Nos. 2—10—0055 & 2—10—0355 cons.
Order filed May 18, 2011

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

MARY JANE GIFFORD, JENNIFER HAZELWOOD and DEBORAH A. NELSON,	Appeal from the Circuit Court of Boone County.
Plaintiffs/Counter-Defendants-Appellants and Cross-Appellees,	
v.	No. 06—CH—272
GALLANO FARMS, LLC, GALLANO FARMS, LTD., STEVE GALLANO and JOHN GALLANO, d/b/a J&S, PHYLLIS GALLANO, d/b/a Gallano Farms, JOHN GALLANO, Indiv. and as a member of Gallano Farms, LLC, STEVE GALLANO, Indiv. and as a member of Gallano Farms, LLC, PHYLLIS GALLANO, as a member of Gallano Farms, LLC, and JOHN GALLANO and STEVE GALLANO, as Trustees of the Fred Gallano Residuary Trust as a member of Gallano Farms, LLC,	
Defendants/Counter-Plaintiffs-Appellees and Cross-Appellants.	Honorable Eugene G. Doherty, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justice Hudson concurred in the judgment.
Justice Zenoff concurred in part and dissented in part.

ORDER

Held: Where the trial court's determination was not against the manifest weight of the evidence or an abuse of discretion, the trial court did not err in denying the plaintiffs' claims for an accounting and for breach of contract or in partially granting the plaintiffs' claim for breach of fiduciary duty.

In 1999, the Gallano Farms LLC (the LLC) was created. The LLC operated farms and a bowling alley in Boone County. The LLC members were the defendants, Phyllis, John, and Steve Gallano, and the plaintiffs, Mary Jane Gifford, Jennifer Hazelwood, and Deborah Nelson. On January 2, 2009, the plaintiffs filed their fifth-amended complaint requesting an accounting and alleging claims for breach of contract and breach of fiduciary duty. On December 18, 2009, the trial court entered an order denying the plaintiffs' claims for an accounting and for breach of contract but granting, in part, the plaintiffs' claim for breach of fiduciary duty. On March 24, 2010, the trial court granted, in part, the defendants' motion to reconsider. The plaintiffs appeal and the defendants cross-appeal from those orders. We affirm.

BACKGROUND

In 1973, Fred L. Gallano and his son, Frederick C. ("Bud") Gallano, formed Gallano Farms, Ltd. (Gallano Ltd.), a farm operations company. The Gallanos had acquired 1,492.5 acres of farmland in Boone County. In 1975, Fred and Bud created the Gallano Farms and Land Trust (the Trust) and named themselves, and Bud's wife (Phyllis) and five children (Steve, Deborah, John, Mary, and Jennifer) as beneficiaries. Ownership of the farmland was transferred to the Trust. From 1975 through 1996, the farmland was rented by Fred, Bud, Phyllis, John and Steve through the following entities: Gallano Ltd.; John and Steve Gallano, d/b/a J&S; and Bud and Phyllis Gallano, d/b/a Gallano Farms. The rent was set pursuant to an ongoing series of oral, cash, year-to-year farm leases. In 1992, the Trust acquired a bowling alley, Concordia Lanes, in Boone County. Also in 1992, Bud executed his will that provided for a residual trust naming John and Steve as trustees for the benefit of Phyllis.

On November 1, 1996, Bud, as trustee and controlling beneficiary of the Trust, executed a series of written leases for the farmland. The written leases provided that the farmland be rented to Gallano Ltd., J&S, and Gallano Farms at a fixed rate of $80 per acre. The lease ran through October 31, 2003. Bud similarly set the rent for the bowling alley at $60,000 per year. Concordia Lanes, Ltd. (Concordia), was established to serve as the operating entity of the bowling alley.

In 1999, following Bud's death, the surviving Gallano family members (Phyllis, John, Steve, Mary, Jennifer, and Deborah) formed the LLC as a mechanism for managing the Trust properties. The members also executed an operating agreement for the LLC. The operating agreement specified that it was a member-managed LLC. Section 5.02 provided that certain transactions were to be undertaken only "upon an affirmative vote of Members holding at least 2/3rds of all Percentage Interests in the Company." Section 5.02(f) provided that a two-third percentage share vote was required to permit a sale "of all or substantially all of the assets of the Company as part of a single transaction or plan." Section 6.04 similarly provided that the members had a right, by way of two-third percentage vote, "to approve the sale, exchange or other disposition of all, or substantially all, of the Company's assets which is to occur as part of a single transaction or plan." In contrast, section 7.07 stated that "in the event of any sale of Company assets *** [two-thirds] must vote in favor as the affirmative vote."

Furthermore, section 5.03 provided that members could open bank accounts in the name of the LLC and be the sole signatory thereon with the restriction that two signatures would be required for any checks greater than $1,000. Section 6.05 indicated that the members were to maintain the accounting records of the LLC and make them available for inspection by any member who so requested. Finally, section 13.015 stated that the agreement "supersedes all agreements previously made between the parties relating to its subject matter."

The original and current members of the LLC and their ownership interests are: Phyllis (15%), John (20%), Steve (20%), John and Steve Gallano as trustees for the Fred Gallano Residuary Trust (6%), Deborah (15%), Mary (11%) and Jennifer (13%). The ownership in the LLC was assigned to mirror the parties' pre-existing ownership in the Trust as given by Bud. At the same time the LLC was created, the Trust was amended to name Phyllis as the successor trustee and the LLC as the beneficiary.

As part of the management of the Trust assets, the LLC created two checking accounts, one for the farming operations and one for the bowling alley operations. John, Steve and Phyllis were signatories on the LLC farm account. At the commencement of this suit, the Trust owned the following assets: 1,540 acres of farmland in Boone County and the houses located thereon; a grain elevator; multiple metal storage/machinery shed buildings; and a bowling alley. The record shows that 1,451.7 acres of the Trust farmland is rented to Gallano Ltd., J&S, and Gallano Farms. John and Steve are the sole owners of Gallano Ltd. and J&S. Phyllis is the sole owner of Gallano Farms. Concordia is owned as follows: each of the five children owns 10%, Phyllis owns 25% and the residuary trust owns 25%. Concordia pays annual rent to the LLC of $60,000 in monthly installments of $5,000. Deborah, Mary, Jennifer, and Phyllis are the signatories on the LLC bowling alley checking account.

On January 2, 2009, the plaintiffs filed their fifth amended three-count complaint. In the complaint, the plaintiffs stated that Phyllis was included as a defendant pursuant to a trial court ruling stating that she was a necessary party but that "relief [was] not sought against her individually by these proceedings." Count I was a claim for an accounting. Therein the plaintiffs alleged that John had breached his fiduciary duty by mismanaging the LLC. The plaintiffs alleged that despite requests for LLC documents and records, they had not received such records. They also alleged that John did not charge sufficient rent for the farmland, used LLC funds to pay for improper expenses, and had not remitted FSA subsidies to the LLC.

Count II was a claim for breach of contract. The plaintiffs alleged that John breached the LLC operating agreement by making unilateral decisions, entering transactions that presented a conflict of interest, incorrectly reporting LLC income, improperly exercising LLC business opportunities, withholding information, refusing to communicate, and claiming improper expenses. Count III was a claim for breach of fiduciary duty. The plaintiffs alleged that John breached his fiduciary duty to the LLC by unilaterally operating the LLC, charging insufficient rent on farmland, claiming improper expenses, misstating income, and concealing his self-dealing. The plaintiffs further alleged that Steve participated and/or consented in both the breaches of contract and of fiduciary duty. The plaintiffs claimed that as a proximate cause of these breaches, they had lost income from the LLC. In the prayer for relief from count III, the plaintiffs asked for damages and requested that the trial court "[o]rder the removal or suspension of [John's and Steve's] member authority as to the [LLC]."

