garrett and Lauren W. acknowledge, the Copeland property, although listed for sale, has yet to be sold. The proceeds from this sale can presumably be used to further reduce CLP's indebtedness. We therefore do not find this argument sufficient to overturn the decision of the trial court.

¶ 155 c. M&B

¶ 156 Garrett and Lauren W. next argue that George and Fred breached their duty of care by making loans to M&B without performing due diligence. As noted above, CLP loaned funds to M&B on four occasions: June 2006, October 2006, March 2007, and March 2008. The first and last loans are at issue here. The facts related to the M&B loans are set forth in section II(A)(1)(e) above. As noted therein, the trial court determined that the loans to M&B were "[p]robably not the best investment" and were "[p]robably influenced by [Fred's] friendship with Charles Manning." The court also remarked that "the transactions involved probably not the most due diligence that I've seen. Maybe [Fred] did rely somewhat on his relationship with Charles Manning in making this decision. Probably not, you know, in hindsight a good investment for the [CLP]." Nevertheless, the court concluded that "this is not a situation where [George and Fred] just blindly threw money at Charles Manning." The court went on to find that Fred "did certain things to try to perform due diligence." Specifically, the court cited evidence that: (1) Fred had several meetings with Manning prior to making the loans; (2) Fred obtained a *pro forma* project statement from Manning reflecting a projected cash-flow analysis; (3) the general partners had the proposed agreement reviewed by legal counsel; (4) during the time when additional loans were made, Fred met with Manning on a regular basis to discuss the status of the loans and the repayment; and (5) Fred did receive additional information from Manning at least for some time about the projects. The court stated that while this "wasn't the best due diligence," and "maybe it was a little negligent," it did not "rise to the level needed to show a breach of the fiduciary duties of care and loyalty." The court also found that the transactions with M&B were not "self-serving" and George and Fred did not profit from them. As such, the trial court found that "it doesn't really reach the level of proof needed to show that this was reckless conduct by the general partners."

¶ 157 As noted above, Garrett and Lauren W. argue that George's and Fred's failure to conduct meaningful due diligence constitutes a breach of their duty of care to CLP and its limited partners.

In support of their contention, Garrett and Lauren W. assert that both George and Fred admittedly failed to request, let alone obtain, any financial statements from M&B or its principals. They further assert that neither George nor Fred bothered to search public records, which would have disclosed that M&B and Manning were involved in litigation alleging fraud and conversion. They also point out that CLP loaned funds to M&B in March 2008, *after* M&B was already in default on a previous loan. The trial court, however, was aware of all of the points raised by Garrett and Lauren W. In determining whether George and Fred conducted meaningful due diligence it weighed these factors in conjunction with other evidence presented at trial and concluded while the due diligence performed by George and Fred was not the best, it was sufficient to defeat Garrett's and Lauren W.'s allegation of breach of the fiduciary duty of care. Given the trial court's role in resolving factual disputes and determining the weight to assign witness testimony, we cannot say the trial court's finding that George's and Fred's conduct did not rise to gross negligence or recklessness is against the manifest weight of the evidence. See *Bernstein & Grazian, P.C.*, 402 Ill. App. 3d at 976.

¶ 158 Garrett and Lauren W. further complain that George and Fred did not disclose to them that M&B had defaulted. They argue that testimony from George that the M&B default was disclosed at the 2007 partnership is not supported by the record as it is not mentioned in the contemporaneous handout distributed at the meeting. Again, however, the trial court was presented with conflicting evidence regarding whether the default was disclosed. The handout referenced by Garrett and Lauren W. provided in relevant part, "Since June 2006, [CLP] has loaned up to $100,000 to [M&B] at attractive interest rates and terms. The current loan balance is approximately $83,000." At trial, George acknowledged that the summary does not mention that M&B was in default on their obligations to CLP. He testified, however, that the loans to M&B were discussed at the meeting as was the fact that the loans were in default. He explained that report of the meeting was intended to provide talking points, and the absence of a particular topic did not mean it was not discussed at the meeting. Garrett himself acknowledged that the loans to M&B were discussed at the August 2007 meeting, even jotting down a note that CLP was "not collecting interest" on the loans. Based on the foregoing evidence, the trial court could have reasonably concluded that George and Fred disclosed to the limited partners at the August 2007 meeting that the M&B loans were in default. See *Bernstein & Grazian, P.C.*, 402 Ill. App. 3d at 976. Accordingly, the trial court's finding is not against the manifest weight of the evidence.

