NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1895

DESTINY SERVICES, L.L.C. & ACCURATE SERVICES, L.L.C.

VERSUS

COST CONTAINMENT SERVICES, L.L.C.

Judgment Rendered: SEP 2 0 2011

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On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket No. 538,737

Honorable Wilson Fields, Judge Presiding

* * * * * *

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McCLENDON, J.

Defendants appeal a judgment rendered in accordance with a jury verdict awarding plaintiffs damages arising from the jury's findings that defendants breached fiduciary duties and committed fraud. For the reasons that follow, we affirm the judgment with respect to the damages awarded for fraud, but vacate the judgment to the extent it awarded damages arising from the alleged breach of fiduciary duties.

FACTS AND PROCEDURAL HISTORY

In 1998, James A. Poché, Jr., M.D., LLC, contracted with Risk Management Services, LLC (RMS) to provide medical bill review and utilization services for RMS and its clients.[1] RMS provides all of the services necessary for a workers' compensation self-insurance program, including medical cost containment. At that time, RMS was owned by Jean Robért, Dominick Vaccaro, Jr., and Robert Moss, III, and Ronald Francis served as its claims manager.

In 2003, Dr. Poché, Moss, and Francis decided to form their own company, Cost Containment Services, L.L.C. (CCS). On July 17, 2003, James A. Poché, MD, LLC, Prestige Services, LLC (a single member LLC owned by Moss), and Francis entered into the Articles of Organization for CCS, which provided that CCS would be managed by its members. The Initial Report, also signed the same date, provided that the members of the LLC are James A. Poché, MD, LLC, Prestige Services, LLC, and Francis. Dr. Poché indicated that he formed CCS after his contract with RMS expired in order to allow him to offer medical cost containment services to additional clients.

On September 16, 2003, CCS, through an e-mail from Moss, submitted a proposal to both Vaccaro and Robért to participate in CCS, including an option to participate in an "equity" position. In this regard, the proposal indicated that "[t]he calculated value of CCS for year one is $4,411,064" and "[t]he maximum total amount of equity available for purchase is 20%."

[1] Dr. James A. Poché, Jr. is the sole owner and member of his LLC.

In accord with the proposal, on September 20, 2003, both Vaccaro and Robért agreed to participate in an equity position with CCS. Vaccaro and Robért, utilizing checks drawn on RMS's account, submitted payments totaling over $218,000.00 to CCS, or over $109,000.00 each, to purchase their equity on behalf of their single member LLC's, Destiny Services, L.L.C. (owned solely by Vaccaro) and Accurate Services, L.L.C. (owned solely by Robért).

In 2004, Vaccaro and Robért requested that CCS provide them information about their investment in CCS. CCS conditioned inspection of the records on Destiny Services, L.L.C. ("Destiny") and Accurate Services, L.L.C. ("Accurate"), through Vaccaro and Robért, respectively, executing a document entitled "Confidentiality Agreement," which purportedly prevented Destiny and Accurate from using the information in "the prosecution and/or defense of any legal action of any type whatsoever."

On December 9, 2005, after declining to sign the "Confidentiality Agreement," Destiny and Accurate filed a "Petition for Preliminary and Permanent Injunctions and for an Accounting," naming CCS as the sole defendant.[2] On December 19, 2005, in response to CCS's exception asserting that Destiny and Accurate had no right of action to inspect CCS's books, Vaccaro and Robért intervened in the suit.

On March 29, 2006, Destiny and Accurate, individually and in a derivative capacity on behalf of CCS, filed a "First Supplemental Petition," naming Francis, Dr. Poché, James A. Poché, MD, LLC (Poché, LLC), Moss, and Prestige Services, LLC, as additional defendants. They sought damages for breach of fiduciary duties and conspiracy to commit fraud. Destiny and Accurate also alleged that despite CCS's making payments to Dr. Poché, Moss, and Francis, neither Destiny nor Accurate had ever received any profits, draws, or capital from CCS.[3] On

[2] On March 27, 2006, Francis and Dr. Poché filed a petition for judicial dissolution/liquidation of CCS. It was subsequently consolidated with the instant action, but Francis and Dr. Poché dismissed the action thereafter.

