

NOTICE
Decision filed 08/17/16. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

2016 IL App (5th) 150283-U

NO. 5-15-0283

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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).

ROBERT G. FOURNIE, SR., and KENNETH FOURNIE,)	Appeal from the
)	Circuit Court of
)	St. Clair County.
Plaintiffs-Appellants,)	
)	
v.)	No. 09-L-95
)	
FOURNIE CONTRACTING COMPANY, INC.,)	
KAREN FOURNIE, and JAMES FOURNIE,)	Honorable
)	Christopher Kolker,
Defendants-Appellees.)	Judge, presiding.

JUSTICE MOORE delivered the judgment of the court.
Justices Welch and Chapman concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err in dismissing the plaintiffs' direct claims against the defendants because Delaware law requires that where the plaintiffs' damages do not exist independent of damages to the corporation, such claims are required to be brought derivatively.

¶ 2 The plaintiffs, Robert G. Fournie, Sr., and Kenneth Fournie, appeal from the July 8, 2015, order of the circuit court of St. Clair County which denied their motion to reconsider its June 17, 2015, order dismissing, with prejudice, counts I, II, and III of their fourth amended complaint against the defendants, Fournie Contracting Company, Karen Fournie, and James Fournie, pursuant to section 2-619 of the Illinois Code of Civil

Procedure (the Code) (735 ILCS 5/2-619 (West 2014)). For the reasons that follow, we affirm.

¶ 3

FACTS

¶ 4 We begin our recitation of the facts necessary to our disposition of this appeal by noting that the record on appeal is substantially incomplete. While this action originated in 2009, the common law record submitted to this court only contains the pleadings and other filings in this case from the time of the filing of the fourth amended complaint on May 21, 2015. Pursuant to Illinois Supreme Court Rule 321 (eff. Feb. 1, 1994), the record on appeal shall consist of, *inter alia*, the entire original common law record, unless the parties stipulate or the circuit court or this court orders otherwise. It appears to this court that the issues presented by the fourth amended complaint relate back to prior orders of the circuit court allowing the plaintiffs to attempt to amend their complaint to correct what it ruled to be fatal defects in the earlier pleadings. On review, this court does not have the benefit of referring to these prior pleadings and proceedings thereon due to the incomplete nature of the common law record. As such, any doubts raised by insufficiencies in the record will be resolved against the appellants. See *Williams v. Dorsey*, 273 Ill. App. 3d 893, 896-97 (1995). With this in mind, we turn to the facts as they can be gleaned from the record on appeal.

¶ 5 On May 21, 2015, the plaintiffs filed their fourth amended complaint (complaint) in the circuit court of St. Clair County. We quote extensively from the complaint in an attempt to ascertain the precise nature of the causes of action stated in the various counts. According to the "Introduction" section of the complaint:

"This is an action to recover damages for breach of the duty [*sic*], a breach of loyalty, for conversion, and the intentional theft of money from the plaintiffs, shareholders of Belleville Concrete Contracting Company (BCC) by the [d]efendants. Defendants worked together (James Fournie as President and Karen Fournie as BCC's bookkeeper and office manager) as employees of BCC and had a duty of loyalty to BCC. They conspired to usurp corporate opportunities and steal the assets and the good will of BCC to the benefit of their new competing company, Fournie Contracting Company, Inc. (FCC), eventually rendering BCC insolvent and forced into receivership."

¶ 6 In the section of the complaint entitled "Facts Common To All Counts," the plaintiffs allege that BCC is a family-owned corporation in which the plaintiffs own 50% of the stock. In January 2002, defendant James Fournie became the president of BCC, and his wife, defendant Karen Fournie, was employed as the bookkeeper/office manager for BCC. As such, the complaint alleges that both James and Karen owed a duty of loyalty and fidelity to BCC. In August 2006, Karen incorporated FCC and began operating FCC as a competing concrete and plastering business at the same address where BCC operated. The complaint alleges that both James and Karen began intercepting and stealing BCC money, checks, and accounts receivable and depositing those funds into FCC. In addition, the two began to divert business opportunities from BCC to FCC and used BCC's address, reputation, employees, equipment, machinery, tools, vehicles, material, and other unknown assets to perform FCC's jobs.

¶ 7 Continuing under the section of the complaint entitled "Facts Common To All Counts," the complaint alleges that the plaintiffs had filed, in a prior case, a petition for accounting and receivership, and during the pendency of this prior proceeding, James and Karen failed to disclose to the court, and the plaintiffs, the existence of FCC, causing the plaintiffs to agree to keep James as president and Karen as bookkeeper/office manager. In addition, the complaint alleges James and Karen, upon leaving BCC, took all BCC's books and records.

