IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2017-CA-01064-COA

SEAHORN INVESTMENTS LLC **APPELLANT**

v.

MERIDIEN PROPERTY MANAGEMENT LLC **APPELLEE**

DATE OF JUDGMENT:	06/09/2017
TRIAL JUDGE:	HON. CHRISTOPHER LOUIS SCHMIDT
COURT FROM WHICH APPEALED:	HANCOCK COUNTY CIRCUIT COURT
ATTORNEYS FOR APPELLANT:	DAVID WAYNE BARIA BRANDON CURRIE JONES
ATTORNEY FOR APPELLEE:	RYAN O'NEIL LUMINAIS
NATURE OF THE CASE:	CIVIL - CONTRACT
DISPOSITION:	ON DIRECT APPEAL: AFFIRMED IN PART; DISMISSED IN PART. ON CROSS-APPEAL: DISMISSED - 02/11/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

PER CURIAM:

¶1. The circuit court entered an order certifying several of its rulings as "final" pursuant to Mississippi Rule of Civil Procedure 54(b). Those rulings included: (1) the grant of Meridien Property Management LLC's motion for partial summary judgment on SeaHorn Investments LLC's claim for breach of fiduciary duty; (2) the grant of Meridien's motion for partial summary judgment as to any "Damages for Lost Revenue and Excess Financing Costs"; (3) the exclusion or limitation of the testimony of two of SeaHorn's expert witnesses; and (4) the denial of Meridien's motion for partial summary judgment on SeaHorn's claim

for breach of contract. SeaHorn filed a notice of appeal from rulings (1) through (3) and a prior order of the circuit court denying SeaHorn's motion to amend its complaint. Meridien then filed a notice of cross-appeal from ruling (4). After oral argument, this Court ordered the parties to file supplemental briefs on the question whether the circuit court's rulings were properly certified under Rule 54(b).

¶2. A majority of the Court has determined that rulings (2) through (4) are not eligible for certification under Rule 54(b). In addition, the circuit court did not certify its order denying SeaHorn's motion to amend its complaint. Therefore, the appeal must be dismissed in relevant part, and the cross-appeal must be dismissed in its entirety.

¶3. With respect to ruling (1)—the grant of Meridien's motion for partial summary judgment on SeaHorn's claim for breach of fiduciary duty—there is not a majority of the Court in favor of any one disposition. Four judges would reverse the grant of partial summary judgment, three judges would affirm, and three judges would dismiss the appeal of that ruling as improperly certified under Rule 54(b). Therefore, because there is not a majority to either reverse or dismiss, the grant of partial summary judgment on SeaHorn's claim for breach of fiduciary duty is affirmed by operation of law.[1]

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[1] *See Dean v. State*, 173 Miss. 254, 310, 162 So. 155, 157 (1935) ("When a cause is carried to an appellate court, what the appellant does is to request or move the court to reverse or set aside the judgment rendered by the trial court. Under the general parliamentary law governing deliberative assemblies, a motion is lost unless a majority of the members of the assembly present vote in favor of it. Courts are governed by the same rules. Consequently, if an appellant's request or motion for the reversal of the judgment against him fails to receive the vote of a majority of the judges, it is lost; the judgment remains in effect without error being declared therein, and the logical thing for the court to do is to so say by entering an order affirming it.").

¶4. ON DIRECT APPEAL: AFFIRMED IN PART; DISMISSED IN PART. ON CROSS-APPEAL: DISMISSED.

CARLTON, P.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION, JOINED BY GREENLEE AND TINDELL, JJ. J. WILSON, P.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION, JOINED BY BARNES, C.J., AND C. WILSON, J. McDONALD, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION, JOINED BY WESTBROOKS, LAWRENCE AND McCARTY, JJ.

CARLTON, P.J., CONCURRING IN PART AND DISSENTING IN PART:

¶5. SeaHorn Investments LLC (SeaHorn) filed suit against Meridien Property Management LLC (Meridien), Coldwell Banker Commercial TEC Realtors (TEC Realtors), and Brandon Wilson for allegedly mismanaging one of SeaHorn's properties and causing it to suffer financial losses. During the early stages of litigation, SeaHorn dismissed TEC Realtors and Wilson as defendants.

¶6. Meridien filed several motions in limine and motions for summary judgment regarding SeaHorn's claims. SeaHorn also filed a motion to amend its complaint, seeking to bring TEC Realtors back into the litigation.

¶7. The circuit court entered an omnibus order granting the following motions: (1) Meridien's motion for partial summary judgment as to SeaHorn's claims for lost revenue and excess financing costs; (2) Meridien's motions to exclude or limit the testimony of SeaHorn's expert witnesses, Steven Dockens and Patrick Coffey; and (3) Meridien's motion for partial summary judgment as to SeaHorn's claim for breach of fiduciary duty. The circuit court denied Meridien's motion for partial summary judgment as to SeaHorn's breach of contract claim. The circuit court also entered an order denying SeaHorn's motion to amend its

complaint to add TEC Realtors as a defendant.

¶8. SeaHorn now appeals from the circuit court's omnibus order and the circuit court's order denying SeaHorn's motion to amend the complaint. SeaHorn asserts the following assignments of error: (1) the circuit court erred in granting summary judgment in favor of Meridien on the issues of monetary damages and fiduciary duty; (2) the circuit court erred in excluding and/or limiting the testimony of two of SeaHorn's expert witnesses, Steve Dockens and Patrick Coffey; and (3) the circuit court erred in denying SeaHorn's motion to amend its complaint to add TEC Realtors as a defendant.

¶9. After SeaHorn filed its notice of appeal, Meridien filed a cross-appeal and argued that the circuit court erred in denying Meridien's motion for partial summary judgment as to SeaHorn's breach of contract claim.[2]

¶10. After review, I would affirm in part the circuit court's judgments.

FACTS

¶11. In September 2008, SeaHorn purchased The Waverly Apartments, a 128-unit multifamily complex, located in Bay St. Louis, Mississippi. SeaHorn renovated the complex and by February 2010, enough units were ready for the complex to be opened. Initially,

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[2] On August 13, 2018, Meridien filed a motion asking this Court to strike portions of SeaHorn's brief and argument. Meridien asserts that SeaHorn argues for the first time on appeal that its lost revenues are in fact its lost profits because no new additional expenses or costs would have to be deducted. Meridien asserts that SeaHorn failed to present this argument to the circuit court.

This Court cannot entertain arguments made for the first time on appeal. *Maness v. K & A Enters. of Miss. LLC*, 250 So. 3d 402, 410 (¶21) (Miss. 2018). However, as discussed later in this opinion, I find that SeaHorn failed to specifically plead special damages, and I decline to address whether SeaHorn presented sufficient evidence to support its claim for monetary damages, including lost profits.

SeaHorn contracted with PMR Companies to manage the property during this "lease up" phase when units were being advertised and rented.

