IN THE COURT OF APPEALS
STATE OF GEORGIA

MILTON SHLAPAK d/b/a SHLAPAK DEVELOPMENT COMPANY, and SHLAPAK DEVELOPMENT COMPANY, Plaintiffs-Appellants, v. VAN DAU, Defendant-Appellee,	Appeal No. A25A0406

APPELLANTS' OPENING BRIEF

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Introduction

The trial court's fundamental error in granting Defendant's motion for summary judgment was failing to recognize that the parties formed a partnership, imposing upon them fiduciary duties of utmost good faith, loyalty, and true and full disclosure of all material information. The trial court ignored classic indicia of partnership in the parties' written agreement and evidence of profit sharing which is *prima-facie* evidence of partnership. O.C.G.A. §14-8-7(4). That error infected the rest of the trial court's rulings. Because the question of partnership bears upon all Plaintiffs' claims, as well as Defendant's statute of limitations defense, this Court should reverse the trial court's summary judgment order in its entirety.

Jurisdiction

This Court, rather than the Supreme Court, has jurisdiction over this appeal under O.C.G.A. §§5-6-34(a)(1) & 15-3-3.1(a)(6). The trial court's July 8, 2024 summary judgment order disposed of all claims, and Plaintiffs-Appellants timely filed a Notice of Appeal on August 7, 2024. *See* O.C.G.A. §5-6-38(a).

Enumeration of Errors

The trial court erred in granting Defendant's motion for summary judgment on all claims.

Statement of the Case

The Parties Form a Partnership

In February 1992, Milton Shlapak and Van Dau executed an agreement "for the purpose of conducting general business with the government of Laos."[1] Although not expressly labeled a "partnership," that's plainly what it was. The parties agreed to (1) mutually contribute "capital and personal services," (2) "devote reasonably equal amounts of time and attention and use the utmost of [their] skills and ability" pursuing the ventures, (3) share profits equally, (4) share losses equally, and (5) have "equal voice in the management of the Ventures."[2]

The agreement followed on multiple contracts in which the Lao government had granted Shlapak's business, Shlapak Development Company (SDC), broad authority to "pursue the evaluation, exploration, and development...of all the marketable natural resources of the country," including associated "infrastructure."[3]

Shlapak and Dau needed each other. Dau was not a party to these government agreements and lacked substantial experience in large-scale development projects.[4] Shlapak depended upon Dau to translate for him,[5] to

[1] V2-245-¶1.
[2] V2-245-46-Prologue, ¶¶4, 7, 8. *See also* V2-251-52-Prologue, ¶¶4, 7, 8.
[3] V2-225.
[4] V6-16:17-23, 34:3-35:8. *See* V2-226, 235, 238-41.
[5] V8-69:4-11, 72:1-25; V11-14-¶8.

mediate Lao relationships,[6] and, in Shlapak's absence from Laos, to keep him informed about existing work and other potential projects for the partnership.[7]

Within the broad purpose of conducting business with the Lao government, the Shlapak/Dau partnership was to "include but not be limited to" seven categories, most notably "(b) Hydroelectric dam development and associated timber reserves-presently under joint venture negotiation with Bechtel Corporation" and "(f) Infrastructure developments."[8]

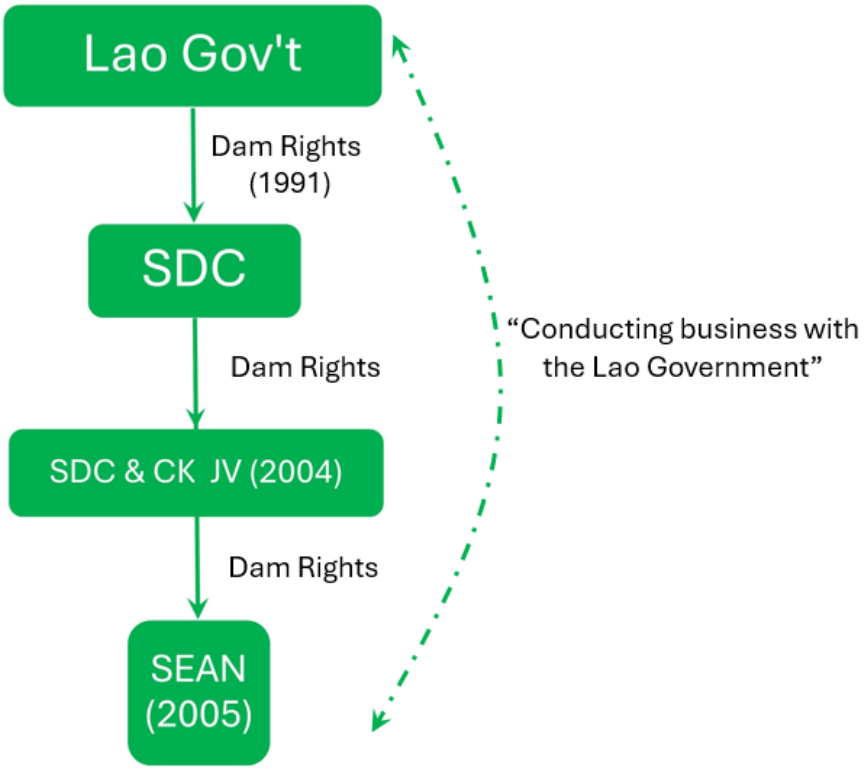
The Partnership's Nam Ngum II Dam Project

The men successfully completed one specific project: the Nam Ngum II dam ("NNII"). SDC owned the government rights to "develop...own, and operate" this dam as well as "any associated infrastructure requirements."[9] Shlapak secured joint venture cooperation from Ch. Karnchang Public Company Limited ("CK"), a Thai construction firm.[10]

SDC assigned its exclusive rights to a joint venture company it established with CK in 2004,[11] ultimately forming a new Thai corporation, Southeast Asia

[6] V8-71:6-18, 90:18-21, 157:2-10.
[7] V8-160:2-10, 207:14-17.
[8] V2-245-¶1.
[9] V2-238-41.
[10] V8-112:2-10; V13-36-¶¶6-7.
[11] V2-263-¶3; V13-36-¶7.

Energy Limited ("SEAN"), to develop and own the dam.[12] Shareholders in this entity were to be CK and several subcontractors.[13]



