COURT OF APPEALS DECISION DATED AND FILED

April 20, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 97-3279

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

RICHARD J. BICKLER,

PLAINTIFF-RESPONDENT,

V.

PARKVIEW VILLAGE ASSOCIATES,

DEFENDANT-APPELLANT,

**BARRETT ZUCKERMAN, ROBERT E. BARTOS,
DAVID V. FOLEY, MURRAY HERMAN,
FOSTER J. JACOBSON, GILBERT MUELLER, JR.,
ROBERT G. PETRIE, JR., PAUL SCHNEIDER,
DAVID E. WARNER, CHARLES ALTSCHULER,
MICHAEL J. BICKLER, JAMES M. CHRISS,
ROBERT J. EVANS, JOHN G. HEIN,
TERRANCE A. INDA, PHILIP C. PELLAND,
BETH M. RUMMEL, IRENE J. SILVERMAN,
THOMAS J. SCHINABECK, DAVID C. LEACH AND
DOUGLAS D. SALMON,**

DEFENDANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: LOUIS J. CECI, Reserve Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Parkview Village Associates, a limited partnership, (Parkview) appeals from a judgment, following a bench trial, entered in favor of Richard J. Bickler, reinstating him as a general partner of Parkview.

Parkview contends that the trial court erred in the following respects: (1) in finding that a laundry service contract between the partnership and a related business entity was reasonable and competitive; (2) in finding that Bickler did not purchase land for his personal use with partnership funds; (3) in shifting the burden of proof to the limited partners; (4) in applying the wrong standard to determine whether Bickler's removal as a general partner was warranted; and (5) in concluding that Bickler's actions did not constitute a material or substantial breach of the partnership agreement; and (6) in ruling that waiver applied as a defense to Bickler's removal as a general partner. Because the trial court's findings of fact are not clearly erroneous and its conclusions of law are reasonably record-based, we affirm.

I. BACKGROUND

Parkview was organized in 1980 by Bickler and Michael Lerner, a long-time business associate. At the time, other enterprises operated by Bickler and Lerner included L&B Development, L&B Management and LBL Investment Company. Parkview was formed for the purpose of constructing low-income housing in Appleton, Wisconsin. Parkview was organized as a form of legitimate tax avoidance for taxpayers in the above-50% tax bracket, whereby within four-to-

five years, an investor would recoup his or her investment in the form of tax loss deductions generated by depreciation and business losses. Initially, the general partners were Bickler, Lerner and Johnson Real Estate, a wholly owned subsidiary of Johnson Wax Corporation.

In 1980, Barrett Zuckerman was retained to raise capital for Parkview through the sale of limited partnership interests. The majority of these limited partnership interests were sold to outside investors. The partnership constructed, and now owns, a Housing and Urban Development (HUD) low-income residential project consisting of one forty-unit building and twenty-two scattered-site duplexes.

In 1983, due to fraudulent practices that occurred in 1980-81 involving funds of the partnership, Lerner resigned as a general partner. His interest was divided between Bickler and Johnson. In 1990, Johnson sold its general partnership interest for $1 to Zuckerman, who then began to investigate alleged past irregularities in the operation of the partnership.

Zuckerman's investigation focused generally on alleged breaches of fiduciary responsibility on the part of Bickler during 1980-81, but more specifically focused on three transactions: (1) the partnership's purchase of the tract of land that is the site of the forty-unit housing facility; (2) a laundry concession contract between Parkview and LZB, Limited, a corporation currently owned by Lynn Bickler, Richard Bickler's wife;[1] and (3) the purchase of a boat by Bickler with partnership funds. Armed with information obtained concerning

[1] At the inception of the partnership, LZB was owned by both Lynn Bickler and Wendy Lerner, the wife of Michael Lerner.

these transactions and other instances of alleged defalcation of trust, Zuckerman, pursuant to the terms of the partnership agreement, obtained the consent of more than two-thirds of the limited partners to remove Bickler as a general partner.[2] As a consequence, Bickler filed this declaratory judgment action against the partnership, Zuckerman, and the limited partners to nullify the vote and gain reinstatement as a general partner. After a bench trial, the trial court concluded that Bickler's removal was invalid and ordered that he be reinstated as a general partner. Parkview now appeals.