On January 30, 2009, the defendants filed an answer and counter-complaint. In the answer to the fifth amended complaint, the defendants asserted the affirmative defenses of estoppel and waiver. The defendants alleged that, since the inception of the LLC, the plaintiffs had never asserted any of their rights under the operating agreement. The plaintiffs had never called a meeting or requested to inspect the books and records of the LLC. The defendants further alleged that after the LLC was formed the plaintiffs had continued to run the bowling alley in accordance with the longstanding customs and practices that were established by their father, Bud. The defendants argued that the plaintiffs were therefore estopped from complaining about the management of the LLC. The defendants' counter-complaint alleged causes of action against the plaintiffs for breach of the operating agreement and for breach of fiduciary duty in mismanaging the bowling alley, to the detriment of the LLC.

A bench trial commenced on June 8, 2009. John testified that there are two groups of assets operated by the LLC, the farm assets and the bowling alley assets. He and Steve were hired by their mother Phyllis to custom farm the Peterson farm. (Phyllis rents that portion of the farmland, about 350 acres, and farms it in her capacity as owner of Gallano Farms.) With respect to the bowling alley, $76,000 was paid by the LLC for new auto scorers when the previous system was damaged by a lightning strike. John believed that Concordia should have paid that expense and that the Trust loaned Concordia funds to purchase the original scorers. He was not aware of the 1996 written leases. Prior to this litigation, he thought he had been operating on an oral year-to-year lease. During the litigation, Steve came across the written leases. When asked whether he was currently renting his farms under a written lease, oral lease, or some other arrangement, John responded that it was pursuant to "some other arrangement" that he described as "business as usual." He farms all the Trust farmland through either J&S, Gallano Ltd., or for Phyllis d/b/a Gallano Farms.

John further testified that he does not live in one of the houses on the farmland; rather, his house is in town. The LLC pays the real estate taxes on his house. He pays for the majority of repairs but the LLC has paid for some repairs over the years. John acknowledged that there were two accounts for the LLC, one for the bowling alley and one for the farming operations. However, he stated that the two accounts have always been a family thing and that something for the bowling alley could easily have been paid out of the farm account. He further acknowledged that he used to receive bowling alley records once a month, but indicated that he had stopped receiving the records some time ago. John could not recall if the farming records were ever furnished to the sisters, but he testified that they were always readily available. John never prevented anyone from looking at any records. He further testified that, historically, the landlord was responsible to pay for such expenses as tiling, building maintenance, septic tank work, furnaces, water tanks and other miscellaneous expenses. When Mary bought her house it was repaired and the repairs were paid by the Trust.

Jennifer testified that she worked at Concordia Lanes about 30 hours per week for $11.50 per hour. The bowling alley had an LLC checking account since its inception in 1992. The plaintiffs wrote checks and made deposits on that account. She was aware of a separate account for the farm operations and that John, Steve, and Phyllis were authorized to sign on that account. John had attempted to close the bowling checking account in early 2008. (The record reveals that it was reopened shortly thereafter). The plaintiffs produce monthly accounting statements for Concordia. The records are kept in the office at the bowling alley and all LLC members have access to them.

Jennifer further testified that the LLC did not pay any expenses with regard to her personal residence. From 1999 through 2005, she never received any records from the farming operation, she only received an annual K-1 statement and a distribution check. She did not receive the entire tax return with details as to how the distribution was determined. In 1999 or 2000, ten acres were sold to Chris Catalani. The plaintiffs did not know that land was for sale, but they agreed to the sale price and received a distribution after the sale. She also received a distribution after Mary's husband paid off a loan he had taken from the Trust. She had recently learned that there had been a sale of an easement in February 2008. She had not been consulted or asked to consent to the easement. She did not receive an interim distribution on that sale. She did not object to the fairness of the price for any of the land sales.

In late 2001 she and her husband approached John about purchasing 20 acres of LLC land near Dawson Lake. They could not reach an agreement on price because John wanted to purchase and then develop land near the same parcel. John wanted to pay less per acre than he was charging Jennifer. John told her that he should get a lower price because he deserved it for working on the land all those years. In 2004, there was another deal to sell some Trust land. The plaintiffs did not sign the sales agreement because they learned that there was a third party involved. The LLC was selling at a lower price and another party was going to immediately resell the land for a higher price. That was when the plaintiffs realized that they could not trust John. Also in 2004, there was a lightning strike that damaged the scorers and other items at the bowling alley. The plaintiffs paid for the minor repairs out of Concordia's operating account. However, the LLC account was used to pay for replacement of the scorers, at a cost of $112,000.

On cross-examination, Jennifer acknowledged that her father set the bowling alley rent at $5,000 per month and nothing changed after the LLC was formed. Her house was not owned by the Trust but Phyllis's, Steve's and John's houses were owned by the Trust. She was aware that John, Steve and her mother were not paying rent for their houses. She acknowledged that there was no meeting or vote to determine whether or not the LLC should pay for replacement of the scorers at the bowling alley. Since the inception of the LLC, if an LLC asset had to be repaired or replaced, the LLC would pay. She acknowledged that over the years the LLC had paid for bowling alley expenses such as contract labor, freight, new carpet, roof, seats and railings, and pinsetters, and that meetings were never called to discuss whether the LLC should pay for those expenditures. She acknowledged that prior to 2005, the LLC members had never discussed rents.

David Watterson testified that he was the managing real estate broker for the farm service department of the National Bank and Trust Company of Sycamore. He performed a cash rent analysis of the Trust's farmland. He also did an income analysis and an analysis of the Farm Service Agency (FSA) payments from the U.S. Department of Agriculture (USDA). An FSA subsidy was an amount a farm operator receives for farming certain property. The FSA subsidy was a factor in determining the fair market cash rent for a particular farm. The higher the subsidy, the higher the rent. Watterson explained the process he used to complete his analysis. He used plat books for Boone County and the USDA's soil analysis website to calculate a productivity index for the various parcels of farmland. The productivity index allowed for a determination as to whether it was Class A, B, or C soil. He then referenced Bulletin 811 of the Farmland Assessment Law (FAL) to find out yield assigned for soil of a specific type. Bulletin 811 contained the highest yields that have been assigned to specific soils. He opined that the various parcels of farmland would rent at between $120 and $160 per acre per year. He also estimated rent on the grain storage bins and outbuildings on the Trust farms. Plaintiffs' Exhibit No. 33, that was admitted into evidence, was Watterson's written report. In his report, Watterson indicated that, in determining cash rent for the Trust farmland, he also considered cash rents in De Kalb County. At trial, he testified that the rents in De Kalb County would generally be slightly higher than in Boone County. On cross-examination, he acknowledged that often times rents in De Kalb County could be considerably higher than in Boone County.

Watterson testified that on a cash rent lease the landlord pays for items related to maintaining the property such as tiling, waterways and spillways, culverts, real estate taxes and insurance.

David O'Brien testified that he was employed for 30 years with the Northeastern Illinois Farm Business Farm Management. He educated farmers in keeping production and financial data. He worked with 20 to 30 farmers per year in Boone County. He assisted them with negotiating leases. He completed a soil analysis of the all the parcels of farmland owned by the Trust. He determined soil types using Bulletin 810 of the FAL, which was standard for the industry. Bulletin 811 set soil types according to a higher standard, equivalent to crop yields achieved by the top 16% of all farm operations in Illinois. It was better to refer to Bulletin 810 because he could not say whether the farmland at issue was in the top 16% of all farms in Illinois in terms of productivity. He opined that fair market cash rent for the farmland at issue, for the years 1999 through 2008, would be: $105, $105, $107, $108, $111, $113, $115, $113, $128, and $138 per acre. His opinion was based on the productivity index as well as his experience in assisting tenants and landlords negotiate cash leases in Boone County. Outbuildings and grain storage bins of the type located on the Trust farmland were normally included in the fair market rent of the farmland at no additional cost. On cross-examination, O'Brien testified that in a cash rent lease, the landlord was typically responsible for expenses such as lime, tiling, real estate taxes and insurance. He further testified that FSA payments would not necessarily increase rents on a cash rent farm; it depended on market conditions.

