THIRD DIVISION
December 27, 2017

No. 1-17-0419

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

DANIEL FOREMAN,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 14 L 10112
	)	
221 PARTNERS FUND, LP and	)	
221 PARTNERS, LLC,	)	
	)	
Defendants-Appellants	)	
	)	
(Cardinal Growth Corp., Cardinal Growth II, LP,	)	
and Cardinal Growth II, LLC,	)	Honorable
	)	Margaret Ann Brennan,
Defendants).	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Cobbs and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: We affirm the order of the circuit court of Cook County entering judgment on the jury's verdict in favor of plaintiff on his claim defendants breached an agreement with him following plaintiff's termination from employment; the trial court's findings that plaintiff was a joint employee and that a joint employer relationship existed with the general partner are not against the manifest weight of the evidence; the jury's finding an agreement existed and that defendants breached that agreement is not against the manifest

weight of the evidence, the trial court properly instructed the jury, and the court did not abuse its discretion in precluding certain witnesses from testifying.

¶ 2 This is the second appeal in this case. The parties were previously before this court on plaintiff Daniel Foreman's appeal of the trial court's judgment granting defendants' motion to dismiss plaintiff's third amended complaint (complaint). Plaintiff's claims were based on an alleged agreement between him, Cardinal Growth Corporation (CGC), Cardinal Growth II, LP (which later changed its name to 221 Partners Fund, LP) (hereinafter Fund II), and Cardinal Growth II, LLC (Cardinal LLC) related to plaintiff's termination from employment. Specifically, plaintiff's complaint sought damages for (1) breach of a contract between himself and CGC, Fund II, and Cardinal LLC based on an alleged agreement relating to plaintiff's termination from his employment; (2) violation of the Wage Payment and Collection Act (Wage Act) (820 ILCS 115/1 *et seq.* (West 2012)); and (3) violation of the Attorneys Fees in Wage Actions Act (Attorney Fee Act) (705 ILCS 225/1 (West 2012)). *Foreman v. Cardinal Growth II, LP et al.*, 2014 IL App (1st) 133473-U, ¶ 2. After plaintiff was terminated from employment, 221 Partners, LLC replaced Cardinal LLC as the general partner of Fund II. Plaintiff's complaint alleged 221 Partners, LLC is liable for plaintiff's claims because it is the general partner of Fund II. The existence of the agreement and which entity employed plaintiff were disputed. The trial court granted defendants' motion to dismiss the complaint. This court reversed the trial court's judgment dismissing plaintiff's complaint. We remanded the matter to the trial court and the parties proceeded to a trial.

¶ 3 On remand the case proceeded to trial on plaintiff's third amended complaint against defendants CGC, Fund II, Cardinal LLC, and 221 Partners, LLC. Defendants are organized under Delaware law. 221 Partners Fund, LP (Fund II) is a Delaware private equity limited

partnership. Cardinal LLC was previously general partner of Fund II. Cardinal LLC hired CGC to provide management services to Fund II.

¶ 4 Defendant Fund II now appeals the judgments in favor of plaintiff on his breach of contract and employment claims. For the following reasons, we affirm.

¶ 5 BACKGROUND

¶ 6 In the prior appeal from the dismissal of plaintiff's complaint, we found (1) plaintiff's complaint adequately pled "the existence of a valid contract, including the element of valuable consideration" (*Foreman*, 2014 IL App (1st) 133473-U, ¶ 31); and (2) plaintiff's employment claims were based on the actions of the founders of the business entities (Joseph McInerney and Robert Bobb) and plaintiff "alleged facts from which it can reasonably be inferred that McInerney was authorized to act on behalf of each defendant *** with regard to plaintiff's hiring, direction, and termination (*Foreman*, 2014 IL App (1st) 133473-U, ¶ 44). We also found that the capacity in which the agreement forming the basis of plaintiff's breach of contract claim was executed or signed, or both, and whether 221 Partners Fund, LP was bound thereby, were "material questions of fact *** not affirmative matters defeating plaintiff's claim" (*Foreman*, 2014 IL App (1st) 133473-U, ¶ 57); and that plaintiff's complaint alleged facts from which it was reasonable to infer that plaintiff was hired as an employee of the then soon-to-be-formed partnership (Fund II) and/or defendants became plaintiff's joint employers after the partnership was formed. We also found defendants' limited partnership agreement was evidence defendants expected to use to contest plaintiff's allegation of an employment relationship with defendant partnership (*Foreman*, 2014 IL App (1st) 133473-U, ¶ 61).

¶ 7 On remand the parties tried the breach of contract issue before a jury and tried plaintiff's claim he was an employee of Fund II as a non-jury matter before the trial court.

¶ 8 Plaintiff testified he began discussions with McInerney in late 2006 or 2007 about plaintiff coming to work with McInerney. McInerney and plaintiff were both in the private equity business. Plaintiff understood that McInerney had a business called Cardinal Growth, which was a partnership with Bobb. Plaintiff described Cardinal Growth as an umbrella organization that contained a fund. The purpose of the fund was to make investments in private businesses, help those businesses grow, and then sell them for a profit. Plaintiff testified the purpose of his discussions with McInerney was for plaintiff to become involved in a new fund McInerney and Bobb were raising, which became Fund II. Plaintiff met Bobb in 2007. Plaintiff only talked with Bobb one or two times and talked with McInerney over a dozen times. McInerney and Bobb did raise the money for Fund II. Plaintiff's and McInerney's discussions continued after Fund II was formed. Plaintiff testified his discussions with McInerney were about what his role would be at Fund II. Plaintiff testified he and McInerney discussed how McInerney would manage Fund II. Plaintiff testified one idea McInerney had was a portfolio partner program. Plaintiff also had a conversation with Bobb in which Bobb stated he would have a hands-on role in Fund II and that Bobb and McInerney would be the investment committee for Fund II. The investment committee decides what the fund is going to do and what investments to make. Plaintiff testified the role of the investment committee "is really to manage the fund." McInerney and Bobb separately informed plaintiff they intended to be the investment committee for Fund II.

¶ 9 Plaintiff testified he accepted employment and that his duties were to search for opportunities for Fund II and to work on opportunities they had for Fund II, "and really take the lead role in those." Prior to accepting employment plaintiff and McInerney discussed plaintiff's compensation. Plaintiff testified they discussed the portfolio partner program and went through it together. The agreement, plaintiff testified, was to provide a salary and healthcare. It would

also provide compensation "if you closed the deal, if you worked on a deal that was closed in terms of transaction fees and part of the management fee and also a bonus payment or incentive type payment if the company was sold for a profit." Plaintiff testified all of those terms were in the portfolio partner agreement. Plaintiff elaborated: "If a deal that I worked on would be closed, there would be fees that we would receive. When a deal closed, there are closing fees that are part of that, I would get a portion of those. I also would have a portion of the management fee that the company would pay the Fund too for working on the business post-closing, and also an incentive payment if the company was sold at a profit." Plaintiff testified he had been working for about a month "when Malabar came into the shop." (Malabar is a company Fund II invested in.) Plaintiff testified he did not bring Malabar to the partnership but he was directed to work on Malabar to determine if it was a deal they wanted to do. Plaintiff testified he would have been entitled to incentive compensation as a result of working on Malabar.

¶ 10 Plaintiff testified he led the work on Malabar. Everything plaintiff and his team did was directed by the investment committee. Bobb and McInerney directed plaintiff to prepare an investment memorandum for the investment committee. The investment committee would use the memorandum to decide whether to continue with the investment in Malabar. At the direction of the investment committee, Bobb and McInerney, plaintiff also prepared an executive summary, preliminary offer, and indication of interest (to Malabar). Plaintiff then performed due diligence on Malabar and began looking for financing. Plaintiff testified Bobb and McInerney directed plaintiff to begin due diligence in their "Monday morning meeting." Plaintiff described the Monday morning meeting. "[W]e get together and discuss the deals that we have." The participants go through a list of approximately 20 different deals and give updates on each. If a deal is at a decision point, a presentation is given at the meeting and Bobb and McInerney are

asked for their opinion. Plaintiff testified the purpose of the meeting is to give a status on all of the deals to Bobb and McInerney; but "[i]f there is something that had to be decided, it really kind of becomes an investment committee meeting where [Bobb and McInerney] have to make a decision." If a decision has to be made Bobb and McInerney decide and tell the staff what to do. Plaintiff has received instruction from Bobb and McInerney in a Monday morning meeting. Plaintiff testified Bobb and McInerney are acting in their capacity as the investment committee in those meetings. Bobb and McInerney ultimately directed plaintiff to prepare a letter of intent to purchase Malabar and the purchase moved forward. Bobb and McInerney directed plaintiff to be involved with the legal documents and financing for the purchase. After Fund II purchased Malabar plaintiff remained involved with Malabar, and Bobb and McInerney asked plaintiff to serve on the board of Malabar.

¶ 11 Plaintiff testified he was owed compensation after Fund II purchased Malabar. Plaintiff testified "the amount for the upfront fee part of $207,000 plus 25 percent of the management fee that was being paid to Fund II, and that would amount to $37,500 would be 25 percent of it. And also incentive payment that would amount to 5 percent of any gain if Malabar was sold [for a profit] in the future." Plaintiff would continue to receive his salary after the Malabar purchase. Plaintiff testified Malabar paid management fees to Fund II as a result of the purchase. Fund II received financing fees and plaintiff testified he was entitled to a share of the financing fees. The financing fees were a part of the transaction fees and transaction fees are listed in the portfolio partner agreement.