¶12. In January 2011, when 84 units had been rented, SeaHorn contracted with a new management company, Meridien. The parties signed a Management Agreement on January 1, 2011, outlining their mutual obligations. Per the Management Agreement, Meridien would be paid monthly the greater amount of $3,500 or seven percent of the month's gross receipts, and Meridien would advertise, lease, and maintain the property. SeaHorn would pay Meridien its monthly fee and all operating expenses, including maintenance and the salaries of needed staff whom Meridien would hire and supervise. The agreement provided that either party could terminate the agreement with or without cause upon thirty-days' written notice. The agreement expressly defined the parties' relationship as principal (SeaHorn) and agent (Meridien).

¶13. In December 2011, SeaHorn terminated the contract with Meridien and personally took over the management of the property through a related company, Coast Management LLC, in January 2012.

¶14. On December 12, 2014, SeaHorn filed a complaint against Meridien and Brandon Wilson, the maintenance man. In its complaint, SeaHorn alleged breach of contract, bad faith, negligent concealment or fraud, breach of fiduciary duty, fraud, conversion, civil conspiracy, and unjust enrichment. SeaHorn claimed that the office at the property was often closed during regular business hours. Meridien employed Wilson as a maintenance man, and his working hours were supposed to be from 8:00 a.m. to 5:00 p.m. However, SeaHorn

learned that Wilson was not only working at an autoparts store during the day, but he was also maintaining four other rental homes that Meridien was managing. SeaHorn obtained documented complaints from renters about the maintenance of the property. SeaHorn claimed it had lost money on the property due to Meridien's mismanagement.

¶15. On January 12, 2015, SeaHorn filed its first amended complaint and added TEC Realtors as a defendant, alleging that TEC Realtors was Meridien's parent company. On April 23, 2015, the circuit court entered an agreed judgment of dismissal as to TEC Realtors. However, on March 16, 2016, nearly a year later, SeaHorn filed a motion to amend its complaint to add TEC Realtors as a defendant. In its motion, SeaHorn asserted that through the course of discovery, SeaHorn received information providing it with a factual and legal basis to prosecute a claim against TEC Realtors for the mismanagement of The Waverly Apartments and the resulting damages. SeaHorn asserted that during Meridien's Mississippi Rule of Civil Procedure 30(b)(6) deposition, Meridien confirmed that it is essentially a "continuation of enterprise" and/or alter ego of TEC Realtors. On September 21, 2016, the circuit court entered an order denying SeaHorn's motion to amend its complaint.

¶16. On April 7, 2016, Meridien filed a motion to dismiss SeaHorn's claims against Wilson. Meridien asserted that SeaHorn "does not intend to prosecute its case against Mr. Wilson and has thus far failed to serve him or otherwise take any adverse action against him. Moreover, SeaHorn has further indicated its intent that Mr. Wilson not be prosecuted by its Motion for Letters Rogatory filed in this Court on March 31, 2016." After a hearing on the matter, the circuit court entered a judgment on September 9, 2016, stating that SeaHorn had

agreed to dismiss Wilson with prejudice.

¶17. In April and May of 2017, Meridien filed the following motions relevant to this appeal:

(1) a motion for partial summary judgment #1, in which Meridien sought to dismiss any vicarious liability claims against it based on any actions or omissions by its former employee, Wilson (Meridien asserted that SeaHorn failed to plead any vicarious or secondary liability claims against Meridien in either its original or amended complaint and that the Management Agreement between the parties bars such claims. Meridien stated that SeaHorn dismissed all claims against Wilson with prejudice in a judgment dated September 8, 2016.);

(2) a motion for partial summary judgment #2, in which Meridien sought to dismiss SeaHorn's claims for lost revenue and excess financing costs (Meridien asserted that it more than doubled the amount of gross revenue for the Waverly Apartments and increased the amount of cash reserves for the complex by over fourteen times from the prior management company. Meridien further asserted that SeaHorn did not specifically plead any of these claims for special damages and that Mississippi law does not recognize claims for lost revenue. Meridien maintained that SeaHorn failed to present competent evidence to support any claims for lost profits or excess financing costs.);

(3) a motion for partial summary judgment #3, in which Meridien sought to dismiss any remaining individual claims asserted by SeaHorn against Meridien in its original and/or amended complaint;[3]

(4) a motion to exclude and/or limit the testimony of Steven Dockens (Dockens, a certified public accountant (CPA), provided expert testimony for SeaHorn and opined that SeaHorn suffered damages in the form of "lost revenues" and "excess financing costs." Meridien claimed, among other things, that Dockens's methodology for computing damages and lost revenues was unreliable and that he was not qualified to testify about excess financing costs.);

(5) a motion to exclude and/or limit the testimony of Patrick Coffey (Coffey, a

[3] In its response to Meridien's motion for summary judgment, SeaHorn agreed that its claims of civil conspiracy, conversion, and concealment should be dismissed.

CPA, provided expert testimony for SeaHorn and provided a report opining that Meridien breached its Management Agreement with SeaHorn. Coffey further opined that if Meridien had not breached the Management Agreement, SeaHorn would have realized greater revenues for the Waverly Apartments in 2011. Meridien argued that Coffey's report and his opinions contained therein failed to meet the level of analysis or detail necessary under Mississippi Rule of Evidence 702.); and

(6) a motion in limine to exclude any evidence of alleged lost revenues or excess financing costs sustained by SeaHorn and statements of any alleged witness taken by SeaHorn (Meridien reiterated its argument that lost revenues are not recoverable in Mississippi, so any evidence of alleged lost revenues would not be relevant or otherwise inadmissible. Meridien also maintained that SeaHorn had not come forward with any evidence of alleged excess financing costs, and therefore could not do so then at trial, even if it did exist. Meridien moved to exclude from evidence any statements taken of any witnesses by SeaHorn as impermissible hearsay.).

¶18. On May 22, 2017, SeaHorn filed a motion in limine to exclude all references to objections, motions in limine, and former claims.

¶19. On June 9, 2017, the circuit court entered an omnibus order and ruled as follows:

1. Meridien's Motion to Exclude and/or Limit Testimony of Steven Dockens, CPA is hereby granted.

2. Meridien's Motion for Partial Summary Judgment #1–Any Claims for Vicarious or Secondary Liability is hereby granted as the Court deems part of the motion confessed by [SeaHorn]. To the extent claims have been brought against Meridien involving Brandon Wilson, he would be considered an agent of Meridien and, therefore, the motion in that regard would be overruled.

3. Meridien's Motion for Partial Summary Judgment #2–Damages for Lost Revenue and Excess Financing Costs is hereby granted.

4. Meridien's Motion for Partial Summary Judgment #3–Remaining Claims is hereby granted as to SeaHorn's claims for (1) civil conspiracy; (2) conversion; (3) bad faith; (4) negligent concealment and/or fraud; (5) breach of fiduciary duty; (6) unjust enrichment; (7) attorneys' fees and punitive damages. The motion is denied as to

SeaHorn's claim for breach of contract.

