STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1949

The Estate of Burton L. Smith,
by its Personal Representatives, Wendi Smith and Nancy Wolf,
Respondent,

vs.

James A. Graner, individually and as Managing Partner of S & G Partners,
Appellant.

Filed July 20, 2010
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 27-CV-07-17683

John C. James, Minneapolis, Minnesota; and

John D. Hagen, Jr., Minneapolis, Minnesota (for respondent)

Ryan R. Kuhlmann, Chamberlain Law Firm, Wayzata, Minnesota (for appellant)

Considered and decided by Lansing, Presiding Judge; Peterson, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this appeal from judgment following a court trial on respondent's claims asserting appellant's mismanagement of partnership funds, appellant asserts that

(1) respondent's claims arising out of a 1993 capital contribution are barred under the doctrine of res judicata and by the six-year statute of limitations under Minn. Stat. § 541.05 (2008); (2) evidence regarding the 1993 events should not have been admitted into evidence because the district court's summary-judgment order limited actionable conduct to that occurring after 2001 and because the evidence was not included on respondent's trial-exhibit list; (3) the district court erred by determining that appellant was overpaid management fees; and (4) appellant is entitled to interest on the 1993 capital contribution. We affirm.

FACTS

Capital Accounts

In 1988, Burton L. Smith and appellant James A. Graner formed a partnership, S&G Partners, to buy an apartment complex in Deer Creek to lease to tenants who qualified for Section 8 housing. The sellers were Gordon and Frances Greenwaldt. The partnership agreement states:

> An individual capital account shall be maintained for each partner. The initial capital of the Partnership shall consist of the amounts contributed by the respective partners as recorded on Schedule A attached hereto and made a part of this Agreement. Except by written agreement of all of the partners, or as otherwise provided herein, the capital account of each partner shall not be subject to withdrawal, and if additional capital is required by the Partnership, such capital shall be contributed in equal parts by the partners, unless otherwise agreed in writing by the partners. Any such additional capital sums which any partner shall contribute from time to time shall be credited to his capital account. No interest shall be paid on any contributions to the capital of the Partnership.

Schedule A indicates that each partner initially contributed $25,000 to the partnership. Appellant, a certified public accountant, handled the partnership's accounting.

In June 1993, the partnership owed a balloon payment on a contract for deed for the Deer Creek apartment complex. Appellant testified, "I sent a note to Mr. Smith saying it appeared that the account balances would be not adequate to fund the payment of that $50,000 dollars and also operate the business, so I suggested we make a capital contribution each of 2,500, for a total of $5000 dollars." Appellant testified that Smith did not respond, so appellant contributed $5,000 to the partnership. At trial, appellant was asked, "So as it turned out, at the time of this transaction, where you paid off the balloon payment, was the partnership in danger -- or either of its accounts of in danger of going to zero or negative?" Appellant answered, "Not as it turned out." Nonetheless, on tax returns, appellant listed himself as owning 56.4% of S&G and Smith as owning 43.6%.

In December 1993, Smith began a lawsuit against appellant seeking confirmation of equal capital accounts and dissolution of the partnership and winding up of its business. The parties executed a settlement agreement based on an offer from a third party to buy the Deer Creek apartment complex. The agreement provided that Smith and appellant each would receive 50% of the sale proceeds and accrued tax credits, and each would pay 50% of a bond. The agreement stated that if the sale did not occur, the parties would immediately apply to the court for a new trial date. Although the sale did not occur, the parties did not put the case back on the trial calendar, and the case was eventually closed.

In January 1995, Smith sent appellant a letter stating:

> Attached is a receipt for a December 29, 1994 deposit of $2,500 by myself in S&G's checking account at State Bank of Young America.
>
> This action in no way represents endorsement of your flagrant abrogation of our partnership agreement in the manner, in which, you paid off the 2nd mortgage with the Greenwaldts.
>
> Further, with a duty to hold down the damages, you will owe me I'm, again asking you to *not* do the partnership's return.

Appellant testified: "I advised Mr. Smith that he needed to provide a business purpose for the deposit. He did not. So I returned the money to Mr. Smith."