¶ 8 Count I of the complaint alleges the following:

"Karen Fournie, James Fournie[,] and FCC committed fraud and deceit upon [the plaintiffs] in the following respects:

- A. Karen Fournie, James Fournie[,] and FCC failed to disclose to [the plaintiffs] that they had incorporated a competing corporation in order to take accounts receivable which were due and jobs from BCC and deposit said funds into an FCC account;
- B. [The plaintiffs] justifiably relied upon the fact that their shares and equity in BCC were secure;
- C. [The plaintiffs] suffered damages resulting from the withholding of these material facts by Karen Fournie, James Fournie[,] and FCC; and
- D. Karen Fournie, James Fournie[,] and FCC knew that the competing corporation, FCC, was taking money due to BCC and jobs intended for BCC, therefore making their shares in BCC worthless.

WHEREFORE, [the plaintiffs] suffered compensatory damages in an amount in excess of \$50,000 and also suffered punitive damages in excess of \$50,000 from the willful and wanton misconduct of Karen Fournie, James Fournie[,] and FCC."

¶ 9 Count II of the complaint alleges the following:

- " A. Defendants, Karen Fournie, James Fournie[,] and FCC[,] knowingly withheld from the plaintiffs material facts.
- B. Defendants, Karen Fournie, James Fournie[,] and FCC[,] withheld the facts with the intent to deceive the [p]laintiffs and induce them to fail to take action against Karen Fournie, James Fournie[,] and FCC.
- C. Plaintiffs *** acted in justifiable reliance on the facts as they knew them.
- D. Plaintiffs['] *** damages resulted from the withholding of material facts by the [d]efendants.

WHEREFORE, [the plaintiffs] suffered compensatory damages in an amount in excess of \$50,000 and also suffered punitive damages in excess of \$50,000 from the willful and wanton misconduct of Karen Fournie, James Fournie[,] and FCC."

¶ 10 Count III of the complaint alleges as follows:

"Since mid-2006 Karen Fournie has continued to operate FCC.

Every FCC job since its inception constitutes a continuing set of damages to the [p]laintiffs, because the work FCC has performed would have otherwise been performed by BCC.

That defendant's [*sic*] said breach of the duty of loyalty owed plaintiffs was outrageous and intentional, meriting an award of punitive damages against [d]efendants in an amount in excess of \$50,000.

That plaintiffs' compensatory damages are in excess of \$50,000."

¶ 11 Count IV of the complaint is an alternative count against James Fournie under a theory of *de facto* partnership. That count alleges that because BCC was a *de facto* partnership, James Fournie owed each partner a duty of loyalty, care, and fidelity which James and Karen Fournie breached by converting the assets and goodwill to the benefit of FCC. That count requests an accounting of both BCC and FCC to determine the actual amount of compensatory damages and an award of punitive damages as well.

¶ 12 On May 29, 2015, the defendants filed a motion to dismiss the plaintiffs' complaint pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2014)). The motion to dismiss outlines the previous history of the litigation, much of which, as previously explained, is missing from the record on appeal, and as such, any doubts regarding this history must be resolved against the appellants. See *Williams*, 273 Ill. App. 3d at 896-97. According to the motion to dismiss, on May 23, 2012, the defendants filed a motion for summary judgment as to all counts of the original complaint, which is not included in the record on appeal. Arguments were heard on the matter on August 3, 2012. The circuit court reserved ruling on the motion and allowed the plaintiffs to file an amended complaint.

¶ 13 According to the motion to dismiss, the plaintiffs filed a first amended complaint containing eight counts against the defendants on August 13, 2012. Again, the first

amended complaint is not contained in the record on appeal. The motion to dismiss asserts that the defendants filed a combined motion to dismiss and for summary judgment directed at the first amended complaint on August 23, 2012. On November 1, 2012, the court issued an order granting summary judgment on counts I-III of the first amended complaint. This order is attached to the motion to dismiss the complaint as Exhibit A. That order dismisses counts I, II, and III of the first amended complaint with prejudice based on the circuit court's finding that they are in fact shareholder derivative actions and cannot be brought by the individual plaintiffs against the named defendants. The order also dismisses counts VI, VII, and VIII of the amended complaint as shareholder derivative actions required to be brought by BCC, which is not made a party. The November 1, 2012, order finds that count IV of the first amended complaint would be the only count upon which the plaintiffs could proceed. This count was brought against defendant James Fournie for violations of his fiduciary duty to the plaintiffs as a *de facto* partner.

