IN THE COURT OF APPEALS OF NORTH CAROLINA

2022-NCCOA-119

No. COA20-888

Filed 15 February 2022

Mecklenburg County, No. 18 CVS 22971

JAMES G. VERDONE, Plaintiff,

v.

GEORGE F. VERDONE, JR., individually and in his capacity as co-executor of the Estate of Emily Verdone, TUMP, LLC, VERDONE LIMITED PARTNERSHIP, CATHERINE E. VERDONE, individually and in her capacity as co-executor of the Estate of Emily Verdone, ELYSA V. STOCKIN, individually and in her capacity as co-executor of the Estate of Emily Verdone, and JAMES G. VERDONE, in his capacity as co-executor of the Estate of Emily Verdone, Defendants.

Appeal by Defendants from order entered 8 July 2020 by Judge George Bell in Mecklenburg County Superior Court. Heard in the Court of Appeals 5 October 2021.

Moore & Van Allen PLLC, by Kaitlin M. Price & Joshua D. Lanning, for plaintiff-appellee.

Falls Law Firm, PLLC, by David C. Boggs & H. Lee Falls, III, for defendants-appellants.

MURPHY, Judge.

¶ 1 Where the agreement forming a Delaware limited partnership unambiguously provides for dissolution of the partnership upon certain requirements being met, the occurrence of those requirements—absent triggering any applicable means of

revoking dissolution—will result in nonjudicial dissolution of the limited partnership. Here, where a limited partnership agreement provided for dissolution upon the resignation of a general partner and no revocation has occurred, the resignation of the limited partnership's sole general partner triggered nonjudicial dissolution. Furthermore, under Delaware law, when a plaintiff seeks personal relief for an injury distinct from that of other partners, it is a proper party to bring a claim for breach of fiduciary duty as a nonderivative action.

BACKGROUND

¶ 2 On 16 December 1997, the Verdone Limited Partnership ("VLP") was formed under the laws of Delaware. At the time of its formation, Emily Verdone was the sole general partner of VLP, and she was also a limited partner alongside Plaintiff James Verdone and Defendants Catherine Verdone, George Verdone, Jr., and Elysa Stockin. Upon the creation of VLP, Emily personally contributed a piece of real estate to VLP, which became its sole significant asset. Emily acted as VLP's Managing General Partner, tax matters partner, and power of attorney.

¶ 3 VLP is governed by its Agreement of Limited Partnership ("Agreement"). The Agreement provides that VLP dissolves under certain circumstances, most of which concern the statuses of VLP's general partners:

> 22. DISSOLUTION OF THE PARTNERSHIP

22.1 General. [VLP] shall be dissolved and terminated and its business wound up only upon the occurrence of any one of the following events:

(a) The filing by, on behalf of, or against a [g]eneral [p]artner of any petition or pleading, voluntary or involuntary, to declare such [g]eneral [p]artner bankrupt under any bankruptcy law or act, or the commencement in any court of any proceeding, voluntary or involuntary, to declare a [g]eneral [p]artner insolvent or unable to pay its debts, or the appointment by any court or supervisory authority of a receiver, trustee or other custodian of the property, assets or business of a [g]eneral [p]artner or the assignment by it of all or any part of its property or assets for the benefit of creditors, if said action, proceeding or appointment is not dismissed, vacated or otherwise terminated within sixty (60) days of its commencement;

(b) The joint determination of the Managing General Partner and the holders of at least 50% of the [l]imited [p]artner [i]nterests that the [p]artnership should be dissolved;

(c) The dissolution, retirement, resignation, death, disability, or legal incapacity of a general partner, and any other event resulting in the dissolution or termination of the [p]artnership under the laws of the State of Delaware; provided, that the events described in Sections 17-402(a)(4) and (5) of the Act or any similar provisions of any successor statute, shall not work a dissolution of the [p]artnership except as expressly provided in (b) above; and

(d) The sale, exchange or other disposition of all or substantially all of the property of the [p]artnership without making provision for the replacement thereof.

22.2 Continuation of Partnership Business. Notwithstanding the provisions of Section 22.1, the [p]artnership shall not be dissolved and terminated upon

> the occurrence of an event described in Section 22.1(b) or 22.1(d) with respect to a general partner (the "Terminating Event"), and its business shall continue pursuant to the terms and conditions of this Agreement, if any general partner or general partners shall be obligated to continue the business of the [p]artnership. If no general partner remains after the occurrence of a Terminating Event, the business of the [p]artnership shall continue pursuant to the terms and conditions of this Agreement, if, within ninety (90) days after the occurrence of such event, all of the [l]imited [p]artners agree in writing to continue the business of the [p]artnership, and, if necessary, to the appointment of one or more persons or entities to be substituted as the general partner. In the event the [l]imited [p]artners agree to continue the business of the [p]artnership, the new general partner or general partners shall succeed to all of the powers, privileges and obligations of the [g]eneral [p]artner, and the [g]eneral [p]artner's [i]nterest in the [p]artnership shall become a [l]imited [p]artner [i]nterest in the [p]artnership. Furthermore, in the event a remaining general partner or the [l]imited [p]artners, as the case may be, continue the business of the [p]artnership as provided herein, the remaining general partner or the newly appointed general partner or general partners, as the case may be, shall take all steps necessary and appropriate to prepare and record an amendment to the [p]artnership's Certificate of Limited Partnership to reflect the continuation of the business of the [p]artnership and the admission of a new general partner or general partners, if any.