5. Meridien's Motion to Exclude and/or Limit Testimony of Patrick Coffey is hereby granted as to Coffey's opinions regarding lost revenue. The motion is denied as to Coffey's remaining opinions.

6. Meridien's Motion in Limine [to exclude any evidence of alleged lost revenues or excess financing costs and statements of any alleged witness taken by SeaHorn] filed on May 19, 2017 is granted, in part. All evidence of alleged lost revenues or excess financing costs allegedly sustained by SeaHorn in connection with the Waverly Place Apartments is hereby excluded. The Court reserves ruling on the motion with regard to statements of any alleged witness taken by SeaHorn and/or its counsel.

7. The Court reserves ruling on SeaHorn's Motion in Limine to Exclude All Evidence Related to Other Claims and Commentary Thereon.

8. The Court reserves ruling on SeaHorn's Motion in Limine to Exclude All References to Objections, Motions in Limine and Former Claims.

¶20. The circuit court held a hearing on these motions on June 19, 2017, after the entry of the omnibus order. At the hearing, the circuit court explained that due to the court's schedule and the attorneys' calendars, "the court ruled without the lawyers appearing to argue the motions in the courtroom . . . [.] The omnibus order did not articulate any reasons for the court's ruling, and I set today as the day to read into the record the basis of each of those rulings." I will address the circuit court's reasons for the rulings on these motions as needed in my discussion below.

¶21. On June 26, 2017, the circuit court entered an order pursuant to Rule 54(b) certifying its rulings in the "Omnibus Order" as final and appealable. SeaHorn now appeals from the circuit court's omnibus order and the order denying SeaHorn's motion to amend its complaint to add TEC Realtors as a defendant. Meridien filed a cross-appeal and asserted that the

circuit court erred in denying its motion for partial summary judgment as to SeaHorn's breach of contract claim.

DISCUSSION

I. Summary Judgment

¶22. This Court reviews a trial court's grant or denial of a motion for summary judgment de novo. *Adams v. Graceland Care Ctr. of Oxford LLC*, 208 So. 3d 575, 579 (¶9) (Miss. 2017). "Summary judgment is proper when 'the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Robinson v. Martin Food Stores Inc.*, 231 So. 3d 1060, 1061 (¶2) (Miss. Ct. App. 2016) (quoting M.R.C.P. 56(c)). This Court views the evidence "in the light most favorable to the party opposing the motion." *Id*. at 1062 (¶3). "Viewing the evidence in this light, summary judgment should be granted when 'the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" *Bennett v. Hill-Boren P.C.*, 52 So. 3d 364, 368 (¶12) (Miss. 2011).

A. Monetary Damages

¶23. SeaHorn argues that the circuit court erred in granting summary judgment on the issue of damages. SeaHorn maintains that genuine issues of material fact exist concerning whether SeaHorn properly pled monetary damages and whether SeaHorn presented competent evidence to support such damages.

¶24. First, I must address my view on whether this Court has jurisdiction to review the circuit court's ruling in this matter. Mississippi Rule of Civil Procedure 54(b) provides as follows:

> When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an expressed determination that there is no just reason for delay and upon an expressed direction for the entry of the judgment. . . .

I recognize that "[o]rdinarily, however, Mississippi courts (at the trial and appellate levels) treat a partial summary judgment as an interlocutory order and not as a final judgment." *Byrd v. Miss. Power Co.*, 943 So. 2d 108, 111 (¶8) (Miss. Ct. App. 2006).

¶25. In the case before this Court, both parties agree that the circuit court's Rule 54(b) certification of its grant of partial summary judgment on the issue of damages is proper. Meridien maintains the judgment at issue disposed of SeaHorn's claim for relief for Rule 54(b) purposes by disposing of the remedy (damages) itself. SeaHorn similarly asserts the circuit court's ruling of partial summary judgment as to SeaHorn's remedy of contract damages left SeaHorn no avenue for recovery should SeaHorn prove its breach of contract claim. SeaHorn cites to *Kmart Corp. v. Fulton Improvements L.L.C.*, 605 F. App'x 374 (5th Cir. 2015) (unpublished), where the Fifth Circuit held that a breach of contract claims fails if the party seeking damages cannot show that the breach caused that party to suffer monetary damages. *Id*. at 376-77 (citing *Bus. Commc'ns Inc. v. Banks*, 90 So. 3d 1221, 1224-26 (Miss. 2012) (claim for compensatory damages requires proof that damages were caused by breach of contract)); *see also Webb v. Braswell*, 930 So. 2d 387, 398 (¶20) (Miss. 2006) (an

appellant filed a complaint for breach of contract and sought damages for future lost profits; on appeal, the supreme court held that the circuit court's grant of partial summary judgment as to the issue of damages concerning lost profits was proper.).

¶26. I find that the circuit court properly certified its grant of partial summary judgment as to SeaHorn's claims for damages as final. I now turn to address the merits of this assignment of error.

¶27. Meridien argues that in its original and amended complaint, SeaHorn failed to specifically plead special damages of lost revenues, excess financing costs, or lost profits. Meridien maintains that "lost revenues" cannot be recovered under Mississippi law. Meridien further argues that SeaHorn failed to provide evidence that Meridien's conduct caused SeaHorn to lose any revenue or to incur any excess financing costs. SeaHorn counters that it provided sufficient verbiage in its complaint to provide Meridien with notice of the nature of the alleged damages.

¶28. At the motions hearing, the circuit court addressed its decision to grant Meridien's motion for summary judgment #2 seeking dismissal of SeaHorn's claims for lost revenue and excess financing costs. The circuit court ruled as follows:

> First, [Meridien] argues here in its motion that those damages are special damages which must be specifically plead. . . .
>
> In response, [SeaHorn] notes that Mississippi is a notice pleading state and [Meridien] has had sufficient notice of the components of its alleged damages and its intent to pursue those. In the *Puckett Machinery* decision and the comment to [Mississippi] Rule [of Civil Procedure] 9, those are damages which must be specifically pled under the rule, but beyond a procedural challenge there, the Court has sustained a motion in limine as to documents that report on gross revenue and excessive finance costs, and in the absence of

> any admissible evidence on those comments of the motion on that part is sustained.

In its omnibus order, the circuit court memorialized its determination that summary judgment was proper on the issue of monetary damages.

¶29. Mississippi Rule of Civil Procedure 8(a) sets out the general rules of pleading, namely that a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," as well as "a demand for judgment for the relief" sought. Subsection (f) further states that "[a]ll pleadings shall be so construed as to do substantial justice." M.R.C.P. 8(f).

¶30. However, Mississippi Rule of Civil Procedure 9(g) requires specific pleading of special matters, including special damages: "When items of special damage are claimed, they shall be specifically stated." The Advisory Committee Notes for Rule 9(g) provide that

> Rule 9(g) requires a detailed pleading of special damages and only a general pleading of general damages. . . . Special damages are required to be pled with specificity so as to give the defendant notice of the nature of the alleged damages. Special damages include, but are not limited to, consequential damages, **damages for lost business profit**, and punitive damages. If claimant fails to plead special damages with specificity, an award for such damages may be reversed.