Management Fee

The partnership agreement provides that "[t]he Partnership shall pay to [appellant], for management of the Partnership property, the sum of Six Hundred ($600.00) Dollars per month from gross rentals." Smith approved two increases to appellant's $600 management fee, first to $630 and then to $660. Additional increases were made to appellant's management fee. Appellant testified that the Minnesota Housing Finance Agency (MHFA), which manages Section 8 housing, suggested the increases because rent could then be raised, and there would be no net effect on partnership profit. In 2003, Smith sent appellant a letter stating:

> It occurs to me that while you've unilaterally given yourself a raise you must be frustrated by your inability to do job #1. Viz., keeping the project full. Accordingly I suggest you retire as manager of Deer Creek I and II. The partnership should hire a highly recommended professional apartment management firm, from the area. They will cost less and

> have the societal and government connections to fill the project. Because they charge only for units rented there is incentive for them to do so. The continuing vacancy problem at Deer Creek I and II dramatically lowers the project's market value.

Respondent Estate of Burton L. Smith brought this lawsuit against appellant alleging claims for breach of a fiduciary duty, breach of contract, and dissolution and winding up of the partnership. The district court granted partial summary judgment for appellant on the claims for breach of fiduciary duty and breach of contract because they accrued more than six years before this lawsuit was commenced. The remaining claims were tried to the court. The district court determined that each party was entitled to 50% of the partnership assets and that appellant had charged excessive management fees. The district court denied a new trial but granted in part appellant's motion for amended findings. This appeal followed.

D E C I S I O N

1. Res Judicata

Appellant argues that because the 1993 adjustment of partnership capital accounts was already litigated in the 1993 lawsuit between the partners, res judicata barred respondent's claim in this action regarding the adjustment. "We review de novo whether the doctrine of res judicata can apply to a given set of facts." *Erickson v. Comm'r of Human Servs.*, 494 N.W.2d 58, 61 (Minn. App. 1992). If the doctrine applies, the decision whether to apply it is left to the district court's discretion. *Id.*

Res judicata is a finality doctrine that mandates that there be an end to litigation. *Hauschildt v. Beckingham*, 686 N.W.2d 829, 840 (Minn. 2004). Res judicata is available

if "(1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; [and] (4) the estopped party had a full and fair opportunity to litigate the matter." *Id.* at 840. "Once there is an adjudication of a dispute between parties, res judicata prevents either party from relitigating claims arising from the original circumstances, even under new legal theories." *Id.* at 837. Res judicata is not to be rigidly applied; instead the focus is on whether its application would work an injustice on the party against whom the doctrine is urged. *Id.*

The district court determined that "the defense of res judicata is not applicable as the [1993] district court case was not adjudicated by a final judgment. . . . It was a proposed settlement based upon a condition precedent which did not occur, the proposed settlement therefore became void and therefore res judicata does not apply." Appellant argues that no evidence was presented at trial to establish that the settlement agreement signed by both parties was void or that the earlier case was not adjudicated by final judgment. But the party invoking res judicata has the burden of proof. *Barth v. Stenwick*, 761 N.W.2d 502, 508 (Minn. App. 2009). Consequently, an absence of evidence that the settlement agreement was void or that the case was not adjudicated by final judgment would not mean that res judicata applies; instead, to invoke res judicata, appellant had the burden of establishing that the case was adjudicated by a final judgment.

Citing *Wessling v. Johnson*, 424 N.W.2d 795 (Minn. App. 1988), *review denied* (Minn. July 28, 1988), appellant argues that Smith's failure to go forward with his lawsuit in 1996, which resulted in the 1999 administrative dismissal of the case, must be

considered an adjudication on the merits under Minn. R. Civ. P. 41.02. Minn. R. Civ. P. 41.02(a), (c), states:

> The court may upon its own initiative, or upon motion of a party, and upon such notice as it may prescribe, dismiss an action or claim for failure to prosecute or to comply with these rules or any order of the court.
>
> . . . .
>
> Unless the court specifies otherwise in its order, a dismissal pursuant to this rule and any dismissal not provided for in this rule or in Rule 41.01, other than a dismissal for lack of jurisdiction, for forum non conveniens, or for failure to join a party indispensable pursuant to Rule 19, operates as an adjudication upon the merits.