The Agreement also grants Emily, the sole general partner of VLP and Managing General Partner at its inception, the ability to personally appoint a new Managing General Partner under certain circumstances:

> 19. MANAGEMENT AND OPERATION OF BUSINESS.

. . . .

> 19.7 Substitute Managing General Partner. In the event **EMILY MCCOY VERDONE** shall die, become incompetent (as determined by his [sic] regular physician), resign as Managing General Partner or cease for any reason to be a [g]eneral [p]artner, **EMILY MCCOY VERDONE** (or her successor-in-interest or any attorney-in-fact or guardian of **EMILY MCCOY VERDONE** in the event of the incompetency of **EMILY MCCOY VERDONE**), shall have the right to appoint a new Managing General Partner to have all the powers and duties specified in this Article 19. Any such successor Managing General Partner shall be required to hire North Carolina Trust Company (or such other bank, trust company or professional money manager as shall be unanimously agreed upon in writing by the [p]artners and any transferee of a [p]artnership [i]nterest who has the rights specified in Section 15.3 but who has not been admitted as a [p]artner of the [p]artnership) to manage and invest the assets of the [p]artnership and the salary to be paid to such successor Managing General Partner shall be determined as provided in Section 19.6.

¶ 4 On 1 April 2014, Emily resigned as general partner of VLP. Upon her resignation, Emily purportedly appointed Tump, LLC—the sole member and manager of which was George—the new Managing General Partner pursuant to Section 19.7 of the Agreement. Shortly thereafter, a majority interest of partners executed an amendment to the Agreement with an effective date of 1 January 2014.[1]

[1] The amended Agreement contains no record of when the majority interest of partners signed the amendment, and the earliest record of its adoption is 25 April 2014. However, the parties agree that the amendment was not signed into effect until after Emily's resignation.

The amended Agreement provided that, in the event Emily died,[2] resigned, or became incompetent, a majority interest of limited partners could appoint a new Managing General Partner if Emily did not do so herself within 60 days. Tump, LLC has claimed to act as the Managing General Partner of VLP since Emily resigned on 1 April 2014.

¶ 5 On 22 January 2019, Plaintiff filed a complaint in Mecklenburg County Superior Court alleging, *inter alia*, that (1) VLP dissolved on 1 April 2014 upon Emily's resignation; and (2) George and Tump, LLC breached their fiduciary duties to VLP and its limited partners by undervaluing the real estate Emily contributed, allowing them to increase their interests in the partnership at the expense of the limited partners.[3] Defendants and Plaintiff both filed motions for summary judgment,[4] with Plaintiff seeking declaratory judgment on the issue of whether VLP had dissolved on 1 April 2014 upon Emily's resignation and Defendants seeking both the denial of Plaintiff's request for declaratory judgment and the dismissal of Plaintiff's breach of fiduciary duty claim. The trial court granted *Plaintiff's Partial Motion for Summary Judgment* and denied Defendants' *Motion for Summary*

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[2] Emily died in 2018.

[3] Plaintiff's *First Amended Complaint*, filed 15 August 2019, contains substantially the same allegations.

[4] Plaintiff filed a *Partial Motion for Summary Judgment*, while Defendants filed a *Motion for Summary Judgment*.

Judgment, ruling that VLP had dissolved on 1 April 2014. Defendants timely appeal, and we affirm.

ANALYSIS

¶ 6 Defendants argue that (A-1) North Carolina courts lack subject matter jurisdiction over this case because dissolution may only occur in Delaware Chancery Court; (A-2) its interlocutory substantive appeals are properly before us; (B) the trial court erred in granting Plaintiff declaratory judgment on the dissolution issue; and (C) the trial court erred in denying their *Motion for Summary Judgment* with respect to Plaintiff's breach of fiduciary duty claim.

¶ 7 As a threshold matter, the Agreement provides that it "shall be governed and construed in accordance with the laws of the State of Delaware . . . ." Where parties include a choice-of-law clause in a binding agreement, we apply the substantive law of the jurisdiction selected by the parties. *See Citibank, S.D., N.A. v. Palma*, 184 N.C. App. 504, 509-10, 646 S.E.2d 635, 639 (2007) (applying the substantive law of South Dakota where the parties contracted to do so). However, as applied in ¶¶ 11 and 28, even when the parties include a choice-of-law clause, "[o]ur traditional conflict of laws rule is that . . . remedial or procedural rights are determined by lex fori, the law of the forum." *Boudreau v. Baughman*, 322 N.C. 331, 335, 368 S.E.2d 849, 853-54 (1988); *infra* at ¶¶ 11, 28.