¶ 14 The defendants' May 29, 2015, motion to dismiss continues to recount the history of this case to which this court is not privy due to the inadequacy of the record. According to the motion, on April 8, 2015, the circuit court ordered the plaintiffs to file a third amended complaint "to reflect the current status of the pleadings."¹ This order is

¹The motion to dismiss does not recount the circumstances surrounding the filing of the second amended complaint and any proceedings related thereto. And, again, these filings are absent from the record on appeal.

attached to the motion to dismiss as Exhibit B. The motion to dismiss states that the plaintiffs filed a third amended complaint on April 27, 2015, containing two counts both grounded in a *de facto* partnership theory. The third amended complaint is also not contained in the record on appeal. The motion to dismiss states that eight days later, the plaintiffs orally requested leave to file the fourth amended complaint, which is the complaint at issue in this appeal.

¶ 15 The motion to dismiss argues that counts I, II, and III of the complaint were previously litigated and dismissed with prejudice, and are barred by the law of the case doctrine. According to the motion to dismiss, these counts plead corporate damages in a direct action, and, as the previous orders dismissing these counts found, must be brought as a shareholder's derivative action. The motion to dismiss also seeks to dismiss count IV of the complaint, arguing that despite the attempt to plead a *de facto* partnership theory, count IV is actually derivative in nature.

¶ 16 On June 16, 2015, the plaintiffs filed a reply to the defendants' motion to dismiss, in which they state that "the first three counts [of the complaint] have nothing to do with the first three [c]ounts from any previous [c]omplaint." The plaintiffs argue in the reply, without citation, that the basis of a derivative action is that all shareholders were harmed equally and any damages would flow back to the corporation where they would be distributed to all the shareholders *pro rata*, based on the shares they controlled. The plaintiffs argue in their reply that they have a direct action because not all of the shareholders were harmed and the defendants would benefit by their own illegal actions

if this were made a derivative action because they would recoup a percentage of the money they already stole from BCC.

¶ 17 In their reply, and in their brief on appeal, the plaintiffs argue that because BCC was incorporated in the State of Delaware, Delaware law should apply to the plaintiffs' claims. They argue that an unpublished Delaware case, *Stevanov v. O'Connor*, No. 3820-VCP, 2009 WL 1059640 (Del. Ch. Apr. 21, 2009), provides support for their direct claims against the defendants because in *Stevanov*, an ex-wife was permitted to proceed directly against an ex-husband in an action related to a closely held family corporation wherein the ex-wife alleged breach of his fiduciary duties as an officer and controller of the corporation in which they were business partners.

¶ 18 On June 16, 2015, the circuit court held a hearing on the defendants' motion to dismiss the complaint.² On June 17, 2015, the circuit court entered an order dismissing counts I, II, and III of the complaint with prejudice, finding the damages the plaintiffs are seeking are those of BCC, and as such, these counts must be brought as derivative actions. On July 1, 2015, the plaintiffs filed a motion to reconsider, arguing that counts I, II, and III of the complaint state direct claims against the defendants.

¶ 19 On July 8, 2015, the plaintiffs filed a motion to voluntarily dismiss count IV of the complaint pursuant to section 2-1009 of the Code (735 ILCS 5/2-1009 (West 2014)). The plaintiffs also filed an offer of proof, attaching public records establishing that BCC

²It is worth noting that this hearing was held before a different judge than all of the previous proceedings regarding the former versions of the complaint.

was incorporated in the State of Delaware and authorized to do business in Illinois as a foreign corporation. On that same date, the circuit court entered an order denying the plaintiffs' motion to reconsider and granting the plaintiffs' motion to voluntarily dismiss count IV. On July 16, 2015, having voluntarily dismissed the only count remaining in the lawsuit, the plaintiffs filed a notice of appeal, pursuant to Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994), of the circuit court's order denying their motion to reconsider. On July 17, 2015, the plaintiffs filed an amended notice of appeal specifying their appeal from the circuit court's order dismissing counts I, II, and III of the complaint with prejudice.