¶ 12 Plaintiff testified "I had my compensation agreement, which was the portfolio partner agreement, and was kind of expecting to hear what I was going to receive form the deal getting done while still working on finding new deals and working on Malabar. And I never heard anything, so I went to [McInerney] *** and said, you know, I think I'm owed some money for

this transaction and he asked me what it would be." Plaintiff testified he calculated what he thought he was owed under the portfolio partner agreement and presented it to McInerney. McInerney told plaintiff he would have to get back to plaintiff. When they spoke about it again McInerney proposed something different to plaintiff. Plaintiff testified McInerney told him "we have to have the Malabar fees and we really can't afford to pay you and I think we need to find a way to structure something for you and then have you—you know, go away, because we're financially strapped here." Plaintiff testified he and McInerney negotiated an agreement for plaintiff's compensation from the Malabar sale and when his employment would end. Plaintiff testified McInerney told him to "write this thing up and let's talk about it. You know, let's look at it. You go write it up and bring it back to me and we'll talk about it." Plaintiff typed the terms they agreed upon in a letter dated July 6, 2009. Plaintiff's attorney asked, "Who were the responsible parties for those payments within this agreement?" and plaintiff responded "It was Cardinal Growth Corp., Cardinal Growth II, LLC and Cardinal Growth II, LP, and all affiliated entities, Cardinal." Plaintiff showed the letter to McInerney, and he and McInerney negotiated additional changes which plaintiff incorporated into a letter dated July 9, 2009. Plaintiff printed the July 9 letter on Cardinal letterhead, plaintiff signed it, and plaintiff gave it to McInerney and asked him and Bobb to sign the letter. Plaintiff testified McInerney said he would do that. Plaintiff again testified that the parties responsible for the payment in the July 9 letter were "Cardinal Growth Corp., Cardinal Growth II, LLC, Cardinal Growth, II. LP and all related entities, Cardinal."

¶ 13 Plaintiff testified that Bobb and McInerney are the only people that have the ability to make agreements on behalf of Fund II. Plaintiff testified that was his understanding because "they are the general partner of Fund II and the general partner can bind the fund." Under the July 9 agreement, plaintiff was to receive, and did receive, an installment payment on July 15,

2009. Plaintiff did not receive any other payments under the July 9 agreement. McInerney informed plaintiff he wanted to renegotiate because they could not afford to pay plaintiff the amount in the July 9 agreement. The parties agreed to a one-time payment of $215,000 payable immediately and a payment of 2 ½ percent of any profit from the sale of Malabar. Plaintiff typed up the agreement in a letter dated August 6, 2009 and showed it to McInerney. McInerney physically changed plaintiff's last day of employment from a date in September to a date in August and gave it back to plaintiff to make that correction. Plaintiff testified McInerney said "make the change and bring it back and *** this is what we're going to go with." Plaintiff agreed to McInerney's change. Plaintiff made the change, printed the letter on Cardinal letterhead, signed it, and gave the letter to McInerney asked him and Bobb to sign it. McInerney never gave plaintiff a signed copy of the letter. Plaintiff testified the parties responsible for the payments under the August 6 agreement were the same Cardinal entities he previously identified. McInerney never objected to Fund II being one of the entities responsible for the payment.

¶ 14 Plaintiff testified that a few days after he signed the August 6 agreement he received half of the upfront payment, or $107,500. Plaintiff identified a bank statement showing a wire transfer to his checking account on August 12, 2009 from Cardinal Capital, LP for $107,500. Plaintiff testified there is a note in the bank statement that says "partial payment under agreement." Plaintiff attempted to obtain the second half of the payment through communications with McInerney. Plaintiff testified he emailed McInerney asking when he would receive the second half of his payment. Plaintiff testified McInerney replied "I hope soon." McInerney never denied that an agreement had been made or that Cardinal owed plaintiff additional money. Cardinal made additional payments to plaintiff. Plaintiff received an additional $25,000. Plaintiff testified to an email informing him he would be receiving another installment on his separation agreement of $25,000. Plaintiff received no further payments.

Plaintiff sent several emails between December 2009 and April 2011 attempting to learn when he would receive the balance of the payment. Plaintiff testified he was able to secure a meeting with Bobb. In that meeting, Bobb did not dispute there was an agreement or that he owed plaintiff more money; Bobb just informed plaintiff the fund was having financial difficulties and hoped to pay but did not know when and "didn't see a lot of hope for it to happen soon." Plaintiff testified he was still owed $82,500 from the $215,000 upfront payment.

¶ 15 Plaintiff described the "carried interest" portion of the August 6 agreement. Plaintiff testified that carried interest was, when an investment makes a profit, the first 20% of the profit goes to the general partner and that is called the carried interest for the deal. Plaintiff testified his August 6 agreement called for him to get 12 ½ percent of the carried interest in Malabar. Plaintiff explained that the August 6 agreement stated plaintiff's payment on the Malabar transaction was to be calculated as though Malabar was the only investment the fund made. Plaintiff explained the intent of that language was to reflect that payments are made only on the investments the payee worked on and not other investments the fund made. "So the fund might have made 20 investments, but if you worked on 2 of them, your compensation is based on the 2 you worked on, not the other 18." Plaintiff further explained that if the fund had an investment that sold for a loss, that would not affect the calculation of his payment on the profit from Malabar in any way. Plaintiff testified the profit on the Malabar transaction includes interest payments Malabar made to Fund II. Plaintiff testified that in November 2011 Fund II sold Malabar for a profit. Plaintiff testified to a spreadsheet he prepared, and the sources of the data he used, showing the money that came to the fund from the Malabar transaction over time as well as the proceeds from the sale. Plaintiff testified his share of the gain from Malabar is $159,648.08.

¶ 16 On cross-examination, defendant's attorney inquired as to plaintiff's earlier allegations that he saw a copy of the August 6 agreement signed by Bobb and/or McInerney on the desk of Bobb's assistant. Plaintiff testified he did see a signed copy on her desk, but he did not recall seeing two handwritten changes to the document on that copy. Defendant's attorney also asked plaintiff about a provision in the portfolio partner agreement stating that its terms would be formally documented in a written agreement. Plaintiff testified they decided not to do a formal document and instead "[w]e just kind of relied on this [(the portfolio partner agreement)] and a little bit of trust was there." Plaintiff stated he did not ask for the formal document because the portfolio partner agreement was acceptable to him. Defendant's attorney directed plaintiff to a portion of the portfolio partner agreement that said the portfolio partner would be "eligible" to receive a portion of transaction fees, and asked plaintiff if he ever had a formal agreement with McInerney that specified what plaintiff had to do to be eligible for a portion of a transaction fee. Plaintiff agreed he never had a detailed, signed agreement. Plaintiff testified on cross-examination that as part of his agreement he would receive part of the "origination fee" for the Malabar transaction even though he did not originate the Malabar transaction. Plaintiff testified this was because the portfolio partner agreement says "you do not have to originate the deal" even though the portfolio partner agreement does not "specifically speak to origination fees." Plaintiff agreed that the management fees Malabar paid were payable to CGC. Plaintiff stated that "when it was clear that I was going to be leaving the company, the management fees were not part of the discussion."

¶ 17 Plaintiff agreed on cross-examination that the July agreement was for less than he believed he was owed under the portfolio partner agreement, and that the August agreement was for less than he agreed to in the July agreement. Defendants' attorney asked plaintiff why he did not sue for what he originally claimed he was owed, and plaintiff responded as follows:

> "Because we had an agreement -- we had a true agreement on August 6th and that's what I wanted-- that's what I'm trying to adhere to. That's a real live agreement. I'm not going to sue for something that was re—I renegotiated it.
>
> If I renegotiated something, I agree to something new, I'm not going to sue for something I renegotiated down. It doesn't make sense."

¶ 18 Plaintiff agreed he was an at-will employee and that he was employed by CGC, and he stated he did all of his work for Fund II. Plaintiff agreed that CGC was being paid 2 percent to provide plaintiff's services to Fund II. On re-direct examination plaintiff testified that all of his discussions with Bobb and McInerney "were about working for Fund II, so I was going to spend all my time working on those deals." Plaintiff also agreed that when he said he received direction from Bobb and McInerney in their capacity as the investment committee, neither of them ever said "on behalf of the investment committee, would you please do this or that?" On cross-examination plaintiff supposed it was his interpretation that Bobb and McInerney were speaking to him on behalf of the investment committee. On re-direct plaintiff's attorney asked him what led him to believe Bobb and McInerney were acting on behalf of the investment committee when they were directing him throughout his employment. Plaintiff testified:

> "Effectively our Monday morning meetings were effectively like an investment committee meeting and those—that's where the direction was being given. The role of the investment committee is to direct the efforts for Fund II in terms of who should work on what. You know, what projects should be pursued or what things should be invested in.
>
> So everything related in our meeting on Monday morning to Fund II was really an investment committee issue."