[3] On December 20, 2007, the trial court granted Vaccaro and Robért leave to file a supplemental and amending petition for intervention seeking the same relief sought by Destiny and Accurate.

August 30, 2006, the defendants filed "Peremptory Exceptions of No Right of Action and No Cause of Action," asserting that Vaccaro, Robért, and their single member LLCs could not maintain an action because none of them were members of CCS. Dr. Poché, in his individual capacity, later filed exceptions of no cause of action and no right of action, along with a motion for summary judgment, apparently asserting that he cannot be held liable individually because at all times pertinent hereto he was acting on behalf of Poché, LLC. On June 6, 2008, the trial court signed a judgment that denied Dr. Poché's exceptions and his motion for summary judgment.

On or about November 7, 2008, defendants filed a "Peremptory Exception of Prescription," alleging that any actions "for fraud and/or negligence that occurred prior to March 24, 2005 are prescribed." The district court later signed an order referring the peremptory exception to the trial on the merits.

A jury trial commenced on December 7, 2009, and the jury rendered its verdict on December 11, 2009. The jury found that Destiny and Accurate were members of CCS within the meaning of LSA-R.S. 12:1301 and that they were owed fiduciary duties by Dr. Poché, Poché, LLC, and Francis.[4] The jury found that defendants breached those duties and that the breach caused injury in the amount of $418,750.00 each to Vaccaro/Destiny and Robért/Accurate. The jury also allocated 25% fault to Dr. Poché, 25% fault to Poché, LLC, and 50% fault to Francis arising from the breach. The jury additionally found that defendants committed fraud and awarded $109,186.00 to each of the plaintiffs on the finding of fraud.

On January 18, 2010, Francis filed a bankruptcy petition, causing an automatic stay to be issued as to Francis. Subsequently, the district court signed a judgment in accord with the jury's verdict, and entered an award against Dr. Poché and Poché, LLC, in the principal amount of $209,375.00 each to Vaccaro/Destiny and Robért/Accurate arising from the breach of the fiduciary

[4] The jury made no finding as to the liability of Prestige Services, LLC and/or Moss because the Prestige/Moss interest in CCS was purchased by CCS in 2005.

duty, and an additional amount of $109,186.00 each to Vaccaro/Destiny and Robért/Accurate (hereinafter collectively referred to as "plaintiffs") arising from the fraud.[5]

ASSIGNMENTS OF ERROR

Dr. Poché and Poché, LLC (hereinafter collectively referred to as "Dr. Poché") have filed an appeal, assigning nine errors, summarized as follows:

1) The trial court erred in denying defendants' exceptions of no cause of action and no right of action arising from the breach of fiduciary duty and for fraud.

2) The trial court erred in finding that the fraud causes of action were not prescribed.

3) The jury committed manifest error in finding that plaintiffs were members of CCS, that defendants breached a fiduciary duty causing damage to Vaccaro/Destiny and Robért/Accurate in the amount of $418,750.00 each, that defendants conspired with one another to commit fraud on Vaccaro/Destiny and Robért/Accurate in the amounts of $109,186.00 each, and in finding Dr. Poché liable in an individual capacity with regard to the breach of fiduciary duty claim.

4) The trial court committed legal error and abused its discretion in not finding the jury verdict clearly contrary to the law and evidence, in not granting defendants' judgment notwithstanding the verdict, and/or in not granting defendants' motion for new trial.

5) The trial court committed legal error in awarding pre-judgment interest from December 5, 2005 on the $209,375.00 breach of fiduciary damage award.

Plaintiffs have also appealed, assigning one error. They assert that the award for the breach of fiduciary duty should be *in solido* as opposed to the joint award based on the allocation of fault percentages assigned by the jury.