Deborah Nelson testified that she and her husband, Ronald Nelson, farmed about 520 acres, part of which they owned. They have never farmed or leased any of the Trust property. She worked at Concordia Lanes. She kept the books for Concordia from 1999 through 2005. Jennifer now maintained Corcordia's books. The plaintiffs and Phyllis were authorized to sign on the LLC bowling alley checking account. At one point the account was closed and the money was removed. She believed that John was responsible even though he was not a signatory on the account. The bowling alley also had a separate checking account for daily operations. From 1999 to the present, she did a summary of the income and expenses of the bowling alley for the LLC and it was sent to the farm. Prior to the litigation she had never seen a tax return for the LLC. She only received the K-1 statement with her distribution. She guessed that the farm records were in the office at her mother's house. She did not have access to the office, the locks were changed about three or four years earlier. Prior to this litigation, she had not received income statements or related financial records from the farm side of the LLC.

Deborah further testified that the scoring system at the bowling alley was damaged by lightning. The old scoring system had been paid for and owned by the LLC. The LLC paid for the new scoring system. The bowling alley did not have a written lease agreement and expenses paid by the LLC were established based on practice. Most minor repairs were paid by Concordia and major repairs were paid by the LLC. Although there were never formal meetings, when a major repair had to be paid out of the bowling LLC, there was discussion about it with either John, Steve or Phyllis. Checks were written out of the bowling alley LLC account for greater than $1,000 with only one signature.

Deborah testified that John ran the farming side of the LLC. The members never voted on the rental amount for the Trust farmland. She was never consulted or voted on the sale of the pipeline easement. She was aware that her mother, John, and Steve were living in Trust-owned houses rent free prior to the formation of the LLC. At the time the LLC was formed, she did not know what rent was being paid for the farmland and she did not ask. She was never consulted on the repairs to her mother's house or the expenses paid by John and Steve out of the LLC farm account. She never received any disclosures other than the K-1 statements. The LLC did not pay any taxes or expenses related to her personal residence.

Mary Gifford testified that she had worked 40 to 60 hours per week at the bowling alley since 1999. Prior to that she worked only part-time. She had helped on the farms over the years. The last time she worked on any of the farms was 1992. She normally received a distribution from the LLC following the completion of the annual K-1 statements. She remembered receiving a special distribution following the "Catalani" transaction. She did not remember receiving a distribution from the pipeline easement but she acknowledged that her last distribution from the LLC was twice the normal amount. She did not know who negotiated the pipeline easement, there was never a 2/3rd vote sell the easement, and she did not know the price for which it was sold. When Deborah was keeping the bowling alley records, Deborah would give a monthly statement to Phyllis of Concordia's revenue and expenses. An LLC statement for the bowling alley was completed once a year. At some point in the past, she remembered asking for tax returns for the LLC but she never received them.

Mary further testified that John ran the farm side of the LLC from 1999 until the present. She did not know what rent was being paid for the farmland. At some point in 2006, Steve called her to say that they needed to change the operating agreement to allow for the sale of land with 51% vote in favor rather than a 2/3rds vote. She trusted John to run the LLC until about 2002. At that time, John tried to sell some of the farmland and there was a third party involved, named Paul Johnson. When she and her sisters spoke with the attorney, he told them that John was involved with Johnson and intended to develop the parcel. Mary acknowledged that her mother told her that the LLC records were in the office at the farm. Mary testified, however, that the office was big and she would not have known where to look.

Steve Gallano testified that the plaintiffs were not consulted on the easement sale because they were not selling land and he believed that a 51% vote would suffice. His attorney told him that 51% would suffice and John and Phyllis both agreed. Steve believed the sale price was a good deal. Steve testified that he had always believed that a 2/3rd vote was necessary to sell or lease land. He acknowledged that a 2/3rd vote was not obtained to lease the farmland from 1999 until the present time. He did not get a 2/3rd vote because he just continued with past practice established by his father. There had never been discussions about farmland rental rates, what expenses would be paid by the landlord verses the tenant, or what the bowling alley would pay for rent. He, Phyllis and John all lived in LLC homes and the LLC paid the real estate taxes on those residences. He and John custom farm the Peterson farm, 353.8 acres, for Phyllis and get paid for that. He never contacted his sisters about extending the written leases. The LLC paid the real estates taxes on the farmland. He did not receive statements from the bowling alley side of the LLC but he had seen them. Records from the farm side of the LLC would have been available to the plaintiffs at the office at Phyllis's house. He did not believe the LLC should have had to pay to replace the scorers at the bowling alley. It should have been paid by Concordia. He never attempted to determine fair market rent for the farmland. Steve testified concerning checks that were written from the LLC farm account from 1999 until the present and the reasons for the expenses.

Phyllis Gallano testified that she had lived at her present home since 1952. Her children Steve, Debbie, John, Mary and Jenny were born in 1945, 1950, 1952, 1954, and 1968, respectively. The boys started helping on the farms at a very early age. After the Trust was created, Bud rented land from the Trust. The Trust paid insurance, taxes, repairs and maintenance on the farmland. Since Bud died, John and Steve have continued to farm the land. She paid the bills both before and after the LLC was formed. To her knowledge, the expenses had not changed after the LLC was formed. To an extent, she participated in decisions regarding the LLC expenses for the farmland. She identified various LLC farm account checks that had been written in the past and identified the reasons for the expenditures. In addition to expenses for maintenance on the farmland, there were many checks written for her own personal household repairs and improvements. There were also checks written for repairs and improvements to both John's and Steve's houses. Phyllis testified that she approved of paying all these expenses out of the LLC farm account.

Phyllis further testified that the records for the LLC are kept in her home and are available to everyone, including the plaintiffs. Had any of the plaintiffs asked to see the books, she would not have prevented it. She acknowledged that a code was needed to enter the office. She gave the code to her granddaughter. She assumed that the plaintiffs knew the code. The plaintiffs never complained about the rents being paid for the farmland or the expenses of the LLC.

Finally, Phyllis testified that John and Steve negotiated the price for the pipeline easement and she approved. She, through Gallano Farms, rented the Peterson farm (350 acres) and paid $80/acre rent. She paid John and Steve the going rate to farm the Peterson farm for her. No one ever complained to her about it. Rent was never paid on the buildings. There was no set date for rental payments. The LLC paid for real estate taxes and all the expenses related to land ownership. She paid the expenses related to working the farm. The LLC had a farm checking account and a bowling alley checking account. The plaintiffs could not sign checks on the LLC farm account. Phyllis testified that she was not authorized to sign checks for the LLC bowling alley checking account. She never discussed farmland rental prices with her daughters and the LLC never held a meeting to discuss that issue. There was never a meeting to discuss the various expenses that would be paid by the LLC. There were never any meetings to discuss the rent and expenses of the bowling alley. The LLC farm checking account had never required more than one signature, even on a check written on an amount greater than $1,000.