On re-cross plaintiff testified the Monday morning meetings were both meetings of people in the office to talk about ongoing business and meetings of the investment committee. They were meetings of the investment committee when a decision was being taken.

¶ 19 Plaintiff agreed that the carried interest is paid to the general partner. The portfolio partner agreement did not specify whether plaintiff had to be employed by the organization to receive a portion of the carried interest under the portfolio partner agreement (but plaintiff added it was written out in the parties' August 6 agreement). Defendant's attorney asked if the profits from the sale of Malabar were "eaten up by losses on other transactions and there were no profits to distribute to limited partners [of Fund II]." Plaintiff did not agree with that statement. Plaintiff stated the distribution the limited partners received was higher than it would have been without the Malabar transaction, but he assumed they must have lost money on their investment in Fund II altogether.

¶ 20 On re-direct examination plaintiff testified his agreement was not affected by the financial performance of the rest of Fund II. Plaintiff also testified he is suing Fund II because "Fund II is an obligor on my contract ***." He explained that his lawsuit does not have anything to do with what would have been due under the portfolio partner agreement. He stated: "We moved away from that by probably late June, and that was—you know, *** I was negotiating away from that to something else and we just continued to negotiate. So whatever that said is not—no longer relevant." Plaintiff testified that in his negotiations with McInerney, he (McInerney) never told plaintiff that plaintiff was not entitled to transaction fees, origination fees, or management fees.

¶ 21 Plaintiff called Raymond Siegel as an adverse witness. Siegel was a representative of Fund II and verified that Fund II "sold [Malabar] for more money than we paid for it." Siegel testified that Fund II planned to return capitol to its investors. Specifically, Fund II planned to

and did "return 7 million of the over $20 million that they had invested." Siegel testified that although a document stating that intention says Fund II plans to "distribute" that money, internally the giving of that money would be called a return of capital. Siegel testified to $9,555,815 in payments to Fund II limited partners. When asked by plaintiff's attorney whether the excess cash the fund realized from the Malabar sale would be included in that amount, Siegel said "No." At Siegel's deposition, he was asked the following question, and gave the following answer:

> Q. "Included within those distributions would have been the excess cash that the fund realized from the Malabar sale, correct?
>
> A. [i] t included the Malabar proceeds, it included the FNA proceeds. It included the—primarily because we could not distribute money until the FNA proceeds were collected, which were approximately 5.8 million so *** it's lots of things."

Siegel was asked, if the Malabar transaction had not made a profit, would the amount of cash distributed have been lowered, and he testified "Yes." On examination by the defense Siegel explained that in his deposition he "was using the colloquial word distribution, meaning to disburse money. Distribution in an accounting sense, financial sense, means you distribute profits. We had no profits to distribute." He then testified the profits from the Malabar sale were never distributed because when the fund sold Malabar there was a lien on Malabar's assets, a bank loan to be paid, and various actions against them—in sum there were "over $50 million of problems we had to address at that point in time." He testified the profits went to the $50 million in problems.

¶ 22 Siegel testified the cash proceeds left from the sale of Malabar after the bank loans were paid off were comingled in the Fund II general operating account. Defendant's attorney asked Siegel if there was "any way to say, when you gave the limited partners 7 million of their 20

million, *** is there any way to say whether the cash several years later was this cash or that cash?" Siegel responded "There is no way of telling." He was then asked, "But the profit was never distributed, was it?" and Siegel responded "it was not." Siegel was asked about a presentation he made to the partners in April 2012. In that presentation was a statement that all capital gains from the Malabar sale shall be allocated *pro rata* based upon the actual capital contributed by all." He clarified that statement referred to capital gains for tax purposes, not "on the accounting books." It does not mean the limited partners would get any money. Siegel testified that at that time the general partner was in discussions regarding returning capital to the limited partners. Siegel did not know if that return of capital would have included the Malabar proceeds from 2012 because "[e]verything went in the same pot." He stated, "We had so many problems we had to work out, everything went in the same pot."

¶ 23 McInerney and Bobb testified as adverse witnesses. McInerney stated that as the president of CGC he indirectly had the authority to make agreements on behalf of Fund II through the general partnership. He stated "the general partner Cardinal Growth II, LLC had a management agreement with Cardinal Growth Corp. and that entity was the operating entity that would manage the affairs of Fund II." Bobb testified he was not involved in the day-to-day activities of the Cardinal entities. Bobb also testified McInerney was responsible for the day-to-day operation of Fund II. Either he or McInerney could enter into agreements on behalf of Fund II. Bobb confirmed that he and McInerney were the only two members of the investment committee, which would approve proposed investments on behalf of Fund II. Employees of the company would approach the investment committee to pitch proposals for investments. Bobb testified that while he was working with the Cardinal entities the investment committee met at regularly scheduled Monday morning meetings. Bobb testified he attended those meetings as a member of the investment committee; but there was no written agenda that said "investment

committee." On questioning by defense counsel, Bobb said CGC gave detailed direction to plaintiff.

¶ 24 At the close of plaintiff's case the defense moved for a directed verdict on the issue of whether plaintiff was an employee of Fund II and on plaintiff's claim for a share of the carried interest in Malabar. The trial court denied both motions. Defendant proceeded with its case.

¶ 25 McInerney testified in defendant's case-in-chief. On direct examination, McInerney testified the Monday morning meetings consisted of staff, third parties, portfolio companies, Bobb, and himself. The meetings were to "kick off the week." There was never a situation where someone said "we are calling a meeting of the investment committee." Decisions were made by him and Bobb "on behalf of [CGC], the manager of the general partner." McInerney testified Foreman was asked to perform tasks on behalf of CGC. McInerney testified plaintiff was terminated for lack of productivity. McInerney also testified that when plaintiff was hired, there were no promises that he would be entitled to a piece of any fees that might be earned by any of the companies plaintiff was involved with. When plaintiff was terminated there were no promises made to him about any future payments. Plaintiff was never an employee of Fund II, according to McInerney, because Fund II "didn't have any employees." On cross-examination McInerney testified plaintiff was given a certain amount, negotiated by Bobb, "as part of his separation agreement." McInerney added, "It was a discretionary payment; not a bonus. He didn't earn any bonus." When asked who made that decision, McInerney testified "Well I'm sure [Bobb] said, you know, let's pay him this, and I said okay, to just get rid of the guy."

¶ 26 On cross-examination in defendant's case, Bobb testified he was not involved in the negotiations with plaintiff upon his exiting the company. Bobb otherwise testified consistently with McInerney that when plaintiff was hired, he was not promised that he would be entitled to any part of any fee or carried interest as part of his employment, and when plaintiff was fired,

Bobb did not recall anyone making any promises that plaintiff would be given any payments in the future. He also said, however, that "[McInerney] may have made a reference to it."

¶ 27 Next, the defense read the sworn testimony of Diane Laws into the record. Laws was an employee of CGC. She was described in prior testimony as Bobb's assistant. As far as Laws knew, neither Bobb nor McInerney ever signed "a severance agreement that [plaintiff] prepared." Laws testified she had never seen a copy of that document signed by either Bobb or McInerney, and thus it was not possible that there was a signed copy on her desk that plaintiff saw.

¶ 28 Defendant also called Siegel in its case-in-chief. Siegel was an investor in Fund II, among approximately 80 limited partners in Fund II. Siegel and two others formed 221 Partners, LLC and took over as general partner of Fund II in 2011. When the new general partner took over their objective was to liquidate Fund II. Plaintiff objected to a portion of Siegel's testimony. During a sidebar outside the presence and hearing of the jury, the trial court instructed defendant's attorney that Siegel could not testify as to the law, and his attempt to testify that the limited partners in Fund II had "no exposure for the liabilities of the company" was improper. When proceedings before the jury resumed, Siegel testified with the aid of a PowerPoint presentation. Siegel explained how a limited partnership is set up and the set up and relationship of the entities in this case. The general partner to Fund II had an operating agreement. The business relationships required Fund II to pay its general partner an annual fee of 2% of capital as a management fee. The general partner hired CGC to provide management services, and the general partner passed the 2% fee on to CGC. Fund II was also required to pay its general partner "carried interest" consisting of 20% of Fund II's profits above a required minimum profit. Siegel also testified, in part, as follows:

> "The management company, the net result of the management company is that it has all the employees, the expertise, the authority, and its role as manager. The

> general partner is left with the responsibility for the investments, but it has—all of the employees, expertise and authority and management ability are up in the management company. And the limited partnership is a passive investor passing all of those through."

¶ 29 Siegel testified it would not have made any business sense for Fund II to make any severance payment to plaintiff because Fund II was already paying for plaintiff's services with the two percent management fee. Siegel examined plaintiff's calculations as to what plaintiff stated he was owed under the August 6 agreement. Siegel testified that if he were making that calculation he would have included interest expense because all of the money used to purchase Malabar was borrowed. Including the interest would decrease the amount plaintiff calculated by anywhere from 10 to $15,000. Siegel also testified that the profit on the sale of Malabar was not distributed within 60 days as required by section 4.1 of the partnership agreement. That section requires the distribution of "the full net cash proceeds from the disposition of partnership investments" subject to "setting aside appropriate reserves for the anticipated liabilities, obligations, and commitments of the partnership." Siegel testified the profit on the Malabar sale was not distributed because the company was faced with setting aside appropriate reserves. He testified the company had unresolved issues totaling approximately $50 million and described "put obligations from a company called CertiFresh." The $50 million was the reason the $6 million profit on Malabar was not distributed. Siegel testified the profit has never been and never will be distributed because the profits were eaten up by losses. Siegel testified any obligations to plaintiff would have been shown on Fund II's financial report and none were shown.