In *Wessling*, the Internal Revenue Service (IRS) placed various federal tax liens on property that was sold under a contract for deed, claiming at various times that the contract-for-deed vendors and BBCA, an entity to which the vendors' interest was transferred, were delinquent taxpayers. 424 N.W.2d at 796. In February 1985, BBCA sued the United States in federal district court to quiet title to the property. *Id.* On May 27, 1986, the IRS sold the property at public auction to the contract-for-deed vendees; BBCA did not challenge the auction procedure and did nothing to reclaim the property during the redemption period. *Id.* at 797. On May 4, 1987, the contract-for-deed vendees sued in state court the vendors, BBCA, and all others in the chain of title, to quiet title to the property. *Id.* In its answer, BBCA counterclaimed against the vendees for claimed deficiencies under the original contract for deed. *Id.* The vendees moved for summary judgment, alleging that BBCA's counterclaim was barred as res judicata. *Id.* On May 21, 1987, BBCA's suit against the United States was dismissed by a federal judge sua

sponte for lack of prosecution. *Id.* The federal court that dismissed the suit allowed BBCA ten days to move for relief from the order, and BBCA did nothing. *Id.* at 799. On October 22, 1987, the vendee's motion for summary judgment was granted. *Id.* at 797.

On appeal, this court noted

> that some jurisdictions do not consider a dismissal for lack of prosecution the equivalent of a full and final adjudication on the merits for purposes of examining the defense of res judicata. Typically, these jurisdictions find that such action is merely procedural in nature and does not operate as a full adjudication.

Id. at 798. But this court then concluded that "Minnesota law indicates that the federal court dismissal acts as an adjudication on the merits." *Id.* However, in reaching this conclusion, this court recognized a distinction between *Wessling* and this court's decision in *Beutz v. A.O. Smith Harvestore Prods., Inc.*, 416 N.W.2d 482 (Minn. App. 1987), *aff'd* 431 N.W.2d 528 (Minn. 1988). This court explained in *Wessling*:

> *Beutz* involved a federal court order which dismissed the lawsuit as a sanction against an attorney for failing to file a responsive memorandum. We held that a dismissal as a sanction for failure to file a legal brief was procedural and did not operate as a full and final adjudication on the merits. Here, the federal court's dismissal was for the substantial failure of lack of prosecution or going forward with one's lawsuit. These cases are distinguishable.

424 N.W.2d at 798 n.2.

Appellant argues that because Smith's failure to go forward with his lawsuit in 1996 resulted in the 1999 administrative dismissal of the lawsuit, the dismissal must be treated as a dismissal for lack of prosecution, which is an adjudication on the merits. But,

as respondent argues, the record does not demonstrate that Smith's 1996 lawsuit was dismissed by the district court.

The district court determined:

> On January 29, 1996, . . . this case was settled. The case was not dismissed by either party or by the Court. The Register of Actions shows that on January 29, 1996, the file was "closed." There is no record of action to reopen albeit there is a letter in the file dated May 15, 1997 from a new counsel for [Smith]. The letter addressed to Judge Pierce states "Sometime back this matter was before you and at that time a tentative settlement was reached; however, that has fallen through and we may need some assistance in the future." Although the parties and the Court have referred to an "administrative dismissal by the Court," there is no record of such in the actual file, the Register of Actions, or the MNCIS electronic system. If such an "administrative dismissal" did occur, it was apparently the result of a court administrative process to remove all inactive or "closed" files from the Court's calendar.
>
> Under the facts of this case, [appellant's] position that this "closing" or "dismissal" would lead to a finding that the closed file was somehow a finding on the merits which would allow the invocation of res judicata would be in error and work a severe and inequitable hardship upon [respondent].

The district court's decision is consistent with *Provident Mut. Life Ins. Co. v. