NOT DESIGNATED FOR PUBLICATION

No. 104,685

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

TRANIN INVESTMENT COMPANY;
ESTATE OF STEVE S. PACK, LOUIS D.
PACK, FLORENCE G. PACK and JAY A. PACK,
Personal Representatives;
ROBERT A. BERNSTEIN; HERBERT M. KOHN;
and ROBERT G. HUDSON,
Appellants/Cross-appellees,

v.

IPC RETAIL PROPERTIES MANAGEMENT, INC;
NORMANDIE VILLAGE ASSOCIATES, L.P.;
and LYNN ALLEN,
Appellees/Cross-appellants.

MEMORANDUM OPINION

Appeal from Sedgwick District Court. TIMOTHY H. HENDERSON, judge. Opinion filed February 24, 2012. Affirmed.

Leonard Rose, of Lathrop & Gage LLP, of Kansas City, Missouri, *Greer S. Lang*, and *Jed D. Reed*, of the same firm, and *John Terry Moore*, of Moore Martin, L.C., of Wichita, for appellants/cross-appellees.

Amy Fellows Cline, of Triplett, Woolf & Garretson, LLC, of Wichita, and *Bobby G. Pryor*, of Pryor & Bruce, of Rockwall, Texas, for appellees/cross-appellants.

Before GREENE, C.J., HILL, J., and MICHAEL E. WARD, District Judge, assigned.

GREENE, C.J.: Tranin Investment Company and the other named plaintiffs (collectively referred to as Plaintiffs), limited partners in Normandie Village Associates, L.P., appeal the district court's summary judgment against them terminating all of their

claims in tort and all but one contract claim against the limited partnership, the general partner IPC Retail Properties Management, Inc. (IPC), and Lynn Allen (collectively referred to as Defendants), after Plaintiffs were allegedly deprived of their right of first refusal to purchase certain commercial real estate in Wichita. After conceding or failing to appeal other rulings, Plaintiffs argue the court erred in concluding Plaintiffs were required to prove they would have exercised their right of first refusal in order to sustain their tort claims; in concluding neither Allen nor other Defendants could be liable for either breach of fiduciary duty or conspiracy; in concluding that Plaintiffs failed to prove they had been damaged; in concluding that Plaintiffs' claim for negligent nondisclosure failed to state a claim; and in concluding that no genuine issues of material fact precluded summary judgment on the claims so terminated. We affirm the summary judgment for reasons set forth below.

FACTUAL AND PROCEDURAL BACKGROUND

The facts surrounding the nature of Plaintiffs' limited partnership interests, the sale of the subject realty, and the basis for the remaining claims asserted against Defendants are convoluted. But—highly summarized—Plaintiffs collectively owned about a 1% limited partner interest in a limited partnership that owned a shopping center in Wichita, and under the limited partnership agreement in effect, Plaintiffs retained a right of first refusal and were deprived of that right when the general partner sold the realty without notice to Plaintiffs, which notice should have been provided by the unilaterally appointed limited partner representative, Lynn Allen, under the limited partnership agreement. The realty sold for an allocated sale price of $9.5 million, Plaintiffs claim it was worth between $6.3 and $7.5 million, and they claim the difference as their measure of disgorgement damages, but they have never sought specific performance. Instead, they seek disgorgement of profits on tort theories.

The limited partnership agreement in effect at the time of the sale provided that "[t]he general partner may sell or initiate such sale [of the limited partnership property] only in accordance with Section 6.2 of the prior [limited partnership] agreement." That section provided in material part:

> "(b) If [general partner] receives a written bona fide offer from a third party to purchase the Real Property for cash or cash and promissory notes and [general partner] desires to cause the Partnership to accept such offer (the 'Offer'), [general partner] *shall deliver a copy of the Offer to the Limited Partner Representative*. At any time within the 30-day period (the 'Offer Period') commencing with the first day as of which a copy of the Offer is delivered by [general partner], the Limited Partner Representative may
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> (i) authorize [general partner] to sell the Real Property on behalf of the Partnership in accordance with the Offer; or
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> (ii) provide written notice to [general partner] that the Limited Partners will elect to purchase (or appoint a designee to elect to purchase) the Real Property in accordance with the Offer." (Emphasis added.)