¶ 30 On cross-examination Siegel agreed that he previously testified that the liquidation distribution to the partners included, among other things, the distributions from Malabar. He

added that the cash that went to the partners "was a mix-match of a whole bunch of stuff" but it did include the proceeds of the sale of Malabar. When asked if it was his testimony that the proceeds were eaten up by other debt, Siegel stated "I am testifying the proceeds went into a pot and there was a positive number at the end." Siegel read from a letter he helped prepare dated May 17, 2012, which stated, "Since the fund cannot make interim distributions in an equitable manner, the general partner has determined to withhold distributions until the Fund is in liquidation." He further stated that upon liquidation the Fund made a return of capital that was referred to in "common language" as "distributions" in correspondence. Siegel testified that in this liquidation there were assets, including the proceeds of the Malabar sale, to be distributed after everything else was paid off. Siegel testified the profit the limited partners would have received from the Malabar sale "went into the general *** account of Fund II." Of the total the limited partners received upon liquidation Siegel testified there is no way of telling how much was Malabar profit or something else because "it's all mixed together."

¶ 31 During a jury instruction conference, the trial court accepted plaintiff's proposed jury instruction 700.02 and refused defendant's instruction 700.02. The court also refused a portion of defendant's instruction 700.03.

¶ 32 The jury found plaintiff proved there was an offer, acceptance, and consideration for the August 6 agreement, Fund II breached that contract, and plaintiff sustained damages as a result of the breach. The jury found that the "value of the contract benefits [plaintiff] proved he should have received" is $242,148.08 and the jury awarded plaintiff that amount for his breach of

contract claim against Fund II and 221 Partners LLC (the new general partner).[1] The trial court granted plaintiff's petition and awarded plaintiff attorney fees pursuant to the Illinois Wages Payment and Collection Act and the Illinois Attorney Fees in Wage Actions Act and granted plaintiff's petition and awarded plaintiff costs pursuant to the Illinois Wages Payment and Collection Act.

¶ 33 This appeal followed.

¶ 34 ANALYSIS

¶ 35 On appeal defendant argues the trial court erroneously found Fund II had a joint employer relationship with plaintiff, defendant is entitled to judgment as a matter of law on plaintiff's claim to a share of the profits from the Malabar transaction, there was no consideration for the August 6th agreement, and the trial court committed various errors with regard to the jury instructions and the admission of certain testimony. We address each argument in turn.

¶ 36 Joint Employment

¶ 37 Defendant argues no evidence supports the trial court's finding of a joint employment relationship between plaintiff and Fund II. Defendant notes this court previously found plaintiff adequately pled a joint employer relationship based on our supreme court's pronouncement of the test to be used when undertaking a joint employer assessment:

> "The test for the existence of joint employers is whether two or more employers exert significant control over the same employees—where from the evidence it can be shown that they share or co-determine those matters governing essential terms and conditions of employment. [Citations.] Relevant factors to consider in making this determination

[1] Although 221 Partners, LLC is named in the complaint and listed on the verdict form, at trial and throughout most of the appeal, the parties referred to Fund II as the singular defendant. For clarity, we have as well.

> include the putative joint employer's role in hiring and firing; promotions and demotions; setting wages, work hours, and other terms and conditions of employment; discipline; and actual day-to-day supervision and direction of employees on the job. [Citations.] *American Federation of State, County and Municipal Employees, Council 31 v. State Labor Relations Board*, 216 Ill. 2d 569, 578–79 (2005) [(*AFSCME, Council 31*)]." (Internal quotations omitted.) *Foreman*, 2014 IL App (1st) 133473-U, ¶ 36.

In this appeal, defendant argues there was no evidence Fund II, as distinguished from CGC or the old general partner, exerted any control over plaintiff, much less significant control. According to defendant, Fund II contracted CGC to find investments for Fund II, and CGC hired plaintiff for that task; plaintiff was unable to point to any aspect of his employment actually controlled by Fund II; and plaintiff was unable to point to any evidence Bobb and McInerney were acting as agents of Fund II when they hired plaintiff. Defendant also argues both Bobb and McInerney testified it was CGC that gave direction and oversight to plaintiff, and even if that direction and oversight came from the investment committee, plaintiff's claim of a joint-employer relationship with Fund II is still unsupported because "[plaintiff] acknowledged the fact the Investment Committee was not part of Fund II and that the [trial] court had clearly so ruled in granting Defendant's motion *in limine* number two—a ruling [plaintiff[accepted." (Emphases omitted.) Defendant argues the trial court granted its motion *in limine* number two prohibiting "any suggestion that any direction given Plaintiff [by] Bobb and McInerney was given on behalf of the Investment Committee of [Fund II] or that [Fund II] had an Investment Committee." Defendant interprets this ruling as a ruling the investment committee was part of the general partner rather than a part of Fund II. Defendant argues that plaintiff's arguments Fund II was a joint employer, because he received direction from the investment committee, "prove—at most—that he was employed by the [former general partner]" rather than Fund II. In sum,

defendant argues "Fund II clearly did not exert the sort of control over Plaintiff's employment that would render it responsible for [plaintiff's attorney] fees" under the Attorney Fee Act.

¶ 38 Plaintiff responds, in part, Fund II directed his employment through Bobb and McInerney acting as the investment committee by controlling Fund II's day-to-day investment activities and supervising and directing plaintiff's daily terms and conditions of employment. Plaintiff argues that whether the investment committee was a committee of Fund II or of the general partner "is a matter of semantics, not practice." The investment committee "existed for the sole purpose of directing and controlling Fund II's assets," and, under Delaware law, "the acts of the General Partner are the acts of the Partnership when carrying on its ordinary business;" therefore, "regardless of whether Bobb and McInerney directed Plaintiff's daily activities in the role of Fund II's Investment Committee, or of the General Partner's Investment Committee, their actions were Fund II's actions." Plaintiff disputes defendant's characterization of the trial court's ruling on defendant's motion *in limine* number two. Plaintiff states the ruling was actually a stipulation that the investment committee was a committee of the general partner and notes that the trial court allowed testimony about the investment committee and its control over plaintiff as it related to the joint employer issue. Plaintiff also argues Fund II had a role in his termination because McInerney was negotiating on behalf of Fund II when attempting to reach a compromise of plaintiff's demand for a portion of the fees Fund II earned from the Malabar transaction. Plaintiff argues there was ample evidence that CGC's alleged "client," Fund II, "shared or co-determined the essential terms and conditions of Plaintiff's employment."

¶ 39 Defendant replies the investment committee did not direct plaintiff's activities but rather CGC directed plaintiff's activities. Defendant argues that Bobb and McInerney gave instructions to plaintiff at the Monday morning meetings in their capacity as owners of CGC, not in their capacity as members of the investment committee of the general partner. Defendant asserts

Bobb and McInerney "testified unequivocally and without objection or contradiction that they were speaking on behalf of CGC" in directing plaintiff's activities.

¶ 40 Whether Bobb and McInerney's actions were the actions of Fund II for purposes of plaintiff's claim Fund II was his joint employer is a question of fact. See *Parkway Bank & Trust Co. v. Northern Trust Co.*, 213 Ill. App. 3d 444, 455 (1991) ("authority and agency are questions of fact"). The determination of an employment relationship is a fact-specific inquiry. *Roberson v. Industrial Comm'n*, 225 Ill. 2d 159, 174 (2007). "We review the trial court's factual findings under a manifest weight of the evidence standard. [Citation.] A finding is against the manifest weight of the evidence 'only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence.' [Citation.]" *Halpern v. Titan Commercial LLC*, 2016 IL App (1st) 152129, ¶ 17.

¶ 41 First, we find sufficient evidence from which the trial court, as trier of fact on plaintiff's claim of joint employment by Fund II, could find that Bobb and McInerney were directing plaintiff's actions in their capacity as the investment committee of the general partner, not as owners of CGC. Siegel testified that the general partner "can farm anything out it wants to with the exception of the responsibility for the investment committee, which remains with the general partner." Plaintiff testified to the steps that have to be taken before the fund would invest in a company, including an investment memorandum, executive summary, preliminary offer, indication of interest, and due diligence. Plaintiff testified that Bobb and McInerney directed him to take each of those steps with regard to the Malabar transaction in their capacity as the investment committee. Bobb testified CGC gave plaintiff "detailed directions" in terms of investigating new companies for investment. However, Bobb also testified he was not involved in the day-to-day activities of the Cardinal entities. Bobb testified McInerney was responsible for the day-to-day operation of Fund II. McInerney testified that the decisions that were

supposed to be made by the investment committee were made by him and Bobb "on behalf of [CGC], the manager of the general partner." But McInerney also testified that he and Bobb were on the general partner's investment committee. The attorneys disagreed as to whether the act of controlling plaintiff by the general partner's investment committee could create a joint employment relationship with the general partner's principal (Fund II); but defendant's attorney stated "We seem to be in agreement that the investment committee is a committee of the general partner." The trial court stated that was how the partnership agreement defined the investment committee and "that's how I am going to go with the definition that was provided as part of the agreement." Although the evidence may have conflicted, the trier of fact could accept plaintiff's testimony. *City of Chicago v. Concordia Evangelical Lutheran Church*, 2016 IL App (1st) 151864, ¶ 76 ("it is for the trier of fact to determine the credibility of witnesses, resolve conflicts in the evidence, and determine the weight to be given to the witness testimony"). A finding that when plaintiff was given direction with regard to investigating investments he was given those directions by the investment committee of the general partner is not against the manifest weight of the evidence.