II. ANALYSIS

STANDARD OF REVIEW

This appeal arises from a declaratory judgment action. The granting or denying of relief in such circumstances is a matter for the discretion of the trial court. *See* ***Hull v. State Farm Mut. Auto. Ins. Co.***, 222 Wis.2d 627, 635-36, 586 N.W.2d 863, 866 (1998). We will uphold a discretionary decision as long as the trial court's exercise of discretion was not erroneous. *See* ***id.***

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[2] The terms of the partnership agreement relevant to removal provide:

> Section 13.01. Removal Power. The Limited Partners, by a vote of the Limited Partners holding two-thirds of the then outstanding Interests (excluding the Interests owned by the General Partners), shall have the right to remove any or all of the General Partners in the event of their willful misconduct, failure to act as a reasonably prudent businessman would under similar circumstances, or for breach of any of their agreements, representations or warranties set forth herein.

Parkview raises six instances of trial court error. For clarity's sake, however, we synthesize and restate its assertions in the disposition of this appeal.[3] In the order of logical importance to our ultimate conclusion, we first address Parkview's challenge to the trial court's factual findings. Parkview's challenge to the trial court's factual findings is two-fold. It claims that the trial court's findings that the laundry lease executed between Parkview and LZB was reasonable and competitive and that the transfer of a small portion of the forty-acre tract in Appleton to Lerner's father was in payment of a broker's commission were clearly erroneous.[4] We now examine each in turn.

A. Challenges to Factual Findings.

1. LZB Lease.

Parkview first contends that the trial court was clearly in error when it found that the terms of the laundry equipment and service lease were reasonable and competitive.[5] This two-pronged determination is a mixed question of fact and

[3] Parkview proffers the following claims of error: (1) the trial court erred when it placed the burden of proving Bickler's breach of his fiduciary duty on the limited partners; (2) the trial court erred, as a matter of law, as to its interpretation of the grounds required for the removal of Bickler as a general partner; (3) the trial court erred, as a matter of law, when it substituted its judgment for the judgment of the limited partners; (4) the trial court erred, as a matter of law, in holding that the limited partners waived their contractual right to remove Bickler as a general partner; (5) the trial court's finding of fact that the LZB lease was reasonable and competitive at the time that it was executed is against the great weight of evidence; and (6) the trial court's finding of fact that Bickler's personal use of land he purchased with Parkview money was proper is clearly erroneous.

[4] In Parkview's brief relating to the two issues of challenged facts, although it is not altogether clear, Parkview appears to utilize different standards of review for the two challenged findings of fact. We apply the clearly erroneous standard for review of both findings of fact that he challenges.

[5] This finding of fact emanates from the following provision in the partnership agreement:

(continued)

law. *See* ***Peplinski v. Fobe's Roofing, Inc.***, 193 Wis.2d 6, 19, 531 N.W.2d 597, 602 (1995). We shall not upset a trial court's findings of fact unless they are clearly erroneous. *See* ***Noll v. Dimiceli's, Inc.***, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983). We review questions of law independently. *See* ***Ball v. District No. 4 Area Bd.***, 117 Wis.2d 529, 537, 345 N.W.2d 389, 394 (1984). Under this standard, even though the evidence would permit a contrary finding, findings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the same finding. *See* ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20-21 (1981).

When the trial court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses, *see* ***Gehr v. City of Sheboygan***, 81 Wis.2d 117, 122, 260 N.W.2d 30, 33 (1977), and of the weight to be given to each witness's

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Section 7.01. General Partners.