Frank Sheley testified that he was a licensed commercial real estate agent. He handled commercial real estate in Boone County. He performed an evaluation of the fair market rent for the Concordia Lanes bowling alley. Because there was no comparable property in Boone County he compared it to local retail space. In his opinion, a fair market rent for the bowling alley was between $8 and $10 dollars per square foot annually. He believed the bowling alley was in the range of 11,000 square feet. On cross-examination, he acknowledged that he had not attempted to do an analysis of the lease value based on the capitalization approach. The capitalization rate in 2009 was between eight and nine percent. If an asset was worth $500,000 and you applied an 8% capitalization rate, the rent would be $40,000 per year. Annual rent divided by the capitalization rate would give an estimate of the building's fair market value. Sheley testified that he had not performed an analysis of the fair market value of the Concordia building.

On November 18, 2009, following the bench trial, the trial court issued a memorandum of decision. The trial court found that the estoppel defense was inapplicable. The trial court noted that the only conduct upon which the defendants could have detrimentally relied was, perhaps, the plaintiffs' silence. However, the trial court noted that estoppel can only arise from a party's silence where the party sought to be estopped had greater knowledge of the facts. The trial court found that there was no basis to find that the plaintiffs had greater knowledge than the defendants about the challenged transactions. With respect to waiver, the trial court found that it could be a proper defense to breach of contract but not to breach of fiduciary duty, as there was no authority to suggest that a fiduciary's duties could be waived.

With respect to the claim for breach of contract, the trial court noted that the plaintiffs had not asserted any specific provision of the operating agreement that had been violated, but had argued that actions were taken without formal votes and meetings. The trial court found that the plaintiffs had waived their claim for breach of contract. The trial court found that the LLC effectively operated as two separate LLCs, the farm and the bowling alley. Corporate formalities were not observed in that neither side ever called a meeting, there was little financial reporting, and both sides wrote checks for more than $1,000 with only one signature.

The trial court found that there was no breach of fiduciary duty as to any identified land sale transactions that were never consummated, because there were no damages. As to the easement transaction, the trial court noted that the operating agreement was unclear as to whether an easement sale would require a two-third vote of the LLC members. Regardless, the trial court found no actionable conduct relating to the easement sale because the plaintiffs had not suffered injury. The trial court found that, based on the evidence, fair market value was received for that transaction.

The trial court further found that the defendants had not breached their fiduciary duty by renting the farmland from 1999 through October 31, 2003 at $80/acre, as they had a pre-existing contractual right to do so under the written leases. The trial court found that the defendants had not entered new transactions on behalf of the LLC. To the extent the plaintiffs argued that the defendants failed to pay even the $80/acre, the trial court further found that the evidence supported a determination that the defendants had in fact paid that rent.

With respect to the farmland rental after the written leases expired, the trial court found that the defendants had breached their fiduciary duty. The trial court noted that when a tenant continues to pay and a landlord continues to accept the same rental after a lease expires, a period-to-period tenancy is created. The trial court found that this was, nonetheless, a new lease transaction undertaken by the defendants on behalf of the LLC. The failure to pay fair market rent was a breach of fiduciary duty.

In determining damages, the trial court noted that Watterson's approach for calculating fair market rent suffered from a number of deficiencies and that O'Brien's testimony was more reliable. O'Brien's testimony established that fair market rent for 2004 through 2008 was $113, $115, $113, $128, and $138 per acre, respectively. The trial court found that the total rent underpayment through 2008 was $296,388.46. The trial court set the rental amount to be paid for 2009 at $149/acre.

The trial court also found O'Brien's testimony credible that outbuildings and grain storage facilities located on rented farmland are usually included as part of renting the acreage. The trial court found that the evidence supported the conclusion that Phyllis's and Steve's homes would commonly be included in the rental of the farmland on which they sit. The trial court noted that John's house was not located on any of the rented farmland. However, with respect to all three houses, the outbuildings, and the grain storage facilities, the trial court found that even if the plaintiffs were entitled to rent for these structures, the plaintiffs failed to provide sufficient evidence to form the basis for an award of damages on this point.

The trial court also rejected the plaintiffs' argument that they could recover from John and Steve for transactions undertaken by Phyllis under the theory of joint and several liability. The trial court found that the plaintiffs had not included pleadings for such recovery in their fifth-amended complaint. Alternatively, the trial court noted that this could be viewed as an issue of proximate cause. The plaintiffs were not seeking damages for the fact that their mother lived rent free in an LLC-owned house. As such, the trial court questioned whether the plaintiffs would have objected had this fact been brought to their attention earlier. Accordingly, the trial court declined to assess the expenditures for Phyllis' household improvements against John and Steve.

The trial court found that the testimony of Watterson and O'Brien established that tiling, lime, placing a culvert, and taxes and insurance are normally landlord expenses. However, the trial court found LLC expenditures for improvements to John's and Steve's homes to be improper. The trial court attached to its memorandum a document entitled "Analysis of Particular Challenged Transactions." The trial court stated that the attachment reflected its analysis of particular expenditures made by or on behalf of Steve or John. The trial court found that transactions totaling $32,802 were improper and assessed those against John and Steve. The trial court declined to award prejudgment interest. The trial court found that such an award would not promote equity because the plaintiffs had tolerated the division and manner of practice in managing the Trust properties.

The trial court denied the plaintiffs' claim for an accounting. The trial court found that the plaintiffs had not demonstrated that they had no adequate remedy at law, a necessary element to warrant an accounting. Furthermore, the court found that even if the plaintiffs had no adequate remedy at law, it would still not exercise its discretion in favor of an accounting. The trial court noted that until the litigation commenced in 2005, the plaintiffs had access to all the books and records of the LLC. Second, the trial court found that the plaintiffs essentially had their accounting via this lawsuit. The trial court noted that there had been extensive discovery and a two-week trial.

Finally, the trial court denied the defendants' counterclaim. The trial court found the breach of contract claim waived for the same reason the plaintiffs' breach of contract claim was waived. The trial court also stated that it did not find the defendants' evidence concerning the fair market value of the bowling alley persuasive. The trial court noted that the total damage award was $327,190.46 and awarded each plaintiff an amount in proportion to their interest in the LLC. On December 18, 2009, the trial court entered a final judgment order incorporating its memorandum of decision.

On January 11, 2010, the defendants filed a motion to reconsider. The defendants argued, in relevant part, that the trial court erred in including, in its calculation of the total rental underpayment, the 353.8 acres of farmland (the Peterson farm) rented by Phyllis d/b/a Gallano farms. On January 13, 2010, the plaintiffs filed a notice of appeal. The case was docketed in this court as case number 2—10—0055. The defendants subsequently filed a motion to stay that appeal pending the resolution of their motion to reconsider. On March 1, 2010, this court granted the motion to stay.

On March 24, 2010, the trial court granted the defendants' motion for reconsideration, in part, and reduced the damage award by $585. A transcript from the hearing on the defendant's motion is not included in the record on appeal and, therefore, the basis for the reduction is not clear. The defendants allege that it was some type of mathematical error. The trial court awarded damages as follows: Deborah was awarded $48,853.57, Jennifer was awarded $42,339.76, and Mary was awarded $35,825.95. On April 7, 2010, the plaintiffs filed a timely notice of appeal. On April 20, 2010, the defendants, John and Steve, filed a timely notice of cross-appeal. The case was docketed in this court as case number 2—10—0355. On June 3, 2010, this court granted the plaintiffs' motion to lift the stay in case number 2—10—0055 and to consolidate the cases for appeal.