(Emphasis added) (citations omitted).

¶31. The Advisory Committee Notes cite to *Puckett Machinery Co. v. Edwards*, 641 So. 2d 29, 37-38 (Miss. 1994), and *Lynn v. Soterra Inc*., 802 So. 2d 162, 169 (Miss. Ct. App. 2001). In *Lynn*, this Court reiterated that special damages should be specifically pled. *Lynn*, 802 So. 2d at 169 (¶27). This Court also explained that the requirement that special damages must be specifically pled can be waived when the parties consent to a trial of the issue or

when a defendant waives objection to the entry of such evidence at trial. *Id.*

¶32. In *Puckett*, the supreme court was faced with the same question as to the applicability of Rule 8 notice-pleading and Rule 9 special-pleading requirements when lost profits were sought. In that breach of contract claim, Edwards, the defendant-counterclaimant, sought damages after Puckett sold him allegedly defective machinery. *Puckett Machinery Co.*, 641 So. 2d at 32. The trial court had ruled that notice pleading of these damages was sufficient, but on appeal, the supreme court found that the consequential damages had not been sufficiently pled pursuant to Rule 9(g). *Id*. at 37. The supreme court cited *Baugh v. Baugh*, 512 So. 2d 1283, 1285 (Miss. 1987), which held that "[Rule 9(g)] requires that in cases where special damages are alleged they must be charged with particularity." *Puckett Machinery Co.*, 641 So. 2d at 37-38.

¶33. In the case before this Court, SeaHorn set forth in its complaint and first amended complaint that "Meridien grossly mismanaged the Waverly Apartments, which resulted in decreased occupancy, excessive expenses[,] and decreased receipts." Under "Causes of Action," Sea Horn asserted its claim for breach of contract and alleged that "Meridien's breach of contract caused damages to SeaHorn . . . entitling it to the relief demanded below." In its "Demand," SeaHorn's complaint requests the following:

> (a) actual damages, the exact amount of which to be proven at the trial of this cause;
>
> (b) punitive damages, the exact amount of which to be determined at the trial of this cause;
>
> (c) attorneys' fees and expenses;

(d) all costs of court, prejudgment interest and post judgment interest; [and]

(e) such other relief or alternative relief as they may be entitled to in the premises.

¶34. Because the damages SeaHorn sought fell under the category of special damages, these damages "should have been specifically pled." *Lynn*, 802 So. 2d at 169 (¶27). My review reflects that SeaHorn failed to specifically plead damages of lost profits or excess financing costs, and I would affirm the circuit court's exclusion of these damages. In so doing, I therefore decline to address SeaHorn's argument that it presented sufficient evidence to support its claims for monetary damages.

B. Breach of Fiduciary Duty

¶35. SeaHorn next argues that genuine issues of material fact preclude dismissal of its claims for breach of fiduciary duty. SeaHorn maintains that it presented evidence to show that a fiduciary duty existed.

¶36. Meridien argues that SeaHorn failed to present evidence demonstrating that it trusted Meridien. Meridien also claims that the Management Agreement did not define the relationship between the parties as a fiduciary relationship.

¶37. In its omnibus order, the circuit court granted Meridien's motion for partial summary judgment as to SeaHorn's claim for breach of fiduciary duty. At the hearing on the motion, the circuit court held that SeaHorn "has not demonstrated a breach of fiduciary duty by presenting competent summary judgment evidence of the existence of such relationship, a fiduciary relationship, and how [Meridien] breached it if in fact one existed."

¶38. The supreme court has held that "a fiduciary duty must exist before a breach of the

duty can occur." *Gibson v. Williams, Williams & Montgomery P.A.*, 186 So. 3d 836, 851 (¶50) (Miss. 2016) (quoting *Baker Donelson Bearman Caldwell & Berkowitz P.C. v. Seay*, 42 So. 3d 474, 485 (¶29) (Miss. 2010)). "Determining the existence of a fiduciary relationship is a question of fact." *Saucier v. Peoples Bank of Biloxi*, 150 So. 3d 719, 725 (¶23) (Miss. Ct. App. 2014).

¶39. In *Saucier*, this Court recognized that

> "Fiduciary relationship" is a very broad term embracing both technical fiduciary relations and those informal relations which exist wherever one person trusts in or relies upon another. A fiduciary relationship may arise in a legal, moral, domestic, or personal context, where there appears on the one side an overmastering influence or, on the other, weakness, dependence, or trust, justifiably reposed. Additionally, a confidential relationship, which imposes a duty similar to a fiduciary relationship, may arise when one party justifiably imposes special trust and confidence in another, so that the first party relaxes the care and vigilance that he would normally exercise in entering into a transaction with a stranger.

Id. at 725 (¶25) (quoting *Lowery v. Guar. Bank & Tr. Co.*, 592 So. 2d 79, 83 (Miss. 1991)).

¶40. Additionally, in *Robley v. Blue Cross/Blue Shield of Miss.*, 935 So. 2d 990, 994-95 (¶12) (Miss. 2006), the supreme court explained that

> [a]lthough every contractual agreement does not give rise to a fiduciary relationship, in Mississippi such a relationship may exist under the following circumstances:
>
> > (1) the activities of the parties go beyond their operating on their own behalf, and the activities are for the benefit of both; (2) where the parties have a common interest and profit from the activities of the other; (3) where the parties repose trust in one another; and (4) where one party has dominion or control over the other.

(Quoting *University Nursing Assocs. PLLC v. Phillips*, 842 So. 2d 1270, 1274 (¶9) (Miss.

2003)). "One of the key elements of a fiduciary relationship is the fiduciary's control of the supervised party's property, and that things of value such as land, monies, a business, or other things of value must be possessed or managed by the dominant party." *Univ. Nursing Assocs*., 842 So. 2d at 1275 (¶13) (internal quotation marks omitted) (quoting *Arnold v. Erkmann*, 934 S.W.2d 621, 629 (Mo. Ct. App. 1996)).

¶41. In *Robley*, 935 So. 2d at 994 (¶10), the supreme court stated that "[t]raditional fiduciary relationships are found in cases of trustee and beneficiary, partners, principal and agents, guardian and ward, managing directors and corporation." (Citing *Carter Equip. Co. v. John Deere Indus. Equip. Co.*, 681 F.2d 386, 390 (5th Cir. 1982)). However, the supreme court clarified that "[a]lthough one does not typically enter into a contract with another person unless he or she has a degree of trust or confidence in that person, without more, such a transaction amounts to merely a business relationship and not a fiduciary relationship." *Id*. at 995 (¶14). SeaHorn must prove the existence of a fiduciary duty by clear and convincing evidence. *Saucier*, 150 So. 3d at 725 (¶23).