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(f) Any of the duties and responsibilities of the General Partners under this agreement may be delegated, assigned or subcontracted by the General Partners on whatever terms and conditions may be acceptable to them at any time, to any individual, corporation or other entity which, in the judgment of the General Partners, is capable of performing the same. If the General Partners assign, delegate or subcontract any of their duties and responsibilities hereunder, the General Partners shall continue to be primarily responsible for the fulfillment of all the obligations as set forth herein. The fact that a General Partner is directly or indirectly interested in or connected with any individual, corporation or other entity employed by the General Partners to render or perform a service, or from or to which or whom the Partnership may buy or sell services, merchandise, materials or other property, shall not prohibit the General Partners on behalf of the Partnership from employing such individual, corporation or other entity so long as the price or fee paid for such materials or services is reasonable and competitive.

(Emphasis added).

testimony, *see* ***Milbauer v. Transport Employes' Mut. Benefit Soc'y***, 56 Wis.2d 860, 865, 203 N.W.2d 135, 138 (1973). This is especially true because the trier of fact has the opportunity to observe the witnesses and their demeanor on the witness stand. *See* ***Syvock v. State***, 61 Wis.2d 411, 414, 213 N.W.2d 11, 13 (1973).

The drawing of an inference on undisputed facts, when more than one inference is possible, is a finding of fact which is binding upon a reviewing court. *See* ***State v. Friday***, 147 Wis.2d 359, 370-71, 434 N.W.2d 85, 89 (1989). It is not within the province of this court to choose not to accept one inference drawn by a fact finder when that inference is a reasonable one. *See* ***id.***

Here, the record fully reflects how the laundry service lease was created and the motivation for its structure. There is no question that it was a contractual circumstance between related parties, i.e., the business ownership initially was placed with the wives of the two active general partners and called L&W Leasing Co. (bearing the first letter of each wife's first name). The term of the lease agreement was fifty years. The length of term was not unlike several other laundry lease agreements that the successor to L&W Leasing Co., LZB, had with other HUD developments in which Bickler participated. The net return to Parkview was greater than had been projected. The term and lease payments withstood the riggers of annual audits and review by HUD without disapproval. The record further shows that the laundry lease was precipitated by HUD's refusal to increase the amount of mortgage funds available for the Parkview project, thereby diminishing the managing general partners' prospects for greater personal

profits. Thus, Bickler and Lerner's decision to enter the laundry service business was not in contravention of the partnership agreement.[6]

Parkview argues that LZB, the successor to L&W Leasing Co., acting as a conduit, in effect, performed no services for 40% of the revenue LZB received versus the 25% Parkview received from an outside contractor who performed all the services. Parkview maintains that it ought to have received a greater share of the revenue or the terms of the lease should have been re-negotiated to create more favorable terms.

In making its findings of historical facts, the trial court relied on the partnership agreement, which permitted apparent conflicts of interest to generally recognized fiduciary duties, as long as the perceived conflict constituted "reasonable and competitive" activity. It heard testimony from Bickler, his son Michael, three former employees of the partnership, and Zuckerman. Lerner invoked his fifth amendment rights and therefore did not testify. The court learned that Lerner had assisted Zuckerman in his efforts to dislodge Bickler from his position as general partner. During closing argument, while evaluating the quality of the evidence, the trial court questioned Parkview's counsel as to what proof existed in the record demonstrating that the laundry lease was not competitive and not reasonable. No one testified that the lease was unreasonable. Parkview's counsel did not cite any specific evidence, but simply responded that the lease documents "speak for themselves."

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[6] In HUD-financed projects of this sort, it is the intent to obtain a mortgage commitment far in excess of the completion costs.

The Bicklers testified that under the circumstances present in 1980-81, and when Lerner's wife's interest in the lease was purchased,[7] the lease provisions were reasonable and competitive. This testimony was uncontroverted. The credibility of the witnesses and the weight to be given to the evidence was for the trier of fact to assess. Parkview asked the trial court to infer from the terms of the lease document and from speculative evidence presented by Michael Bickler that better terms could have been negotiated, but were not and, therefore, the lease was not reasonable or competitive. This was a finding of fact that the court, in its wisdom, eschewed making. It is obvious that the finder of fact, based on the lack of evidence before it, rejected the inference proposed by Parkview. The state of the record is such that we cannot conclude that there is no reasonable basis for the trial court's finding that the terms of the lease were reasonable and competitive.