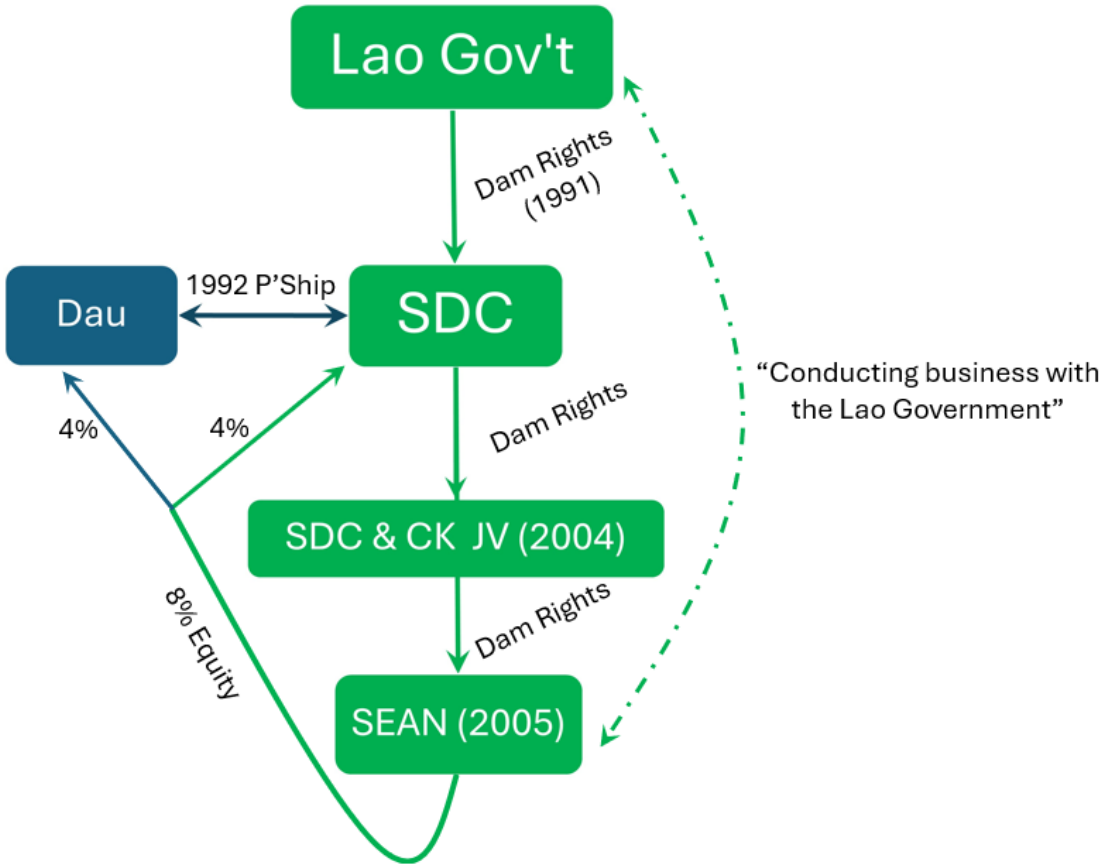
This structure typifies what it means to "conduct general business with the government of Laos."[14] The Lao government grants development rights to a private party, which are subsequently assigned to a new "special purpose company" that develops and operates the project.[15] The shareholders of the special purpose company are typically other joint-venture or subcontracting entities who

[12] V13-204-05.
[13] V2-264-65-¶6; V13-208-¶3.2.
[14] V2-245-¶1.
[15] V13-35-¶4.

together carry out the government contract assigned to the company they now jointly own.[16]

For participating in the joint venture and contributing its exclusive dam rights, SDC received an 8% equity stake in SEAN.[17] Notably, Dau was not a party to the CK joint venture and not entitled to *any* compensation or equity under that agreement. Nonetheless, CK and SEAN understood that Dau was entitled to half the stock owed to SDC.[18] The only basis for that entitlement was Shlapak and Dau's 1992 partnership agreement, or so a jury could find.[19] Thus, when SEAN issued SDC's stock, the men split it evenly, each receiving 4%.[20]

[16] *See, e.g.* V13-37-38-¶11, 44-45-¶33; V13-208-¶3.2.
[17] V13-229-30. *See also* V2-260-¶1.1, 263-¶5.1.
[18] V13-229-30.
[19] *See* V8-97:3-9, 406:7-14.
[20] V13-229-30.



Dau's 4% ownership stake went to an entity called PT Construction (now PT (Sole), ("PT")), leading Shlapak to believe that PT was Dau's company.[21] In this litigation, though, Dau has denied any ownership or beneficial interest in PT beyond a salary for what he calls limited "consultancy services."[22] Dau claims his brother founded and owned PT, with ownership later passing to Dau's son.[23]

[21] V6-52:16-53:14; V8-114:15-116:8; 187:17-188:21.
[22] V6-18:18-25, 30:20-24, 32:10-14, 66:18-22.
[23] V6-16:25-17:22, 32:15-21, 119:11-23.

Dau now denies any personal connection with PT's receipt of the SEAN stock.[24] However, Dau previously acknowledged in a 2014 document prepared by his attorneys that he, himself, was "a shareholder of the Nam Ngum II Project."[25]

This identity of interest between Dau and PT's shareholder position in SEAN is more consistent with the evidence than with Dau's litigation disavowal.[26] Dau served as PT's president and chairman.[27] He personally represented PT as a Director at SEAN board meetings.[28] Though denying involvement "in [PT's] day-to-day operation,"[29] Dau executed contracts for PT to develop substantial infrastructure constituting a core of PT's business.[30] Unsurprisingly, CK representatives understood that PT was the "Van Company."[31] A jury could easily conclude the same.

Dau Strikes Out on His Own

While Shlapak was working to consummate the NNII dam deal and ensure Dau received his share, Dau was actively working with CK—a relationship

[24] V6-52:3-54:14.
[25] V2-277-¶2.
[26] *See* PT documents describing Dau's close connection to the company at V7-246 and V12-274.
[27] V6-22:21-22, 69:4-16.
[28] *See* V8-319:4-11; V13-209-¶5.2.
[29] V6-63:6.
[30] V2-279-89; V13-67, 131.
[31] V11-20.

Shlapak had developed on the partnership's behalf[32]—to secure government-authorized infrastructure projects for PT, to Shlapak's exclusion.[33]

For instance, in 2006 Dau secured a contract for PT to complete the government-mandated resettlement "infrastructure projects" associated with the partnership's NNII dam.[34] Yet "Infrastructure developments" were expressly within the scope of the 1992 Agreement.[35]

Then, in 2011, Dau secured a contract for PT to participate in the Lao-government-instigated Xayaburi Dam project, including developing resettlement-related infrastructure.[36] PT would go on to do the same for the Luang Prabang Dam.[37] PT received an ownership interest in entities holding the government rights to develop and operate these dams.[38] Dau and/or his son, David Dau, received director seats on these companies' boards.[39]

Under Dau's leadership, PT also pursued other natural resource developments with the Lao government, including oil and gas exploration and mining projects.[40] Thus, Dau was reaping the benefits of his partnership with

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[32] V8-192:19-25; V8-390:15-391:8.
[33] V8-112:11-25; V8-320:9-321:20; V11-103-¶7.
[34] V11-103-¶7; V13-52, 67; V6-140:20-141:6.
[35] V2-245-¶1(f).
[36] V13-131, 37-38-¶11, 44-¶32.
[37] V13-44-45-¶¶33-34.
[38] V13-37-38-¶11, 44-45-¶¶31-34; V6-141:7-23.
[39] V6-67:14-68:3; V10-14-¶11.
[40] V2-282-83; V10-14-16-¶¶13-18.

Shlapak while also serving as the president and chairman of a competing company pursuing hydroelectric dam development, infrastructure development, oil and gas exploration, and mining projects—all items enumerated in their 1992 partnership agreement.[41]

Dau Misrepresents His Participation in these Projects and Falsely Denies the Existence of Additional Partnership Opportunities

Dau never disclosed to Shlapak his or his company's participation in these projects.[42] Instead, he affirmatively misrepresented both his role in the projects and the unavailability of any other projects for the partnership to pursue. First, when Shlapak saw Dau leaving a 2004 or 2005 meeting with CK, Dau assured him that "he had nothing to do with that meeting or getting any business...outside [Shlapak's] agreement with him."[43] Dau "often" repeated the claim that he was not personally involved in other projects, but that the work was rather his brother's.[44] And Dau never informed Shlapak that the "work" was actually projects within the scope of their partnership. Dau's ongoing non-disclosure and affirmative misrepresentations lulled Shlapak into believing that "[Dau] had nothing to do with" other projects, so Shlapak "didn't follow what P.T. was doing."[45]

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[41] V2-245-¶1.
[42] V8-111:9-11; 395:15-17; 410:4-412:19.
[43] V8-320:12-14; *see* V8-321:1-24.
[44] V8-112:22-25.
[45] V8-320:15-18; s*ee* V8-206:15-20, 364:2-8; V11-14-15-¶¶8-14.