¶42. In the case before this Court, Section 12 of the Management Agreement (Relationship of Agent to Owner) sets forth as follows:

> The relationship of the parties to this Agreement shall be that of Principal and Agent, and all duties to be performed by Agent under this Agreement shall be for and on behalf of Owner, in Owner's name, and for Owner's account. In taking any action under this Agreement, Agent shall be acting only as Agent for Owner, and nothing in this Agreement shall be construed as creating a partnership, joint venture, or any other relationship between the parties to this Agreement except that of Principal and Agent, or as requiring Agent to bear any portion of losses arising out of or connected with the ownership or operation of the Premises. Nor shall Agent at any time during the period of this Agreement be considered a direct employee of Owner. Neither party shall

> have the power to bind or obligate the other except as expressly set forth in this Agreement, except that Agent is authorized to act with such additional authority and power as may be necessary to carry out the spirit and intent of this Agreement.

¶43. In its amended complaint, SeaHorn claimed that (1) Meridien had a fiduciary duty as manager of the Waverly Apartments. At all relevant times, Meridien knew that SeaHorn reposed faith, confidence, and trust in Meridien to ensure that the Waverly Apartments were managed and maintained as agreed; (2) Meridien had a fiduciary obligation to SeaHorn to act in the best interests of SeaHorn in the performance of the management responsibilities per the contract between SeaHorn and Meridien; (3) Meridien breached that fiduciary duty; and (4) Meridien's wrongdoing proximately caused damages to SeaHorn, entitling it to the relief demanded.

¶44. In its response to Meridien's motion for summary judgment, SeaHorn stated that under the terms of the Management Agreement, SeaHorn "appoint[ed] [Meridien] as sole and exclusive Agent of [SeaHorn] to lease and manage the [Waverly]." SeaHorn asserted that it trusted Meridien to fully carry out the management of the Waverly Apartments, which included unfettered access to bank accounts funded by SeaHorn, full authority to "hire, supervise, discharge, and pay" all employees, and the responsibility of keeping the property in good repair.

¶45. After reviewing the record, I find that SeaHorn failed to establish the existence of a fiduciary duty. As stated, "[a]lthough one does not typically enter into a contract with another person unless he or she has a degree of trust or confidence in that person, without more, such a transaction amounts to merely a business relationship and not a fiduciary

relationship." *Robley*, 935 So. 2d at 995 (¶14). My review of the record reflects that SeaHorn presented no evidence in the court below to demonstrate or support its claims that it trusted Meridien or that Meridien had a financial obligation to SeaHorn. I would therefore affirm the circuit court's grant of summary judgment on SeaHorn's claim of breach of fiduciary duty. In finding that SeaHorn failed to establish the existence of a fiduciary duty, I find no need to further delve into whether SeaHorn presented evidence to show that Meridien breached its fiduciary duty.

C. Cross-Appeal: Breach of Contract Claim

¶46. In its cross-appeal, Meridien claims that the circuit court should have dismissed SeaHorn's breach of contract claim. Meridien maintains that SeaHorn failed to provide sufficient evidence to create a genuine issue of material fact that Meridien breached any provisions of its contract with SeaHorn; as a result, the circuit court erred in denying Meridien's motion for partial summary judgment as to SeaHorn's breach of contract claim.

¶47. This Court ordered supplemental briefing from the parties to address the question of whether the circuit court's denial of summary judgment as to Meridien's breach of contract claim can be considered a final, appealable judgment on that claim. Both parties asserted that the circuit court's denial of summary judgment as to this claim could be considered final and appealable. However, in the recent case of *Jourdan River Estates LLC v. Favre*, 278 So. 3d 1135, 1154-55 (¶78) (Miss. 2019), our supreme court determined that because "a trial court lacks appellate jurisdiction to certify a denial of summary judgment as final under Mississippi Rule of Civil Procedure 54(b)," the supreme court therefore lacked "appellate

jurisdiction over these remaining claims pending in the trial court." The supreme court held that "[a]bsent proper jurisdiction, we cannot address the denial of summary judgment regarding the claims remaining" in that case. *Id*. at 1155 (¶78). The supreme court accordingly dismissed the defendants' cross-appeal regarding the circuit court's denial of summary judgment and remanded the case to the circuit court for further proceedings. *Id*. at (¶79). I would do the same.

II. Motions in Limine

¶48. SeaHorn argues that the circuit court erred in granting Meridien's motions to exclude and/or limit the testimony of two of SeaHorn's expert witnesses, Steven Dockens and Patrick Coffey. The circuit court specifically ruled that Dockens was excluded from testifying on the issue of lost profits or excess financing costs. As to Coffey, the circuit court granted Meridien's motion only as to Coffey's opinions regarding lost revenue.

¶49. I decline to address these issues, as I would affirm the circuit court's grant of summary judgment on the issue of monetary damages, specifically lost profits and excess financing costs, rendering them moot.

III. SeaHorn's Motion to Amend the Complaint

¶50. SeaHorn next argues that the circuit court erred in denying its motion to amend its complaint to bring TEC back into the litigation. In its motion to amend, SeaHorn claimed that Meridien was the alter ego of TEC and therefore a necessary party. On appeal, SeaHorn argues that "there was no justification for the [circuit] court's denial of SeaHorn's timely and justified motion to amend the complaint."

¶51. In their supplemental briefing, both parties agree that the circuit court's order denying SeaHorn's motion to amend is not a final and appealable order pursuant to Rule 54(b) because the circuit court did not certify the order under Rule 54(b) and the order does not dispose of a claim for relief. "Absent a certification under Rule 54(b), any order in a multiple-party or multiple-claim action, even if it appears to adjudicate a separable portion of the controversy, is interlocutory." *Newson v. Newson*, 138 So. 3d 275, 277 (¶7) (Miss. Ct. App. 2014) (quoting M.R.C.P. 54 advisory committee notes). I recognize that "[i]nterlocutory orders are not appealable unless the Mississippi Supreme Court grants permission to appeal under Rule 5 of the Mississippi Rules of Appellate Procedure." *Id*. at 278 (¶11). My review of the docket shows that SeaHorn failed to obtain permission under Rule 5 to appeal from the circuit court's order. I therefore would dismiss the appeal from the circuit court's order denying SeaHorn's motion to amend for lack of jurisdiction. *See Meekins v. Kennon*, 141 So. 3d 51, 53 (¶18) (Miss. Ct. App. 2014).

GREENLEE AND TINDELL, JJ., JOIN THIS OPINION.

J. WILSON, P.J., CONCURRING IN PART AND DISSENTING IN PART:

¶52. After the circuit court entered its "omnibus order" deciding most of the issues involved in this appeal and cross-appeal, SeaHorn filed a motion for a stay of proceedings in the circuit court so that it could pursue an interlocutory appeal. *See* M.R.A.P. 5. In response, Meridien suggested that the circuit court should certify the rulings in its omnibus order as "final" and appealable pursuant Mississippi Rule of Civil Procedure 54(b). SeaHorn then agreed that certification under Rule 54(b) was proper. The circuit judge stated he

"purposely" did *not* certify his various rulings as final and appealable because he did not believe that they were eligible for certification, and he did not think that he could enter a Rule 54(b) order "just because of judicial economy." Nonetheless, the circuit judge went along with what the parties wanted and certified his rulings under Rule 54(b).