2. Property Purchase.

We next examine whether the trial court's finding that a conveyance of a small parcel of land to Lerner's father was the payment for a real estate broker's commission was clearly erroneous. In engaging in this analysis, we apply the same standard of review as set forth above. The relevant parcel was part of the total site purchased from William and Michael Neufeld on May 8, 1980, for the sum of $80,000. At the time, Parkview consisted of three general partners, Bickler, Lerner, and Johnson. It is undisputed that the $80,000 was contributed by Johnson. The partnership did not have any limited partners at the time. Limited partnership interests were not solicited until December 10, 1980. The parcel

[7] When Lerner was relieved of his position as general partner, he and his wife liquidated their interests in the partnership and related entities, and Bickler purchased these interests including Wendy Lerner's interest in the laundry business.

intended for Lerner's father was physically separated from the larger portion of the property by a road easement and was located under high tension wires.

Parkview claimed, but submitted no direct evidence, that Bickler used partnership funds to purchase the smaller parcel for his own use. The undisputed evidence, however, reveals that it was the intention of the managing general partners to convey the smaller parcel to Lerner's father as and for a finder's commission. But Bickler, Lerner, and Lerner's father became subject to a judgment taken against them by Mr. and Mrs. Robert Denton arising from another project that failed. In order to protect the small parcel from seizure by the Dentons, it was conveyed by the Nuefeld brothers to the wives of Bickler and Lerner: Lynn and Wendy. Subsequently, in August and September 1980, for reasons not disclosed in the record, the same parcel was conveyed to Bickler and Lerner, then to LBL Investment, Co., and finally to the Dentons to partially discharge the judgment.[8]

The trial court received into evidence a document setting forth the broad discretionary powers possessed by the general partners in section 7.01 of the partnership agreement and more specifically subsection (xi), which allowed the general partners to "perform any and all other acts or activities customary or incident to the acquisition, ownership, management, improvement, leasing and disposition of real estate …." Furthermore, the provisions of the Parkview Limited Partnership offering agreement set forth in five separate sections the broad latitude given the general partners in organizing, developing and achieving

[8] Parkview additionally claims that there was a failure to disclose this conveyance of partnership real estate at a falsely determined low value as evidenced by tax exempt transfer tax; yet, the same parcel was shortly thereafter used to establish a $50,000 credit against the judgment the Dentons had against them.

the purposes of the partnership.[9] The fact that a real estate commission was intended for Lerner's father remains uncontradicted regardless of what later methodology was employed to put the disputed value of the parcel to use. No evidence appears in the record disputing the general partners' authority to pay a commission for land acquisition. Thus, there is a reasonable basis in the record to support the findings of fact of the trial court and reject the inferences proposed by Parkview.

B. Challenges to Trial Court's Legal Conclusions.

We now examine Parkview's claim of trial court errors of law.

1. Burden of Proof.

Parkview first claims that the trial court erred by placing upon it the burden of proving Bickler's breach of fiduciary duty. We reject this claim. Bickler filed a claim for declaratory judgment pursuant to the Uniform Declaratory Judgments Act, § 806.04, STATS., for the purpose of procuring an adjudication declaring his rights and obligations existing under the Parkview Limited Partnership agreement. In essence, the trial court was asked to determine whether there was a basis for Bickler's removal as a general partner under the agreement. Whether a party's activities constitute performance of its obligations under a contract may present a question of fact. *See* ***Smith Realty Co., Inc. v. Zimmerman***, 75 Wis.2d 11, 17, 248 N.W.2d 472, 475 (1977) (determining a fact question existed as to "whether the plaintiff's broker's activities constituted

[9] We refer to sections entitled "Use of Proceeds," pages 12 and 26; "Management of the Project," page 21; "Potential Conflict of Interest of General Partners," page 24 and "Compensation of General Partners and Affiliates," pages 29-30.

performance of its obligations under the contract.”). Even though the underlying facts may not be in substantial dispute, the events themselves may give rise to competing inferences, which should be resolved by the finder of fact. Here, both Bickler and Parkview had the opportunity to present their respective cases through the submission of oral and documentary evidence. Although Parkview argues mightily suggesting all sorts of double dealing, the trial court, after hearing the witnesses and reviewing the documentary provisions allowing broad discretion on the part of the general partners, accepted the version of events portrayed by Bickler. Although the trial court’s determination was influenced by the paucity of evidence presented by Parkview, this expression of evaluation is not the equivalent of improperly placing the burden of proof upon Parkview. This contention, therefore, fails.