DISCUSSION

BREACH OF FIDUCIARY DUTY AND FRAUD PRECEPTS

The essence of the fiduciary duty lies in the special relationship between the parties. The fiduciary's duty includes the ordinary duties owed under tort principles, as well as a legally imposed duty which requires the fiduciary to handle a matter "as though it were his own affair." **Beckstrom v. Parnell**, 97-1200, p. 8 (La.App. 1 Cir. 11/6/98) 730 So.2d 942, 947-48. Persons who owe

[5] Destiny and Accurate filed a Motion for New Trial and *Additur*, and Dr. Poché, Poché, LLC, and CSS filed a Motion for New Trial and/or to Set Aside and Vacate the Judgment Notwithstanding the Verdict. The trial court denied both motions.

fiduciary duties may not take even the slightest advantage, but must zealously, diligently and honestly guard and champion the rights of the person or entity to which they owe that duty. **Noe v. Roussel**, 310 So.2d 806, 819 (La. 1975). It is this duty of loyalty which distinguishes the fiduciary relationship. **Gerdes v. Estate of Cush**, 953 F.2d 201, 205 (5th Cir. 1992). A cause of action for breach of fiduciary duty requires proof of fraud, breach of trust, or an action outside the limits of the fiduciary's authority. **Id.**

Breach of a fiduciary duty entitles one to the recovery of damages, measured by the loss sustained by the party owed the fiduciary duty and the profit of which he has been deprived; the focus of this measure of damages is on the profit "deprived" from the party owed the duty, not the breaching party's actual gain. **Woodward v. Steed**, 30,611, p. 2 (La.App. 2 Cir. 6/24/98), 715 So.2d 629, 631.

The claim for fraud encompasses the claim for breach of the higher duty of loyalty owed by the fiduciary. **Beckstrom**, 97-1200 at p. 9, 730 So.2d at 948. Moreover, intent to defraud and loss or damage are two essential elements to constitute legal fraud. **McDonough Marine Serv., A Div. of Marmac Corp. v. Doucet**, 95-2087, p. 6 (La.App. 1 Cir. 6/28/96), 694 So.2d 305, 309.

ARE PLAINTIFFS MEMBERS OF CCS SUCH THAT THEY CAN MAINTAIN A CAUSE OF ACTION ARISING FROM A BREACH OF FIDUCIARY DUTY?

Dr. Poché contends that the jury committed manifest error in finding that plaintiffs were members of CCS. Members in a member-managed LLC are deemed to stand in a fiduciary relationship to the LLC and its members. LSA-R.S. 12:1314 A(1). Dr. Poché asserts that since plaintiffs were not members, they have no cause of action or right of action to recover for breach of any fiduciary duty.

Dr. Poché claims that although plaintiffs were allowed to invest in CCS, no offer to become CCS members was ever made by CCS or by CCS's existing members — Francis, Poché, LLC, and Prestige Services, LLC — to any of the plaintiffs in the September 16, 2003 proposal or otherwise. Rather, Dr. Poché

contends that plaintiffs, as investors, were assignees of a membership interest as contemplated by LSA-R.S. 12:1330. Louisiana Revised Statutes 12:1330 A provides, in pertinent part:

> Unless otherwise provided in the articles of organization or an operating agreement, a membership interest shall be assignable in whole or in part. An assignment of a membership interest shall not entitle the assignee to become or to exercise any rights or powers of a member until such time as he is admitted in accordance with the provisions of this Chapter.

Also, LSA-R.S. 12:1332, entitled right of assignee to become a member, provides, in pertinent part:

> A. Except as otherwise provided in the articles of organization or a written operating agreement:
>
> (1) An assignee of an interest in a limited liability company shall not become a member or participate in the management of the limited liability company unless the other members unanimously consent in writing.

Dr. Poché asserts that none of the plaintiffs had a membership interest in CCS and the plaintiffs remained assignees because there was never unanimous consent in writing evidencing the members' intent to allow plaintiffs to become members of CCS. Dr. Poché points out that the annual report filed with the Secretary of State on June 29, 2004, indicated that CCS's only members were Francis, Poché, LLC, and Prestige Services, LLC.[6] Dr. Poché concludes that because plaintiffs were assignees, they have no right of action or cause of action for damages arising from any breach of a fiduciary duty. See Susan Kalinka, *Louisiana Civil Law Treatise: Limited Liability Companies and Partnerships: A Guide to Business and Tax Planning*, 9 La. Civ. L. Treatise § 3.31 (2001) ("[N]o member or manager owes a fiduciary duty to an assignee of a member's interest.")