Second, Dau repeatedly misrepresented to Shlapak that there was nothing further for their partnership to pursue, even as he was actively working to involve PT in developing Lao-government-instigated dams and other infrastructure. Shlapak depended on Dau to identify further opportunities they could pursue because Dau "was there...in the field with the people."[46] Yet, whenever Shlapak asked whether there were additional opportunities for the partnership, Dau would answer "not now," "not yet," "no," "nothing," or "none."[47]

Dau's Bad Faith Attempt to Terminate the 1992 Partnership

Around 2014, CK's outside counsel, Nopadol Intralib, evidently became concerned that Shlapak might have an ownership claim on the projects CK and Dau were pursuing without him.[48] Thus, he spoke with Dau about terminating the 1992 Agreement.[49] Dau *admits* that the purpose was to "prevent Shlapak from having a claim over other ventures or opportunities."[50] He hoped to prevent Shlapak from obtaining any "profit sharing" or "free shares" (meaning equity) in companies formed to develop and own the other "ventures or opportunities" he had pursued without Shlapak.[51]

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[46] V8-160:2-10.
[47] V8-204:9-19, 286:5-11, 347:23-348:11, 396:10-19; 408:16-409:3.
[48] V6-83:17-84:9, 85:14-25, 92:2-9.
[49] *Id.*
[50] V6-85:18-86:5.
[51] V6-86:8-15. *See also*, V6-102:20-103:1.

With this goal, Dau engaged lawyers to draft a new agreement.[52] This 2014 contract begins by acknowledging the parties' existing "joint venture,"[53] which it then purports to "terminate" and "supersede[]."[54] This new arrangement would be limited to two specific projects: (1) the already completed NNII dam, and (2) the eventually abandoned Nam Bak I dam.[55]

Dau secured Shlapak's signature on this agreement (1) without disclosing opportunities he had failed to bring to the existing partnership or future opportunities it might pursue, and (2) without stating, in the text of the contract or otherwise, his desire to obtain a generalized release for all claims that may have accrued from 1992 through 2014.[56]

Shlapak Belatedly Learns of the Diverted Partnership Opportunities

It wasn't until a 2019 visit to the NNII dam site that Shlapak first learned of PT's involvement in additional infrastructure development.[57] During that visit Shlapak viewed a promotional video related to the dam that discussed the "tremendous amount of [resettlement] work [on] homes, roads, hospitals, etc.…all accomplished by P.T. Construction."[58] Surprised by this, Shlapak retained counsel

[52] V6-101:15-102:7.
[53] V2-272-¶1(a).
[54] V2-274-¶5(e).
[55] V2-277-¶¶1-2.
[56] V8-343:16-344:23.
[57] V8-195:18-196:2.
[58] V8-196:18-197:3.

and began pursuing this lawsuit.[59] It was only during this litigation that Shlapak learned of other PT activities.[60]

The Trial Court Grants Dau's Motion for Summary Judgment

Dau moved for summary judgment on all claims.[61] Plaintiffs opposed this motion in briefing and in a hearing, raising all grounds discussed in this brief.[62] The trial court granted summary judgment on all claims, applying incorrect legal standards and resolving disputed factual questions in Dau's favor.[63]

Argument

This Court cannot affirm summary judgment if there is any evidence from which a reasonable jury could find for Plaintiffs on the critical elements of their claims or Dau's statute of limitations defense. *Davenport v. Ne. Ga. Med. Ctr., Inc.*, 247 Ga.App. 179, 180 (2000). "Trial court rulings on summary judgment enjoy no presumption of correctness...and an appellate court must satisfy itself *de novo* that the requirements of O.C.G.A. § 9-11-56(c) have been met." *Carlisle v. Broe*, 363 Ga.App. 238, 247 (2022). This Court "must view the evidence, and all reasonable inferences drawn therefrom, in the light most favorable to the nonmovant." *Id.*

[59] V8-197:6-13.
[60] V8-111:6-11, 225:19-226:8; V11-15-¶¶17-18.
[61] V7-260-91.
[62] V10-219-83; V13-148-69; V16-31:15-84:12, 92:20-96:11, 135:12-137:14.
[63] V2-5-23.

I. The trial court erred in concluding, as a matter of law, that the 1992 Agreement did not create a partnership and did not give rise to fiduciary duties.

"Determining the existence of a partnership is generally a mixed question of law and fact and cannot be resolved as a matter of law unless the verdict one way or the other is demanded by the evidence." *Seals v. Major*, 364 Ga.App. 239, 242-43 (2022). Furthermore, "the question of partnership bears on the question[] of fiduciary duty," *id.* at 246, because "[a]ny partnership agreement includes, *as a matter of law*, an agreement for each partner to act in the 'utmost good faith' toward the other partner." *Arford v. Blalock*, 199 Ga.App. 434, 437 (1991), *aff'd sub nom. Wilensky v. Blalock*, 262 Ga. 95 (1992) (emphasis added).

A. The trial court erred in concluding, as a matter of law, that no partnership existed.

"Factors that indicate the existence of a partnership include a common enterprise, the sharing of risk, the sharing of expenses, the sharing of profits and losses, a joint right of control over the business, and a joint ownership of capital." *Aaron Rents, Inc. v. Fourteenth St. Venture, L.P.*, 243 Ga.App. 746, 747 (2000), *aff'd sub nom. Accolades Apts., L.P. v. Fulton Cnty.*, 274 Ga. 28 (2001). Moreover, "[t]he receipt by a person of a share of the profits of a business is prima-facie evidence that he is a partner in the business." O.C.G.A. §14-8-7(4).

Ultimately, the "the true test of whether there is a partnership…is the intent to contract for those things which under the law constitute a partnership." *Aaron*

Rents, Inc., 243 Ga.App at 747-48. The Court "must look to the substance of the [parties'] agreement rather than mere nomenclature in determining" intent. *Id*. at 748. Indeed, "parties may be deemed partners based on the structure of their relationship, even if they disclaim partnership in the agreement at issue." *Seals*, 364 Ga.App. at 245 (reversing summary judgment where contract created a common enterprise, sharing of profits, and sharing of liabilities/risk).

Here, the 1992 Agreement established a common enterprise, committing the parties to "associate" with one another, contribute "capital and personal services," and "devote reasonably equal time and attention and use the utmost of [their] skill and ability in furtherance of the Ventures."[64] Dau and Shlapak also agreed to distribute profits and bear the risk of losses "in equal proportions."[65] Finally, the contract established a joint right of control, granting each party "equal voice in the management of the Ventures" with neither party able to bind the other without "the express written consent of the other."[66] These facts easily create a genuine issue of material fact whether the parties formed a partnership.

Through their prepared summary judgment order, Dau's counsel led the trial court into error by focusing on "mere nomenclature," namely the lack of the words

[64] V2-245-46-Prologue, ¶¶1, 7.
[65] V2-246-¶4.
[66] V2-246-¶8.

"partner" or "partnership" in the agreement.[67] The order also focused on the absence of certain formalities (registration, issuing K-1s, annual accountings) not required for the formation of a common law general partnership, let alone dispositive.[68]

Moreover, the defense-drafted order ignores the express written agreement to divide partnership profits evenly and asserts, as a factual matter, that evidence of profit sharing "does not exist" since Dau's share of the profits were eventually vested in PT.[69] Yet Dau offers no explanation why Shlapak would, with no apparent reason, accept only half the SEAN stock SDC was owed and allow the other half to pass to an entity purportedly unrelated to Dau, SDC, or the partnership.[70] The facts are more than sufficient for a reasonable jury to conclude that the only basis upon which Dau had any right, claim, or interest in 4% of the SEAN stock was the 50/50 profit sharing provision of the 1992 partnership agreement, that Shlapak honored that provision when he allowed PT to receive half the stock owed to SDC, and that Dau accepted the stock as his personal share of the partnership's profits from the NNII dam.[71]

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[67] V2-11.
[68] V2-12.
[69] *Id.*
[70] V6-52:3-55:20.
[71] V2-263-¶5.1, 277-¶2; V8-97:3-9; V11-22-23.