¶53. Unfortunately, the circuit judge's initial view of the issue was correct. All of the issues raised in this appeal and cross-appeal are either ineligible or inappropriate for certification under Rule 54(b). Therefore, both the appeal and cross-appeal should be dismissed for lack of appellate jurisdiction.

I. Cross-Appeal: Breach of Contract

¶54. I concur with Presiding Judge Carlton's opinion that we lack jurisdiction over Meridien's cross-appeal from the denial of its motion for summary judgment on SeaHorn's claim for breach of contract. *See Jourdan River Estates LLC v. Favre*, 278 So. 3d 1135, 1154-55 (¶78) (Miss. 2019) (holding that a trial court cannot certify a *denial* of summary judgment as final under Rule 54(b)).

II. Appeal: Motion to Amend the Complaint

¶55. I also concur with Presiding Judge Carlton's opinion that we lack jurisdiction over SeaHorn's attempt to appeal from the denial of its motion to amend its complaint. SeaHorn concedes that the circuit court never certified that ruling as final under Rule 54(b).

III. Appeal: "Damages for Lost Revenue and Financing Costs"

¶56. The circuit court's ruling granting "Meridien's Motion for Partial Summary Judgment #2—Damages for Lost Revenue and Excess Financing Costs" did not fully or finally resolve

any substantive "claim." Therefore, that ruling is not eligible for certification under Rule 54(b).

¶57. "When more than one claim for relief is presented in an action," Rule 54(b) permits a trial court to "direct the entry of a final judgment as to one or more but fewer than all of the *claims*." M.R.C.P. 54(b) (emphasis added). In order to be eligible for certification under Rule 54(b), a ruling must finally "decide a *claim* between the . . . parties." *Ne. Mental Health Mental Retardation Comm'n v. Cleveland*, 126 So. 3d 1020, 1024 (¶15) (Miss. Ct. App. 2013) (emphasis added). A ruling that "merely decide[s] an issue" but does not "fully resolve[]" any claim is not eligible for certification. *Id.* That is, a decision that leaves "a portion of [the] claim pending" does "not fall within that limited category of decisions in which Rule 54(b) may be applied." *Id.* at (¶16) (quotation marks omitted) (holding that an order granting partial summary judgment as to the validity of a contract could not be certified under Rule 54(b)); *accord Brown v. Collections Inc.*, 188 So. 3d 1171, 1175 (¶13) (Miss. 2016) (holding that a partial summary judgment order denying a defense could not be certified under Rule 54(b)).

¶58. The Fifth Circuit addressed a similar issue in *Monument Management Limited Partnership I v. City of Pearl*, 952 F.2d 883 (5th Cir. 1992).[4] In that case, the owner of a grocery store ("Monument") sued the City of Pearl for "physical damages, lost income, lost

[4] "Federal precedent has guided [our Supreme Court] in assessing Rule 54(b) certified judgments." *Brown*, 188 So. 3d at 1176 (¶16); *see also Cox v. Howard, Weil, Labouisse, Friedrichs Inc.*, 512 So. 2d 897, 900 (Miss. 1987) ("Trial attorneys should review *Wright and Miller*, Moore's *Federal Practice* and Federal case law before they propose a Rule 54(b) judgment to a trial court. In turn, trial judges should require such research and preparation before they even consider the propriety of granting it.").

profits, lost business value, and punitive damages" allegedly caused by road closures and the City's use of the store's property for parking and storage. *Id.* at 884. The district court granted partial summary judgment for the City as to Monument's alleged damages for "lost income, lost profits, and lost business value." *Id.* The district court also certified its ruling for appeal pursuant to Federal Rule of Civil Procedure 54(b). *Id.* at 885. However, the Fifth Circuit held that certification was improper and dismissed the appeal. *Id.* The court held that a ruling "must dispose of [a] claim *entirely*" before it may be certified under Rule 54(b). *Id.* (emphasis added). The court reasoned that the district court's order granting partial summary judgment "disposed of most of the elements of damages arising from Monument's inverse condemnation claim against the City, but it did not dispose of that claim in its entirety." *Id.* Because "the judgment [did] not dispose of the entirety of any one claim, it [could not] be made an appealable judgment by recourse to Rule 54(b)." *Id.* (quoting *Landry v. G.B.A.*, 762 F.2d 462, 464 (5th Cir.1985)).[5]

¶59. Our Supreme Court also addressed a similar issue in *Colom Law Firm LLC v. Board of Trustees*, 16 So. 3d 692 (Miss. 2009). In that case, a law firm sued a school board for holding unlawful "special board meetings," which allegedly prevented the firm from bidding

[5] *See also, e.g.*, *Edwards v. Prime Inc.*, 602 F.3d 1276, 1289 & n.11 (11th Cir. 2010) (holding that "*partial* dismissals" of demands for punitive damages and injunctive and declaratory relief did not amount to "a final judgment disposing of an entire claim" and therefore were "not the stuff of Rule 54(b) certification"); *Gen. Acquisition Inc. v. GenCorp Inc.*, 23 F.3d 1022, 1028 (6th Cir. 1994) ("The fact that [a plaintiff] seeks to recover two types of damages . . . does not convert a single claim into multiple claims. . . . A district court's rejection of one of several requests for relief arising from a single wrong does not establish appellate jurisdiction under Rule 54(b)."); *Sussex Drug Prods. v. Kanasco Ltd.*, 920 F.2d 1150, 1154 (3d Cir. 1990) ("An order that eliminates two of several elements of damages flowing from a single claim does not qualify for Rule 54(b) certification.").

on a contract to provide legal services. *Id.* at 693-94 (¶¶1-4). The firm sought (1) an order declaring void a resolution extending the contract of another law firm, (2) injunctive relief, and (3) attorney's fees. *Id.* at 693 (¶1). The chancery court granted partial summary judgment in favor of the school board "and dismissed the part of the [c]omplaint that sought to have the [special] meetings declared a nullity." *Id.* at 694 (¶5). The chancery court also certified its ruling as final under Rule 54(b). *Id.* at (¶6). However, our Supreme Court dismissed the appeal. *Id.* at 695-96 (¶¶14-15). The Court held that certification under Rule 54(b) was improper because "the trial court ruled only as to the *scope of damages*" while the "liability claim [was] still pending." *Id.* at 695 (¶13) (emphasis added). The Court emphasized that a "*decision that leaves a portion of [a] claim pending . . . does not fall within the ambit of Rule 54(b).*" *Id.* (quoting M.R.C.P. 54(b) cmt.); *accord Byrd v. Miss. Power Co.*, 943 So. 2d 108, 111-12 (¶10) (Miss. Ct. App. 2006) (holding that the circuit court improperly certified a grant of "partial summary judgment on the issue of damages in one count of a seven-count complaint . . . without even a determination . . . of . . . liability on that claim").