2. Grounds for Removal.

Second, Parkview claims that the trial court erred as a matter of law in its interpretation of the grounds required for removal of Bickler as a general partner. Parkview asserts that the standard of whether Bickler acted “as a reasonably prudent business person,” contained in section 13.01 of the partnership agreement, should have been applied in determining whether his removal was proper. The trial court’s decision was partially based upon whether Bickler materially or substantially breached his fiduciary duty. The trial court did not address the issue of whether Bickler conducted himself as a reasonably prudent business person.

“[I]f a trial court reaches the proper result for the wrong reason, it will be affirmed.” ***State v. Patricia A.M.***, 176 Wis.2d 542, 549, 500 N.W.2d 289, 292 (1993). An appellate court may sustain a lower court’s holding on a theory or

on reasoning not presented to the lower court if the record provides reasonable support for such result. *See **id.*** We conclude that the record does provide such support and, therefore, reject Parkview's contention.

This claim of error presents the question of whether the business judgment rule contained in section 13.01, and utilized by Zuckerman in garnering support from the limited partners to remove Bickler, prevails over the trial court's reliance on an absence of substantial breach of contract to reinstate Bickler. To resolve this apparent conflict, we look to the terms of the contract and what little case law exists relating to the topic.

The business judgment rule has its genesis in corporate equity litigation. *See generally*, R. Franklin Balotti & James J. Hanks, Jr., *Rejudging the Business Judgment Rule*, 48 BUS. LAW. 1337 (1993); Charles Hansen, *The Duty of Care, The Business Judgment Rule, and The American Law Institute Corporate Governance Project*, 48 BUS. LAW. 1355 (1993). The rule can apply with equal force to partnerships. *See* ***Bane v. Ferguson***, 890 F.2d 11, 14 (7th Cir. 1989). The rule prohibits a court from substituting its judgment for that of the suspect decision maker, unless the decision maker abuses his or her discretion. *See* Balotti & Hanks, Jr., *Rejudging the Business Judgment Rule*, 48 BUS. LAW. at 1339. The rule has both substantive and procedural characteristics. *See **id.*** at 1339 n.11. It can be thought of as a "statement of the circumstances (informed basis, good faith, honest belief) under which a court will not substitute its judgment for that of [the decision maker]." ***Id.*** at 1339. Procedurally, it creates an evidentiary presumption that, in arriving at a decision, the decision maker "acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company." ***Id.*** at 1339 n.11.

Whether the business judgment rule might apply to the instant case, and how it might apply, requires further inquiry. Questions that remain are: In whose favor ought the rule be applied and, in the context of the Parkview Partnership agreement, does the rule have any redeeming force or vitality? Parkview appears to apply the business judgment rule as both a sword and a shield. On the one hand, Parkview uses the rule as a justification for removing Bickler yet, on the other hand, Parkview seeks to use the rule as a defensive device to thwart judicial substitution of its judgment. Under certain circumstances, the uses may not be mutually exclusive. In our present context, however, we conclude that such a two-fold application is not warranted.

The business judgment rule, as contained in the Parkview Limited Partnership agreement, states that a general partner may be removed if that partner fails "to act as a reasonably prudent businessman would under similar circumstances …." It distinguishes between the powers and responsibilities of the general partners and the limited partners. The former have "full, exclusive and complete discretion in the management and control of the affairs of the Partnership." The latter "shall not participate in the management or control of the Partnership's business, transact any business for the Partnership, or have the power to sign for or bind the Partnership, such powers being vested solely and exclusively in the General Partners." Thus, the position of a general partner in terms of business judgment policy is similar to that of a board of directors of a corporation. Limited partners are subordinate to general partners. Therefore, the business judgment rule is first applied in favor of the general partner's performance.