Generally, we note that the assignment statute applies when a member sells his interest or a portion thereof to a third party, which is typically done without the consent of the other LLC members. As succinctly stated by one

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[6] Moreover, Jayne Apple, the CPA who prepared CCS's tax returns and K-1s for the years 2007 and 2008, indicated that she included an explanatory note with the returns that according to "management" Destiny, Accurate, Robért and Vaccaro were not members of CCS.

court, one of the policies requiring consent of all other members to allow an assignee to become a member is that "it is far more tolerable to have to suffer a new passive co-investor one did not choose than to endure a new co-manager without consent." **Eureka VIII LLC v. Niagara Falls Holdings LLC**, 899 A.2d 95, 115 (Del.Ch. 6/06/06). That is particularly the case where an LLC is closely held. Larry E. Ribstein & Robert R. Keatinge, *Ribstein and Keatinge on Limited Liability Companies* § 7:4 (2005). When an LLC is closely held, "members often work closely with co-owners and, therefore, prefer to select their associates." **Id.** Transfers of membership interests, then, "introduce potential new conflicts of interest" and "change and perhaps complicate decision-making." **Id.** In the instant case, however, CCS's members consented at least to allowing plaintiffs to obtain an interest in the profits of the L.L.C. Cf. **Kinkle v. R.D.C., LLC**, 04-1092 (La.App. 3 Cir. 12/8/04), 889 So.2d 405 (representative of an estate managing a deceased member's interest in an LLC was an assignee under LSA-R.S. 12:1330).

We recognize, as noted by Dr. Poché, that the jury's finding with regard to whether plaintiffs were members of CCS is subject to the manifest error standard of review on appeal. Under that standard of review, an appellate court may only reverse factual determinations if it finds from the record that a reasonable factual basis for the finding does not exist and that examination of the entire record reveals that the finding is clearly erroneous. **Stobart v. State, Department of Transportation and Development**, 617 So.2d 880, 882 (La. 1993). Thus, where two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. **Stobart**, 617 So.2d at 883.

"Member" is defined as "a person with a membership interest in a limited liability company." LSA-R.S. 12:1301 A(13). "Membership interest" is defined as "a member's rights in a limited liability company, collectively, including the member's share of the profits and losses of the limited liability company, the right to receive distributions of the limited liability company's assets, and any right to vote or participate in management." LSA-R.S. 12:1301 A(14).

Here, plaintiffs had the right to share in the profits and losses and to receive distributions of assets, as discussed below. Further, we note that CCS's general ledger included a category of contributions from "Members" and listed Robért and Vaccaro as such. Ronald Gagnet, an expert in accounting and business valuation retained by plaintiffs, testified that the books showed the equity accounts of all five individuals, including Robért and Vaccaro, by name, as well as a category for "Members' Draws." The income tax returns prior to 2007 characterized Destiny and Accurate as "members" and provided them K-1 tax forms.[7] Additionally, Destiny and Accurate received a "Notice of Special Meeting of Members," and the existing members allowed them to vote with regard to whether CCS should be dissolved. Considering the foregoing, we cannot conclude that the jury committed manifest error in finding that plaintiffs were members of CCS.

ARE PLAINTIFFS, AS MEMBERS OF CCS, ENTITLED TO AN EQUAL SHARING OF PROFITS?

The plaintiffs urge that they are members entitled to an equal sharing because CCS's Articles of Organization indicated that there would be no operating agreement. Absent a written operating agreement, plaintiffs assert that the LLC's profits must be shared equally among the members. LSA-R.S. 12:1323.[8]

We note that when CCS was formed, the only entities appearing in the Articles of Organization were Francis, Poché, LLC, and Prestige Services, LLC, and the Articles of Organization provided that CCS would be managed by its

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[7] Guy Koontz, the CPA that prepared the forms, indicated that he "needed to mark something, and that is what I chose to mark," but indicated that neither Poché nor Francis ever told him that any of the plaintiffs were a member of CCS. Koontz further testified that there was no space on the IRS forms for an equity investor.