¶60. The result should be the same in this case. The circuit court's ruling granting partial summary judgment as to "damages for lost revenues and excess financing costs" did not dispose of any claim in its entirety. Rather, the ruling only limited the damages that SeaHorn could recover and left pending a portion of SeaHorn's breach of contract claim. Therefore, the ruling was not eligible for certification under Rule 54(b), the circuit court erred by

certifying it as final, and we lack jurisdiction to review it on appeal.[6]

IV. Appeal: Rulings Limiting or Excluding Expert Testimony

¶61. For the same reasons, we also lack jurisdiction to review the circuit court's orders excluding or limiting the testimony of SeaHorn's experts (Dockens and Coffey). We might have jurisdiction to review those rulings if they were the basis of a ruling that finally disposed of a "claim" and was properly certified under Rule 54(b). *See McDonald v. Mem'l Hosp. at Gulfport*, 8 So. 3d 175, 178, 181-82 (¶¶7, 14-19) (Miss. 2009). However, Dockens's and Coffey's testimony related to the circuit court's ruling granting partial summary judgment as to "damages for lost revenues and excess financing costs." For the reasons just explained, that ruling was not eligible for certification under Rule 54(b). Therefore, the circuit court's rulings as to Dockens and Coffey were not eligible for certification either.

V. Appeal: Breach of Fiduciary Duty

¶62. Thus, the only ruling that was even potentially eligible for certification under Rule 54(b) was the circuit court's grant of partial summary judgment on SeaHorn's claim for breach of fiduciary duty. This ruling should not have been certified either, though, because it involves essentially the same facts as SeaHorn's breach of contract claim, which remains

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[6] The two cases that Presiding Judge Carlton cites on this issue, *ante* at ¶25, are inapposite. In *Webb v. Braswell*, 930 So. 2d 387 (Miss. 2006), the order granting partial summary judgment as to "lost profits" was appealed by permission pursuant to Mississippi Rule of Appellate Procedure 5—*not Rule 54(b)*. *Id.* at 390-92, 398 (¶¶1, 6-7, 21) & n.2. And in *Kmart Corp. v. Fulton Improvements L.L.C.*, 605 F. App'x 374 (5th Cir. 2015) (unpublished), the plaintiff appealed from a full and final summary judgment in favor of the defendant. That appeal did not involve a Rule 54(b) certification, and the opinion does not even mention Rule 54(b).

pending in the circuit court.

¶63. "It is incumbent on trial attorneys and trial judges to recognize that Rule 54(b) judgments must be reserved for rare and special occasions." *Cox*, 512 So. 2d at 900. "[T]he authority in a trial court to enter a Rule 54(b) judgment should be exercised *cautiously* in the interest of sound judicial administration in order to *preserve the established judicial policy against piecemeal appeals* in cases which should be reviewed only as single units." *Id.* (quotation marks omitted). To that end, we have held that "[i]f 'a commonality of operative facts' underlies the claims and defenses of a case, Rule 54(b) certification is not justified." *Reeves Constr. & Supply Inc. v. Corrigan*, 24 So. 3d 1077, 1083 (¶16) (Miss. Ct. App. 2010) (quoting *Lowery v. Fed. Express Corp.*, 426 F.3d 817, 823 (6th Cir. 2005)); *accord Myatt v. Peco Foods of Miss. Inc.*, 22 So. 3d 334, 340 (¶12) (Miss. Ct. App. 2009).[7]

¶64. In this case, SeaHorn claims that the same alleged misconduct and failures of Meriden constituted both breaches of the parties' contract and breaches of Meridien's fiduciary duty. SeaHorn's two claims are essentially alternative theories of recovery for the same alleged wrongs. Indeed, during oral argument in this Court, counsel for SeaHorn acknowledged that the two claims were "pled alternatively," that he did not "know that [he could] tease them out," and that there was a "large overlap" between the two claims. If there is a subsequent appeal from a final judgment on the breach of contract claim, it will in all likelihood raise factual and legal issues similar to those that are raised in the present appeal. Under *Reeves*

[7] *See also, e.g.*, *Lottie v. W. Am. Ins. Co.*, 408 F.3d 935, 938-39 (7th Cir. 2005) (holding that a ruling disposing of one claim should not be certified when there is a significant factual overlap between that claim and other claims that remain pending); *In re Se. Banking Corp.*, 69 F.3d 1539, 1550 (11th Cir. 1995) (same).

Construction, *supra*, an order granting partial summary judgment as to one of two largely overlapping claims should not be certified as final and appealable under Rule 54(b).

CONCLUSION

¶65. The parties wanted to get a number of issues before an appellate court, presumably because they both thought that appellate rulings on those issues could materially advance the litigation and possibly save time and expense. There is a procedural mechanism for that: Mississippi Rule of Appellate Procedure 5 provides for appeals of interlocutory orders by permission of the Supreme Court.[8] That is the procedure that should have been followed in this case. The various issues raised on appeal and cross-appeal are all ineligible or inappropriate for certification under Rule 54(b), and this Court lacks appellate jurisdiction. Accordingly, the appeal and cross-appeal both should be dismissed.

BARNES, C.J., AND C. WILSON, J., JOIN THIS OPINION.

McDONALD, J., CONCURRING IN PART AND DISSENTING IN PART:

¶66. I concur with Presiding Judge Carlton in finding that the circuit court's ruling on the breach of fiduciary claim was certifiable under Rule 54(b) because it constituted a final judgment on SeaHorn's separately pleaded claim. While proof of the breach of contract claim and breach of fiduciary duty claim may include some overlapping facts, the elements of proof for a breach of fiduciary duty claim do not depend upon proving a breach of contract claim, or vice versa. However, I disagree with Presiding Judge Carlton's view regarding

[8] While review under Rule 5 is permissive, if permission is granted, the Supreme Court has jurisdiction to review the *entire* case. *Pub. Employees Ret. Sys. of Miss. v. Hawkins*, 781 So. 2d 899, 900-02 (¶¶4-7) (Miss. 2001); *McDaniel v. Ritter*, 556 So. 2d 303, 306-07 (Miss. 1989).

affirmation of the circuit court's grant of summary judgment on the breach of fiduciary duty claim, as will be discussed below.

¶67. I also concur with Presiding Judge Carlton's conclusion that pursuant to the recent supreme court case of *Jourdan River Estates LLC v. Favre*, 278 So. 3d 1135 (Miss. 2019), we lack jurisdiction to consider Meridien's cross-appeal of the circuit court's denial of summary judgment regarding SeaHorn's breach of contract claim.

¶68. I further concur with Presiding Judge Carlton that we lack jurisdiction over SeaHorn's appeal of the denial of the motion to amend its complaint because there was never a certified judgment on that claim under Rule 54(b).

¶69. On all other issues, I disagree with Presiding Judge Carlton's opinion.