¶ 42 We believe defendant overstates the scope of the trial court's ruling on its motion *in limine* number two. The trial court's finding is not a determination that Bobb and McInerney's directions were on behalf of CGC, or that their acts cannot be attributed to Fund II. Defendant disputed, in the trial court and on appeal, the meaning of those acts. During argument on the motion *in limine*, plaintiff's counsel argued "whether it's a general partner or the [limited partner's] investment committee doesn't matter. Those acts of the [general partner] are imputed on the limited partner." Defendant's attorney argued the general partner's agency does not create an employment situation because the "employees of an agent are not necessarily the employees of a principal." Defendant renewed that argument in its reply, that even if Bobb and

McInerney were directing plaintiff's activities as the investment committee of the general partner, plaintiff's claim that fact creates a joint employer relationship with Fund II, the limited partner, fails because plaintiff failed to provide authority for the proposition that "an agent's employees are *ipso facto* employees of the principal." In this scenario, defendant argues the general partner, as agent of the principal Fund II, did not create an employment relationship between plaintiff and Fund II by controlling plaintiff's work. In other words, the general partner may be plaintiff's joint employer, but that does not necessarily mean Fund II is also plaintiff's joint employer. Defendant's argument fails.

¶ 43 We note the trial court found an employment relationship to exist between plaintiff and Fund II as a joint employer, and defendant, who has the burden on appeal, has failed to cite this court to any authority that an agent *cannot* bind its principal to an employment relationship by performing acts the agent was authorized to perform. Regardless, the opposite is true. A principal will be bound by the authority he gives to another. *Siena at Old Orchard Condominium Association v. Siena at Old Orchard, LLC*, 2017 IL App (1st) 151846, ¶ 80. The existence of the purported agent's authority generally is a question of fact that must be proved by a preponderance of evidence. *Progress Printing Corp. v. Jane Byrne Political Committee*, 235 Ill. App. 3d 292, 306 (1992). "Such findings of fact will be overturned only if against the manifest weight of the evidence. [Citation.]" *Id.* Bobb and McInerney's control of plaintiff's work as the investment committee of the general partner can be imputed to Fund II as the limited partner. "Under Delaware law, a general partner of a limited partnership is 'an agent of the partnership for the purpose of its business, purposes or activities.' Del. Code Ann. tit. 6 § 15–301(a); *id.* § 17-403(a) (West 2011). Thus, an act of a general partner 'for apparently carrying on the ordinary course of the partnership's business *** binds the partnership.' [Citation.]" *Huppe v. WPCS Int'l Inc.*, 670 F.3d 214, 221 (2d Cir. 2012). See also *Ioerger v. Halverson*

Construction. Co., 232 Ill. 2d 196, 202 (2008) ("Partners *** are agents of the partnership and of one another for purposes of the business. That is so both as a matter of common law and under the Uniform Partnership Act"). Moreover, "as between the principal and third persons, the principal is bound by all acts of the agent which are within the apparent scope of his authority." *Burba v. Baltic-Am. Line*, 233 Ill. App. 132, 135 (1924). "In Illinois *** '[a] principal is bound not only for the precise act which he expressly authorized the agent to do, but also for whatever belongs to the doing of it or is necessary to its performance.' [Citations.]" *Universal Fire & Casualty Insurance Co. v. Jabin*, 16 F.3d 1465, 1471 (7th Cir. 1994). In this case, the investment committee was expressly authorized to make investment decisions for Fund II. The general partner, through its investment committee, was acting within its authority when it directed plaintiff's daily activities to enable it to make those investment decisions. Because the general partner was carrying out its authority from Fund II when it directed plaintiff's work, Fund II was bound by those actions, potentially giving rise to a joint employer relationship with plaintiff. The trial court's finding is not against the manifest weight of the evidence. See generally *North Penn Transfer, Inc., v. Commonwealth of Pennsylvania*, 434 A.2d 228 (1981).

¶ 44 Turning to the factors to consider in undertaking a joint employer assessment, defendant argues there was no evidence Bobb and McInerney were acting as agents of Fund II when they hired plaintiff. But plaintiff testified that all of his discussions with McInerney concerning employment surrounded working on Fund II. Therefore, there is evidence Fund II had some role in plaintiff's hiring. Moreover, it was plaintiff's demand for a share of payments from a Fund II deal and financial concerns about Fund II that led to his termination; so Fund II also had a role in plaintiff's firing. The evidence established that Bobb and McInerney engaged in "actual day-to-day supervision and direction of [plaintiff] on the job." *AFSCME, Council 31*, 216 Ill. 2d at 579. The right to control the employee's work has been called the most important consideration in

assessing whether someone is an employee. See *Roberson v. Industrial Comm'n*, 225 Ill. 2d 159, 175 (2007). There was sufficient evidence of Bob and McInerney's roles in hiring and firing plaintiff for Fund II, and directing his work, to support the trial court's judgment. The holding that plaintiff was a joint employee of Fund II is not against the manifest weight of the evidence.

¶ 45 Malabar Profits

¶ 46 Next, defendant argues plaintiff was not entitled to judgment on his claim for a share of the profits from the sale of Malabar based on the parties' agreement in the August 6 letter because the agreement was that plaintiff would receive his share at the same time the Malabar profits were distributed to the limited partners, and "the evidence is undisputed that" no profits from the sale of Malabar were ever distributed to the limited partners. Defendant argues "[t]he proceeds of the Malabar sale consisted of fungible cash;" therefore, "one cannot say that the proceeds were not eaten up by the $52 million of other problems, or whether the sales proceeds went into the partial return of initial capital that was made nine years later. While the proceeds of the sale may or may not have been distributed, it is clear that that there was no distribution of profits." (Emphasis omitted.) Plaintiff responds "the August 6 Agreement says nothing about 'profits' being distributed." Instead, all that was required to trigger plaintiff's rights under the August 6 agreement was any distribution to the limited partners after a sale for a profit. Alternatively, plaintiff argues that even if a distribution of profit was required, Fund II made two distributions after the Malabar sale, and the testimony established those distributions included the proceeds Fund II received from the Malabar sale. Therefore, plaintiff argues, the jury could reasonably infer Fund II distributed the profits from the Malabar sale.

¶ 47 During closing argument, plaintiff's counsel argued that plaintiff had to prove that "the distribution of those profits actually took place to the limited partners." Plaintiff's counsel argued the evidence stressed that the profits from the Malabar sale had been distributed.

Plaintiff's counsel noted that plaintiff's agreement called for plaintiff to receive a share of the Malabar profits as if Malabar was the only investment in Fund II. Defense counsel argued Siegel testified the profits were never distributed and that "the profits got eaten upon by the losses on other deals. So there is no distribution of profit." Plaintiff's counsel revisited his arguments in his rebuttal argument. Plaintiff's counsel argued, in part, "that at the end of the day, there was still profit and that excess cash went into the distributions. So yes, Members of the Jury, absolutely, there were profits traceable to the Malabar's transaction that were distributed to the limited partners that triggered that portion of the August 6th agreement." On appeal from a jury verdict, we may not simply reweigh the evidence and substitute our judgment for that of the jury. *Snelson v. Kamm*, 204 Ill. 2d 1, 35 (2003). We may reverse a jury verdict only if it is against the manifest weight of the evidence. *Id.* "A verdict is against the manifest weight of the evidence where the opposite conclusion is clearly evident or where the findings of the jury are unreasonable, arbitrary, and not based upon any of the evidence. [Citations.]" The jury heard evidence that Fund II sold Malabar for a profit, and that the limited partners received cash that included the proceeds of that sale. The parties' agreement called for plaintiff's payment to be "calculated as though Malabar was the only investment made by the fund." There was evidence there was profit from the sale of Malabar after the bank loans were repaid. The jury's finding that profits from the sale of Malabar were distributed to the limited partners triggering plaintiff's right to payment pursuant to the terms of the parties' agreement is not against the manifest weight of the evidence.