[8] Louisiana Revised Statutes 12:1323 provides:

> The profits and losses of a limited liability company shall be allocated among the members and among classes of members in the manner provided in a written operating agreement. **To the extent the operating agreement does not so provide in writing, profits and losses shall be allocated equally among the members.** The provisions of this Section regarding the allocation of losses shall not affect the limitations on the liability of members and managers set forth in R.S. 12:1320. (Emphasis added.)

members. Additionally, Francis, Poché, LLC, and Prestige Services, LLC, were the only three members listed in the Initial Report. Accordingly, Francis, Poché, LLC, and Prestige Services, LLC were the only members of CCS when it was founded. See LSA-R.S. 12:1305. Because no operating agreement was in effect at the time CCS was formed, each member—Francis, Poché, LLC, and Prestige Services, LLC—was entitled to share equally in the profits, losses, and distributions. See LSA-R.S. 12:1323 and 12:1324.

Later, Vaccaro and Robért, through the September 16, 2003 e-mail proposal, were offered an option to participate in an "equity" position with CCS, and the equity available for purchase was limited to a "maximum total amount" of 20%. The option did not specifically provide Vacarro or Robért any authority to act as managers in the member-managed LLC. See LSA-R.S. 12:1317 A, 12:1332 A(1), and LSA-R.S. 12:1318. Vaccaro and Robért agreed to the equity position and ultimately purchased over $218,000.00 in equity in CCS.

In determining whether an operating agreement exists, substance is considered over form.[9] We note that Louisiana's LLC law is intended "to give maximum effect to the principle of freedom of contract." LSA-R.S. 12:1367 B. In furthering its goal to allow freedom of contract, the Louisiana LLC Act defines operating agreement to mean "any agreement, written or oral, of the members ... memorializing the affairs of a limited liability company and the conduct of its business." LSA-R.S. 12:1301 A(16). An operating agreement is contractual in nature; thus, it binds the members of the LLC as written and is interpreted pursuant to contract law. **Kinkle v. R.D.C., L.L.C.**, 04–1092, p. 7 (La.App. 3 Cir. 12/8/04), 889 So.2d 405, 409.

A contract is formed by the consent of the parties established through offer and acceptance. LSA-C.C. art. 1927. Parties are free to contract for any object that is lawful, possible, and determined or determinable. LSA-C.C. art.

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[9] See e.g, **Spires v. Casterline**, 4 Misc.3d 428, 434, 778 N.Y.S.2d 259, 264-65 (N.Y. Sup. Ct. 2004) wherein several documents, including a "Partner's Interim Voting Agreement," met the requirements of an operating agreement pursuant to New York's LLC law.

1971. Interpretation of a contract is the determination of the common intent of the parties. LSA-C.C. art. 2045. In attempting to determine that common intent, we may not seek a different interpretation "[w]hen the words of a contract are clear and explicit and lead to no absurd consequences." LSA-C.C. art. 2046. However, if words of a contract are susceptible of different meanings, we must interpret them in the manner that "best conforms to the object of the contract." LSA-C.C. art. 2048. We are required to interpret a doubtful provision "in light of the nature of the contract, equity, usages, the conduct of the parties before and after the formation of the contract, and of other contracts of a like nature between the same parties." LSA-C.C. art.2053.

The proper interpretation of a contract is a question of law. **Montz v. Theard**, 01-0768, p. 5 (La.App. 1 Cir. 2/27/02), 818 So.2d 181, 185. When considering legal issues, the reviewing court accords no special weight to the trial court, but conducts a *de novo* review of questions of law and renders judgment on the record. **Id.**

At all times pertinent hereto, the members have been free to contract any provision they desired, so long as the provision is not in conflict with the limited requirements of the Louisiana LLC Act. Accordingly, we conclude that the September 16, 2003 proposal accepted by plaintiffs, although not entitled "Operating Agreement," qualifies as such pursuant to LSA-R.S. 12:1301 A(16), set out above. Therefore, we must look to the agreement entered into by the members to ascertain the rights and obligations of the parties thereto.