In late 2005, the general partner entered into a contract for the sale of the subject partnership property as part of a package deal to sell all of its retail properties in the United States for a total purchase price of $94 million. On the day of closing the transaction, counsel for the general partner "discovered" the right of first refusal possessed by Plaintiffs, notified counsel for the title company, and acted to keep the overall transaction on schedule for closing by drafting a "Designation of Limited Partner Representative" appointing Allen and an "Authorization to Sell" for Allen's signature. Allen indeed executed the documents within 30 minutes of receipt, but Allen did not communicate or disclose to Plaintiffs that an offer had been received to purchase the limited partnership property or that the general partner intended to accept the offer and sell the property.

Plaintiffs' ultimate petition alleged a host of contract and tort claims against Defendants, including breach of contract, breach of the implied covenant of good faith

and fair dealing, fraud by silence, breach of fiduciary duty, tortious interference with contractual relations, tortious interference with valid business expectancy, civil conspiracy, and aiding and abetting the breach of fiduciary duty. Prior to the summary judgment ruling that is the subject of this appeal, Plaintiffs conceded they could not prove damages to support some of these claims.

After discovery, Defendants moved for summary judgment, and the district court granted the motion, concluding in material part:

> "11. Plaintiffs have failed to show they suffered any harm from not being granted their alleged right of first refusal because Plaintiffs have not provided sufficient evidence establishing that they would have exercised their right of first refusal, had they been given this opportunity. To the contrary, the evidence presented by Plaintiffs that the buyer paid more than fair market value for the Retail Property contradicts Plaintiffs' speculation that they may have exercised the right of first refusal.
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> "14. While Kansas law allows a party to recover disgorgement of profits as an element of damages in a breach of fiduciary duty claim under certain circumstances, Plaintiffs presented no evidence that Defendant Lynn Allen received any profits from the Sale at issue. Indeed, Plaintiffs admit Defendant Lynn Allen did not receive any such profits. Furthermore, Kansas law does not allow Plaintiffs to recover any alleged profits earned by Defendants IPC Retail Properties Management, Inc. and Normandie Village Associates, L.P. from Defendant Lynn Allen.
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> "15. Even if a disgorgement theory of damages was legally available to Plaintiffs, there are no profits proximately caused by the complained-of action. Plaintiffs would have had to pay the same purchase price as the buyer allocated to (and paid for) the Retail Property—$9.5 million—if they had exercised their purported right of first refusal. Therefore, Defendants did not earn any profit out of the actions they took which Plaintiffs allege resulted in a denial of Plaintiffs' alleged right of first refusal.
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> "16. Even were Plaintiffs entitled to recover Defendants' alleged profits, the evidence they have submitted in support of such alleged profits does not prove with reasonable certainty the amount of Defendants' alleged profits. Plaintiffs offer no

> evidence of the amount the Buyer would have been willing to pay for the Retail Property independent of the other properties included in the sale. Without any evidence of such valuation, market value is insufficient to determine Defendants' benefit. This failure by the Plaintiffs to prove their damages with reasonable certainty independently precludes them from recovering such damages."

The summary judgment terminated all claims except a remaining contract claim, and that claim was subsequently dismissed voluntarily. Plaintiffs appeal the summary judgment against them, but the appeal is limited to their claim for disgorgement of profit in tort.

DID THE DISTRICT COURT ERR IN AWARDING SUMMARY JUDGMENT TO DEFENDANTS?

Standards of Review

When the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law, summary judgment is appropriate. The district court is required to resolve all facts and inferences which may reasonably be drawn from the evidence in favor of the party against whom the ruling is sought. When opposing a motion for summary judgment, an adverse party must come forward with evidence to establish a dispute as to a material fact. In order to preclude summary judgment, the facts subject to the dispute must be material to the conclusive issues in the case. On appeal, we apply the same rules and where we find that reasonable minds could differ as to the conclusions drawn from the evidence, summary judgment must be denied. *Osterhaus v. Toth*, 291 Kan. 759, 768, 249 P.3d 888 (2011).

To the extent that this court must interpret a partnership agreement, the legal effect of a written instrument is a question of law. The agreement may be construed and its legal effect determined by the appellate court regardless of the construction made by the

district court. The primary rule for interpreting a written contract is to ascertain the parties' intent. If the terms of the contract are clear, the intent of the parties is to be determined from the language of the contract without applying rules of construction. *Osterhaus*, 291 Kan. at 768.