A. Jurisdiction

1. Subject Matter Jurisdiction in North Carolina

¶ 8 Defendants first argue the trial court lacked subject matter jurisdiction over this case, claiming Del. Code Ann. tit. 6, § 17-111 confers exclusive jurisdiction over the dissolution of Delaware limited partnerships to the Delaware Chancery Court. Del. Code Ann. tit. 6, § 17-111 states, in relevant part, "[a]ny action to interpret, apply or enforce the provisions of a partnership agreement . . . *may* be brought in the Court of Chancery." Del. Code Ann. tit. 6, § 17-111 (2021) (emphasis added). "[Reviewing] issues of statutory construction and interpretation *de novo*[,]" *Taylor v. Diamond State Port Corp.*, 14 A.3d 536, 538 (Del. 2011), we decline to adopt Defendants' interpretation, as neither the statute's plain language nor its place in Delaware's statutory scheme lends itself to such a restrictive interpretation.

¶ 9 Under Delaware law, "[i]f [a] statute is unambiguous, there is no room for interpretation, and the plain meaning of the words controls." *Rubick v. Sec. Instrument Corp.*, 766 A.2d 15, 18 (Del. 2000). Here, Del Code Ann. tit. 6, § 17-111 uses permissive language to communicate that a specific statutory claim "*may* be brought in the Court of Chancery[,]" not that it *must*. Del Code Ann. tit. 6, § 17-111 (2021) (emphasis added); *see Elf Atochem N. Am., Inc. v. Jaffari*, 727 A.2d 286, 296 (Del. 1999) ("In general, the legislature's use of 'may' connotes the voluntary, not mandatory or exclusive, set of options."). This language simply directs Delaware claimants to the proper court within the enacting state's own jurisdiction; it

"is *not* making a claim against the world that no court outside of Delaware can exercise jurisdiction over [this] type of case." *IMO Daniel Kloiber Dynasty Trust*, 98 A.3d 924, 939 (Del. Ch.) (emphasis in original), *refusing appeal*, 100 A.3d 1020 (Del. 2014).

¶ 10 The Delaware legislature makes clear in its choice of language when it intends for one of its courts to have exclusive jurisdiction over a type of claim. *See* Del Code Ann. tit. 6, § 18-305(f) (2021) (emphases added) ("Any action to enforce any right arising under this section *shall* be brought in the Court of Chancery. . . . The Court of Chancery is hereby vested with *exclusive* jurisdiction . . . ."). It has not done so here.[5] Accordingly, North Carolina's courts have subject matter jurisdiction over this dispute.

2. Appellate Jurisdiction

¶ 11 Defendants also argue that, despite the interlocutory nature of this appeal, this Court has appellate jurisdiction to hear the merits of the case. The appropriateness of an interlocutory appeal is a procedural issue to which North

[5] Defendants refer us to the North Carolina Business Court's non-binding decision in *Camacho v. McCallum* for the proposition that "[j]udicial dissolution of entities created under, and granted substantial contractual freedom by, the laws of one state should be accomplished by a decree of a court of that state." *Camacho v. McCallum*, 2016 NCBC 79, 2016 WL 6237825, at *5 (N.C. Super. Ct. 2016). Even assuming, *arguendo*, we found this sweeping proposition persuasive, it would still be inapplicable here, as this case concerns the *non*judicial dissolution of a Delaware entity. In other words, even if North Carolina's courts lacked the authority to dissolve a Delaware entity, our courts would still have authority to recognize that such an entity *has been* dissolved.

Carolina law applies notwithstanding the Agreement's choice of law provision; by nature, the determination concerns *when* an issue may be heard on appeal, not how to resolve the issue. *See Boudreau,* 322 N.C. at 335, 368 S.E.2d at 854 ("[R]emedial or procedural rights are determined by . . . the law of the forum."); *see generally* N.C. R. App. P. 28(b)(4) (2022).

¶ 12 "Generally, there is no right of immediate appeal from interlocutory orders and judgments." *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). Under N.C.G.S. § 1-277(a),

> [a]n appeal may be taken from every judicial order or determination of a judge of a [S]uperior or [D]istrict [C]ourt, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

N.C.G.S. § 1-277(a) (2021). "No hard and fast rules exist for determining which appeals affect a substantial right[;]" rather, "[w]hether an interlocutory appeal affects a substantial right is determined on a case by case basis." *Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984); *McConnell v. McConnell*, 151 N.C. App. 622, 625, 566 S.E.2d 801, 803 (2002).

> In order to determine whether a particular interlocutory order is appealable pursuant to [N.C.G.S. §] 1–277(a) . . . we utilize a two-part test, with the first inquiry being whether a substantial right is affected by the challenged

> order and the second being whether this substantial right might be lost, prejudiced, or inadequately preserved in the absence of an immediate appeal. A substantial right is one which will clearly be lost or irremediably adversely affected if the order is not reviewable before final judgment.

Clements v. Clements, 219 N.C. App. 581, 584, 725 S.E.2d 373, 376, *disc. rev. denied*, 366 N.C. 388, 732 S.E.2d 481 (2012) (marks and citations omitted). The burden is on the appellant to establish the basis for an interlocutory appeal. *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 379, 444 S.E.2d 252, 253 (1994).