In accordance with the proposal, plaintiffs agreed to participate as passive non-managing members in CCS, and the proposal limited the "maximum total amount of equity available for purchase [to] 20%." Clearly, the parties intended to allow plaintiffs to purchase a percentage of ownership in CCS, not to exceed a total maximum of 20% of the company. Although plaintiffs could have opted to purchase the entire 20% of outstanding equity, they chose not do so and purchased $218,000.00 in equity, or roughly 5% total of the company in accordance with CCS's estimated value of $4,411,064.

In return, we note that CCS was required to make "[e]quity disbursements [to plaintiffs]...on as near a quarterly basis as possible." Nothing in the agreement provides that a member should receive a greater share of disbursement of profits than his percentage of equity ownership interest.

Although an operating agreement need not be in writing, LSA-R.S. 12:1323 requires a written agreement in order to modify the statutory provision that profits and losses are shared equally. We find that the September 16, 2003 e-mail proposal and subsequent acceptance meets the writing requirement. Accordingly, plaintiffs are not entitled to an equal sharing of profits in CCS. Rather, plaintiffs, pursuant to the parties' agreement, are entitled to their share of profits in accordance with their equity ownership interest.[10]

Nevertheless, plaintiffs as members of CCS, albeit not entitled to an equal sharing of profits, were owed fiduciary duties pursuant to LSA-R.S. 12:1314 A(1). Accordingly, plaintiffs can maintain a cause of action for breach of the fiduciary duty.

DO PLAINTIFFS HAVE A PERSONAL RIGHT OF ACTION ARISING FROM ANY BREACH OF FIDUCIARY DUTIES?

Dr. Poché contends that plaintiffs have no personal right of action to sue or recover for breach of fiduciary duty damages in their own name, but can only bring a derivative action on behalf of the LLC. In this regard, LSA-C.C.P. art. 611 provides, in pertinent part:

> When a corporation or unincorporated association refuses to enforce a right of the corporation or unincorporated association, a shareholder, partner, or member thereof may bring a derivative action to enforce the right on behalf of the corporation or unincorporated association.

Accordingly, shareholders in a corporation have no personal right of action to enforce rights on behalf of the corporation. See **Bordelon v. Cochrane**, 533 So.2d 82, 85-86 (La.App. 3 Cir. 1988), writ denied, 536 So.2d 1255 (La. 1989),

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[10] In accordance with the agreement, it appears that plaintiffs were initially entitled to roughly 5% of the profits, or 2.47% each. However, plaintiffs' interest increased slightly after CCS bought Prestige/Moss's interest in 2005. Following Prestige/Moss's buyout, it appears that plaintiffs' equity interest in CCS was roughly 7% of the company, or 3.62% each.

and **Dennis v. Copelin**, 94-2002, pp. 8-9 (La.App. 4 Cir. 2/1/96), 669 So.2d 556, 560-61, writ denied, 96-1012 (La. 6/21/96), 675 So.2d 1079.

Plaintiffs point out that as recognized under corporate law, where the breach of a fiduciary duty causes loss to a shareholder personally, *i.e.*, a direct loss to the shareholder which is not suffered by all shareholders of a corporation, that shareholder may have a right to sue individually. **Talbot v. C & C Millworks, Inc.**, 97-1489, p. 6 (La.App. 1 Cir. 6/29/98), 715 So.2d 153, 156-57 (shareholder has a personal right of action where he alleged that he has suffered a loss which the other shareholders have not suffered, *i.e.*, the payment of dividends to all shareholders but himself). As such, plaintiffs maintain that they have a personal right of action in this regard.

In this matter, plaintiffs allege that defendants breached fiduciary duties by paying themselves large profits out of CCS's funds, without any such parallel payments being made to plaintiffs. Specifically, plaintiffs contend that the following amounts were withdrawn over several years: $1,340,691.00 by Dr. Poché, $1,170,799.00 by Francis, and $469,000.00 by Moss. Additionally, plaintiffs note that no distributions were sent to them until after they filed suit. Plaintiffs returned these distributions because they were unable to verify whether the amounts paid were appropriate and plaintiffs felt the amounts paid were late. Moreover, plaintiffs note that the defendants would not allow them to review CCS's financial records to ascertain whether the amounts sent were appropriate unless plaintiffs signed a confidentiality agreement, which, among other things, attempted to preclude plaintiffs from filing any suit to protect their interests. See LSA-R.S. 12:1319(B).[11]