ANALYSIS

On appeal, the plaintiffs argue that the trial court erred in: (1) finding that the defendants had not breached their fiduciary duty by leasing farmland at less than fair market value from 1999 through 2003; (2) allowing the defendants to retain part of the profits that resulted from the defendants' breach of fiduciary duty; (3) denying an accounting; (4) failing to dissociate John and Steve from the LLC as an equitable remedy; (5) failing to include Phyllis's personal expenses that were charged to the LLC in the damage award because John and Steve were jointly and severally liable for those damages; (6) finding that the defendants had not breached the operating agreement; and (7) calculating damages. On cross-appeal, the defendants argue that the trial court erred in: (1) finding that they breached their fiduciary duty in leasing the farmland between 2004 and 2008; and (2) its calculation of damages by including rents on farmland leased by Phyllis d/b/a Gallano Farms.

The plaintiffs' first contention on appeal is that the trial court erred in finding that the defendants did not breach their fiduciary duty by leasing Trust farmland at less than fair market value from 1999 through 2003. The plaintiffs argue that the trial court only considered the defendants' contractual duties but failed to address the defendants' concurrent fiduciary duties to the members of the LLC.

Members in a member-managed limited liability company owe each other the fiduciary duties of loyalty and care. *Anest v. Audino*, 332 Ill. App. 3d 468, 475 (2002); 805 ILCS 180/15—3(a) (West 2008). The duty of loyalty requires a member to account to the company and to act fairly in conducting the company's business. 805 ILCS 180/15—3(b) (West 2008). A member's duty of care "is limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of the law." 805 ILCS 180/15—3(c) (West 2008). Moreover, a member of a member-managed limited liability company shall discharge his duties consistent with the obligation of good faith and fair dealing. 805 ILCS 180/15—3(d) (West 2008). In the present case, the parties do not dispute that, as members of a member-managed LLC, they shared a fiduciary relationship and owed each other the duties of loyalty, care, and good faith and fair dealing.

To prevail on a claim for breach of fiduciary duty, the plaintiffs were required to prove the existence of a fiduciary duty, that the defendants breached this duty, and that they suffered damages proximately caused by that breach. *Neade v. Portes*, 193 Ill. 2d 433, 444 (2000). We review the trial court's determination as to the alleged breach of fiduciary duty pursuant to a manifest weight of the evidence standard of review. *Bernstein and Grazian, P.C. v. Grazian and Volpe, P.C.*, 402 Ill. App. 3d 961, 976 (2010). Under this standard, we may only conclude that the trial court's determination was against the manifest weight of the evidence if an opposite conclusion is clearly apparent or the trial court's findings appear to be unreasonable, arbitrary, or not based on the evidence. *Id.*

The trial court found that the defendants did not breach their fiduciary duty by renting the farmland at issue for $80/acre from 1999 through 2003 because it was their contractual right to do so and there was no new transaction on behalf of the LLC. This determination was not against the manifest weight of the evidence. The evidence showed that the lease rates for the subject farmland were governed by preexisting written leases, written by Bud Gallano in 1996. The trial court found, and the plaintiffs do not dispute on appeal, that these written leases were valid and binding for the years 1999 through 2003. The leases were created prior to the creation of the Gallano LLC and before the defendants' fiduciary duties arose therefrom.

The plaintiffs essentially argue that the defendants' fiduciary duty outweighed their contractual right to lease the land at the rates set in the written leases. In so arguing, the plaintiffs rely on cases such as *Labovitz v. Dolan*, 189 Ill. App. 3d 403 (1989), *Anest v. Audino*, 332 Ill. App. 3d 468 (2002), and *Bakalis v. Bressler*, 1 Ill. 2d 72 (1953). In *Labovitz*, the reviewing court, in reversing a motion to dismiss, held that even though the partnership agreement granted the general partner broad discretion regarding the distribution of cash to the limited partners, the general partner could still be found to have breached his fiduciary duty by using economic coercion to cause the limited partners to sell their interests to him at a bargain price. *Labovitz*, 189 Ill. App. 3d at 404. In *Anest*, the defendant was found to have breached his fiduciary duty because he secretly usurped a distributorship offer directed to a company in which he had a minority interest and management responsibilities. *Anest*, 332 Ill. App. 3d at 478. In *Bakalis*, the defendant was found to have breached his fiduciary duty where he secretly purchased the building in which his partnership's bakery business was leased and concealed the negotiations from his partner. *Bakalis*, 1 Ill. 2d at 78-79. We find the defendant's reliance on these cases unpersuasive. In *Labovitz*, the defendant used coercion to force the plaintiffs to sell their interest. In *Anest* and *Bakalis*, the defendants engaged in secretive activity that was to their own benefit and to the detriment of the other members of the company.

In the present case, the defendants did not engage in any such actions. The defendants testified that the LLC business records were available to the plaintiffs at the farm office at Phyllis' house. There was no evidence that the defendants attempted to conceal those records. The plaintiffs argue that the defendants breached their fiduciary duty because they did not disclose the leases to the plaintiffs. However, the leases were written by Bud. John and Steve testified that they were not even aware of the leases until the litigation commenced. At that time, Steve found the leases as he was looking through the farming paperwork.

The plaintiffs also argue that the defendants breached their fiduciary duty because they stood on both sides of the lease transaction. However, the defendants did not negotiate the written leases on behalf of the LLC; rather, they were executed by Bud in his capacity as major beneficiary and trustee of the Trust. When the LLC was formed, it was a successor to those leases because of its position as beneficiary of the Trust. The defendants were not involved in the lease transactions in their capacities as fiduciaries of the LLC. Accordingly, the defendants cannot be held to have breached a fiduciary duty for renting the farmland at $80/acre under the written leases.

The plaintiffs' second contention on appeal is that the trial court erred in allowing the defendants to retain their share of the LLC profits that resulted from the defendants' breach of fiduciary duty and that the trial court should have disgorged the defendants of such profits. Specifically, after the trial court determined the total damages incurred by the LLC, it only awarded the plaintiffs an amount in proportion to their collective 39% interest in the LLC. The plaintiffs argue that they are entitled to 100% of the damage award.

The issue of damages is a question of fact and, accordingly, a trial court's finding of damages will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Fieldcrest Builders, Inc. v. Antonucci*, 311 Ill. App. 3d 597, 607 (1999). A damage award is against the manifest weight of the evidence only where it is apparent that " 'the trial court ignored the evidence or that its measure of damages was erroneous as a matter of law.' " *Fieldcrest*, 311 Ill. App. 3d at 607, quoting *Meade v. Kubinski*, 277 Ill. App. 3d 1014, 1018 (1996). "[A] fiduciary may not retain any profits obtained through a breach of duty." *Regnery v. Meyers*, 287 Ill. App. 3d 354, 364 (1997).

The plaintiffs rely on *Regnery* in arguing that the defendants were improperly allowed to retain profits resulting from their breach of fiduciary duty. In *Regnery*, the defendants, corporate officers, breached their fiduciary duty by selling 600 shares of company stock to themselves at less than market value. *Id.* at 358. The defendants thereafter received $195,000 in dividends and made a sales profit of $4,359,900 from the 600 wrongfully acquired shares. *Id.* at 359. The trial court awarded the plaintiffs, who were 35.71% stockholders in the subject corporation, 35.71% of those profits. However, the reviewing court found that it would be inequitable for the defendants to retain the profits gained from their breach and directed the trial court to order disgorgement of those profits. *Id.* at 366.

Regnery is instructive to the extent it shows that it is proper to require a defendant to disgorge profits which were obtained as a direct result of the defendant's breach of fiduciary duty. However, the facts in this case are not analogous to those in *Regnery.* Under the facts in this case, the profits obtained as a result of the defendants' breach were 39% of the total damages because the defendants would have been entitled to 61% anyway, based on their interest in the LLC, had they paid the proper amount of rent and expenses. In other words, the profit realized or the revenue gained by the defendants was the opportunity to hold back the plaintiffs' 39% share of funds that should have been paid to the LLC. Accordingly, the defendants adequately disgorged their profits and the trial court's determination was not against the manifest weight of the evidence.