¶ 13 In issuing its order, the trial court simultaneously denied Defendants' *Motion for Summary Judgment* and granted *Plaintiff's Partial Motion for Summary Judgment*, which, collectively, embraced two major issues: whether VLP had dissolved in April 2014 upon Emily's resignation as general partner and whether Defendants were entitled to summary judgment with respect to Plaintiff's breach of fiduciary duty claim. Accordingly, we must determine whether the resolution of each of these issues affects Defendants' substantial right in deciding whether we may review the trial court's order. N.C. R. App. P. 28(b)(4) (2022) ("When an appeal is interlocutory, the statement must contain sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.").

¶ 14 Defendants argue that, as to the first issue, "the [trial court's order] is immediately appealable because it affects [their] substantial right to continue operating [VLP] and requires [VLP] to dispose of its only substantial asset[.]" They

also argue that, due to the overlap between the first issue and the second, we should exercise our discretion to review both issues. We agree. Defendants' control over a significant asset hinged on the trial court's granting or denying the parties' motions, and the risk of the partnership assets being liquidated is appreciable upon VLP being held dissolved. *Cf. Phoenix Ltd. P'ship of Raleigh v. Simpson*, 201 N.C. App. 493, 499, 688 S.E.2d 717, 721 (2009) ("[W]e agree with [the] defendants that the order of the trial court granting specific performance to [the] plaintiff and requiring [the] defendants to convey the . . . property to [the] plaintiff affects a substantial right."). Furthermore, because "address[ing] but one interlocutory . . . issue would create fragmentary appeals[,]" we exercise our discretion to address the issues raised in Defendants' *Motion for Summary Judgment* with respect to the breach of fiduciary duty claim as well. *RPR & Assocs., Inc. v. State*, 139 N.C. App. 525, 531, 534 S.E.2d 247, 252 (2000), *aff'd per curiam*, 353 N.C. 362, 543 S.E.2d 480 (2001).

B. Dissolution of VLP

¶ 15 Defendants' first substantive contention on appeal is that the trial court erred in granting *Plaintiff's Partial Motion for Summary Judgment* on the basis that VLP had dissolved upon Emily's 2014 resignation. The status of a Delaware corporation is an archetypally substantive issue to which Delaware law applies. *See Citibank*, 184 N.C. App. at 509-10, 646 S.E.2d at 639. We review the meaning of the Agreement de novo. *Pellaton v. Bank of New York*, 592 A.2d 473, 478 (Del. 1991) (marks omitted)

("The proper interpretation of language in a contract, while analytically a question of fact, is treated as a question of law both in the trial court and on appeal."); *Salamone v. Gorman*, 106 A.3d 354, 367 (Del. 2014) ("We review questions of contract interpretation *de novo*.").

1. VLP Was Dissolved under the Agreement's Unambiguous Command

¶ 16 Under Section 22.1(c) of the Agreement, VLP "shall be dissolved and terminated and its business wound up [] upon . . . [t]he dissolution, retirement, resignation, death, disability or legal incapacity of a general partner[.]" Plaintiff argues that this provision resulted in the dissolution of VLP upon Emily's resignation in 2014, while Defendants contend, *inter alia*, that Section 19.7 of the Agreement conflicts with Section 22.1(c), rendering the Agreement ambiguous. Section 19.7 provides that,

> [i]n the event **EMILY MCCOY VERDONE** shall die, become incompetent . . . , resign as *Managing* General Partner or cease for any reason to be a [g]eneral [p]artner, [she] shall have the right to appoint a new *Managing* General Partner[6] to have all the powers and duties specified in [Article 19 of the Agreement].

(Emphases added). Defendants argue that, by giving Emily the ability to appoint a new Managing General Partner upon her death, resignation, or departure from the

[6] The Agreement refers separately to the Managing General Partner and ordinary general partners, at times referring to multiple general partners; the two are not coterminous.

role of general partner, the Agreement contemplated VLP surviving her resignation as general partner, directly contradicting Section 22.1(c). Were this true, the Agreement's terms would be rendered ambiguous.

¶ 17 However, Defendants ignore that the Agreement provides for limited circumstances under which a general partner may transfer their interest. Section 16 provides means by which a general partner may wholly transfer their interest to a successor general partner.[7] Read in conjunction with Section 16, Section 19.7 simply

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[7] Section 16, in relevant part, provides that

> the transferee of all or part of a[n] [i]nterest of a [g]eneral [p]artner (if such transfer otherwise meets the requirements of Section 16.3), may be admitted to the [p]artnership as a general partner upon furnishing to the [g]eneral [p]artners all of the following:
>
> (a) The written approval of both the [g]eneral [p]artners and a [m]ajority in [i]nterest of the [l]imited [p]artners, which approval may be granted or denied in the sole discretion of the [p]artners;
>
> (b) Such financial statements, guarantees or other assurances as the [g]eneral [p]artners may require with regard to the ability of the proposed general partner to fulfill the financial obligations of a general partner hereunder;
>
> (c) Acceptance, in form satisfactory to the [g]eneral [p]artners, of all the terms and provisions of this Agreement and any other documents required in connection with the operation of the [p]artnership pursuant to the terms of this Agreement;

provided Emily, the original Managing General Partner of VLP, the ability to pass that mantle to a transferee general partner under Section 16. In other words, if Emily had transferred her general partner status to a new person or entity in compliance with Section 16, Section 19.7 would have *also* enabled her to appoint the transferee general partner the new Managing General Partner, as she would have "cease[d] . . . to be a [g]eneral [p]artner" under Section 19.7 in completing the Section 16 transfer.