¶ 48 Next, defendant argues the members of 221 Partners, LLC, the new general partner of Fund II, have no liability for any promises McInerney made to plaintiff before they became the general partner. Defendant states that under Delaware law, a person admitted as a partner into an existing partnership is liable for all of the obligations arising before their admission to the

partnership, but that liability "shall be satisfied only out of partnership property." Before trial, 221 Partners, LLC filed a motion for judgment on the pleadings on the grounds that under Delaware law, "a successor general partner does not have a personal liability for pre-existing obligations of the limited partnership." 221 Partners, LLC argued it "is not personally liable for the debts of the limited partnership incurred before it became general partner, including the alleged debt to Plaintiff." The trial court denied that motion. In a posttrial motion for a judgment notwithstanding the verdict or, in the alternative, for a new trial, defendant 221 Partners, LLC again argued it has no personal liability for preexisting partnership obligations, and only "partnership assets can be taken for such debts." 221 Partners, LLC stated that as applied, the general partner "has no liability for any promises Mr. McInerney may have made before it became the general partner." On appeal, plaintiff argues Delaware law clearly states general partners are liable for a limited partner's debts, and "[w]hether there are partnership assets available to Plaintiff to collect on those obligations is an entirely different question than whether the [general partner] is liable." Plaintiff also argues 221 Partners, LLC is liable for the obligation on the Malabar transaction because that obligation arose after it became the general partner. Defendant disputes that claim, arguing the distribution triggering plaintiff's receipt of payment for the Malabar transaction occurred after it became the general partner, but the obligation—*i.e.*, the August 6 letter—arose before it became the general partner.

¶ 49 Under Delaware law, "a general partner of a limited partnership has the liabilities of a partner in a partnership that is governed by the Delaware Uniform Partnership Law [(Partnership Law)] in effect on July 11, 1999 (6 Del. C. § 1501 *et seq.*) to persons other than the partnership and the other partners." Del. Code Ann. tit. 6, § 17-403 (West). The Partnership Law states:

> "(a) Except as otherwise provided in subsections (b) and (c) of this section, all partners are liable jointly and severally for all obligations of the partnership unless otherwise agreed by the claimant or provided by law.
>
> (b) A person admitted as a partner into an existing partnership is not personally liable for any obligation of the partnership incurred before the person's admission as a partner." Del. Code Ann. tit. 6, § 15-306 (West).

Delaware law also provides that "[a] judgment creditor of a general partner of a limited partnership may not levy execution against the assets of the general partner to satisfy a judgment based on a claim against the limited partnership" (Del. Code Ann. tit. 6, § 17-403 (West)) unless certain conditions are met that do not apply in this case.

¶ 50 We agree with defendant that we did not specifically decide the issue of the incoming general partner's liability in the prior appeal. The balance of the "upfront payment" portion of plaintiff's damages is an obligation the partnership incurred before 221 Partners, LLC, was admitted as the general partner. Under Delaware law, that sum is payable only from partnership property. See Del. Code Ann. tit. 6, Subt. II, Ch. 15, Refs & Annos (West) ("A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before the person's admission as though the person had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property.") We find the general partner is liable for the liability on plaintiff's payment from the Malabar transaction. 221 Partners, LLC, took over as general partner in June or July 2011. In November 2011 Fund II sold Malabar for a profit. The parties' agreement stated that "[t]he Carried Interest will be paid to [plaintiff] upon the exit of the Malabar transaction." Plaintiff's receipt of a portion of the carried interest was conditioned upon Fund II's exit from the Malabar transaction for a profit. "A condition is an event, not certain to occur, which must occur *** *before*

performance under a contract becomes due." (Emphasis added.) Restatement (Second) of Contracts § 224 (1981). "Performance under a contract becomes due when all necessary events, including any conditions and the passage of any required time, have occurred so that a failure of performance will be a breach." *Id.* The obligation under the August 6 agreement to pay plaintiff a portion of the carried interest on the Malabar transaction did not become due until the condition was satisfied, by which time 221 Partners, LLC, was the general partner of Fund II. Defendant cites no authority for its assertion that "a new general partner is not personally liable for a promise made before it became the general partner," when that promise was contingent on an event that was not certain to occur but did occur after it became the general partner. The obligation on the Malabar transaction was incurred after 221 Partners, LLC's admission as a general partner. Therefore, under Delaware law, the new general partner is liable for the Malabar payment.

¶ 51 Jury Instructions

¶ 52 Defendant argues the trial court failed to properly instruct the jury on the issue of consideration for the August 6 agreement. Defendant claims the trial court erred by instructing the jury, in pertinent part, as follows:

> "As stated in Instruction ___, the fist element of a contract claim Mr. Foreman must prove is the existence of a contract. There is a contract if Mr. Foreman proves there was an offer by one party, acceptance by the other party and consideration between the parties.
>
> Mr. Foreman claims the parties entered into a contract which had the following terms:
>
> a) $215,000 payment to be paid by Cardinal Growth II, LP to Mr. Foreman;

b) A payment referred to as a 'Carried Interest' as described in the August 6th letter; and ***.

To prove the existence of a contract between Mr. Foreman and Cardinal Growth, II, LP, Mr. Foreman has the burden of proving each of the following propositions:

First, Mr. Foreman must prove that one party made an offer to the other. An 'offer' is a communication of a willingness to enter into a contract.

* * *."

¶ 53 Defendant argues the trial court's error in giving the foregoing instruction was not harmless because "there was absolutely no outside support for [plaintiff's] disputed assertion that he had an entitlement to portions of various fees." Defendant tendered a modified version of Illinois Pattern Jury Instruction 700.03, which the trial court refused. Defendant argues that in light of the "lack of evidence of consideration" the allegedly inadequate instruction the trial court gave might have led the jury to find an enforceable contract without also finding adequate consideration. Defendant's tendered instruction read, in pertinent part, as follows, with the differences between the instruction given to the jury noted:

"As stated in Instruction ___, the fist element of a contract claim Mr. Foreman must prove is the existence of a contract. There is a contract if Mr. Foreman proves there was an offer by one party, acceptance by the other party and consideration between the parties.

Mr. Foreman claims the parties entered into a contract which had the following terms:

a) $215,000 payment to be paid by Cardinal Growth II, LP to Mr. Foreman;

b) A payment referred to as a 'Carried Interest' as described in the August 6th letter; and

c) Mr. Foreman will waive any claim he might have pursuant to the terms under which he had been employed.

To prove the existence of a contract between Mr. Foreman and Cardinal Growth, II, LP, Mr. Foreman has the burden of proving each of the following propositions:

First, Mr. Foreman must prove that Cardinal Growth II, LP made an offer to him or he made an offer to it.

An 'offer' is a communication of a willingness to enter into a contract.

* * *."

¶ 54 Defendant's argument is based on the trial court's refusal to include in the instruction, as a term of the contract, that "Mr. Foreman will waive any claim he might have pursuant to the terms under which he had been employed." At a jury instruction conference, plaintiff's counsel noted plaintiff's instruction informed the jury "the agreement has to include an exchange of promise [*sic*], a value, which is known as consideration. *** This is standard IPI. I don't know why we have to change the IPI. There is nothing unique about, it's consideration in a modification of a contract claim." Defendant's concern was with defining what plaintiff was "giving up" as consideration for the August 6 agreement. Counsel stated: "How is it [supposed] to state what Mr. Foreman was to give up in terms of the alleged contract? We have here what the other side was giving up. I just want to have, they are giving this, and they are giving that. Tell me what you want to put there." The parties continued their arguments over adding language to the instruction. Eventually the trial court ruled "I think right now to include

paragraph (c) or any of the various ways we have tried to bring up is really adding an element or instructing on the law that's not accurate. So that won't be given."

> "Generally, a trial court's decision to grant or deny an instruction is reviewed for abuse of discretion. [Citation.] 'The standard for determining an abuse of discretion is whether, taken as a whole, the instructions are sufficiently clear so as not to mislead and whether they fairly and correctly state the law.' [Citation.] When the question is whether the applicable law was conveyed accurately, however, the issue is a question of law, and our standard of review is *de novo*. [Citation.]" *Studt v. Sherman Health Systems*, 2011 IL 108182, ¶ 13.

¶ 55 The instruction given to the jury stated plaintiff had to prove the agreement "included an exchange of promises or value, which is known as consideration." The dispute between the parties concerned whether the instruction, which is required to state the material terms of the contract, should have defined plaintiff's consideration. The instruction the trial court gave in this case accurately conveyed the law; therefore, our standard of review is abuse of discretion. The trial court did not abuse its discretion. The court's concern was that the language defendant sought to add to the pattern jury instruction was not found in the August 6 letter and therefore was not a term of the contract. The court noted defendant's attorney could argue the contract was missing a term. Moreover, at the jury instruction conference, plaintiff's counsel argued that waiver of any claims was not plaintiff's proffered consideration. "As a general rule, a judgment will not be reversed where the jury instructions are faulty unless they mislead the jury and the complaining party suffered prejudice." *Dabros by Dabros v. Wang*, 243 Ill. App. 3d 259, 269 (1993). Defendant argues in reply the problem with the instruction as given is that the jury could have concluded that if plaintiff "proved the promise of Fund II, then [p]laintiff would be entitled to recover." We disagree. The jury was instructed, in the contested instruction, that it had to

find consideration for the agreement. We fail to discern any prejudice to defendant. Defendant sought to define what that consideration was by instructing the jury on a term of the contract that was not found in the writing. Defendant has not demonstrated an obligation to define the consideration in the jury instructions when that consideration is not a term in the contract. The trial court did not abuse its discretion in refusing defendant's modification.