PLAINTIFFS FAILED TO DEMONSTRATE THAT THEY SUFFERED DAMAGES RESULTING FROM THE DEPRIVATION OF THEIR RIGHT OF FIRST REFUSAL

Although Plaintiffs have itemized six claims of error in the district court's summary judgment, our conclusions that Plaintiffs have failed to prove any cognizable damages resulting from the deprivation of their right of first refusal and that none of the Defendants benefited or profited by reason of the misconduct requires that we affirm the summary judgment.

Plaintiffs Did Not and Cannot Demonstrate a Compensable Injury Because the Offer to be Matched Exceeded Fair Market Value

A right of first refusal is a conditional option empowering its holder with a preferential right to purchase property on the same terms offered by or to a bona fide purchaser. 17 C.J.S., Contracts § 58. A right of first refusal requires the owner, when and if the owner decides to sell, to offer the property first to the person entitled to the preemptive right at the stipulated price. *Bergman v. Commerce Trust Co.*, 35 Kan. App. 2d 301, 306, 129 P.3d 624 (2006). A holder of a right of first refusal can normally seek specific performance. 25 Williston on Contracts § 67:85 (4th ed. 2002). Damages, the normal legal remedy for breach of contract, are generally considered an inadequate remedy where the holder actually desires conveyance of the property. 33 Causes of Action Second 217, § 27 (2007); see *Head v. Scanlin*, 258 Ga. 212, 214, 367 S.E.2d 546 (1988).

Here, the exercise of Plaintiffs' right was specified by written contract as the election to purchase the subject property "in accordance with the Offer," defined as "a written bona fide offer from a third party to purchase the Real Property for cash or cash and promissory notes." Thus, to exercise the conditional option under the limited partnership agreement, Plaintiffs were obligated to purchase the property on terms offered by the third party or for an allocated sale price of $9.5 million. They contend this offer *exceeded* the fair market value of the property by $2.3 to $3.2 million.

The general measure of monetary damages for a vendor's refusal to convey land pursuant to contract is the "loss of the bargain" and is usually based on the difference between the contract price and the market value of the land at the time of the breach. *McAdam v. Leak*, 111 Kan. 704, Syl. ¶ 5, 208 P. 569 (1922); see *Stoneburner v. Fletcher*, 408 N.E.2d 545, 551 (Ind. App. 1980). When the market value and the contract price are the same, there is no loss of the bargain and there can be no award of compensatory damages. See *Arlington State Bank v. Colvin*, 545 N.E.2d 572, 575-76 (Ind. App. 1989). It follows that when, as here, the contract price *exceeds* the market value, there has been no loss of bargain and can be no compensatory damage award. 92A C.J.S., Vendor and Purchaser § 767, p. 195 ("If value of the land is less than the contract price, there can be no recovery.").

In the typical case alleging breach of the right of first refusal, the available equitable contract remedy is specific performance. See 25 Williston on Contracts § 67.85. Here, Plaintiffs never sought specific performance nor loss of the bargain damages or "lost opportunity" damages, and indicated that "they are not entitled to recover these damages." Testimony for some of the individual Plaintiffs conceded they had no interest in purchasing the property at the allocated premium price. As limited partners in the limited partnership that owned the subject property, Plaintiffs stood to benefit by the sale at such a premium and participated in accordance with their limited partnership agreement. They contend, however, that they should be able to recover the "wrongfully

obtained" benefits that Defendants were able to obtain when Plaintiffs' right of first refusal was destroyed, and they measure this as the difference between the fair market value at time of sale and the premium price allocated to the property in the package sale. This claim confounds the laws of contracts and damages for several reasons.

The Fiduciary Did Not Benefit Directly or Indirectly from Her Breach of Duty

Plaintiffs have prosecuted their suit against Allen and the other Defendants based on the theory that they should be entitled to a disgorgement of profit, citing *Ablah v. Eyman*, 188 Kan. 665, 365 P.2d 181 (1961). The argument is that Allen breached her fiduciary obligations by secretly appointing herself to serve as the limited partner representative and then waived Plaintiffs' right of first refusal without Plaintiffs' advice or consent. Thus, they argue, she should not be allowed to escape liability for wrongfully obtained benefits secured "for her IPC-related principals," even though Plaintiffs concede that Allen did not personally receive any direct monetary benefit from the transaction. We conclude that Plaintiffs' claim in this regard must fail because the caselaw cited by Plaintiffs consistently requires as an element of recovery that either the fiduciary or his or her principals received either a direct or an indirect benefit from the transaction, and here there was neither.