¶ 18 Concededly, certain provisions of Section 22.1(c) complicate the application of Section 19.7. Section 19.7, for instance, grants Emily—or, in the event of her incompetence, her successor-in-interest, attorney-in-fact, or guardian—"the right to appoint a new Managing General Partner" if a physician deems her incompetent. At the same time, Section 22.1(c) results in the dissolution of VLP in the event of the "disability or legal incapacity of a general partner[.]" As written, the only times when

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> (d) A certified copy of a resolution of its [b]oard of [d]irectors (if it is a corporation) authorizing it to become a general partner under the terms and conditions of this Agreement;
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> (e) A power of attorney substantially identical to that contained in Article 36;
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> (f) Such other documents or instruments as may be required in order to effect its admission as a general partner; and
>
> (g) At the request of the [g]eneral [p]artners, payment of such reasonable expenses as may be incurred in connection with its admission as a general partner.

the incapacity provision of Section 19.7 could be given effect without triggering dissolution under Section 22.1(c) are, first, in the window between a physician finding Emily incompetent and a court adjudging her incompetent in the event Emily remains Managing General Partner; or, second, at a time *Emily* becomes legally incompetent in the event a transferee serves as Managing General Partner.[8] Either of these circumstances is unlikely and ultimately does not impact our analysis here.

¶ 19 The fact that certain provisions of Section 19.7 take on a narrow application when read in conjunction with Section 22.1(c) does not, as Defendants contend, render the provisions conflicting or ambiguous. Under Delaware law, purportedly conflicting contract clauses are to be reconciled unless "the two clauses are totally repugnant[.]" *See Holland v. Nat'l Auto. Fibres*, 22 Del. Ch. 99, 107-08, 194 A. 124, 127 (1937) ("[C]ourts should strive to make some sort of reconciliation between [] apparently repugnant provisions[,] [t]hough the reconciliation may not be entirely satisfying[.]"); *In re Farm Indus., Inc.*, 41 Del. Ch. 379, 390, 196 A.2d 582, 589 (1963) ("[I]f reasonably possible, the court should adopt a construction which would uphold an agreement rather than one which would invalidate it."). Nothing about the respective language of Sections 19.7 and 22.1(c) is unclear, nor are the two mutually exclusive. *See Comet Sys., Inc. Shareholders' Agent v. MIVA, Inc.*, 980 A.2d 1024, 1030 (Del. Ch.

[8] We note Section 19.7's provisions all refer to Emily personally, while Section 22.1(c)'s provisions refer generically to general partners.

2008) (marks omitted) ("[A] contract term is ambiguous only when the provisions in controversy are reasonable or fairly susceptible of different interpretations or may have two or more different meanings. . . . If [the] language is unambiguous, its plain meaning alone dictates the outcome.").

¶ 20 Here, the plain, unambiguous command of Section 22.1(c) dictates that VLP dissolved upon Emily's resignation as general partner, effective 1 April 2014, regardless of her purportedly appointing Tump the new Managing General Partner. There is no record of her properly transferring her general partner status to Tump pursuant to Section 16 of the Agreement; instead, she purported to "resign as [g]eneral [p]artner and appoint Tump . . . as the successor [g]eneral [p]artner" under Section 19.7. Section 19.7 granted Emily no such power, as general partner and Managing General Partner are separate offices under the Agreement. Accordingly, we affirm the trial court's order granting *Plaintiff's Partial Motion for Summary Judgment,* as VLP dissolved upon Emily's resignation as general partner.

2. Delaware's Default Statutory Rules Do Not Prevent the Dissolution of VLP

¶ 21 Alternatively, Defendants argue the default partnership rules in the Delaware Partnership Act control whether VLP had dissolved, either preventing or revoking dissolution. However, this argument is unavailing for two reasons. First, "the partnership agreement is the cornerstone of a Delaware limited partnership, and

effectively constitutes the entire agreement among the partners with respect to the admission of partners to, and the creation, operation and termination of, the limited partnership." *Elf Atochem*, 727 A.2d at 291; *see also* Del. Code Ann. tit. 6, § 17-1101(c) (2021) ("It is the policy of this chapter to give maximum effect to the principle of freedom of contract and to the enforceability of partnership agreements."). Section 22 of the Agreement speaks comprehensively to the circumstances in which VLP dissolves, allowing the partners to revoke dissolution only under certain circumstances listed in Section 22.2, none of which occurred in this case.[9]

¶ 22 Second, even if applicable, neither of the statutes to which Defendants direct us revoke dissolution. One of the two statutes—Del. Code Ann. tit. 6, § 17-801(3)—permits dissolution to be revoked in the "event of [the] withdrawal of a general partner . . . ." Del. Code Ann. tit. 6, § 17-801(3) (2021). However, Del. Code Ann. tit. 6, § 17-801(3) only applies where "no [] right to agree or vote to continue the business of the limited partnership . . . is provided for in the partnership agreement[.]" *Id*. In this case, Section 22.2 *does* provide for a vote for dissolution revocation but excludes the withdrawal of a general partner from the instances in which such a vote occurs.

[9] Specifically, Section 22.2 provides that, "[n]otwithstanding the provisions of Section 22.1, the [p]artnership shall not be dissolved and terminated upon the occurrence of [a vote to dissolve the partnership] or [the disposition of all partnership property]" if a general partner remains to continue the partnership's business or the limited partners elect a substitute general partner. Section 22.1(c), which governs dissolution by resignation, is not subject to this revocation provision.

Furthermore, because the Agreement independently specifies the resignation of a general partner as a dissolving event, the clear command of Del. Code Ann. tit. 6, § 17-801(5), which provides for dissolution "[u]pon the happening of events specified in a partnership agreement" and has no revocation provision, would control here, rendering exceptions to Del. Code Ann. tit. 6, § 17-801(3) inapplicable. Del. Code Ann. tit. 6, § 17-801(5) (2021).

¶ 23 Defendants also contend Del. Code Ann. tit. 6, § 17-806 applies here. While Del. Code Ann. tit. 6, § 17-806 could apply under certain circumstances, the events required for it to have revoked dissolution did not occur. Under Del. Code Ann. tit. 6, § 17-806,

> unless a partnership agreement prohibits revocation of dissolution, then notwithstanding the occurrence of an event set forth in [Del. Code Ann. tit. 6, § 17-801(5)], the limited partnership shall not be dissolved and its affairs shall not be wound up if, prior to the filing of a certificate of cancellation in the office of the Secretary of State, the business of the limited partnership is continued . . . by the vote or consent of the limited partners of the limited partnership who own more than 2/3 of the then-current percentage or other interest in the profits of the limited partnership owned by all of the limited partners.

Del. Code Ann. tit. 6, § 17-806 (2021). Here, Del. Code Ann. tit. 6, § 17-806 could apply, as the Agreement does not fully prohibit dissolution. However, at no point was dissolution revoked by a two-thirds interest of shareholders.

¶ 24 As no statute revoked the dissolution of VLP under the Agreement, Defendants' statutory arguments fail.

3. Defendants' Affirmative Defenses Do Not Prevent the Dissolution of VLP

¶ 25 Defendants further contend that the dissolution of VLP did not occur because Plaintiff's arguments were either waived, estopped, barred by statute of limitations, or barred by laches. However, Defendants have failed to establish the necessary elements of waiver and estoppel and have failed to actually argue the applicable law of laches and statute of limitations; consequently, none render VLP undissolved.

¶ 26 First, Defendants argue Plaintiff waived dissolution by waiting more than four years after Emily's resignation as general partner before arguing VLP had dissolved. "Waiver is the voluntary and intentional relinquishment of a known right. It implies knowledge of all material facts, and intent to waive.[10] The facts relied upon for proof must be unequivocal in character." *Realty Growth Inv'rs v. Council of Unit Owners*,

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[10] Our research reveals no existing North Carolina cases discussing whether waiver is procedural or substantive for conflict of laws purposes. However, because the essential feature of waiver in our jurisdiction is the choice to relinquish a specific right, the laws of the state governing the underlying right logically apply to whether that right has been waived. *See Klein v. Ins. Co.*, 289 N.C. 63, 68, 220 S.E.2d 595, 598-99 (1975) ("[Waiver] is always based upon an express or implied agreement. There must always be an intention to relinquish a right, advantage, or benefit. The intention to waive may be expressed or implied from acts or conduct that naturally lead the other party to believe that the right has been intentionally given up."); *see also Boudreau*, 322 N.C. at 339, 368 S.E.2d at 856 ("The question of what is procedure and what is substance is determined by the law of the forum state."). Here, where Delaware law governs rights arising under the Agreement, we apply Delaware's doctrine of waiver. *See supra* at ¶ 7.

453 A.2d 450, 456 (Del. 1982) (citations omitted). While waiver may be implied, *Feldman v. Cutaia*, 956 A.2d 644, 655 n.29 (Del. Ch. 2007), *aff'd*, 951 A.2d 727 (Del. 2008), *other portions called into doubt by Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251 (Del. 2021), the scope of contractual waiver only includes "all rights or privileges to which a person is legally entitled under a contract *which are intended for his sole benefit*[.]" *Components, Inc. v. W. Elec. Co.*, 267 A.2d 579, 582 (Del. 1970) (emphasis added). Here, Plaintiff could not have waived the dissolution of VLP, as the ongoing existence of VLP was not Plaintiff's personal right, nor did the dissolution of VLP result from the invocation of Plaintiff's right; rather, it occurred as a condition of the Agreement that formed VLP.

¶ 27 Second, Defendants contend Plaintiff is estopped from arguing VLP had dissolved.