As stated earlier in this opinion, the essence of the business judgment rule's application is focused on whether the decision maker acted on an

informed basis, in good faith and in the honest belief that the action taken was in the best interests of the business entity. If the business judgment rule were the only measure to be applied to Bickler's discharge of responsibilities, the limited partners would be on firm footing for their removal action. Other provisions in the partnership agreement, however, dramatically detract from the rule's effect.

Section 7.01(a)(iv) provides that the general partners may:

> Bring, defend, settle, compromise or otherwise participate in any and all actions, proceedings or investigations whether at law, in equity or before any governmental authority or agency, and whether brought against the Partnership or the General Partners, arising out of, connected with or related to the business and affairs of the Partnership or the enforcement or protection of interests in the Partnership.

Section 7.01(c) provides in pertinent part:

> The General Partners may engage in other business ventures of every kind, independently or with others, including, but not limited to, the real estate business in all its phases and including, without limitation, the ownership, operation, management and development of real property which competes with the Project, and neither the Partnership nor any of the Limited Partners shall have any rights in such independent ventures or the income derived therefrom.

Section 7.01(f) provides in pertinent part:

> Any of the duties and responsibilities of the General Partners under this agreement may be delegated, assigned or subcontracted by the General Partners on whatever terms and conditions may be acceptable to them at any time, to any individual, corporation or other entity which, in the judgment of the General Partners, is capable of performing the same.… The fact that a General Partner is directly or indirectly interested in or connected with any individual, corporation or other entity employed by the General Partners to render or perform a service, or from or to which

> or whom the Partnership may buy or sell services, merchandise, materials or other property, shall not prohibit the General Partners on behalf of the Partnership from employing such individual, corporation or other entity so long as the price or fee paid for such materials or services is reasonable and competitive.

(Emphasis added). More specifically, the Partnership is authorized to obtain architectural, construction, construction management, property management, and financing and accounting services from firms with which a general partner is associated.

In addition, the offering memorandum given to each limited partner before investing in the partnership, and which was received into evidence without objection, contained notification that fiduciary responsibilities notwithstanding, certain fees to be paid to the general partners were not determined by "arms length" negotiation; that the general partners, in fact, owned business entities that were doing business with the partnership; that conflicts of interest were not ruled out; and that limited partners had no right to participate in management and could not vote on any matters.[10]

When the elements of "informed basis," "good faith," and "best interest of the company" necessary for the application of the business judgment rule, are matched against the broad discretionary exceptions made to the normal fiduciary provisions contained in the partnership agreement, any limitation imposed by the rule short of egregious conduct in reality becomes a nullity. The only limitation placed upon party-related transactions requires that the transaction be reasonable and competitive. We have already rejected Parkview's challenges

[10] The limited partners argue, and correctly so, that the terms of the partnership agreement control the relationship between the limited partners and Bickler. Nevertheless, many of the exculpatory provisions in the agreement are paraphrased in the memorandum of offering and it was before the court for due weight assessment.

to the trial court's finding on reasonableness and competitiveness. Therefore, we need not address it again.

We conclude that the authority granted the general partners, absent a finding of unreasonableness and lack of competitiveness or egregious conduct, renders the application of the business judgment rule provision as embodied in the partnership agreement a nullity.[11]

3. Material Breach Determination.

Next, Parkview claims that the trial court erred in concluding that Bickler's actions did not constitute a material or substantial breach of the partnership contract. Parkview expresses this claim of error in terms of violations of his fiduciary duty.

Parkview alleged a number of breaches of fiduciary duty.[12] The trier of fact, however, was obviously not satisfied with the level of proof for many of the suggested transgressions. Only the land acquisition commission, the laundry service contract, and the purchase of the boat from partnership funds survived fact- finder scrutiny to warrant consideration in determining whether there had been a material breach of the partnership agreement. As we have already decided,

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[11] Because we have concluded that the business judgment rule has no application to the circumstances of this case, we find no necessity in addressing its application in favor of the limited partners against the determinations of the trial court.