¶ 56 Next, defendant argues the trial court erred in failing to give its version of IPI 700.02, which would have instructed the jury that to prove he is entitled to recover damages from Cardinal Growth II, LP for breach of contract plaintiff has the burden of proving "[t]he occurrence of a condition as to the claim for carried interest." The trial court did not give that instruction and only instructed the jury that plaintiff had to prove (1) the existence of a contract, (2) defendant's failure to perform its obligations, and (3) resulting damages to plaintiff. The trial court did give a separate instruction (Instruction No. 8) that read as follows: "Daniel Foreman must also prove that the 'Carried Interest' became due." Plaintiff argues defendant offered Instruction No. 8 as a compromise to its request to include defendant's proffered language in IPI 700.02, thus defendant waived their right to appeal the use of Instruction No. 8 to instruct the jury. Alternatively, plaintiff argues defendant's argument is waived because the language defendant claims the trial court erroneously excluded "is nearly identical to the language Defendants wanted to include."

¶ 57 In the jury instruction conference defendant's attorney argued the payment of the Malabar profits to the limited partners was "a condition to the money coming due [to plaintiff], and it's a part of the plaintiff's case that should be in the conditions that the plaintiff has to prove." We find the instruction was not in the place defendant wanted it, but the instruction was given to the jury. The court instructed the jury plaintiff had to prove the carried interest became due. Defendant argues on appeal that "[n]o reason has been presented why compliance with

condition precedent should be excised from the IPI instruction simply because it was applicable to one, but not the other, of the amounts sought." Defendant asserts the instructions as given may have "misled the jury into ignoring this element of Plaintiff's claim." A free-standing instruction on plaintiff's burden in this regard (Instruction No. 8) should have had the opposite effect on the jury. (We note defendant argues Instruction No. 10, a free-standing instruction on acceptance of a written contract, "unduly emphasized one aspect of IPI 700.03.") Regardless, defendant points to nothing to demonstrate the jury was misled, other than its disagreement with the jury's decision. The instructions were a proper statement of the law and defendant has failed to demonstrate the instructions as given prejudiced him.

¶ 58 Finally with regard to jury instructions, defendant argues jury Instruction No. 10 unfairly highlighted and reinforced one aspect of plaintiff's case, was inapplicable or misleading, and could have allowed the jury to wrongly conclude that the fact payments were made by others tended to prove that Fund II made an agreement with plaintiff. Instruction No. 10 read as follows:

> "A party named in a contract may, by its acts and conduct, indicate its agreement to the contract's terms and become bound by the contract's terms even though it has not signed the contract."

¶ 59 Defendant argues this instruction was improper because the conduct allegedly indicating agreement to the contract's terms is partial payments to plaintiff with notations referring to an agreement, but none of those payments came from Fund II. Defendant asserts plaintiff's claim "as presented at trial, is based upon an oral contract. Payments by Fund I or CGC do not tend to prove that Mr. McInerney formed the claimed oral contract on behalf of Fund II." (Emphasis omitted.) Plaintiff responds "the relevant IPI instructions *** needed to be supplemented in order to inform the jury as to the legal validity of an unsigned but written contract." Plaintiff

also argues the question of the source of payments to plaintiff was a factual question, so defendant's argument is inapplicable to the question of whether the trial court abused its discretion in instructing the jury.

¶ 60 First, as to the payments to plaintiff as conduct indicating agreement to the terms of the parties' agreement, plaintiff did not argue to the jury that payments from Fund II indicated Fund II's intent to agree to the terms of the August 6 letter. During closing argument plaintiff's counsel argued plaintiff accepted the offer when he agreed to McInerney's terms and amended the August 6 letter to reflect McInerney's final change. Plaintiff's counsel argued an agreement does not have to be signed "so long as the parties are agreeing to their terms and manifest an intent to be bound by those terms, it does not have to be signed. *** And that is what we've got here." Plaintiff's counsel also argued the evidence of defendant's acceptance was plaintiff's testimony he saw a signed copy of the agreement, and his attorney attacked the credibility of Laws' testimony to the contrary. Later, counsel argued "Cardinal Fund, LP[,] *another one of these Cardinal entities*[,] deposited $107,500 directly into [plaintiff's] checking account." (Emphasis added.) Plaintiff's counsel also argued that communications between plaintiff and McInerney and another employee of the Cardinal entities, Eric Martinez, were manifestations of intent. Plaintiff acknowledged in closing argument that the payments came from other Cardinal entities. Defendant's attorney did argue to the jury that the fact of payments from Cardinal Capital, LP (Fund I) and CGC does *not* "prove that there was an obligation on behalf of Fund II."

¶ 61 Plaintiff's argument was that it was the conduct of McInerney that manifested his assent to the agreement, including causing funds to be distributed to plaintiff under his "separation agreement" as stated in the notation on the wire transfer and the email from Mr. Martinez. We are not persuaded by defendant's argument on appeal that Instruction No. 10 was inapplicable or misleading, where the evidence established that McInerney, who plaintiff argued was authorized

to act for Fund II, directed the payments to plaintiff, as evidenced by Martinez's email, and who negotiated plaintiff's separation following plaintiff's demand for payment on a deal for Fund II (see *supra* ¶ 38); and where plaintiff's argument alleviated any potential confusion about the source of the payments.

¶ 62 Consideration

¶ 63 Next, defendant argues the jury's finding that plaintiff proved there was consideration for the August 6 agreement is contrary to the manifest weight of the evidence. Defendant argues the parties' agreement, and their prior versions, all stem from plaintiff's initial claim he was promised a share of certain fees when he was hired, which defendant claims is not true. Defendant argues that without the initial claim to a right to certain fees, there is no consideration in the form of agreeing to forego some of those fees, and no consideration for subsequently agreeing to less in "a series of ever-diminishing agreements." (Defendant argues plaintiff leaving his employment cannot form the consideration for any of the agreements because plaintiff was an at-will employee.) Defendant argues the finding of consideration is against the manifest weight of the evidence where Bobb and McInerney testified there was no agreement to give plaintiff a share of the fees when he was hired, and plaintiff's testimony to the contrary is "uncorroborated and contradictory." Defendant repeats its arguments on appeal but fails to demonstrate that the opposite conclusion is clearly evident or that the verdict is arbitrary or unsupported by evidence. We may not simply reweigh the evidence and substitute our judgment for that of the jury. *Snelson*, 204 Ill. 2d at 35.

> "We will not set aside a jury verdict unless, considered in the light most favorable to the appellee, it is contrary to the manifest weight of the evidence. [Citation.] 'A jury's verdict is against the manifest weight of the evidence only where the opposite conclusion

is clearly evident or when the verdict appears to be arbitrary or to be unsupported by the evidence.' [Citation.]" *Koehler v. Packer Group, Inc.*, 2016 IL App (1st) 142767, ¶ 57.

¶ 64 Defendant's argument plaintiff gave no consideration for his separation agreement because he was an at-will employee is based on the alleged absence of a right to any of the payments in the agreement. Plaintiff testified as to his initial employment negotiations with McInerney and their discussion of the portfolio partner agreement. In closing argument, defendant's attorney argued Bobb and McInerney testified "there was no agreement when [plaintiff] was hired to give him any of this." Counsel argued the carried interest represents money Fund II pays to the general partner, and the "only one who could give away the carried interest would be the person who got it, which would be the general partner." Later in his closing argument defendant's attorney stated "I asked [plaintiff] was there any agreement that you would get your 10—your percentage of the profits even though you weren't there? He said, I don't remember any. But that didn't stop him from making the claim. He claimed an origination fee even though he made no origination." Counsel stated "[plaintiff] had no promises in his employment agreement. You heard Mr. Foreman. Where is the writing? The document that he says they agreed to [(the portfolio partner agreement)] says there is going to be a written contract. You heard Mr. Foreman say this wasn't discussed, that wasn't discussed. So he was entitled to nothing."

¶ 65 The jury was free to infer that when plaintiff was hired plaintiff and McInerney agreed to abide by the terms of the portfolio partner agreement without adhering to the further written documentation requirement contained therein. The jury was instructed plaintiff had to "prove that the 'Carried Interest' became due." The jury clearly accepted plaintiff's evidence on that point, and defendant's parsing of whether "eligible" in the portfolio partner agreement meant plaintiff *would* receive those payments does not establish that their verdict was arbitrary or not

based on evidence. "The jury is free to accept some evidence and reject others, as well as to determine the credibility of the witnesses and weigh their testimony." *Barth v. State Farm Fire & Casualty Co.*, 228 Ill. 2d 163, 180 (2008). The jury could also reasonably infer that following their negotiations upon plaintiff's termination, the parties agreed to a portion of the management fee as a measure of payment (and source of funds). "It is the jury's function to determine the facts, disputed as well as undisputed, and to make reasonable inferences therefrom. [Citation.] The jury's determination of factual questions may not be set aside on review because a judge believes a different conclusion more reasonable." *Theesfeld v. Eilers*, 122 Ill. App. 2d 97, 102 (1970). There was evidence in this case from which the jury could reasonably find plaintiff was entitled to incentive payments related to the deals he worked on. Defendant's argument concerning plaintiff's at-will status does not show that the verdict was arbitrary or unreasonable.