Thus, the plain terms of the 1992 Agreement and the equal sharing of the profits flowing from the NNII dam are more than sufficient to create a genuine dispute of fact as to the existence of a partnership, if not to establish a partnership as a matter of law.

B. The trial court erred in finding that Dau did not owe fiduciary duties of utmost good faith, loyalty, and full disclosure based on the 1992 Agreement.

"Partners owe fiduciary duties to one another to act in the utmost good faith and with the finest loyalty." *AAF-McQuay, Inc. v. Willis*, 308 Ga.App. 203, 211 (2011) (cleaned up); O.C.G.A. §23-2-58. Georgia law also imposes specific disclosure obligations on all partners to "render…true and full information of all things affecting the partners to any partner." O.C.G.A. §14-8-20.

Having wrongly ruled as a matter of law that SDC and Dau were not in a partnership, the trial court compounded its error by ruling that the 1992 Agreement did not create fiduciary duties. The defense-drafted order reasons that the agreement did not expressly spell out the parties' fiduciary duties or contain an express non-compete provision.[72] That's beside the point because Georgia law imposes these duties on "*[a]ny* partnership agreement...*as a matter of law*." *Arford*, 199 Ga.App. at 437 (emphasis added).

[72] V2-11-12.

Because the trial court failed to assume Dau owed SDC all the attendant duties of partnership, this Court should reverse the trial court's grant of summary judgment as to all counts. *See Seals*, 364 Ga.App. at 246 (summarily reversing summary judgment on plaintiff's fiduciary duty and breach of contract claims where the trial court erroneously ruled no partnership existed "[b]ecause…partnership bears on [these] questions.").[73]

[73] If the 1992 Agreement somehow did not form a partnership, the trial court erred in ruling that the parties were not otherwise in a confidential relationship. V2-14-15. The agreement unquestionably created a multi-decade joint venture, as Dau himself acknowledged. V2-272-¶1.a. That, plus Shlapak's reliance on Dau to translate and protect his related business interests from abroad (*Supra* at 2-3) independently foreclose summary judgment on Dau's fiduciary duties. *See Cushing v. Cohen*, 323 Ga.App. 497, 508 (2013) ("Parties who join together as partners…joint venturers, or otherwise to achieve a common business objective may owe each other a fiduciary duty" and "the existence of a confidential or fiduciary relationship is generally a factual matter for the jury"); *King v. Fryer*, 107 Ga.App. 715, 716 (1963) ("A member of a joint venture owes the duty to the other members of the venture…not to disrupt or abandon the venture for the purpose of obtaining benefits for himself and not to do any act which obstructs the carrying on of its business to a successful conclusion."); *Bowman v. Fuller*, 84 Ga.App. 421, 426 (1951) ("Where a joint adventure is established, the general laws of partnership and agency apply." (cleaned up)); *Aaron Rents, Inc.*, 243 Ga.App. at 748 ("In this instance, as in most, the distinction [between a joint venture and a partnership] is not crucial and the same general rules apply." (cleaned up)).

II. The trial court erred in granting summary judgment based on the 2014 agreement.

The trial court ruled that, by executing a 2014 agreement with a merger clause, the parties (1) "terminated" the 1992 Agreement and (2) "extinguished and discharged" any *existing damages claims* arising from the parties' performance under that agreement for the twenty-two years it was in force.[74] By this erroneous reading,[75] the merger clause allowed Dau (1) to terminate his 1992 partnership obligations in order to take advantage of present and future opportunities otherwise within the scope of the prior agreement; (2) to do so without disclosing the existence of such opportunities to his partner, (3) to obtain a release from any and all claims that vested prior to 2014 without specifically bargaining for such a release or including any express release provision in the contract *and* (4) to do so without disclosing to his partner those previously concealed diversions of partnership opportunities.

A. The trial court erred in ruling that the 2014 agreement released Dau from any obligations and duties under the 1992 Agreement because Dau's attempt to terminate that agreement to exploit partnership opportunities without compensating Shlapak was itself a breach of fiduciary duty.

Georgia law provides a right to damages for the "wrongful dissolution" of a partnership. O.C.G.A. §14-8-38(b)(1). Moreover,

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[74] V2-17.
[75] *See* V2-15.

> Even though a partner has a right to dissolve the partnership, if...it is proved that the partner acted in bad faith and violated his fiduciary duties by attempting to appropriate to his own use the...prosperity of the partnership without adequate compensation to his co-partner, the dissolution would be wrongful and the partner would be liable…for violation of the implied agreement not to exclude the other partner wrongfully from the partnership business opportunity.

Wilensky, 262 Ga. at 98 (affirming and quoting *Arford*, 199 Ga.App. at 438).

Thus, even where the partnership is "at will," the power to dissolve the partnership "must be exercised in good faith" such that "[a] partner may not dissolve a partnership to gain the benefits of the business for himself...." *Arford*, 199 Ga.App. at 438. This principle applies whether "a partner wrongfully appropriates a prospective business opportunity of his partnership to his own use *or that of another*." *McMillian v. McMillian*, 310 Ga.App. 735, 739 (2011) (emphasis added).

Having erroneously determined that there was no partnership and no partnership duties, the trial court ignored this case law and uncritically accepted Dau's 2014 bad-faith attempt to terminate the 1992 Agreement.[76] A jury could easily find Dau's bad faith from his own admission that the entire purpose of the 2014 agreement "was to prevent Shlapak from having a claim over other ventures or opportunities."[77] If Dau's true intention was to prevent Shlapak from having a

[76] V2-15-17.
[77] V6-85:23-25.

claim over the projects Dau was already pursuing and those he would pursue in the future, he was obligated by his duties of loyalty, utmost good faith, and full disclosure to expressly alert Shlapak both to the existence of these past, present, and future opportunities and to his intention to exploit them without Shlapak. He did neither.

Instead, Dau presented Shlapak with the 2014 agreement at a social outing with their wives,[78] stating that the purpose of the agreement was to clarify "CK's view of moving forward with NN2 and Nam Bak project" such that Shlapak "would benefit from the free share [ownership interest] from Nam Bak" in the same manner as NNII.[79]

A reasonable jury could conclude that Dau's purpose was to free himself to pursue existing and future opportunities otherwise included within the 1992 Agreement without the pesky need of sharing any of it with his business partner. Having earned millions of dollars in shareholder equity in SEAN by sharing the fruit of Shlapak's exclusive rights to develop the NNII dam, and having established a business relationship with CK through Shlapak's efforts on that project,[80] Dau now had the capital and credibility he needed to shed his reliance on Shlapak, thereby doubling his profits on existing and future opportunities.

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[78] V8-349:15-23.
[79] V6-102:10-19.
[80] V8-192:19-25.

Dau argues that because he terminated the 1992 partnership in 2014, Shlapak cannot make a claim against projects within the scope of that agreement,[81] the very argument *Arford* and its progeny foreclose. Instead, a reasonable jury could conclude that Dau's attempt to terminate the 1992 Agreement to keep Shlapak from having a claim over these other ventures, was itself a breach of his partnership duties. Even if the 2014 agreement could terminate any duty to disclose *future* matters related to the 1992 Agreement, a fiduciary is under an ongoing duty to disclose *prior* breaches of fiduciary duty "even after" the relationship ends. *Coe v. Proskauer Rose, LLP*, 314 Ga. 519, 530 (2022). Thus, the 2014 agreement cannot warrant summary judgment on those undisclosed claims.

B. Even aside from wrongful dissolution, the trial court erred in ruling that the 2014 merger effected a general release from Shlapak's pre-existing claims for Dau's breaches.