¶ 20

ANALYSIS

¶ 21 We begin our analysis with the applicable standard of review. When the circuit court dismisses a complaint under section 2-615 of the Code (735 ILCS 5/2-615 (West 2014)) or 2-619 (735 ILCS 5/2-619 (West 2014)), our standard of review is *de novo*. *Goldberg v. Michael*, 328 Ill. App. 3d 593, 597 (2002). We may affirm the decision of the circuit court for any reason appearing in the record, regardless of the basis relied upon by the circuit court. *Id.*

¶ 22 Having set forth the applicable standard of review, we turn to the choice of law issues presented by this appeal. The issue of whether the plaintiffs were required to bring their claims in a derivative action instead of a direct action is determined by application of the substantive law of Delaware since BCC was incorporated in that state. *Lipman v. Batterson*, 316 Ill. App. 3d 1211, 1215 (2000). In addition, to the extent that our *de novo* review requires us to determine whether the plaintiffs have adequately pleaded causes of

action for breaches of fiduciary duty involving BCC, Delaware law governs such claims as well. *Prime Leasing, Inc. v. Kendig*, 332 Ill. App. 3d 300, 314 n.1 (2002).

¶ 23 Under Delaware law, the issue of whether a stockholder's claim is derivative or direct must turn solely on the following questions: (1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)? *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031, 1033 (Del. 2004). In the context of a claim for breach of fiduciary duty, the inquiry is stated as follows: "Looking at the body of the complaint and considering the nature of the wrong alleged and the relief requested, has the plaintiff demonstrated that he or she can prevail without showing an injury to the corporation?" *Id.* at 1036. "The stockholder's claimed direct injury must be independent of any alleged injury to the corporation." *Id.* at 1039. "The stockholder must demonstrate that the duty breached was owed to the stockholder and that he or she can prevail without showing an injury to the corporation." *Id.*

¶ 24 Before applying the analysis set forth by the Delaware Supreme Court to counts I, II, and III of the complaint in order to determine whether they must be brought derivatively, it is important to note that a reading of the allegations contained therein, which are quoted extensively above, makes it difficult to determine precisely what specific causes of action are being alleged. In the introduction section of the complaint, the plaintiffs state that the action is one to recover damages for "breach of the duty, a breach of loyalty, for conversion, and the intentional theft of money from the plaintiffs." Yet count I of the complaint appears to allege the elements of a claim for fraud against all

three defendants, count II appears to allege the elements of a claim for misrepresentation, and count III for continuing injury. Allegations are absent regarding the duty of FCC to the plaintiffs or any allegations that would allow for piercing of the corporate veil of FCC. Despite these potential deficiencies in the causes of action alleged, however, we proceed to a *Tooley* analysis to determine whether the circuit court was correct in finding that these counts must be brought as derivative causes of action rather than directly.

¶ 25 It is clear from all of the allegations of damage throughout the body of the complaint that BCC was injured by the alleged wrongdoing of the defendants, and that the plaintiffs were injured as shareholders because BCC was so injured. The complaint alleges that the defendants incorporated FCC and operated FCC in direct competition with BCC, intercepted and stole BCC money, diverted BCC business opportunities, and converted BCC assets for FCC's use. The complaint further alleges the defendants failed to keep BCC's records and inventory safe, and obstructed BCC's ability to bond and insure itself. In fact, there are no allegations in the complaint whatsoever as to how the plaintiffs were injured by the defendants' wrongdoing, other than by virtue of the fact that they are the shareholders of BCC. Accordingly, the allegations in the complaint fail to show a direct injury to the plaintiffs independent of an injury to BCC, and under a *Tooley* analysis, must be brought as a derivative action. The plaintiffs' argument that they should be able to proceed directly because the defendants would benefit, as shareholders, by their own illegal actions if this were made a derivative action must fail, as under the logic

of this argument, any action against a shareholder for an injury to the corporation should be brought directly, and this conclusion directly contradicts the law of Delaware.³

¶ 26 The plaintiffs cite an unpublished case from the Delaware Court of Chancery in support of their direct claims. See *Stevanov v. O'Connor*, No. 3820-VCP, 2009 WL 1059640 (Del. Ch. Apr. 21, 2009). The circuit court refused to give this case consideration in ruling on the defendants' motion to dismiss. However, because under Delaware law an unreported decision is entitled to great deference, although it is not necessarily *stare decisis*, we will consider it here. See *Aprahamian v. HBO & Co.*, 531 A.2d 1204, 1207 (Del. Ch. 1987). Having carefully considered *Stevanov*, we find that it does not support the plaintiffs' attempts to pursue direct claims against the defendants.