¶ 66 Exclusion of Witnesses

¶ 67 Next, defendant argues the trial court erred when it barred John Signa, CGC's controller, from testifying as a sanction for violating Illinois Supreme Court Rule 213(f)(1) (eff. Jan. 1, 2007). Rule 213 states, in pertinent part, as follows:

> "(f) Identity and Testimony of Witnesses. Upon written interrogatory, a party must furnish the identities and addresses of witnesses who will testify at trial and must provide the following information:
>
> (1) Lay Witnesses. A 'lay witness' is a person giving only fact or lay opinion testimony. For each lay witness, the party must identify the subjects on which the witness will testify. An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party's knowledge of the facts known by and opinions held by the witness.

> (2) Independent Expert Witnesses. An 'independent expert witness' is a person giving expert testimony who is not the party, the party's current employee, or the party's retained expert. For each independent expert witness, the party must identify the subjects on which the witness will testify and the opinions the party expects to elicit. An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party's knowledge of the facts known by and opinions held by the witness.[2]
>
> * * *
>
> (i) Duty to Supplement. A party has a duty to seasonably supplement or amend any prior answer or response whenever new or additional information subsequently becomes known to that party." IL S. Ct. R. 213 (eff. Jan. 1, 2007).

¶ 68 Defendant does not refute the failure to disclose Signa in its responses to plaintiff's Rule 213 interrogatories or the failure to supplement its response to those interrogatories. Defendant argues "[b]arring Mr. Signa's testimony was unfair" where defendant listed Signa on a witness list on May 2nd, six weeks before trial, defendant's counsel represented that he informed plaintiff's counsel of the subject matter of Signa's testimony in a phone call a couple of days before the hearing on plaintiff's motion *in limine* to bar Signa's testimony, and plaintiff failed to object to Signa's testimony until June 8th, less than a week before trial was to begin. Defendant asserts plaintiff had time to depose Signa and accused plaintiff of intentionally waiting "to sandbag Defendants to obtain an unfair advantage." Plaintiff responds defendant waived this issue by failing to make an offer of proof as to Signa's expected testimony. In *Pempek v. Silliker*

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[2] The trial court found "the accountant really falls into an (f)(2) position and should have been more fully disclosed. That distinction, however, makes no difference to our disposition.

Laboratories, Inc., 309 Ill. App. 3d 972 (1999), the trial court barred a witness from testifying as a sanction for failing to disclose the witness prior to the date discovery was closed. *Pempek*, 309 Ill. App. 3d at 984. The *Pempek* court cited our supreme court's decision in *People v. Andrews*, 146 Ill. 2d 413 (1992), in which the court wrote as follows:

> "[T]he key to saving for review an error in the exclusion of evidence is an adequate offer of proof in the trial court. [Citations.] The purpose of an offer of proof is to disclose to the trial judge and opposing counsel the nature of the offered evidence and to enable a reviewing court to determine whether exclusion of the evidence was proper. [Citation.] The failure to make an adequate offer of proof results in a waiver of the issue on appeal. [Citation.]" (Internal quotation marks omitted.) *Pempek*, 309 Ill. App. 3d at 984 (quoting *Andrews*, 146 Ill. 2d at 420-21).

¶ 69 In this case, defendant failed to preserve Signa's proposed testimony through a proper offer of proof. "That being the case, we decline to review the trial court's refusal to allow [Signa] to testify as, were we to find trial error, we would be unable to determine whether such error affected the outcome of the trial." *Id.* at 984. "Moreover, a party is not entitled to reversal based upon the trial court's evidentiary rulings unless the error substantially prejudiced the aggrieved party and affected the outcome of the case. [Citation.] The party seeking reversal bears the burden of establishing such prejudice. [Citation.]" *Kovera v. Envirite of Illinois, Inc.*, 2015 IL App (1st) 133049, ¶ 55. Defendant has not argued how the exclusion of Signa's testimony prejudiced it. Defendant does argue cumulative errors "created a situation in which one 'cannot say that the errors did not affect the verdict.' [Citation.]" We will address that contention if errors are found. See *United States v. Allen*, 269 F.3d 842, 847 (7th Cir. 2001) ("If there are no errors or a single error, there can be no cumulative error. [Citation.]").

¶ 70 Next, defendant argues the trial court erroneously excluded its experts' testimony because there would have been no harm in allowing the experts to testify where they could have explained the business structure of the Cardinal entities and the alleged decision not to distribute the Malabar profits. Defendant argues the trial court applied an incorrect standard under which expert testimony was inadmissible unless necessary to the jury's understanding of a disputed fact. "The 'rule of necessity,' which held expert testimony to be inadmissible unless necessary to the jury's understanding of a disputed fact, has been abolished in Illinois in favor of a more lenient rule. Expert testimony is now properly admitted whenever it will assist the trier of fact to understand the evidence or to determine a fact in issue." *Thacker v. UNR Industries, Inc.*, 151 Ill. 2d 343, 365 (1992). Following arguments at the hearing on plaintiff's motion to bar the experts' testimony the trial court ruled as follows:

> "Given that the complaint that is before me is a *** breach of contract and an Illinois Wage Payment Collection Act, that's why I asked, what are these experts with their opinions, how are their opinions going to aid the jury?
>
> What I've heard is it's trial strategy. It would have been easier on the defendants to have one of these individuals do a—basically be a summary expert and not necessarily adding anything other than tying it up a little bit more neatly.
>
> You have your witnesses that are going to be available to testify as to—I understand that they are coming in, because their Fund is out of here; that they are under subpoena, but you do have these individuals here. They are able to testify. They were present with the formation of this agreement, and you have their testimony already, at least for deposition purposes, in the can concerning the opinions that they would offer as their (f)(2)s on things like that.

> I just don't see that the experts here are going to the point where they are aiding the jury other than being cumulative, and for those reasons, they will not be testifying in this matter."

¶ 71 We do not believe the trial court excluded the experts' testimony under the rule of necessity. From the record we believe the trial court excluded the experts' testimony because it felt the experts' testimony would be cumulative of other witnesses' testimony. "The trial court has discretion to exclude such cumulative evidence. [Citations.] Only when there is a clear abuse of discretion will such a decision by the trial court be reversed. [Citations.]" *Kozasa v. Guardian Electric Manufacturing Co.*, 99 Ill. App. 3d 669, 678 (1981). See also *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 45 (2010) ("The trial court has discretion to limit the number of witnesses and may bar an expert from testifying if the expert's testimony would be cumulative."). "The trial court abuses its discretion when it improperly excludes evidence so as to deprive a party of a fair trial. [Citation.]" *Cetera*, 404 Ill. App. 3d at 45.

¶ 72 In response to plaintiff's motion *in limine* to bar the experts' testimony, defendant claimed "the experts' testimony has two points: 1) with good reason, private equity funds generally do not have employees and 2) the failure of Fund II to have distributed the Malabar profits was the only business decision which could have reasonably been made at the time, given the surrounding circumstances." At the hearing on the motions *in limine*, defendant's attorney conceded "I could just as easily put [Bobb and McInerney] on to explain it [(referring to the experts' testimony)]. [Bobb and McInerney] are not in a position to say that [the structure of the Cardinal entities] is the customary way in which this is done by similar companies throughout the industry, which the two experts will say, and that's one of their disclosed opinions. But in terms of the arrangement, yes, [Bobb and McInerney] know the arrangement or even Mr. Siegel knows the arrangement for that matter." When the trial court inquired about the relevance of the

industry custom, defendant's counsel responded that evidence was just to show "this is not something made up to try to cheat Mr. Foreman. This is the way people typically do—typically do business." Defendant's attorney conceded that evidence did not have great weight in the proceedings.

¶ 73 The trial court correctly found the experts' testimony would be cumulative of other evidence. Therefore, it was within the trial court's discretion to exclude it. Defendant has not explained how the exclusion of these experts' testimony deprived it of a fair trial, claiming only that there would have been no harm in allowing it. Defendant has not shown an abuse of discretion in the barring of the experts' testimony. Defendant goes on to argue that the trial court "exacerbated the effect of its error [in barring the experts' testimony] by then unduly limiting the scope of Mr. Siegel's testimony." Defendant claims that "[h]aving said that Siegel was a substitute for the experts, the trial court should have let him testify as an expert would and without interference." During a sidebar outside the presence and hearing of the jury, the trial court instructed defendant's attorney that Siegel could not testify as to the law, and therefore his attempt to testify that the limited partners in Fund II had "no exposure for the liabilities of the company" was improper. Plaintiff also objected when Siegel's testimony became a narrative, and the trial court instructed defendant's attorney to ask him questions. First, "it is well settled that 'expert testimony as to legal conclusions that will determine the outcome of the case is inadmissible.' [Citation.] As such, experts cannot offer 'legal conclusions that infringe on the jury's duties.' [Citation.]" *Todd W. Musburger, Ltd. v. Meier*, 394 Ill. App. 3d 781, 800 (2009). Second, whether to permit narrative testimony is within the trial court's discretion, and we find no abuse of discretion here—defendant failed to show how narrative testimony was best suited to Siegel's testimony. Having found no error concerning the trial court's evidentiary rulings on the witnesses' testimony, there can be no cumulative error.

¶ 74 CONCLUSION

¶ 75 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 76 Affirmed.