> [A] party claiming estoppel must demonstrate that: (i) they lacked knowledge or the means of obtaining knowledge of the truth of the facts in question; (ii) they reasonably relied on the conduct of the party against whom estoppel is claimed; and (iii) they suffered a prejudicial change of position as a result of their reliance. . . . Regardless of the form of the action, the burden of proof of estoppel rests upon the party asserting it. [] [E]quitable estoppel must be proven by clear and convincing evidence[.]

Nevins v. Bryan, 885 A.2d 233, 249 (Del. Ch.) (citations omitted), *aff'd*, 884 A.2d 512 (Del. 2005). Assuming, without deciding, estoppel conceptually applies to the nonjudicial dissolution of VLP, Defendants have argued only that they relied on

Plaintiff's purported representation that VLP continued to exist after Emily's resignation. They have made no attempts to show the first and third elements of estoppel occurred; consequently, estoppel does not apply. *See* N.C. R. App. P. 28(a) (2022) ("The scope of review on appeal is limited to issues so presented in the several briefs. Issues not presented and discussed in a party's brief are deemed abandoned.").

¶ 28 Finally, as to Defendants' remaining affirmative defenses, we note Defendants have cited Delaware law for the propositions that both Plaintiff's declaratory judgment claim and his breach of fiduciary duty claim are barred by laches and statute of limitations. However, North Carolina courts have long held that, in conflict of laws cases, "[t]he *lex fori* determines the time within which a cause of action shall be enforced." *Vanderbilt v. Atlantic Coast Line R.R.*, 188 N.C. 568, 580, 125 S.E. 387, 394 (1924) (marks omitted); *see also Boudreau*, 322 N.C. at 340, 368 S.E.2d at 857 ("Ordinary statutes of limitation are clearly procedural, affecting only the remedy directly and not the right to recover."); *Martin Marietta Materials, Inc. v. Bondhu, LLC*, 241 N.C. App. 81, 84, 772 S.E.2d 143, 146 (2015) (holding that "we must apply the appropriate statute of limitations under North Carolina law to [the] [p]laintiff's substantive claims" governed by Virginia law).[11]

[11] We note that, unlike a statute of limitations, laches is not a direct time bar, nor is it a creation of a state legislature:

¶ 29 Defendants have presented only the inapplicable laws of Delaware for the proposition that Plaintiff's claims are barred, and they have presented no North Carolina authority in the alternative. Defendants' arguments on appeal must "contain citations [to] the authorities upon which [they] rel[y][;]" "[i]ssues not presented in [their] brief, or in support of which no reason or argument is stated, [are] taken as abandoned." N.C. R. App. P. Rule 28(b)(6) (2022). Having made no contention on appeal that Plaintiff's claims were barred under North Carolina law, Defendants have abandoned the affirmative defenses of both laches and statute of limitations with respect to both issues.

> In equity, where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim, the doctrine of laches will be applied. Hence, what delay will constitute laches depends upon the facts and circumstances of each case. Whenever the delay is mere neglect to seek a known remedy or to assert a known right, which the defendant has denied, and is without reasonable excuse, the courts are strongly inclined to treat it as fatal to the plaintiff's remedy in equity, *even though much less than the statutory period of limitations*, if an injury would otherwise be done to the defendant by reason of the plaintiff's delay.

Teachey v. Gurley, 214 N.C. 288, 294, 199 S.E. 83, 88 (1938) (emphasis added); *see also* the *MMR Holdings, LLC v. City of Charlotte*, 148 N.C. App. 208, 209, 558 S.E.2d 197, 198 (2001) ("[T]he mere passage of time is insufficient to support a finding of laches[.]"). However, for purposes of our analysis, laches is still procedural; it affects "only the remedy directly and not the right to recover[,]" notwithstanding the fact that its impact on a claimant's ability to recover often hinges more directly on prejudice than the passage of time. *Boudreau*, 322 N.C. at 340, 368 S.E.2d at 857.

4. Conclusion

¶ 30 The Agreement unambiguously provides that VLP dissolves upon the resignation of a general partner. Neither Delaware's statutory default rules governing limited partnerships nor any of Defendants' affirmative defenses revoked or otherwise prevented this nonjudicial dissolution from having occurred. Accordingly, the trial court did not err in granting *Plaintiff's Partial Motion for Summary Judgment*.

C. Breach of Fiduciary Duty

¶ 31 Finally, Defendants argue the trial court erred in denying their *Motion for Summary Judgment* with respect to Plaintiff's breach of fiduciary duty claim. Specifically, they argue Plaintiff lacked standing because he failed to bring the claim in a derivative capacity.[12] We review de novo whether Plaintiff had standing to bring his breach of fiduciary duty claim in an individual capacity. *Richards v. Copes-Vulcan, Inc.*, 213 A.3d 1196, 1199 (Del. 2019) ("The summary judgment standard of review is *de novo*."). Delaware law applies to the classification of a suit against a Delaware partner as direct or derivative. *See Cabaniss v. Deutsche Bank Secs., Inc.*, 170 N.C. App. 180, 182, 611 S.E.2d 878, 880 (holding that, "because the [subject of

[12] Defendant also argues the claim was barred by Delaware's law of laches and statute of limitations. However, for the reasons discussed in Part B-3, Defendants have abandoned the statute of limitations and laches arguments. *Supra* at ¶¶ 28-29.

the suit] is a Delaware limited partnership, Delaware law controls" whether the action is direct or derivative), *cert. denied*, 360 N.C. 61, 621 S.E.2d 176 (2005).