The plaintiffs' third contention on appeal is that the trial court abused its discretion in denying an accounting. The plaintiffs argue that the trial court erred in finding that their claim for an accounting failed because they had not shown the lack of an adequate legal remedy. The plaintiffs contend that because they had proved a breach of fiduciary duty, they were not required to show that they lacked an adequate remedy at law. Additionally, the plaintiffs argue that the trial court erred in finding that they had access to all the books and records of the LLC and that they had a duty to inquire as to those records. Rather, the plaintiffs argue that the defendants had a duty to disclose the records and did not do so.

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. *Id.* An accounting should not be ordered if the circumstances make it either unnecessary or improper. *Id.* Whether or not to grant an accounting is a matter within the trial court's discretion. *Newton v. Aitken*, 260 Ill. App. 3d 717, 722 (1994).

Under the circumstances in the present case, we cannot say the trial court abused its discretion in denying the plaintiffs' claim for an accounting. As stated by the trial court, the plaintiffs have essentially had their accounting through this lawsuit. There was extensive discovery including the production of all LLC records and a two-week trial at which the parties addressed whether the plaintiffs were entitled to repayment as a result of any improper accounting. Accordingly, allowing the matter to proceed to an additional hearing for an accounting was no longer necessary. See, *e.g.*, *Coughlin v. SeRine*, 154 Ill. App. 3d 510, 516 (1987) (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). Moreover, it is not an abuse of discretion to deny an accounting when the party seeking it "had full access to all pertinent records and documents." *Id.* at 722-23. The trial court's finding that the plaintiffs had access to all pertinent records and documents was not against the manifest weight of the evidence. Phyllis, John and Steve all testified that the LLC farm records were kept in the office at Phyllis's house and that the plaintiffs could have looked at the records at any time. Although a code had been installed to enter the office a few years earlier, Phyllis testified that she gave the code to a granddaughter, one of the plaintiffs' daughters, and that she believed all the plaintiffs knew the code. There was no evidence that the plaintiffs were ever denied access to the office.

The plaintiffs rely on *Beerman v. Graff*, 250 Ill. App. 3d 632 (1993), to argue that the defendants had a duty to produce the records and that whether they had full access to the records is irrelevant. *See id.* at 638 (a defendant partner in an accounting action must show that he has made full disclosure and not dealt secretly behind his partner's back). However, *Beerman* is inapposite.

In *Beerman*, the fiduciary occupied an apartment rent free for more than a decade without the knowledge of the other partners. *Id.* at 638. Here, the plaintiffs had full knowledge that the defendants were farming the subject land and living in the houses owned by the LLC. Moreover, section 6.05 of the operating agreement only required the defendants to maintain records and make them available for inspection. It did not require that copies of records be sent to LLC members at their individual addresses.

Finally, the parties dispute whether or not current case law requires proof of an inadequate remedy at law in order to obtain an accounting. However, because we may affirm on any basis in the record (*Padilla v. Vazquez*, 223 Ill. App. 3d 1018, 1027 (1991)), we need not address this issue. Whether or not the plaintiffs had to show the inadequacy of legal remedies, for the reasons stated above, the trial did not abuse its discretion in denying their claim for an accounting.

The plaintiffs' fourth contention on appeal is that the trial court erred in denying equitable relief as a remedy for the defendants' breach of fiduciary duty. Specifically, in the prayer for relief of the claim for breach of fiduciary duty, the plaintiffs requested that the trial court "order the removal and/or suspension of John Gallano's and Steve Gallano's member authority as to the GALLANO LLC." We find this contention forfeited for purposes of appeal. Although the plaintiffs included this request in their prayer for relief, the plaintiffs had not established a basis for such relief either in the complaint or at trial. The plaintiffs cited section 35—45(6) of the Limited Liability Company Act (805 ILCS 180/35—45 (West 2008)), allowing for expulsion of a member by judicial determination, for the first time in their closing trial brief. At trial, however, the plaintiffs never argued as to the appropriate factors that needed to be proven to warrant the requested equitable relief or how those factors were met in this case. During closing argument, the plaintiffs requested that the trial court find in their favor on damages and have a subsequent hearing on attorney fees, prejudgment interest, and equitable relief. Specifically, the plaintiffs stated that the trial court should "ask us to come back and see what we believe the Court should do concerning voting rights of John and Steve." This was insufficient to preserve the issue for appeal. *See Busch v. Graphic Color Corporation*, 268 Ill. App. 3d 763, 766 (1995) (claim forfeited on appeal where, at trial, the plaintiff made only brief mention during argument and did not offer evidence in support of contention).

The plaintiffs' fifth contention on appeal is that the trial court erred in not including Phyllis' improper expenses in the damage award. The plaintiffs note that the trial court had found that John and Steve were not liable as to any breaches that benefitted Phyllis because the plaintiffs were not requesting relief from Phyllis. The plaintiffs argue that John and Steve are jointly and severally liable for any breaches that benefitted Phyllis and that the defendants could have asserted a cross-claim for contribution. The plaintiffs argue that their failure to make a claim against their mother did not exonerate her and that there is no law requiring them to sue all joint tortfeasors.

Fiduciaries who join in a breach of duty are jointly and severally liable. *See Cherney v. Soldinger*, 299 Ill. App. 3d 1066, 1072 (1998). A third party's inducement of, or knowing participation in a breach of fiduciary duty by an agent is a wrong against the principal which may subject the third party to liability. *Village of Wheeling v. Stavros*, 89 Ill. App. 3d 450, 454 (1980). Under Illinois law, it is possible for one to bring an action against a person or entity that colludes in or induces a breach of fiduciary duty. *Appley v. West*, 832 F.2d 1021, 1030 (7th Cir.1987).

Nonetheless, the trial court did not err in excluding Phyllis's improper household expenses from the damage award. The trial court correctly noted that the plaintiffs' fifth-amended complaint did not allege any wrongdoing by Phyllis, for which either John or Steve could be jointly or severally liable. The plaintiffs' fifth-amended complaint alleged only that John breached his fiduciary duty and that Steve participated or consented to those actions. The plaintiffs did not allege that Phyllis breached her fiduciary duty by paying for improper household expenses out of the LLC account or that John and Steve participated in or consented to any such breach of fiduciary duty by Phyllis.

Moreover, the trial court noted that this could also be viewed as an issue of proximate cause. As stated above, to prevail on a claim for breach of fiduciary duty, a plaintiff is required to prove that any such breach proximately caused his or her injury. *Neade*, 193 Ill. 2d at 444. To the extent that John or Steve could be liable for participating in or consenting to any breach by Phyllis, the plaintiffs cannot show that such breach was the proximate cause of any injury. The trial court found that the plaintiffs had not shown that, had John or Steve informed the plaintiffs that Phyllis was using LLC funds to pay for personal household expenses, they would have objected. This determination was not against the manifest weight of the evidence. The plaintiffs' fifth-amended complaint specifically stated that the only reason Phyllis was named in the complaint was due to a trial court order requiring her to be named as a party. The plaintiffs were not seeking damages for the fact that their mother lived rent free in an LLC property. In their closing trial brief, the plaintiffs only requested damages for unpaid household rent from John and Steve. Accordingly, we cannot say that the trial court erred in excluding Phyllis' improper household expenses from the damage award.