[12] Among the various suggestions of impropriety made by Zuckerman and the limited partners were the following: that $7,000 was paid by the partnership to Michael Bickler, son of Richard; that partnership gasoline and lumber were delivered to Bickler's home for his personal use; and that Bickler was the sole general partner of another limited partnership when $213,000 of Parkview's money was withdrawn and used in the other limited partnership. In the eyes of the finder of fact, none of these suggested defalcations were supported by the evidence. We agree and decline to specifically address them.

the trial court did not err in determining that the laundry service was reasonable and competitive and that Bickler did not use partnership funds to purchase land for his own personal use. Thus, the only remaining contention is whether Bickler's boat purchase constitutes a material breach of the partnership agreement.

It was undisputed that in 1980, Bickler purchased a boat for $3,000 using partnership funds. The two checks for the purchase were issued by Lerner, at Bickler's request, after it was ascertained that Bickler would be entitled to share in a portion of profits for some of the general partners' activities on behalf of the partnership. When it was determined that the transaction should not have been handled in such a manner, Bickler reimbursed the partnership. Bickler readily admitted that such activity was a mistake and accepted responsibility for his action. When, in 1983, Bickler and Johnson called for a special audit because of suspected irregularities by Lerner, the boat transaction was revealed as well. As a result of the audit report, a special meeting of the limited partners was held on June 23, 1983, during which written and oral reports were presented to the limited partners. As a result, Lerner's relationship as a general partner was terminated. No sanctions or recommendations for sanctions were taken against Bickler, and he remained a general partner until 1994, when he was removed by the limited partners' vote. The trial court ruled, as a matter of law, that there had been full or at least constructive disclosure of this transgression to the limited partners. The court was aware of the financial size of the housing project, i.e., $3,780,000, and that the improper activity occurred over ten years before being resurrected by Zuckerman for review. From our review, we conclude that there is a reasonable basis in the record for the trial court to decide that there was no material or substantial breach of the partnership agreement arising from the boat purchase.

4. Waiver.

Finally, Parkview contends that the trial court erred as a matter of law in concluding that Parkview waived its contractual right to remove Bickler as a general partner. The trial court held that the failure of the partners to seek Bickler's removal for over twelve years constituted a waiver of any breaches by Bickler of the partnership agreement. Parkview posits two reasons for its contention: (1) the trial court's conclusion is legally deficient because it fails to articulate whether the limited partners had actual or constructive notice of Bickler's malfeasance; and (2) the trial court erred in concluding that the doctrine of waiver may be invoked after a period of time regardless of whether notice of breach has occurred. We are not persuaded.

"[E]ven where such a material breach has occurred, the non-breaching party may waive the claim of materiality through its actions." ***Management Comp. Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis.2d 158, 183-84, 557 N.W.2d 67, 78 (1996).

Our independent review of the record reveals that the activities about which Zuckerman complains occurred during 1980-81. During 1981-83, Bickler's connection with these events was examined by an independent auditor, the FBI, HUD's inspector general's office, and by the third general partner, Johnson. The result of these investigations was made available to the limited partners at a partnership meeting held on June 23, 1983. There was no evidence presented that the contents of any of these reports were withheld from any of the limited partners. Neither at that meeting, nor for over ten years, was any action taken to sanction Bickler, much less remove him from his general partnership role. The trial court may not have articulated the basis for its conclusions that the limited partners had

actual and constructive knowledge of Bickler's activities, but the record contains ample support of the acquiescence by the limited partners in Bickler's stewardship as general partner. The trial court did not err in basing part of its decision on waiver.

In summary, Parkview's defense consisted primarily of repeated attacks on Bickler's decade-old actions. In the daily affairs of life, saying something often enough may make it so. In the courtroom, however, where the trial court is the finder of fact based on the evidence presented, saying so, no matter how often said, does not make it so. Parkview did not present enough credible evidence to support its allegations. The trial court ruled accordingly.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.