¶ 32 Under Delaware law, whether a suit is derivative or direct is a situational determination:

> The test for distinguishing direct from derivative claims in the context of a limited partnership is substantially the same as that used when the underlying entity is a corporation. In both instances the determination is made by careful application of a rather nuanced test. The test looks to the nature of the injury and to the nature of remedy that could result if the plaintiffs are successful. When a plaintiff alleges either an injury that is different from what is suffered by other shareholders (or partners) or one that involves a contractual right of shareholders (or partners) that is independent of the entity's rights, the claim is direct. If the injury is one that affects all partners proportionally to their *pro rata* interests in the corporation, the claim is derivative. In a derivative action the plaintiff sues for an injury done to the partnership and any recovery of damages is paid to the partnership. Conversely, in a direct action the plaintiff sues to redress an injury suffered by the individual plaintiff and damages recovered are paid directly to the plaintiff who was injured. In every case the court must determine from the complaint whether the claims are direct or derivative and may not rely on either party's characterization. Because harm to the entity will almost inevitably harm the stakeholders and because the entity itself is in some ways no more than an amalgamation of a certain subset of stakeholders' interests, differentiation of direct from derivative claims can be elusive.

Anglo Am. Sec. Fund v. S.R. Global Fund, 829 A.2d 143, 149-50 (Del. Ch. 2003) (citations omitted).

¶ 33 The portion of Plaintiff's *First Amended Complaint* discussing Defendants' alleged breach of fiduciary duty reads as follows:

> 144. A fiduciary relationship existed between Rick Verdone and the [p]artnership and Rick Verdone and the other limited partners of the [p]artnership.
>
> 145. A fiduciary relationship also existed between Tump and the [p]artnership and the limited partners of the [p]artnership.
>
> 146. Consequently, Rick Verdone owed the [p]artnership, Jim Verdone, and the other partners fiduciary duties by virtue of the fact that he was making management decisions on behalf of the [p]artnership[.]
>
> 147. Tump also owed fiduciary duties to the [p]artnership and all the limited partners by virtue of its role as Managing General Partner of the [p]artnership.
>
> 148. Rick Verdone and Tump had an obligation to not undervalue the [p]artnership . . . .
>
> 149. Rick Verdone and Tump breached their fiduciary duties owed to the [p]artnership, Jim Verdone and the other partners by acting in his own self-interest, and against the interest of the [p]artnership and other limited partners, when he undervalued the [p]artnership . . . .
>
> 150. As a result, Rick Verdone has been able to substantially increase his interest of the [p]artnership without providing a reasonable value to the [p]artnership for the additional interests he has received.
>
> 151. The [p]artnership suffered damages that were proximately caused by Rick Verdone and Tump's breach of their fiduciary duties because the [p]artnership received

> inadequate consideration for the sale of additional interests.
>
> 152. Jim Verdone suffered damages that were proximately caused by Rick Verdone's and Tump's breach of fiduciary duty because his value in the [p]artnership was improperly diluted.

Typically, "a diminution of the value of a business entity is [] derivative in nature." *Id.* at 151. However, the Delaware Supreme Court has observed that some claims may be brought *either* directly *or* derivatively where they "concern[] a controlling [interest]holder and transactions that result[] in an improper transfer of both economic value *and* voting power from the minority [interest]holders to the controlling [interest]holder" in a business entity.[13] *El Paso Pipeline GP Co. v. Brinckerhoff*, 152 A.3d 1248, 1263 (Del. 2016) (emphasis in original). Plaintiff's claim, the facts of which were not in dispute at the summary judgment hearing, satisfies this requirement because the undervaluation through which he alleges he lost economic and voting power in VLP also diluted the value of the partnership. As Plaintiff was entitled to bring this claim for breach of fiduciary duty either directly or derivatively under Delaware law, he had standing to bring the claim directly, and we affirm the trial court's ruling.

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[13] Although the Delaware Supreme Court declined to find the specific claim at issue in *Brinckerhoff* was one of these "dual-natured claim[s]," *id.*, its analysis indicates that the same factors that would permit a corporate dilution claim to be brought either directly or derivatively also conceptually apply to limited partnerships. *See generally id.*

CONCLUSION

¶ 34 The unambiguous command of the Agreement renders VLP nonjudicially dissolved upon the "retirement, resignation, death, disability or legal incapacity of a general partner[.]" As Emily resigned on 1 April 2014 and no provision in the Agreement or any applicable statute revoked dissolution, VLP dissolved on 1 April 2014 upon Emily's resignation. Further, because Plaintiff seeks personal relief for an injury distinct from that of VLP's other stakeholders in his breach of fiduciary duty claim, he properly brought the claim in a nonderivative capacity.

AFFIRMED.

Judges DILLON and JACKSON concur.

Report per Rule 30(e).