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[11] Louisiana Revised Statutes 12:1319(B) provides:

> Unless otherwise provided in the articles of organization or an operating agreement, a member may do any of the following:
>
>> (1) At the member's own expense, inspect and copy any limited liability company record upon reasonable request during ordinary business hours.
>>
>> (2) Obtain from time to time upon reasonable demand the following:

To the extent plaintiffs allege that the majority members received payments beyond which they were entitled, such action can be maintained only as a derivative action on behalf of the LLC insofar as the loss was borne by CCS. Also, LSA-R.S. 12:1328, entitled "Liability upon wrongful distribution," provides, in pertinent part:

> A. Each member, if management is reserved to the members, or manager, if management is vested in one or more managers pursuant to R.S. 12:1312, who knowingly, or without the exercise of reasonable care and inquiry, votes for or assents to a distribution in violation of the articles of organization, an operating agreement, or R.S. 12:1327 ***shall be jointly and severally liable to the limited liability company*** for the amount of the distribution that exceeds the amount that could have been distributed without violating R.S. 12:1327, the articles of organization, or an operating agreement. ***Each member shall be liable to the limited liability company*** for the amount which the member received in violation of this Section. (Emphasis added.)

Plaintiffs assert that Dr. Poché, LLC, Francis, and Moss received contributions beyond which they were entitled, thereby depleting CCS of any funds to pay plaintiffs' their portion of the profits.[12] We note that any loss arising from the alleged improper disbursements was borne by CCS and the right to bring such an action belongs to CCS. See **Thornton ex rel. Laneco Const. Systems, Inc. v. Lanehart**, 97-2871, pp. 8-9 (La.App. 1 Cir. 12/28/98), 723 So.2d 1127, 1133, writ denied, 99-0177 (La. 3/19/99), 740 So.2d 115. As such, plaintiffs have no personal right of action in this regard. Rather, any such claim

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(a) True and complete information regarding the state of the business and financial condition of the limited liability company.

(b) Promptly after becoming available, a copy of the limited liability company's federal and state income tax returns for each year.

(c) Other information regarding the affairs of the limited liability company as is just and reasonable.

(3) Demand a formal accounting of the limited liability company's affairs whenever circumstances render it just and reasonable.

[12] Ronald Gagnet, an expert in accounting and business valuation retained by plaintiffs, explained that "at the end of each calendar year, virtually all of the cash in the company was distributed in the form of guaranteed payments or member distributions." Gagnet observed that this practice resulted in inequities in the member capital accounts such that the plaintiffs ran positive capital account balances and the managing members ran negative balances in virtually the same amount. As he noted, the defendants ended up owing the plaintiffs "the full amount of the non-managers' capital balances at the end of each calendar year."

must properly be asserted through a derivative action. See LSA-C.C.P. art. 611. Although plaintiffs filed a derivative action on behalf of CCS, plaintiffs did not pursue nor seek recovery of these alleged improper disbursements on behalf of CCS at trial. Rather, the jury verdict form requested that the jury only determine what damages, if any, arising from defendants' breaches of fiduciary duties would compensate Vaccaro/Destiny and Robért/Accurate for their losses.[13] As such, plaintiffs did not specifically seek compensation for the losses sustained by CCS, derivatively.[14]

In light of the foregoing, we vacate the jury's award arising from the defendants' alleged breaches of fiduciary duties. Moreover, we pretermit plaintiffs' appeal seeking to have the breach of fiduciary duty award rendered *in solido* against the defendants.