The "merger rule" simply means that "where parties enter into a final contract[,] all prior negotiations, understandings, and agreements on the same subject matter are merged into the final contract, and are accordingly extinguished." *Atlanta Integrity Mortg., Inc. v. Ben Hill United Methodist Church*, 286 Ga.App. 795, 797 (2007) (cleaned up). Georgia courts have *not* held, as the defense-drafted trial court order ruled, that merger *on its own* functions to release

[81] V7-279.

existing damages claims arising from pre-existing, reciprocal obligations on a contract under which the parties have already performed.[82]

That can't be right because a release of existing claims "must be mutually intended by both parties to the contract" and "supported by a consideration." *Adair v. Park*, 97 Ga.App. 719, 721, 722 (1958). Parties can mutually discharge *executory* duties by a simple recission or modification, because there "an agreement to annul on one side is a sufficient consideration for the agreement to annul on the other side." *Id.* However, where one party has performed under the contract, the other party "cannot be relieved" of his liability "in the absence of consideration on his part." *Id. See also* 17A C.J.S. *Contracts* §586 ("That an oral contract was merged into a written one does not affect a party's right to recover damages for a breach of the oral contract *while it was in force*." (emphasis added)); 17B C.J.S. *Contracts* §603 ("A contract may be discharged or abrogated at any time *before the performance is due* by a new agreement…." (emphasis added)).

Here, the 2014 agreement could not serve as a general release of claims for Dau's pre-existing breaches. What Dau argues for, and what the trial court granted,

[82] The defense-drafted summary judgment order misconstrues *Bulford v. Verizon Bus. Network Servs., Inc.*, 970 F. Supp. 2d 1363 (N.D. Ga. 2013). There, the entire purpose of the arms-length separation agreement was to *explicitly release* "any claim [plaintiff] may have against [defendant]...based on any event that has occurred before [plaintiff] sign[ed] this Release," and that release was supported by consideration (severance compensation). *Id*. at 1366.

would allow a party—even a fiduciary—to obtain a surreptitious release of vested claims arising from undisclosed breaches, without ever expressly bargaining for such release, notifying the other party of this goal and gaining their mutual assent, or providing consideration. In sum, Dau could not wipe clean twenty-two years' worth of pre-existing, vested performance obligations through a simple change in the scope of the partnership moving forward.

C. The trial court erred in ruling that the termination of the 1992 Agreement also terminated any breach of fiduciary duty claims arising from the partnership.

Even if this Court were to allow a fiduciary to surreptitiously "merge" vested-yet-undisclosed contract claims out of existence, that would not extinguish Shlapak's *tort* rights of action for breach of fiduciary duty.

"'Private duties may arise…from relations created by contract, express or implied. The violation of a private duty, accompanied by damage, shall give a right of action.'" *Wimpy v. Martin*, 356 Ga.App. 55, 56 (2020) (quoting O.C.G.A. §51-1-8). "[W]hile a tort action cannot be based on the breach of a contractual duty only, it can be based on conduct which, in addition to breaching a duty imposed by contract, also breaches a duty imposed by law." *Id.* (plaintiff's tort claim for defendant's failure to remit plaintiff's share of partnership profits survived, even absent any viable claim for breach of their partnership agreement itself); *see also Tidikis v. Network for Med. Commc'ns & Rsch. LLC*, 274 Ga.App. 807, 810 (2005)

(breach of fiduciary duty claim survived where contract created confidential relationship, though defendant was not in breach of the contract itself).

Here, even if the breach of contract claims were merged out of existence in 2014, that wouldn't eliminate tort claims arising from the fiduciary duties of loyalty and utmost good faith imposed by law—duties the parties were bound to honor so long as the 1992 contractual relationship was in force.[83]

III. The trial court erred in ruling, as a matter of law, that none of the disputed opportunities fell within the scope of the 1992 Agreement.

A. The trial court erred in ruling Dau had no obligation to refrain from competing with the partnership or diverting partnership opportunities to others.

The trial court believed the lack of an explicit "exclusivity or non-compete provision" in the 1992 Agreement meant that nothing "prevent[ed] either party from pursuing or assisting other companies with business with the government of Laos."[84] But the duties of utmost good faith and loyalty imputed by law to *every* partnership include the duty not to "wrongfully appropriate[] a prospective business opportunity of [the] partnership to [one's] own use *or that of another*." *McMillian*, 310 Ga.App. at 739 (emphasis added). That tracks basic agency principles, which prohibit an agent from "competing with the principal and from

[83] Similar reasoning applies to Shlapak's and SDC's independent claims for fraud and unjust enrichment.
[84] V2-11-12.

taking action on behalf of or otherwise assisting the principal's competitors." *Restatement (Third) of Agency* §8.04 (2006); O.C.G.A. §14-8-9(1) ("Every partner is an agent of the partnership for the purpose of its business...."); *Fine v. Commc'n Trends, Inc.*, 305 Ga.App. 298, 309 (2010).

In other words, all partnerships are "exclusive" in the sense that the duties of loyalty and utmost good faith prevent a partner from competing directly with the partnership, acting as the agent of a competitor, or otherwise assisting the partnership's competitors. Thus, it is not dispositive of Dau's breach that he did not "personally enter[] into any contract with the Lao government" or "never owned stock in PT," as the trial court states.[85]

The evidence clearly shows that Dau assisted PT in securing work on infrastructure developments and dam projects during his partnership with Shlapak.[86] He also later served on the board of the Luang Prabang Power Company Limited, a competing company doing business with the Lao government.[87] Furthermore, while Dau served as PT's president, PT actively pursued other projects with the Lao government such as mining, and oil and gas exploration—all business included within the 1992 Agreement.[88] These facts raise a genuine issue

[85] V2-10.
[86] V11-103-¶7; V13-67, 131.
[87] V6-67:21-68:3.
[88] V9-405-06, 411.

as to Dau's breach of the 1992 Agreement and his fiduciary duties by diverting these opportunities as an agent for, or by otherwise aiding, competitors of the partnership.

B. The trial court erred when construing the scope of the partnership and resolved genuine disputes in Dau's favor.

Where "the language of the contract is clear and unambiguous...the contract is enforced according to its plain terms." *Winterboer v. Floyd Healthcare Mgmt., Inc.*, 334 Ga.App. 97, 101 (2015) (cleaned up). If, however, "the contract is ambiguous in some respect" and "ambiguity remains after applying the rules of construction, the issue of what the ambiguous language means and what the parties intended must be resolved by a jury." *Id.* at 102.

Here, the trial court broke rule number one by failing to give effect to the plain terms of the 1992 Agreement. Somehow the court ruled that PT's participation in hydroelectric dam development and resettlement-related infrastructure development did not fall within the express categories of "hydroelectric dam development" and "infrastructure developments."[89] Rather than honor this language, the court focused solely on whether the Xayaburi dam, the Luang Prabang dam, and resettlement work on the NNII dam are listed *by name* in the 1992 Agreement.[90] It never explains why additional future dam projects are not

[89] V3-121-¶1(a), (f).
[90] V2-10.

included in the category "hydroelectric dam development" or, for that matter, "infrastructure developments" given that dams themselves are very clearly infrastructure.[91]

Furthermore, a significant aspect of PT's role in the Xayaburi and Luang Prabang dams included resettlement-related infrastructure developments—the same work PT completed for the NNII dam.[92] The summary judgment order never explains why the category "infrastructure development" in the 1992 Agreement doesn't encompass PT's building of "electricity, water supply...[m]edical facilities, homes, [and] paved roads."[93] Indeed, Dau himself stated that resettlement involved these "infrastructure projects."[94] Reasonable jurors might agree.