The plaintiffs' sixth contention on appeal is that the trial court erred in finding that the defendants had not breached the operating agreement. The plaintiffs argue that the defendants breached the operating agreement by usurping all management control of the farming operations (even though the operating agreement stated that it was to be managed by all members), by being the sole signatories on the farming checking account, and by not furnishing records. Additionally, the plaintiffs argue that the defendants breached the operating agreement because the integration clause superseded the written leases and, therefore, the defendants were required, pursuant to section 5.02(g) of the agreement, to get an affirmative vote of members holding at least two-thirds interest in the LLC before leasing land at $80/acre. If the written leases are controlling, the plaintiffs argue that the defendants breached the written leases by paying for tiling, lime and other non-lease expenses and by not paying rent in April as required by the written leases. The plaintiffs further argue that the defendants breached section 5.02(f) of the operating agreement when they sold a pipeline easement without an affirmative vote of members having two-thirds interest. Whether a breach of contract has occurred is generally a question of fact which will not be disturbed unless the finding is against the manifest weight of the evidence. *Mohanty v. St. John Heart Clinic, S.C.*, 225 Ill. 2d 52, 81 (2006).

The trial court's determination that the defendants had not breached the operating agreement was not against the manifest weight of the evidence. "Parties to a contract have the power to waive provisions placed in the contract for their benefit, and such a waiver may be established by conduct indicating that strict compliance with the contractual provisions will not be required." *Suburban Auto Rebuilders, Inc. v. Associated Tile Dealers Warehouse, Inc.*, 388 Ill. App. 3d 81, 91 (2009). In *Kern v. Arlington Ridge Pathology, S.C.*, 384 Ill. App. 3d 528 (2008), a plaintiff shareholder and director sued the remaining directors claiming that they breached their fiduciary duty by trying to amend the corporation's bylaws without a quorum or the approval of 80% of the shareholders, as required by the bylaws. *Id.* at 532-33. The *Kern* court held that because the corporation had not adhered to the bylaw requirements for six years, the parties had essentially abrogated those requirements. *Id.* at 532.

Similarly, in the present case, the plaintiffs have waived their claim that the defendants breached the operating agreement by usurping all management control of the farming operations, by being the sole signatories on the farming checking account, and by not furnishing records. The evidence showed that the plaintiffs essentially ran the bowling alley without meetings, were the sole signatories on the LLC bowling alley checking account, signed checks over $1,000 with only one signature, and only sent annual LLC records for the bowling alley to Phyllis to be put in the office at her house. Furthermore, section 6.05 of the operating agreement does not require the defendants to furnish records, only to maintain the company's books and make the books available for inspection. Phyllis testified that the books were always available to anyone at the farm office at her house.

Additionally, the plaintiffs have forfeited their arguments that the defendants had breached any specific provision of the operating agreement because their complaint failed to allege violations of any specific provisions of the agreement. *Eagan v. Chicago Transit Authority*, 158 Ill.2d 527, 534 (issue waived where the plaintiff failed to raise it in his complaint and did not amend his complaint to include it). Even absent forfeiture, the plaintiffs' arguments are without merit.

The plaintiffs argue that the defendants were required, pursuant to section 5.02(g) of the operating agreement, to get an affirmative vote of members with at least a two-thirds interest before leasing land at $80/acre. However, as explained above, the defendants did not execute the written leases. The plaintiffs argue that the integration clause in the operating agreement superseded the written leases. The integration clause, section 13.015 of the operating agreement, stated only that the operating agreement "supersedes all agreements previously made between the parties." The written leases were between the Trust and Gallano Ltd., J&S, and Gallano Farms. As such, because the written leases were not between the parties to the operating agreement, the agreement did not supersede the written leases.

The plaintiffs also argue that an affirmative two-thirds vote was required for leasing the land after the written leases expired. However, the evidence showed that the defendants did not execute new written leases. When the written leases expired, a period-to-period tenancy was created that was governed by the terms of the original written leases. See *Roth v. Dillavou*, 359 Ill. App. 3d 1023, 1027 (2005) (acceptance of monthly rental payments created a month-to-month tenancy that was governed by the terms of the original lease agreement). The defendants therefore did not execute new written leases and cannot be said to have breached the operating agreement for failing to obtain a two-thirds vote in favor. To the extent the plaintiffs argue that the defendants breached the written leases, this argument is also forfeited as it was not included in their fifth-amended complaint. *Id.*

Finally, the plaintiffs argue that the defendants breached the operating agreement by selling a pipeline easement without an affirmative two-thirds vote of the members. However, even if the operating agreement required a two-thirds vote, the plaintiffs have failed to establish any damages. *See W.W. Vincent and Co. v. First Colony Life Insurance Co.*, 351 Ill. App. 3d 752, 759 (2004) (to state a claim for breach of contract, a plaintiff must show, in part, resultant damages). The trial court found that the evidence supported a determination that fair market value was received and we decline to disturb this determination. *Flynn v. Cohn*, 154 Ill.2d 160, 166 (1992) (the trial judge is in the best position to resolve conflicts in the testimony). Moreover, the plaintiffs never challenged either the sale or the sale price of the easement, only the fact that there was never a vote on the transaction. Accordingly, the trial court did not err in denying the plaintiffs' claim for breach of the operating agreement.

The plaintiffs' final contention on appeal is that the trial court's damage award was against the manifest weight of the evidence. At the outset, we note that this contention is forfeited for failure to provide sufficient cites to the record or any citation of authorities. See Ill. S. Ct. R. 341(h)(7) (eff. Sept. 1, 2006); *Poplar Grove State Bank v. Powers*, 218 Ill. App. 3d 509, 516-17 (1991) (an appellate court is entitled to have an issue defined clearly and is not a depository in which an appellant may dump the burden of argument and research; an issue that an appellant raises only inadequately is waived). Even absent forfeiture, this contention is without merit.

The plaintiffs first argue that the trial court erred in finding that $80/acre for rent was fair from 1999 through 2003. However, the trial court did not find that $80/acre was fair, only that the written leases controlled the rental rate from 1999 through 2003. As stated above, this was not against the manifest weight of the evidence. The plaintiffs argue that the trial court allowed improper expenses that effectively reduced the net rent paid. However, with any rental property it is always possible that expenses will exceed rental income.

The plaintiffs argue that the trial court refused to consider the amount of FSA subsidies received as a factor in determining fair market rent. However, both experts testified regarding the FSA subsidies. We acknowledge that Watterson opined that the FSA subsidies would have a significant impact on the fair market rents. O'Brien's testimony showed that, in his opinion, FSA subsidies, absent extreme circumstances, would not have a significant impact on fair market rent. Although the trial court found O'Brien's testimony more reliable, that is not an indication that the trial court failed to consider the FSA subsidies. This contention is therefore without merit.

The plaintiffs argue that the trial court erred in assigning no rental value to the houses and grain storage facilities on the farmland. However, this determination was not against the manifest weight of the evidence. O'Brien testified that houses and grain storage facilities on farmland are normally included in the fair market rent of the land. The trial court specifically stated that it found O'Brien's testimony on this point more credible that Watterson's testimony. We decline to disturb the trial court's credibility determination. *Flynn*, 154 Ill.2d at 166 (the trial judge is in the best position to determine the credibility of the witnesses).

Finally, the plaintiffs argue that the trial court improperly rejected testimony by Ronald Nelson that his bid of $190/acre on farmland similar to the Trust farmland was rejected as too low. However, the admission of evidence is within the sound discretion of the trial court and a reviewing court will not reverse the trial court unless that discretion was clearly abused. *Gill v. Foster*, 157 Ill. 2d 304, 312-13 (1993). The trial court did not abuse its discretion. The plaintiffs were required to show that the land Nelson bid on was of similar quality to the Trust land at issue. *See City of Evanston v. Piotrowicz*, 20 Ill. 2d 512, 522 (1960) (in order to use comparable sales as evidence of value, the party must show that they are similar both in character and locality to the land in controversy)). The trial court found that the plaintiffs had not laid this foundation and the plaintiffs offer no argument on appeal as to why this determination was in error. Moreover, Nelson's testimony was only that he was "told" that his bid was too low. The trial court properly struck this testimony as hearsay. *See Laughlin v. France*, 241 Ill. App. 3d 185, 192 (1993) (out-of-court statements offered to prove the truth of the matter are generally inadmissible).