¶ 159 d. Gardner

¶ 160 Next, Garrett and Lauren W. contend that George and Fred breached their duty of care by misrepresenting and failing to fully disclose to them all material facts relating to CLP's indebtedness to Gardner. According to Garrett and Lauren W., George and Fred caused CLP to borrow from and encumber all of its assets in favor of their *alter ego*, Gardner, which contributed to CLP's inability to service its overall indebtedness. Garrett and Lauren W. contend that George's and Fred's fiduciary duties prohibit all forms of secret dealings and self-preference in any partnership matter and also require them "to fully disclose partnership business to other partners." See *Pielet v. Hiffman*, 407 Ill. App. 3d 788, 795 (2011). In particular, Garrett and Lauren W. complain that George and Fred failed to contemporaneously disclose to them the full terms and conditions associated with the loans from Gardner, and affirmatively misrepresented the extent of CLP's debt to Gardner in the report distributed to attendees of the August 2007 partnership meeting.

¶ 161 The trial court determined that George and Fred were "really up-front and [provided] detailed disclosures to the limited partners." The manifest weight of the evidence supports this finding. The handout distributed to attendees of the August 2007 partnership meeting disclosed that at that time, CLP had a total debt of "approximately $3,134,950" associated with the Snead property, of which $2,464,000 is from City National Bank "and the balance is borrowed from Gardner." Garrett and Lauren W. claim that although the report disclosed $670,950 of debt to Gardner ($3,134,950 minus $2,464,000), it understated CLP's actual indebtedness to Gardner at the time by $100,473.87, according to CLP's general ledger. We do not find this alleged discrepancy significant. As the report indicates, it was merely an approximation of the amount of debt associated with Snead. Moreover, the discrepancy cited by Garrett and Lauren W. amounts to only 3.2% of the total debt referenced. Garrett and Lauren W. further contend that the summary fails to disclose that Gardner was assessing to CLP loan administration and guarantor fees, which, they assert, were material terms of the lending agreement between CLP and Gardner. George testified that he informed the attendees at the August 2007 partnership meeting that Gardner's support was "central to being able to complete the construction and furnishing" of Snead. George acknowledged on cross-examination that the handout does not mention any loan fees due and payable Gardner. As noted above, however, the report was merely intended to provide talking points and the absence of a particular topic did not necessarily mean that it was not discussed at the meeting. Based on this record, and given the trial court's role in resolving factual disputes and assessing the evidence, it could have reasonably concluded that George's and Fred's conduct did not rise to the level of being grossly negligent or reckless so as to support a claim for breach of the fiduciary duty of care. The trial court's decision, therefore, is not against the manifest weight of the evidence.

¶ 162 e. Other

¶ 163 Garrett and Lauren W.'s final contention is that George's and Fred's breaches of their duty of loyalty also constitute breaches of their duty of care. See *Levey v. Hamilton*, 354 B.R. 181, 200-01 (Bankr. N.D. Ill. 2006) (suggesting that breaches of the duty of loyalty can also constitute breaches of the duty of care, good faith, and fair dealing where managers enrich themselves to the detriment of a business's creditors). Garrett and Lauren W. devote one short paragraph to this claim, which is apparently premised on a finding that they prevailed on appeal with respect to each of their breach of duty-of-loyalty claims. However, having rejected each of Garrett's and Lauren W.'s breach of duty of loyalty claims, we decline to find that this conduct constitutes a breach of the duty of care.

¶ 164 D. Accounting

¶ 165 Next, Garrett and Lauren W. argue that the trial court erred in not allowing their request for an accounting. In denying the request, the court explained:

> "I also do not see any need for an accounting in this case because there's been voluminous discovery that has been done. And, quite frankly, there's probably not a stone that's been left unturned in terms of discovery in this particular case. But there's no need for it."

Garrett and Lauren W. argue that the trial court's ruling ignores "various accounting anomalies" in CLP's books and records. In particular, they allege that the general partners' record keeping on behalf of CLP fails to conform to use Generally Accepted Accounting Principles (GAAP). As a result, they argue that the trial court should be directed to appoint an independent accountant to review all of CLP's books and records and recommend an appropriate course of action.

¶ 166 The right to an accounting is not an absolute right, but one which should be accorded only on equitable principles. *Tarin v. Pellonari*, 253 Ill. App. 3d 542, 555 (1993). Whether an accounting is warranted depends on the particular facts of each case. *Tarin*, 253 Ill. App. 3d at 555. An accounting should not be ordered if the circumstances make it either unnecessary or improper. *Tarin*, 253 Ill. App. 3d at 555. Whether or not to grant an accounting is a matter within the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion. See *Newton v. Aitken*, 260 Ill. App. 3d 717, 722 (1994). A trial court abuses its discretion only when no reasonable person would take the view adopted by the trial court. *Janda v. U.S. Cellular Corp.*, 2011 IL App (1st) 103552, ¶ 96.

¶ 167 Under the circumstances of the present case, we cannot say that no reasonable person would take the view adopted by the trial court. The trial court was aware of the alleged accounting irregularities alleged by Garrett and Lauren W., as they were referenced in its closing argument. Nevertheless, the trial court determined these allegations were insufficient to warrant an accounting. The trial court did not abuse its discretion in making this finding. As noted by the trial court, Garrett and Lauren W. have essentially had their accounting through the "voluminous discovery" that had been done in this case. Counterdefendants produced over 10,000 pages of records, including, but not limited to ledger statements, vendor bills, Greenbrier documents, financial records, City National records, and 12 years of UBS statements and credit line statements that were obtained by subpoena. Furthermore, an electronic copy of CLP's general ledger database, containing every ledger entry of the partnership since its inception, was produced. Based on this evidence, the trial court could have reasonably concluded that all of CLP's financial affairs were subject to scrutiny and review, and allowing the matter to proceed to an additional hearing for an accounting was not necessary. See, *e.g.*, *Newton*, 260 Ill. App. 3d at 722-23 (affirming denial of accounting where party requesting accounting had full access to all records and documents); *Coughlin v. SeRine*, 154 Ill. App. 3d 510, 515-16 (1987) (holding that the trial court did not abuse its discretion in dismissing claim for accounting when information requested via accounting would be available by pursuing appropriate discovery and at trial on claim for breach of fiduciary duty).

¶ 168 Citing to Illinois Supreme Court Rule 213(f) and (g) (eff. January 1, 2007), Garrett and Lauren W. further claim that the trial court abused its discretion in refusing to admit certain evidence, developed through their expert Renner, allegedly showing irregularities in CLP's books and records which also demonstrate the need for an accounting. Illinois Supreme Court Rule 213(f)(3) (eff. Jan.1, 2007) provides that upon written interrogatory, a party must identify its controlled expert witnesses and identify "(i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefor; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case." Under Illinois Supreme Court Rule 213(g) (eff. January 1, 2007), the expert's testimony on direct examination is limited to information disclosed in an answer to a Rule 213(f) interrogatory or a discovery deposition. The decision to admit evidence pursuant to Rule 213 is within the sound discretion of the circuit court and will not be disturbed absent an abuse of that discretion. *Sullivan v. Edward Hospital,* 209 Ill.2d 100, 109 (2004).

¶ 169 The record establishes that counterdefendants' attorney objected to Renner's testimony about these alleged irregularities because it involved "some additional work" that Renner did after the cutoff for discovery and it was not disclosed in his reports or in his amended Rule 213(f) disclosure. Garrett's and Lauren W.'s attorney responded that the information at issue was disclosed prior to

Renner's second deposition and that counterdefendants' attorney questioned Renner about it. Counterdefendants' attorney explained that he received "about a hundred-something pages from this newly-generated work" just two days before Renner's deposition, but did not have an opportunity to review it with an accountant. Over the objection of counterdefendants' attorney, the trial court allowed Renner to testify about the alleged irregularities. The following day, however, the trial court changed its ruling, remarking:

> "Mr. Sullivan [counterdefendants' attorney] lodged an objection based on late notice on this after discovery deadline was entered into; and I allowed the testimony subject to objection because, quite frankly, I wanted to hear what it was.
>
> But after listening to the evidence and reviewing these exhibits, I'm going to sustain the objection on the basis of late notice. This really has never been an issue in this case, the accounting issues.
>
> Mr. Renner's testimony basically was, I put all this together and, you know what, I just can't figure it out. So there's some money up here and there's some money down here, and I just don't know where it came from or where it went.
>
> You know, basically his testimony almost seemed to be, 'I just can't explain this, Judge.' I mean, perhaps inferentially you might say there was an opinion in there, you know, to raise an inference of improper accounting methods; but he didn't even say that. He just said he couldn't figure it out.
>
> So quite frankly, the testimony not only was late–not only were these records late disclosed, but the testimony adds nothing to this case.

We're focusing on the allegations of the counterclaim. We're focusing on what became of the assets of [CLP] and whether they were appropriately invested, whether there were breaches of fiduciary duties of loyalty and care.

And this testimony about these numbers and not being able to add up the numbers, it's just speculation. It wasn't really more than that. And it hasn't been a focus of the trial, hasn't been a focus of the pleadings and it was late disclosed; so it's not going to be a part of the evidence."

¶ 170 We find that the trial court did not abuse its discretion in excluding Renner's testimony on the alleged irregularities. Not only did the trial court conclude that the disclosure of this evidence was untimely, the court essentially found that it was not relevant and it was speculative. See *Sekerez v. Rush University Medical Center*, 2011 IL App (1st) 090889, ¶ 62 (noting that the trial court has discretion to bar irrelevant or unreliable testimony); see also *People v. Morgan*, 197 Ill. 2d 404, 456 (2001) (noting that evidence is irrelevant if it is remote, uncertain, or speculative). Having found that the trial court did not abuse its discretion in excluding Renner's testimony about alleged accounting irregularities, it cannot form the basis of an accounting claim.

¶ 171 E. Gardner Discovery

¶ 172 Next, counterplaintiffs assert that the trial court abused its discretion by denying them discovery regarding the finances of Gardner. To place this argument in context, we provide the following additional background. On July 17, 2009, Garrett and Lauren W. filed a motion to compel discovery. In the motion, Garrett and Lauren W. stated that the Snead and Copeland properties "appeared to be encumbered by a Deed of Trust dated March 11, 2008 * * * granted by [CLP] to Gardner LLLP * * *, which is an entity related to Frederick and/or George, to secure the repayment of a Promissory Note dated March 11, 2008 in the original principal amount of $1,200,000.00 payable by [CLP] to Gardner." The motion alleged that counterdefendants refused to produce various documents related to Gardner, including, but not limited to "the organizational documents relating to Gardner * * * so as to allow [Garrett and Lauren W.] to determine the relationship between Frederick and/or George as well as possibly [CLP] to Gardner." On July 22, 2009, the trial court granted the motion.

¶ 173 Thereafter, counterdefendants filed a motion to reconsider the discovery order while Garrett and Lauren W. filed a "Motion for Assistance in Obtaining Discovery." Garrett's and Lauren W.'s motion alleged that despite the trial court's ruling on July 22, 2009, counterdefendants refused to provide the information which the court ordered produced. The matter proceeded to a hearing on both motions. On January 6, 2010, the trial court entered an order modifying its earlier ruling. Among other things, the January 6, 2010, order required counterdefendants to produce: (1) "Documents and other records relating to any notes payable by [CLP] to any bank, financial institution or other entity including, but not limited to, GARDNER LLLP;" and (2) "Documents or records relating to financial or any other transactions between [CLP] and * * * GARDNER LLLP." The court expressly declined to order counterdefendants to produce the general ledger of Gardner, explaining that Gardner is not an entity that is "at issue" in this case. The court remarked, however that "if you [counsel for Garrett and Lauren W.] see that there's transactions going on between [CLP] and [Gardner] which I'm ordering them to produce and you feel that you need to investigate that further, then we'll be back in here again."

¶ 174 On April 6, 2011, Garrett and Lauren W. filed another motion to compel discovery, requesting, *inter alia*, "information relating to the payment (or nonpayment) by [CLP] of certain interest, guarantors' fees and other sums to * * * Gardner." In the motion, Garrett and Lauren W. alleged that during the course of George's discovery deposition, "it became readily apparent that that [*sic*] [CLP's] tax returns (which were prepared on cash accounting basis) reflected the payment to Gardner of substantial interest and guarantor's fees which had not been disclosed." Garrett and Lauren W. further alleged that counterdefendants "attempted to address this problem" in supplemental discovery responses filed after George's deposition. That supplemental response provided in part:

> "According to CLP's CPA and tax preparer, the CLP tax returns reflect deductions for interest and guarantor fees for 2007 through 2009, even though no actual cash payments were made for those expenses owed to Gardner LLLP. As reflected in the accounting records of both CLP and Gardner LLLP, the interest expense and guarantor charges were posted directly as an additional loan from Gardner LLLP to CLP. For purposes of simplifying the accounting for both entities, no checks or funds were exchanged at year end. Correspondingly, the Gardner LLLP's tax returns reported the 2007-09 interest and guarantors' fees as taxable income. This treatment was for tax purposes only and does not affect the CLP financial statements or any CLP partner capital accounts."

Garrett and Lauren W., noting that the supplemental response references "the accounting records and tax returns of Gardner," sought production of "[a]ll documents relating to Gardner's accounting and financial records for the year 2005 through the present, including without limitation, Gardner's general ledger, financial statements, accounting records, and state and federal tax returns." Following a hearing, the trial court denied Garrett's and Lauren W.'s request for production of the documents relating to Gardner.

¶ 175 On appeal, Garrett and Lauren W. challenge the trial court's ruling with respect to the Gardner discovery. They claim that they were prejudiced at trial when counterdefendants "surprised them with testimony about Gardner and its relationship to George which formed the lynchpin of their defense relating to an alleged 'business plan' under which Gardner would 'stand behind' CLP." Accordingly, they urge reversal of the trial court's ruling.

¶ 176 The trial court is vested with wide discretion in ruling on discovery matters. *Janda*, 2011 IL App (1st) 103552, ¶ 96. As such, a trial court's discovery ruling will not be overturned on appeal absent an abuse of that discretion. *Janda*, 2011 IL App (1st) 103552, ¶ 96. As noted previously, a trial court abuses its discretion only when no reasonable person would take the view adopted by the trial court. *Janda*, ¶ 96. In this case, the trial court did not abuse its discretion in denying Garrett's and Lauren W.'s request for the production of additional documents related to Gardner.

¶ 177 The notion that Garrett and Lauren W. were "surprised" at trial by testimony about Gardner's relationship to George finds no support in the record. The trial court granted Garrett and Lauren W. access to voluminous discovery, including documents relating to "any notes payable by [CLP] to * * * GARDNER LLLP" and "financial or any other transactions between [CLP] and * * * GARDNER LLLP." Among other things, Garrett and Lauren W. received all of CLP's UBS bank statements from 1999 to 2011 as well as all of CLP's financial records and its electronic database, evidencing CLP's financial inflows and outflows. Moreover, George was extensively questioned at trial about Gardner and admitted "for the record" that Gardner was owned by him and Fred. Further, the record establishes that Gardner's role as a lender to CLP was discussed at the partnership meeting held in August 2007. Garrett attended the August 2007 meeting as well as a make-up meeting conducted by George for Lauren W. Accordingly, we cannot say that no reasonable person would take the view adopted by the trial court.

¶ 178 F. Litigation Costs

¶ 179 Garrett's and Lauren W.'s final argument on appeal concerns the payment of litigation costs. At trial, there was testimony that George's and Fred's litigation expenses are being paid by CLP. According to Garrett and Lauren W., however, George and Fred "were not authorized to cause CLP to pay for their attorneys' fees in this *** litigation" because the indemnification provision in the CLP Partnership Agreement does not permit it. Garrett and Lauren W. further contend that all loans by Gardner to CLP to pay such fees should be vacated and released or if such fees were paid without loans from Gardner, the general partners should repay those amounts to CLP for the benefit of its limited partners, excluding George and Fred.

¶ 180 Counterdefendants initially respond that Garrett and Lauren W. waived the argument that the litigation costs incurred in defending this action are not a partnership expense because they never pleaded a breach of the Partnership Agreement. In their reply brief, Garrett and Lauren W. do not dispute that they did not raise this issue in their pleadings. Rather, they contend that George's and Fred's argument "about alleged deficiencies in Garrett and Lauren's pleadings * * * was not raised in the Circuit Court, and thus has been waived." Despite these countervailing claims of waiver, we opt to address this argument. See *Oshana v. FCL Builders, Inc.*, 2013 IL App (1st) 120851, ¶ 18 (noting that forfeiture is a limitation on the parties and not the court).

¶ 181 Garrett and Lauren W. argue that under Illinois law, for a party to recover attorney fees under an indemnification provision, that provision must expressly provide for the recovery of attorney fees or costs of defense. See *Nalivaika v. Murphy*, 120 Ill. App. 3d 773, 777 (1983) ("Attorney fees are recoverable where required by the specific terms of a written contract of indemnity."). According to Garrett and Lauren W., however, the Partnership Agreement in this case contains only one indemnification provision, which does not contain the words "defense," "defend," or "attorney's fees." They therefore assert that George and Fred were not authorized to cause CLP to pay for their attorney fees in this litigation. George and Fred respond that the Partnership Agreement's indemnity provision requires CLP both to "indemnify" and to "hold * * * harmless" the general partners against "any loss or damage incurred by reason of any act or omission performed or omitted by the General Partner in good faith on behalf of the Partnership." George and Fred argue that courts have found similar language to be broad enough to encompass an intention by the parties to include attorney fees. Alternatively, George and Fred rely upon a provision in the Partnership Agreement authorizing the general partners to retain and pay from CLP's assets, attorneys to represent CLP.

¶ 182 The Partnership Agreement provides for indemnification in Article 7, Section 2, which states in relevant part:

> "**Section 2. Liability of General Partner**
>
> The General Partner shall not be liable, responsible or accountable in damages or otherwise to any Limited Partner or Limited Partners for, and the Partnership shall indemnify the General Partner and hold the General Partner harmless against, any loss or damage incurred by reason of any act or omission performed or omitted by the General Partner in good faith on behalf of the Partnership."

An indemnity provision is to be construed as any other contract, and under the rules of contract construction, the intention of the parties is the paramount concern. *Charter Bank v. Eckert*, 223 Ill.

App. 3d 918, 925 (1992). In construing an indemnification provision, it must be given a fair and reasonable interpretation based upon a consideration of all the language of the agreement of which it is part and the factual setting of the case. *Charter Bank*, 223 Ill. App. 3d at 925. An indemnity provision must be set forth in clear and explicit language so that the indemnitor's obligations are manifestly determinable. *Charter Bank*, 223 Ill. App. 3d at 925. Although indemnity agreements are not void, they nevertheless are not favored and must be strictly construed. *Charter Bank*, 223 Ill. App. 3d at 925.

¶ 183 Here, we agree with Garrett and Lauren W. that the language in Article 7, Section 2 of the Partnership Agreement does not expressly provide for indemnification with respect to attorney fees. Thus, under that provision, George and Fred were not entitled to recover attorney fees from CLP. See *Nalivaika*, 120 Ill. App. 3d at 777 ("In the instant case, the indemnity agreement does not mention attorney fees and the agreement is therefore not specific enough to support the allowance of such fees.").

¶ 184 In so holding, we find the cases relied upon by George and Fred to be distinguishable. For instance, in *LID Associates v. Dolan*, 324 Ill. App. 3d 1047, 1070-71 n.13 (2001), the indemnity provision required the partnership to "indemnify and hold harmless each of the General Partners * * * from any loss, damage, fine, penalty, expense (*including attorneys' fees*), judgment or amounts paid in settlement by such General Partner by reason of any act performed * * * or omitted to be performed * * * in connection with the business of the Partnership, or in furtherance of its interests." (Emphasis added.) Thus, the indemnity provision in *LID Associates* expressly contemplated attorney fees. George and Fred also cite to *Spurr v. LaSalle Construction Co.*, 385 F. 2d 322 (7th Cir. 1967), and *Jackson National Life Insurance Co. v. Gofen & Glossberg*, 882 F. Supp. 713 (N.D. Ill. 1995).

Although the indemnity provisions in those cases do not expressly reference attorney fees, they are not analogous to the indemnity provision in the Partnership Agreement before us. The language at issue in *Spurr* provided for the indemnification from "*any and all* liability, payments and *expenses of any nature*." (Emphasis added.) *Spurr*, 385 F. 2d at 330-31. The indemnity provisions at issue in *Jackson National Life Insurance Co.* covered "any loss, liability or expense" and all "unusual expenses" incurred because of litigation. *Jackson National Life Insurance Co.*, 882 F. Supp. at 727. Thus, the indemnity provisions in those two cases was more specific than the one in the Partnership Agreement, which merely provided for indemnification from "any loss or damage." See *Jackson National Life Insurance Co.*, 882 F. Supp. at 727 (noting that while Illinois courts do not require that the phrase "attorney fees" appear in the indemnity agreement, there must be evidence that the parties intended indemnification for such expenses).

¶ 185 The Partnership Agreement, however, also contains the following language in Article 6, Section 2(c):

> "**Section 2. Specific Powers of the General Partner**
>
> Specifically, but not by way of limitation, the Partnership, by and through the General Partner shall be authorized to exercise the following powers:
>
> * * *
>
> c. Employment of Agents and Others
>
> The Partnership may employ agents, employees, managers, accountants, attorneys, consultants, and other persons necessary or appropriate to carry out the business and affairs of the Partnership * * *.

> The Partnership may pay as an expense of the Partnership such reasonable fees, costs, expenses, salaries, wages and other compensation to such persons as the General Partner shall determine. Such expenses shall include payment or reimbursement for all fees, costs and expenses incurred in the formation and organization of the Partnership."

Garrett and Lauren W. do not address the applicability of this provision. We conclude that this provision permits CLP to pay the cost of defending this lawsuit. Garrett and Lauren W. sued not only the general partners of CLP, but the Partnership itself. Accordingly, pursuant to this provision, George and Fred were authorized by the Partnership Agreement to retain, and pay from CLP's assets, attorneys to represent CLP. Therefore, we reject Garrett's and Lauren W.'s claim that George and Fred must pay their own litigation costs. In so holding, we note that Garrett and Lauren W. do not suggest that any attorney fees were incurred to defend George and Fred apart from their roles as general partners. As such, to the extent that any of the attorney fees are attributable to defend George and Fred outside of their roles as general partners, the issue has been waived by Garrett and Lauren W.

¶ 186 III. CONCLUSION

¶ 187 For the reasons set forth above, we affirm the judgment of the circuit court of Winnebago County.

¶ 188 Affirmed.