Second, the trial court unjustifiably restricted what it means to "conduct general business with the government of Laos."[95] All the deals here involve layers of joint venture agreements, creation of special purpose entities, and execution of related shareholder agreements, all driven by government-granted development rights. This factual context demonstrates that conducting business with the Lao government is not limited only to entities with a direct, bilateral agreement with

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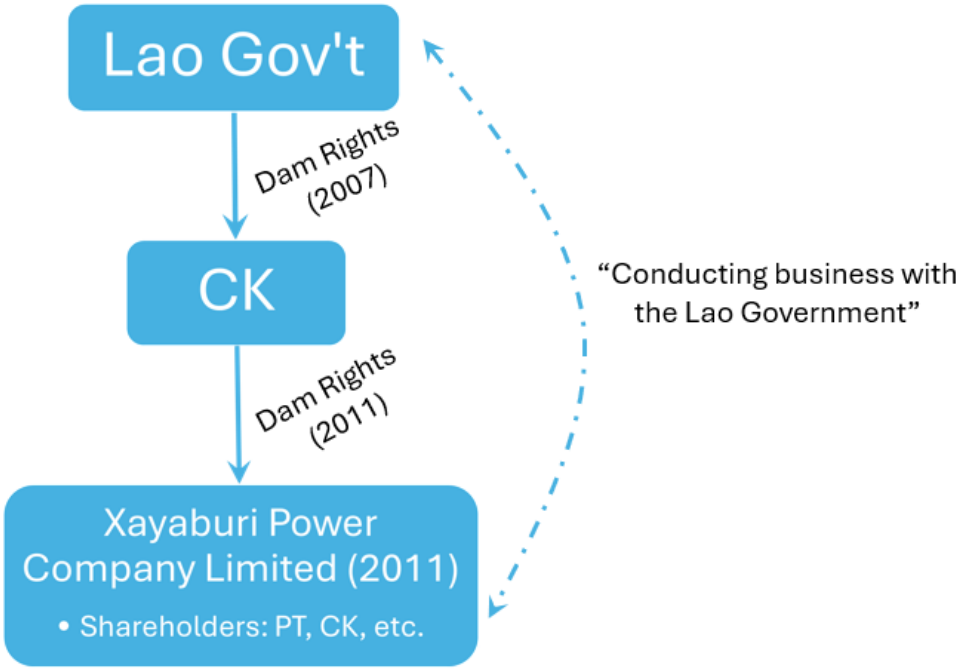
[91] *See, e.g.,* ASSOCIATION OF STATE DAM SAFETY OFFICIALS, *Dams 101*, https://damsafety.org/dams101 (last visited Oct. 31, 2024) ("Dams are a vital part of the national infrastructure.").
[92] V13-41-¶¶22-23, 44-45-¶¶31, 33-34.
[93] V6-140:20-141:6.
[94] V6-140:14-25.
[95] V2-245-¶1.

the government. At a minimum, there is an ambiguity on that point that a jury must resolve.

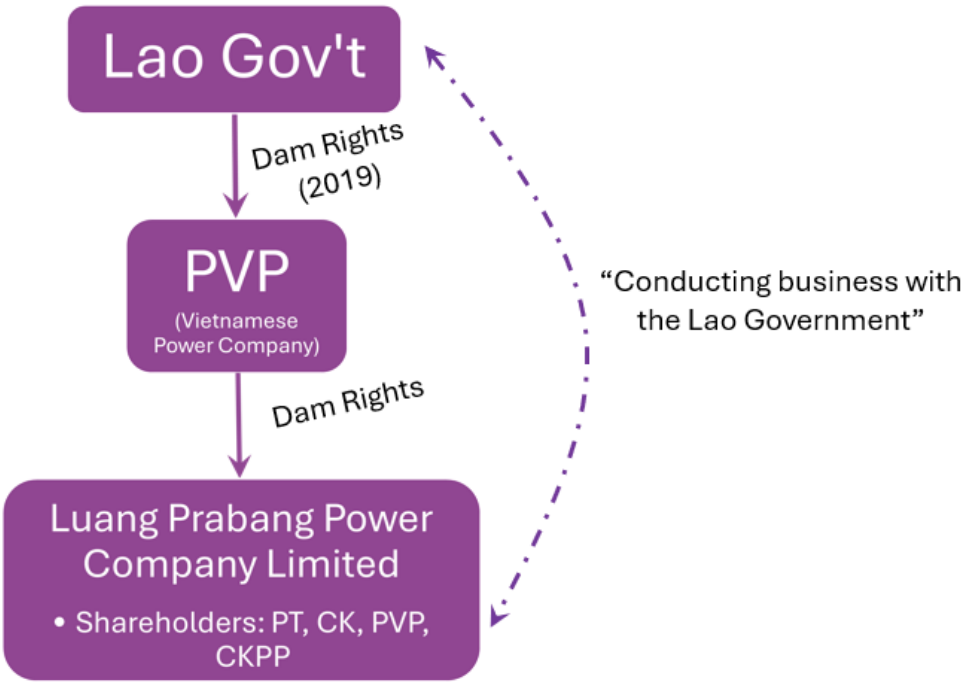
The trial court found it dispositive that "PT (Sole) did not have any contracts with the government of Laos regarding NNII resettlement, the Xayaburi dam or the Luang Prabang dam,"[96] and that "PT (Sole)'s contracts were with the entities that owned the dams."[97] This form-over-substance reasoning ignores that PT itself owned the entities that "owned the dams" and had its own executives sitting on their boards. In other words, PT didn't simply have third-party contracts with private entities; it was an active participant and owner in the enterprise carrying out government-granted development rights.[98]

[96] V2-10-11.
[97] V2-11.
[98] V6-141:19-22; V13-37-38-¶11, 44-45-¶¶31-34.

Xayaburi Dam Deal Structure



Luang Prabang Dam Deal Structure



As these projects show, this structure is precisely what it means to "conduct business with the government of Laos": multiple parties join together to own and operate a special purpose entity to carry out a government contract. That's the business PT joined as to the Xayaburi and Luang Prabang dams. The NNII resettlement contract involved collateral infrastructure developments flowing directly out of SDC's contract with the government to construct that dam. To the extent that it is reasonably in dispute whether these projects constituted "conducting general business with the government of Laos," the trier of fact must resolve any such ambiguity, not the trial court.

C. The trial court erred in resolving factual disputes as to Dau's interest in PT in Dau's favor.

As discussed above, Dau would have breached the 1992 Agreement and his duties of loyalty and utmost good faith by diverting partnership opportunities even to unrelated third parties. However, a genuine fact issue also exists as to whether Dau was serving his own personal interests when he diverted work to PT.

The trial court fully credited Dau's assertions that the company was his brother's,[99] that he was "involved with PT (Sole's) work...on a limited basis,"[100] and that he never "owned any shares or interest in PT."[101] But CK's outside

[99] V2-8.
[100] V2-20.
[101] V2-9.

general counsel perceived that PT was the "Van Company."[102] PT's own documents state, with no mention of Dau's brother, that PT was "incorporated…by the vision of Van Dau"[103] and that Dau himself was the company's CEO and responsible for its growth and success.[104] This evidence is more than sufficient to create a material fact issue as to Dau's close personal connection to and financial interest in PT.

But even crediting that PT was Dau's brother's and later his son's, a partner may not divert partnership opportunities to his family. For obvious reasons, the law presumes an identity of interest between siblings and between parents and children for conflict-of-interest purposes. O.C.G.A. §14-3-860(1)(A), (3). A reasonable jury could conclude that, despite denying ownership of PT, Dau was serving his personal interests when he diverted business to a company owned by his immediate family.

IV. The trial court erred in ruling, as a matter of law, that Dau's fraudulent misrepresentations and nondisclosures did not toll the statute of limitations.

Where a defendant's fraud has "debarred or deterred [the plaintiff] from bringing an action, the period of limitation shall run only from the time of the plaintiff's discovery of the fraud." O.C.G.A. §9-3-96. This tolling applies where:

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[102] V11-20.
[103] V9-404.
[104] V12-274.