On cross-appeal, the defendants argue that the trial court erred in finding that they were liable for breach of fiduciary duty for leasing farmland below the market rate from 2004 through 2008. The defendants contend that the plaintiffs were equitably estopped from asserting such a claim. Specifically, the defendants argue that even after the formation of the LLC, the plaintiffs, in their own management of the bowling alley, engaged in the same conduct that they complain constitutes a breach by the defendants. The parties continued to run the bowling alley and the farm operations in the manner established by their father. The defendants argue, therefore, the plaintiffs should be estopped from claiming a breach of fiduciary duty.

> "To establish equitable estoppel, the party claiming estoppel must demonstrate that: (1) the other person misrepresented or concealed material facts; (2) the other person knew at the time he or she made the representations that they were untrue; (3) the party claiming estoppel did not know that the representations were untrue when they were made and when that party decided to act, or not, upon the representations; (4) the other person intended or

> reasonably expected that the party claiming estoppel would determine whether to act, or not, based upon the representations; (5) the party claiming estoppel reasonably relied upon the representations in good faith to his or her detriment; and (6) the party claiming estoppel would be prejudiced by his or her reliance on the representations if the other person is permitted to deny the truth thereof." *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill.2d 302, 313-14 (2001).

Whether or not a party has met its burden of proof with respect to estoppel is a question of fact for the trial court to determine. *Lawrence v. Board of Education*, 152 Ill. App. 3d 187, 201 (1987). "A court of review will not reverse [a] trial court's decision with respect to estoppel unless it is against the manifest weight of the evidence." *Id.*

The trial court's determination, finding the affirmative defense of equitable estoppel inapplicable to the facts in this case, was not against the manifest weight of the evidence. The defendants do not argue that the plaintiffs misrepresented or concealed material facts, only that the plaintiffs failed to object to the manner in which the LLC was operated. Estoppel can arise from a party's silence "only where there is knowledge of the facts on one side and ignorance on the other." *Trossman v. Philipsborn*, 373 Ill. App. 3d 1020, 1042 (2007). There is no evidence in the present case to find that the plaintiffs had greater knowledge than the defendants of any facts. Moreover, the defendants did not demonstrate that they relied on the plaintiffs' silence to their detriment. Although the defendants argue that the plaintiffs also failed to pay fair market rent for the bowling alley property, the trial court found their evidence on the issue unpersuasive. In contrast, the evidence clearly showed that the defendants were not paying fair market rent for the subject farmland. Accordingly, any reliance on the plaintiffs' silence was a benefit to the defendants, not a detriment. Finally, there is no evidence that the plaintiffs' silence was intended to induce the defendants to act in any particular manner. Accordingly, the defendants may not rely on the theory of equitable estoppel.

The defendants' second and final contention on cross-appeal is that the trial court erred in its calculation of damages. In calculating the farmland rental under-payments, the trial court included the farmland that was rented to Phyllis d/b/a Gallano Farms. The defendants argue that this is inconsistent with the trial court's determination that the plaintiffs could not recover damages related to transactions that benefitted Phyllis. In its memorandum of decision, the trial court explained that once the written leases expired, the continuing rental payments were a new transaction, and that Steve and John were on both sides of that transaction. John and Steve farmed all the land at issue and the rents were set for all the land collectively. Accordingly, the underpayment of rent on the land farmed by Phyllis d/b/a Gallano Farms not only benefitted Phyllis, but it also was a benefit to John and Steve as it allowed the rent on the farmland they rented to remain undisturbed. This is not inconsistent with the trial court excluding Phyllis's personal expenses that were improperly paid by the LLC from the damage award. The payment of Phyllis's personal expenses from the LLC farm checking account was solely beneficial to Phyllis and had no personal benefit for John and Steve. Moreover, although the trial court found that the evidence supported a determination that the plaintiffs would not have objected to the LLC paying for Phyllis' personal household expenses, there is no similar evidence showing that they would not have objected to the $80/acre rent had they known. As such, the trial court's damage calculation was not against the manifest weight of the evidence.

For the foregoing reasons, the judgment of the circuit court of Boone County is affirmed.

Affirmed.

JUSTICE ZENOFF, concurring in part and dissenting in part:

I respectfully dissent from that part of the majority's Order that affirms the trial court's denial of plaintiffs' claim for an accounting. For the following reasons, I believe the trial court abused its discretion.

In holding that the plaintiffs had to establish that they had no adequate remedy at law in order to be entitled to an accounting, the trial court applied the general rule. See *Mann v. Kemper Financial Companies, Inc.*, 247 Ill. App. 3d 966, 980 (1992) ("To sustain an action for accounting in equity, the complaint must allege the absence of an adequate remedy at law ***."). However, the exception to the general rule applies here: "***[T]here is an exception for when an accounting action is sought based upon a breach of fiduciary duty so that a plaintiff may proceed with the action." *Mann*, 247 Ill. App. 3d at 980; *People ex rel. Hartigan v. Candy Club*, 149 Ill. App. 3d 498, 501 (1986) ("Under [the] exception an accounting may be ordered even though there is no showing made as to the adequacy of legal remedies and there is no duty on the plaintiff to plead their inadequacy."). Contrary to the trial court's belief, this court did not decline to recognize the exception in *Kennedy*. The court in *Kennedy* was addressing what the plaintiff in that case had to show initially to be entitled to an accounting. *Kennedy* is inapposite to the present facts on this point.

I cannot agree with the majority that plaintiffs obtained their accounting through this lawsuit, or that their ability to inspect the LLC's books and records under the operating agreement gave them a remedy. An accounting is a remedy; discovery is a procedural device. A suit for an accounting is a bifurcated process in which the court first determines whether the defendant is liable to give an accounting, and then "the decree to account follows of course." *Quayle v. Guild*, 91 Ill. 378, 390 (1878). In the second stage hearing, the court hears evidence of the matters of account. *Quayle*, 91 Ill. 2d at 390. In *Kennedy*, this court agreed with *Quayle* and held that if the party seeking an accounting prevails in an initial hearing and proves his entitlement to an accounting, the court conducts a separate hearing on the actual accounting. *Kennedy*, 221 Ill. App. 3d at 521. In contrast, discovery is the disclosure of facts, deeds, documents, or other things in the exclusive knowledge or possession of one party, which are necessary to the party seeking discovery as part of a cause of action or defense in a pending action. *Fosse v. Pensabene*, 362 Ill. App. 3d 172, 177 (2005). Thus, an accounting requires a judicial act, not just an exchange of documents between the parties. "An accounting imports an adjustment of the accounts of the parties and the rendition of a judgment for the balance ascertained to be due." *Apple v. Smith*, 106 Kan. 717, ___ (Sup. Ct. Kan. 1920). Moreover, while the operating agreement may have entitled plaintiffs to inspect the books and records, an inspection is not an accounting. Indeed, the inspection could give rise to an action for an accounting.

For these reasons, I would reverse that part of the trial court's judgment that denied the plaintiffs' claim for an accounting and remand to the trial court to conduct a bifurcated hearing in accordance with *Quayle* and *Kennedy* and award such other and further relief, including fees and costs, as may be warranted.