In *Ablah*, for example, our Supreme Court held that where an accountant's workpapers had been wrongfully replevied, the accountant could recover either the damages actually caused to him or an amount equal to the benefits wrongfully received by the defendant. 188 Kan. at 675-78. The court characterized the rule of damages as the resulting benefit rule, which is based on the principle that no one should be allowed to enrich himself or herself unjustly at the expense of another. The court noted, however, that the rule applies when the tortfeasor has *received a benefit* from his or her wrongful act. 188 Kan. at 678-81. Given Plaintiffs' concession that Allen received no such benefit here, *Ablah* does not support their claim for relief.

Other cases cited by Plaintiffs, specifically *Henderson v. Hassur*, 225 Kan. 678, 594 P.2d 650 (1979), and *Arst v. Stifel, Nicolaus & Co., Inc.*, 954 F. Supp. 1483 (D. Kan. 1997), also fail to support any recovery here. Both cases are clearly distinguishable from the facts before us.

In *Henderson*, the fiduciary realized a $32,000 benefit from a breach of duty, keeping one-half of the profits and placing the other half into a joint venture account belonging to himself and the contractor with whom he corroborated in securing the wrongful sale. Our Supreme Court found that the principal's cause of action against this fiduciary was not predicated on loss of value caused by the fiduciary's conduct, rather it was "based upon the duty of an agent to disgorge any secret profits he received in conducting his principal's business." 225 Kan. at 688. The court then supported a recovery of the entire $32,000, both the direct and indirect benefits, holding:

> "When an agent participates in a scheme and obtains a secret profit from the subject matter of the agency at the expense of the principal the agent should be required to account *not only for the profits going directly into his pocket but also for those going into the assets of a venture in which he has an interest and by which he may expect to share profits.*" (Emphasis added.) 225 Kan. at 688.

Similary, in *Arst* the court held that "an agent violating the fundamental duty of loyalty by undisclosed self-dealing will not be permitted to evade that duty by the expedient of arranging the sale of the property to a close family member." 954 F. Supp. at 1494. The fiduciary in *Arst*, however, sold the property to a close relative. The *Arst* court found that the rule precluding undisclosed self-dealing by an agent *includes all indirect transactions under which the agent benefits from the transfer*," including transfers to a spouse, sister, daughter or any close relative. (Emphasis added.) 954 F. Supp. at 1494.

These cases do not support a recovery here because Allen received neither a direct nor an indirect benefit from the transaction. There has been absolutely no showing that

Allen benefited from the transfer beyond Plaintiffs' amorphous allegations that she benefited by maintaining her job security and keeping her bosses happy. This is clearly distinguishable from situations where the fiduciary arranged either a joint account or transferred monetary benefits to a close family relative. We reject Plaintiffs' theory that Kansas law would support recovery against Allen where there has been shown no direct or indirect pecuniary benefit from her breach of fiduciary duty.

Neither the Limited Partnership nor the General Partner Benefited from Allen's Breach of Duty

Plaintiffs also argue we should extend Kansas law to allow "disgorgement" of profits from the general partner that allegedly conspired with Allen to deprive Plaintiffs of their right of first refusal. Thus, we must also determine whether the general partner obtained benefits from Allen's breach of fiduciary duty.

If Plaintiffs had been notified of their right to match the offer and then purchased the subject property for $9.5 million, both the general partner and the limited partnership would have been in precisely the same financial position as they were in selling the property to the third party. As Defendants emphasize, Plaintiffs would have been required under the terms of the Second Limited Partnership Agreement and by the definition of a right of first refusal to match any outstanding offer. Thus, the amount IPC or the limited partnership would have received for the sale of the property *would have been the same whether it was sold to the buyer or Plaintiffs*. Plaintiffs actually have conceded an essentially identical consequence in their failure to challenge Defendants' argument that they would have suffered the same tax consequences whether they exercised their right at first refusal or suffered the consequences of the sale to the third party.

Plaintiffs argue, however, that they did not need to match the $9.5 million offer because it was a premium price for the property. They assert that IPC and the limited partnership received a premium for the property because the buyer was not interested in

buying it as a standalone property, considered it a throw-in, and agreed to buy it only because IPC mandated its inclusion in order to sell the principle target, Walpole Mall, the property allocated at $37.5 million as part of the package deal. Thus, Plaintiffs question the need to match the $9.5 million allocated to the property because it was never of real interest to the buyer. The buyer's representative testified, however, that the buyer would not have put up *more* money for the property, but did not testify that the buyer paid a premium for the property or that there was any bad faith in establishing the allocation amount.