"first…the defendant committed actual fraud; second…the fraud concealed the cause of action from the plaintiff, such that the plaintiff was debarred or deterred from bringing an action; and third…the plaintiff exercised reasonable diligence to discover his cause of action despite his failure to do so within the statute of limitation." *Coe*, 314 Ga. at 529. At summary judgment, a plaintiff is "only required to present evidence that raises a genuine issue of material fact" as to these elements. *Id.*

That's the case here. Shlapak has testified that he did not discover Dau's breaches until 2019.[105] Shlapak and SDC filed this lawsuit in January 2022, well within the limitations period on all claims when the tolling statute is applied.[106]

A. The trial court erred in ruling that no reasonable juror could conclude that Dau's actual fraud concealed Shlapak's and SDC's claims and deterred them from pursuing them.

A plaintiff can demonstrate "actual fraud" by showing *either* "(1) actual fraud involving moral turpitude, or (2) a fraudulent breach of a duty to disclose that

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[105] V8-195:18-197:13.

[106] Breach of contract and breach of fiduciary duty arising from a partnership agreement - six years (O.C.G.A. §9-3-24; *Godwin v. Mizpah Farms, LLLP*, 330 Ga.App. 31, 38 (2014); *Cochran Mill Assocs. v. Stephens*, 286 Ga.App. 241, 244 (2007)); Fraud and unjust enrichment - four years (*Copeland v. Miller*, 347 Ga.App. 123, 125 (2018); *Engram v. Engram*, 265 Ga. 804, 806 (1995)). The trial court erroneously stated that the applicable statute of limitations on breach of fiduciary duty claims is four years. V2-19-fn.11. Where conduct breaches a fiduciary duty arising from a partnership agreement, Georgia courts have applied the "six-year statute of limitations for breach of simple contracts…to these breach[es] of fiduciary duty." *Godwin*, 330 Ga.App. at 38.

exists because of a relationship of trust and confidence.*" Hunter, Maclean, Exley & Dunn, P.C. v. Frame*, 269 Ga. 844, 846 (1998). Furthermore, "a fiduciary relationship encompasses a duty to disclose so that 'suppression of a material fact which a party is under an obligation to communicate constitutes fraud.'" *Goldston v. Bank of Am. Corp.*, 259 Ga.App. 690, 696 (2003) (quoting O.C.G.A. §23-2-53). A fact is material and subject to the duty of "true and full" disclosure if it relates to anything "affecting the partners." O.C.G.A. §14-8-20.

Coe v. Proskauer Rose addresses tolling in relation to a fiduciary's duty to disclose. *Coe* reversed summary judgment, finding actual fraud where a law firm had only "vaguely referred to" a conflicting representation in its engagement letter. 314 Ga. at 530-31. That was true even though, unlike here, the law firm made *no affirmative misrepresentations*.

Here, there are genuine fact disputes as to *both* Dau's affirmative misrepresentations *and* failure to disclose material facts when under a duty to do so. As for affirmative misrepresentations, the summary judgment order incorrectly states that the "only evidence of Dau's intent to 'conceal or deceive' is Dau's statement that he spoke with a government representative to obtain work for his brothers' company."[107] This ignores Shlapak's testimony that Dau also repeatedly

[107] V2-19-20.

claimed that (1) he was not involved in any additional projects and (2) no such opportunities existed for the partnership to pursue.[108]

The trial court also held, as a matter of law, that Dau's representations that he was trying to get some work for his brother "does not show that Dau intended or attempted to conceal any facts from Plaintiffs."[109] If the idea is that Dau's statement was true, that is disputed by Dau's multiple affiliations with PT and the reasonable inference that he had a beneficial interest in the company that received his 4% partnership share of the SEAN equity. *Supra* at 6-7, 30-31. At best it's a half-truth not allowed between partners.

If the idea is that Dau's statement was a sufficient disclosure that he was helping his brother compete with the partnership for resource development and infrastructure opportunities within the scope of the partnership, a reasonable jury could differ. For one thing, Dau did not say he was getting work for PT with a "government representative,"[110] as the order erroneously states, let alone work within the scope of the partnership. Rather he made a vague and generalized representation about getting unspecified work for "my brother."[111] That's no better than the fiduciary in *Coe* who "vaguely referred to" the key information. 314 Ga.

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[108] V8-112:11-25, 320:9-18, 321:15-20, 204:11-19, 347:19-348:14, 396:8-18, 408:16-409:3.
[109] V2-20.
[110] V2:19-20.
[111] V8-112:11-25, 320:9-18, 321:15-25.

at 530-31. Dau had come from a meeting with a *Thai* construction firm (CK) with multi-country operations, not a Lao government representative.[112] As far as Shlapak knew, the work Dau was attempting to secure "for his brother" could have been any kind of project anywhere, rather than work on Lao government projects within the scope of the 1992 Agreement.

A reasonable jury could conclude that Dau intentionally downplayed his role in the work and failed to disclose with the forthrightness required of partners that he was pursuing work for PT that fell within the partnership's scope. His statement was not, as a matter of law, a "true and *full*" disclosure of his involvement in the work, the nature and scope of the work, and its relationship to the partnership. O.C.G.A. §14-8-20 (emphasis added). The trial court, which had already wrongly rejected the claim that the men were partners, reasoned that, "because [Dau] is not an attorney," he did not have "legal duties of candor and loyalty" to Shlapak and SDC.[113] The law demands precisely those duties of partners, not merely attorneys. O.C.G.A. §23-2-58; O.C.G.A. §14-8-20. A reasonable jury could conclude that Shlapak was justified in relying on Dau's misrepresentations and nondisclosure and was thus deterred from discovering and asserting his claims.

[112] V11-103-¶7; V8-112:11-25.
[113] V2-22.

B. The trial court erred in ruling, as a matter of law, that Shlapak and SDC did not exercise reasonable diligence in discovering and pursuing their claims.

"Questions of...whether the plaintiff could have protected himself by the exercise of proper diligence are, except in plain and indisputable cases, questions for the jury." *Sanders v. Looney*, 247 Ga. 379, 381 (1981) (cleaned up). This is particularly true in a partnership, where "one partner is entitled to rely on representations made by another partner." *Lehman v. Zuckerman*, 198 Ga.App. 202, 205 (1990) (cleaned up). "Where a confidential relationship exists, a plaintiff does not have to exercise the degree of care to discover fraud that would otherwise be required, and a defendant is under a heightened duty to reveal fraud where it is known to exist." *Coe*, 314 Ga. at 530 (cleaned up).

In *Coe*, the Supreme Court held that it was reasonable for the plaintiffs to rely upon the law firm's continued nondisclosures in failing to initiate their claims sooner, even absent affirmative misrepresentations. Reasonable diligence and reliance remained issues of fact "even *after* the legal engagement was completed." *Id.* at 531 (emphasis added). Thus, even though public sources including news reports, congressional reports, and other lawsuits referring to the law firm indicated the conflicted representation, issues of material fact regarding the plaintiffs' actual knowledge and reasonable diligence precluded summary judgment. *Id.* at 531-32.

A plaintiff's affidavit denying having seen these materials was sufficient to raise an issue of material fact. *Id.* at 532.

Here, the trial court erroneously stated that "the undisputed evidence confirms that Plaintiffs had *actual knowledge* of their alleged claims."[114] In fact, Shlapak testified repeatedly that he had no actual knowledge of Dau's breaching activities until 2019.[115] At best, the trial court's actual-knowledge finding rests on *inferences* from Dau's statements regarding his brother's company or references buried in documents that Shlapak testified he had not read. A jury must settle those questions.