¶70. I join Presiding Judge Wilson's opinion with respect to our lack of jurisdiction to review the circuit court's grant of partial summary judgment as to damages for lost revenue or excess financing costs and the exclusion of experts. As stated by Presiding Judge Wilson, these issues have not been fully and finally adjudicated and are thus not properly certifiable under Rule 54(b).

¶71. On the merits of the breach of fiduciary duty claim, I would reverse the circuit court's ruling because there are genuine issues of material fact in dispute that preclude summary judgment. The grant or denial of a motion for summary judgment is reviewed de novo, and evidence is viewed "in the light most favorable to the party against whom the motion has been made." *Maness v. K&A Enters. of Miss. LLC*, 250 So. 3d 402, 408 (¶16) (Miss. 2018) (internal quotation marks omitted). "If . . . there is no genuine issue of material fact, and the

moving party is entitled to judgment as a matter of law, summary judgment should . . . be entered in his favor. Otherwise, the motion should be denied." *Lowery v. Harrison Cty. Bd. of Supervisors*, 891 So. 2d 264, 266 (¶7) (Miss. Ct. App. 2004) (quoting *Williamson ex rel. Williamson v. Keith*, 786 So. 2d 390, 393 (¶10) (Miss. 2001)). In this case there were genuine issues of material fact in dispute for a jury to resolve on the issue of breach of fiduciary duty.

¶72. In paragraphs 28 through 32 of its complaint, SeaHorn adequately pleaded a cause of action for bad faith and breach of fiduciary duty. There, SeaHorn alleged that "Meridien had a fiduciary duty as the manager and knew that SeaHorn reposed faith, confidence and trust in Meridien to ensure that the Waverly Apartments were managed and maintained as agreed" and "to act in the best interest of SeaHorn in the performance of the management responsibilities per the contract. . . ." When Meridien filed a motion for summary judgment on the claim, the circuit court held SeaHorn had not brought forth evidence sufficient to challenge summary judgment on the issues of bad faith and breach of fiduciary duty and granted Meridien's motion. The court said that "the plaintiff has not demonstrated a breach of fiduciary duty by presenting competent summary judgment evidence of the existence of such a relationship, a fiduciary relationship, and how the defendant breached it if in fact one existed." I disagree.

¶73. The elements of a claim for breach of fiduciary duty are (1) a fiduciary relationship and (2) its breach. Restatement (Second) of Torts, § 874 & cmt. (a)-(b) (1979). A "fiduciary relationship is a very broad term embracing both technical fiduciary relations and those

informal relations which exist wherever one person trusts in or relies upon another." *Hopewell Enters. Inc. v. Trustmark Nat. Bank*, 680 So. 2d 812, 816 (Miss. 1996). In *Mabus v. St. James Episcopal Church*, 884 So. 2d 747, 758 (¶23) (Miss. 2004), the Supreme Court said:

> Whenever there is a relation between two people in which one person is in a position to exercise a dominant influence upon the former, arising either from weakness of mind or body, **or through trust**, the law does not hesitate to characterize such a relationship as fiduciary in character.

(Emphasis added) (quoting *Mullins v. Ratcliff*, 515 So. 2d 1183, 1191 (Miss. 1987).

¶74. In *Dunn v. Dunn*, 786 So. 2d 1045, 1052 (¶30) (Miss. 2001), the Mississippi Supreme Court said that in determining whether a fiduciary relationship exists, we have to look to see if one person depends upon another and explained:

> Additionally, a confidential relationship, which imposes a duty similar to a fiduciary relationship, may arise when one party justifiably imposes special trust or confidence in another, so that the first party realizes the care and vigilance that he normally would exercise on entering into a transaction with a stranger.

Id. at 1052 (¶24).

¶75. Finally, whether a fiduciary duty exists is ordinarily a question of fact. *Smith v. Franklin Custodian Funds Inc.*, 726 So. 2d 144, 150 (¶28) (Miss. 1998); *Saucier v. Peoples Bank of Biloxi*, 150 So. 3d 719, 725 (¶23) (Miss. Ct. App. 2014).

¶76. While Mississippi courts "do not ordinarily impose fiduciary duties upon contracting parties," *Dominquez v. Palmer*, 970 So. 2d 737, 742 (¶26) (Miss. Ct. App. 2007), in some contract cases, a fiduciary relationship may arise. *Robley v. Blue Cross/Blue Shield of Miss.*, 935 So. 2d 990, 994-95 (¶11) (Miss. 2006). In *Robley,* the supreme court said:

> Traditional fiduciary relationships are found in cases of trustee and beneficiary, partners, *principal and agents*, guardian and ward, managing directors and corporation.

Id. at 994 (¶10) (emphasis added) (citing *Carter Equip. Co. v. John Deere Indus. Equip. Co.*, 681 F.2d 386, 390 (5th Cir. 1982)). To determine if a fiduciary relationship was created in a commercial transaction, we look to

> whether (1) the parties have shared goals in each other's commercial activities, (2) one of the parties places justifiable confidence or trust in the other party's fidelity, and (3) the trusted party exercises effective control over the other party.

Saucier, 150 So. 3d at 725 (¶26).

¶77. In their contract, SeaHorn and Meridien specifically agreed that Meridien was SeaHorn's agent. The management agreement specifically created a principal-agent relationship between them. Seahorn entrusted its money and its property to Meridien to provide SeaHorn's tenants with a safe and well-maintained living environment. SeaHorn also and relied on Meridien to make a profit. There are several provisions of the contract that give Meridien the responsibility of handling the money and making decisions to improve the operating efficiency of the apartments on which SeaHorn could rely. For example, in Section 2 - BANK ACCOUNTS, Meridien was to establish bank accounts in SeaHorn's name but was to manage them for SeaHorn's benefit. In Section 8 - LEASING AND RENTING, Meridien was obligated to "use all reasonable efforts to keep the premises rented by procuring tenants for the premises." In Section 10 - MAINTENANCE AND REPAIRS, Meridien was charged with making "all ordinary repairs and replacements reasonably necessary to preserve the premises in its present condition and for the operating efficiency

of the premises . . . ." Thus, Meridien clearly had financial and operational obligations to SeaHorn, and SeaHorn had a right to rely upon Meridien to perform the duties owed to SeaHorn. SeaHorn identified items it had to purchase like air conditioners and tools that were missing when it took over the management. SeaHorn also paid Meridien for the maintenance-man's salary, not knowing that Meridien was using him to maintain other Meridien properties as well. Whether these facts constitute sufficient evidence to prevail on establishing a fiduciary duty and subsequent breach is not our call, but rather one for a jury to determine.

¶78. I believe that if the breach of contract claim survived summary judgment, so too should the breach of fiduciary duty claim. The elements to be proven for each are slightly different but may include some overlapping facts that are in dispute. I would hold that SeaHorn has met the threshold necessary to survive summary judgment on the breach of fiduciary duty claim.

WESTBROOKS, LAWRENCE AND McCARTY, JJ., JOIN THIS OPINION.