FRAUD

With regard to the fraud claim, Dr. Poché asserts that the claim was prescribed at the time plaintiffs amended their petition to seek damages arising from fraud. Dr. Poché notes that actions for fraud are delictual in nature and subject to a prescriptive period of one year. See LSA-C.C. art. 3492 and **Gad v. Granberry**, 2007-0117, p. 6 (La.App. 3 Cir. 5/30/07), 958 So.2d 125, 128, writs denied, 2007-1336, 2007-1361 (La. 9/28/07), 964 So.2d 364, 965 So.2d 365. The prescriptive period commences to run when the plaintiff knew or reasonably should have known that he or she has suffered harm due to a tortious act of the defendant. **Harvey v. Dixie Graphics, Inc.**, 593 So.2d 351, 354 (La. 1992). Louisiana Civil Code art. 3492, like all prescription statutes, is strictly construed against prescription and in favor of maintaining the cause of action. **Paragon**

[13] Neither party objected to this portion of the jury verdict form. We note that the law requires a contemporaneous objection. The failure to make a contemporaneous objection to the jury instructions or to the jury verdict precludes the issues from being raised for the first time on appeal. See LSA-C.C.P. art. 1793; **Robinson v. Astra Pharmaceutical Products, Inc.**, 98-0361, 98-0362, p. 7 (La.App. 1 Cir. 3/31/00), 765 So.2d 378, 383, writ denied, 00-1225 (La. 6/2/00), 763 So.2d 607.

[14] To the extent plaintiffs never received their distributions of profits retained by CCS in accordance with the terms of the parties' agreement, plaintiffs would have a personal right of action to recover these sums directly from CCS, and not from the defendants individually, insofar as they suffered a direct loss not sustained by the other majority members. However, it is unclear whether CCS retained any profits and plaintiffs did not seek recovery directly from CCS.

Dev. Group, Inc. v. Skeins, 96-2125, p. 3 (La. App. 1 Cir. 9/19/97), 700 So.2d 1279, 1281.[15]

Dr. Poché notes that on December 21, 2005, plaintiffs received the 2004 CCS General Ledger, which reflected the reclassification of plaintiffs' funds into Moss's capital account. Dr. Poché contends that should have put plaintiffs on notice of any claims for fraud. Accordingly, Dr. Poché avers that the supplemental petition filed by Robért and Vaccaro on December 20, 2007 was filed untimely.

We note that although plaintiffs may have had some reason to question the reclassification of funds in their capital accounts by December 21, 2005, such knowledge was insufficient to put plaintiffs on notice that defendants may have been misappropriating funds, including equity contributions and profit distributions. Rather, plaintiffs, through later discovery, learned of these alleged misappropriations. Accordingly, given that we must construe in favor of maintaining the action and against prescription, we deny Dr. Poché's exception of prescription related to plaintiffs' fraud claim.

The jury awarded Vaccaro/Destiny and Robért/Accurate $109,186.00 each, or the amount that each invested in CCS. Based on the totality of evidence, including testimony that CCS currently has a *de minimus* value due in large part to actions of the majority owners and that the majority owners can choose to dissolve the LLC at any time,[16] we are constrained to find that the jury did not abuse its discretion in making this award.[17]

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[15] We note that the exception of prescription was refiled with this court.

[16] After plaintiffs did not vote in favor of dissolving CCS, the Articles of Organization were amended to provide that CCS may be dissolved by consent of its members and that each member's vote is equal to the member's membership interest in the LLC. Additionally, we note that defendants formed a new entity, Cost Containment Systems, LLC, but that entity later dissolved without having done any business at all.

[17] Dr. Poché also filed exceptions of no cause of action and no right of action with this court with regard to the fraud claim, asserting that the fraud was not alleged with particularity nor is the damage to plaintiffs as a result of the alleged fraud. In light of our ruling on the merits, we deny Poché's exceptions of no right of action and no cause of action with regard to the fraud claims.

CONCLUSION

For the foregoing reasons, Dr. Poché's exceptions of prescription, no cause of action, and no right of action, which are all related to the fraud claim, are denied, and the trial court's January 28, 2010 judgment awarding damages for the fraud claim is affirmed. We vacate the January 28, 2010 judgment with regard to the damages awarded for defendants' alleged breaches of fiduciary duties. In light of this ruling, we pretermit plaintiffs' cross-appeal. Each party is to bear his/its own costs of these appeals.

JUDGMENT AFFIRMED IN PART, VACATED IN PART; DEFENDANTS' EXCEPTIONS OF PRESCRIPTION, NO CAUSE OF ACTION, AND NO RIGHT OF ACTION DENIED; PLAINTIFFS' CROSS-APPEAL PRETERMITTED.