Second, the trial court resolved in Dau's favor genuine disputes as to Plaintiffs' reasonable diligence in discovering their claims. In doing so, the trial court states generally that information of PT's involvement in the Xayaburi dam and NNII resettlement was (1) "open and available" and that (2) "much" evidence of this involvement "comes from Plaintiff's own files."[116]

As to the first assertion, Shlapak's belief that PT was Dau's company does not, as the trial court states, make the details of PT's activities in a distant country

[114] V2-20 (emphasis added); *see also*, V2-22.
[115] V8-111:6-11, 195:18-197:13, 206:9-20, 225:19-226:8, 364:2-8; V11-14-15-¶¶12-13, 17-18.
[116] V2-21.

"open and available," [117] especially considering the scant evidence of PT's activities discussed below. Rather, this belief, when coupled with Dau's misrepresentations that he was not involved in other projects, leads to the opposite inference: Shlapak believed Dau was not involved and thus, believing PT and Dau were one and the same, had no reason to investigate what projects, if any, PT was undertaking.[118] Parties in fiduciary relationships of trust do not have to follow bread crumbs and assume the worst.

The trial court makes a passing reference to "publicly available" evidence detailing PT's work.[119] If that refers to a brochure obtained *during this litigation* by Plaintiff's IT specialist from PT's now defunct website, the record demonstrates a dispute as to when and for how long this brochure was readily accessible.[120] And why in the first place would Shlapak have a duty to visit PT's website to search for signs of disloyalty? Even more than the *Coe* plaintiffs, who reasonably relied upon their attorney's nondisclosures in not seeking out public sources of information,

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[117] V2-21. Here the trial court cites *Allman v. Young*, 314 Ga.App. 230, 231 (2012), where it was open and obvious for *seven years* before plaintiffs sued that their real estate contract hadn't closed by the deadline and that construction hadn't begun. Information regarding PT's activities in Laos was not similarly "open and available" to Shlapak, a United States resident who doesn't speak or read Lao or Thai and who depended upon Dau to keep him abreast of information related to his international business interests.

[118] V8-320:15-18.

[119] V2-20.

[120] V11-106-07 (noting that brochure was not linked on website when discovered); V10-394-95-¶29.

Shlapak was thrown off the scent by Dau's repeated misrepresentations and ongoing nondisclosures.

The trial court also notes some testimony Shlapak attended the SEAN board meeting in which PT was granted the NNII resettlement contract and that he voted in favor of that contract.[121] But Shlapak testified that he never voted for such a contract and was never informed that PT received such a contract at a board meeting or otherwise.[122] That dispute must be resolved by a jury, especially considering Shlapak was relying on Dau to translate for him at these board meetings.[123] A jury could believe that Dau was working to exclude Shlapak from the partnership opportunity allegedly discussed.

The supposed evidence of PT's activities from Plaintiffs' files does not foreclose a dispute of fact as to reasonable diligence.[124] That "evidence" consists of several passing references to PT's work spread across three documents found among decades worth of business records: one bullet point in a miscellaneous,

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[121] V2-8-fn.5.
[122] V8-316:1-17; V8-208:22-209:12; V8-317:5-24; V11-14-15-¶¶12-14.
[123] V8-57:21-58:8, 208:22-209:12; V11-14-¶8, 15-¶14.
[124] The trial court cited *Falanga v. Kirschner & Venker, P.C.*, 286 Ga.App. 92 (2007), where a former client brought a claim for fraudulent billing after failing to contemporaneously review the regular billing statements that eventually revealed the fraud. *Id.* at 94-95. There, unlike this case, the fiduciary party himself regularly supplied to the plaintiff the very information he needed to discover his claims, in documents a party would normally review in the ordinary course of the relationship. Several bullet points of text among Shlapak's corpus of records do not come close.

twenty-nine slide PowerPoint presentation on the NNII project;[125] three bullet points in a forty-five-page SEAN financial audit, generically noting payments to PT;[126] and two simple notations of "PT" in a detailed twelve-page Xayaburi dam brochure.[127] In each case, Shlapak has testified that he either does not remember ever seeing the document[128] or that he may have casually picked up some documents during site visits but never read them.[129]

Furthermore, Dau contends that Shlapak acquired the Xayaburi dam brochure during an August 2016 site visit.[130] This is the only document in Shlapak's records that supposedly, and as a matter of law, put him on notice of PT's involvement in that dam. Even if it did, Shlapak and SDC filed their claims in January 2022, within the six-year period governing the breach of contract and partnership-related fiduciary duty claims related to this project. *See Godwin*, 330 Ga.App. at 38-39 ("[E]ach act of alleged breach…creates a new cause of action for that specific act.").

Charging Shlapak with constructive knowledge of every line of text included among many boxes of files defies common sense. This is especially true here

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[125] V13-271, 279.
[126] V13-283, 308-09.
[127] V13-331, 336, 338.
[128] V8-337:22-23.
[129] V8-312:1-9, 364:10-16; V11-16-¶21.
[130] V7-277-¶¶8-9.

because a partner is not required to scour every document that comes into his possession for evidence of disloyalty. Instead, partners may take each other at their word, without the due diligence that might be required in an arm's-length transaction. At the very least, these few documents, buried in thousands, do not add up to the "plain and indisputable" evidence required by Georgia law to remove from the jury the question of Plaintiffs' reasonable diligence.

V. The trial court erred in ruling that Shlapak's and SDC's claims for fraud, unjust enrichment, and attorney's fees fail as a matter of law.

The trial court summarily disposed of Shlapak's and SDC's fraud claims in a two-sentence footnote, based on the same wrong reasons it rejected tolling.[131] The fraud claims do not duplicate the contract claims, as the trial court ruled, because fraud is in independent tort undergirded here by partnership duties imposed by law, beyond those imposed by contract. The trial court was also wrong that Shlapak and SDC "were not damaged by any reliance" on Dau's fraud.[132] Dau's fraudulent misrepresentations and nondisclosures induced Shlapak and SDC to bestow on Dau millions of dollars of equity in SEAN (fruits of the partnership's NNII project) while taking no action as Dau diverted other profitable opportunities to his own

[131] V2-22-fn.12.
[132] *Id.*

benefit.[133] Thus, this Court should also reverse the trial court's ruling as to the fraud claims.

The trial court also reasoned that plaintiffs could not assert unjust enrichment claims because the parties had a contract.[134] But a jury could find that Dau unjustly enriched himself by breaching partnership duties imposed by statute even if he breached no express term of the contract. *See, e.g.*, *Campbell v. Ailion*, 338 Ga.App. 382, 387-88 (2016) (a party may proceed to trial on breach of contract and unjust enrichment claims as alternative theories). The trial court also wrongly states that "Plaintiffs do not assert that they conferred a benefit on Dau for which he failed to compensate them."[135] In fact, Plaintiffs conferred millions of dollars of equity in SEAN to Dau's benefit—a benefit Dau should not retain given his disloyalties.

Finally, because the trial court erred in granting summary judgment on Plaintiffs' substantive claims, it erred in dismissing Plaintiffs' claim for attorney's fees under O.C.G.A. §13-6-11.[136]

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[133] *See* V8-97:3-9, 320:9-18.
[134] V2-6-fn.2.
[135] *Id.*
[136] V2-22-23.

CONCLUSION

The trial court erred in ruling, as a matter of law, that Dau and Shlapak/SDC were not partners and thus did not owe each other fiduciary duties of utmost good faith, loyalty, and full disclosure. Because that error infected the trial court's assessment of the facts and governing law, this Court should reverse the summary judgment order in its entirety.

This submission does not exceed the word count limit imposed by Rule 24.

Respectfully submitted, this 4th day of November, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2024, I served a true and correct copy of **APPELLANTS' OPENING BRIEF** by filing the same with the Court's eFast electronic filing system and also by email on the below counsel of record. I also certify that there is a prior agreement with the following counsel of record to allow documents in a PDF format sent via email to suffice for service:

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