We concede that an allocated sale price warrants our scrutiny for legitimacy. A panel of our court recently faced a package deal where the price to be paid by a third party fluctuated based on whether the right of first refusal was executed upon. See *Waste Connections of Kansas v. Ritchie Corp.*, 43 Kan. App. 2d 655, Syl. ¶¶ 2, 4-5, 228 P.3d 429 (2010), *rev. granted* 292 Kan. 926 (2011) (pending). The panel noted several risks that may be present in a package deal situation:

> "The package deal is a risky situation in the terms of the right of first refusal. There is 'a risk in package deals that the purchase price may be unfairly allocated or padded to defeat the rights of first refusal.' *In re Adelphia Communications Corp.*, 368 B.R. 348, 353 (Bankr. S.D.N.Y. 2007). In a package deal situation, more protection needs to be given to the right of first refusal to prevent collusion or bad faith. In a package deal, the purchase price should come under greater scrutiny and any doubt in the amount should be resolved to protect the right of first refusal." 43 Kan. App. 2d at 667.

As the Defendants emphasize, however, Plaintiffs have failed to show that the seller and the purchaser here colluded in bad faith to defeat the right of first refusal. Here, the concerns that were present in *Waste Management* are not present, as there was no evidence of price padding to defeat the Plaintiffs' right of first refusal. In contrast, the record on appeal reflects clearly that allocations were determined *before any party to the transaction was apparently conscience of Plaintiffs' right of first refusal*. In the absence

of bad faith or collision, Plaintiffs have given us no reason to suspect that the allocated price was anything other than an arms' length determination of sale price for the subject property, and it was indeed this allocated price that was required to be matched by Plaintiffs.

The Defendants, therefore, would have been in the same financial position if Plaintiffs bought the property because, as Plaintiffs themselves argue, the omission of the property would not have halted the package deal, as the property was considered a "throw-in." As in *In re Adelphia Communication Corp.*, 368 B.R. 348, 357 (Bankr. S.D.N.Y. 2007) which was cited by the *Waste Management* panel, "here the parties themselves have made a reasonable allocation of the overall price to the property in question. Therefore, it is that allocation—not a fair market substitute for it—that must stand." See also *Uno Restaurants v. Boston Kenmore Realty*, 441 Mass. 376, 382-89, 805 N.E.2d 957 (2004). IPC would have been in the same position whether Plaintiffs exercised their right of first refusal or the transaction with the third party was completed; therefore, neither the limited partnership nor the general partner profited from Allen's breach of fiduciary duty.

We simply fail to perceive any profit to be disgorged from the limited partnership or the general partner by reason of Allen's breach of duty. Thus we hold that even if we were to endorse the remedy of disgorgement under these circumstances, there were simply no profits to be disgorged here.

Plaintiffs' Claim for Negligent Misrepresentation Also Fails

Plaintiffs' claim for negligent misrepresentation must also fail due to Plaintiffs' inability to demonstrate compensable injury. In *Southwind Exploration v. Street Abstract Co.*, 42 Kan. App. 2d 122, 129, 209 P.3d 728 (2009), a panel of this court formally recognized the tort of negligent nondisclosure. The tort, however, is limited to *loss*

suffered by specified persons under the Restatement (Second) of Torts. *Southwind*, 42 Kan. App. 2d at 127 (quoting Restatement (Second) of Torts § 552 [1976]). The Restatement (Second) of Torts § 552B (1976), provides:

> "(1) The damages recoverable for a negligent misrepresentation *are those necessary to compensate the plaintiff for the pecuniary loss to him* of which the misrepresentation is a legal cause, including
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> (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and
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> (b) pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation.
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> "(2) the damages recoverable for a negligent misrepresentation *do not include the benefit of the plaintiff's contract with the defendant.*" (Emphasis added).

Before closing our opinion, however, we certainly do not endorse Allen's conduct. From the uncontroverted facts, Allen's complete disregard of Plaintiffs' known right of first refusal would have been tortious and legally cognizable were it not for the unique circumstances here that made it impossible for Plaintiffs to demonstrate either a direct injury or a benefit to the tortfeasor that could be disgorged.

Having concluded that Plaintiffs have failed to prove compensable injury or any benefit to the tortfeasors to be disgorged under these circumstances, all other issues framed by Plaintiffs and the cross-appeal are moot.

Affirmed.