¶ 27 In *Stevanov*, the issue was whether an ex-wife in a closely held family corporation had a direct action against her ex-husband for his breach of fiduciary duties as an officer and controller of the corporation. *Stevanov*, No. 3820-VCP, 2009 WL 1059640, at *5. The ex-husband filed a motion for summary judgment arguing, *inter alia*, that the ex-wife was required to bring her action derivatively. *Id.* at *4. The chancery court declined to grant summary judgment based on its exclusively derivative nature, holding that a more thorough development of the record would clarify the law or its application. *Id.* at *6. The court expressed concern that it was unclear whether the ex-wife was pursuing her

³We note that Illinois law mirrors that of Delaware on the issue of direct versus derivative actions. See *Small v. Sussman*, 306 Ill. App. 3d 639, 643-45 (1999).

breach of fiduciary duty claim on a *de facto* partnership theory.⁴ *Id.* In addition, the court acknowledged that the facts in *Stevanov* could potentially be subject to the rationale another chancery court had utilized to allow plaintiffs to proceed directly in the context of a limited partnership. *Id.* (citing *In re Cencom Cable Income Partners, L.P.*, No. C.A. 14634, 2000 WL 130629 (Del. Ch. Jan. 27, 2000)). However, the *Stevanov* court did not actually hold that the ex-wife could proceed directly; rather, the court held that it was not prepared to grant a summary judgment on the direct claims based on the record as it was developed at that time. *Id.*

¶ 28 In *Cencom*, however, the chancery court expressly limited its holding to cases involving alternative business entities, excluding corporations from its analysis by stating:

"This case presents a situation very familiar to this Court: passive investors in a business enterprise seek redress against the entity controlling the affairs of that enterprise for alleged breaches of duties owed to those passive investors. When this dispute arises in the corporate context, the Court of Chancery is well served by a highly developed body of law explaining principles that govern resolution of these disputes. Mechanistically applying the corporate common law rules

⁴We note that in the present case, the circuit court has permitted the plaintiffs to proceed in count IV of the complaint against defendant James Fournie directly on a theory of *de facto* partnership. The plaintiffs have voluntarily dismissed count IV of the complaint, presumably to pursue this appeal.

surrounding derivative claims can sometimes defeat efficient resolution of claims made in other contexts, however. In cases like the present one involving alternative business entities, the Court looks at corporate law precedent but, while doing so, recognizes the need for flexibility in determining its applicability." *Cencom*, No. C.A. 14634, 2000 WL 130629, *2.

¶ 29 The *Cencom* court held that:

"If: (1) a business association consists of only two parties in interest, one a putative class of injured plaintiffs and the other the defendant party that controls the business association; and, (2) the business association is effectively ended, but for the winding up of its affairs; and, (3) the two sides oppose each other in the final dispute over the liquidation of that association; then a claim brought in that context is direct. Under those circumstances, which are the facts of this case, classifying claims of collective injury as derivative ignores the reality that the dispute is really between the *only* two entities that make up the business association- the limited partner class and the general partner. It is not an action brought on behalf of the partnership itself." (Emphasis in original.) *Id.* at *1.

¶ 30 Interestingly, the *Stevanov* court mentioned that the closely held corporation in that case may be subject to the test stated in *Cencom*, without stating that the *Cencom* court itself excluded corporations from the test. *Stevanov*, No. 3820-VCP, 2009 WL 1059640, at *6. Nevertheless, the chancery court in *Stevanov* did recognize the reluctance of other chancery courts to expand *Cencom* into the corporate context. *Id.*

(citing *Agostino v. Hicks*, 845 A.2d 1110, 1125 (Del. Ch. 2004) (citing *Akins v. Cobb*, No. CIV.A. 18266, 2001 WL 1360038 (Del. Ch. Nov. 1, 2001))).

¶ 31 The plaintiffs cite no Delaware case that actually applies the *Cencom* test in the corporate context to find that the plaintiffs may proceed directly, and we are aware of none. Further, we note that even if we could find support in Delaware law that the *Cencom* test could be applied in the case of a closely held corporation, this test could only be applied to allow the plaintiffs to proceed directly against James Fournie, as the remaining defendants are not controlling entities with regard to BCC, but rather are alleged to be an employee and a competing corporate entity. And as we have already recognized, the circuit court has allowed the plaintiffs to proceed directly against James Fournie under a *de facto* partnership theory, but the plaintiffs have chosen to voluntarily dismiss that claim. Otherwise, we find, for the aforementioned reasons, that the plaintiffs are required to bring their causes of action against the defendants as derivative claims.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, the July 8, 2015, order of the circuit court of St. Clair County, which denied the plaintiffs' motion to reconsider its June 17, 2015, order dismissing counts I, II, and III of the plaintiffs' fourth amended complaint with prejudice, is affirmed.

¶ 34 Affirmed.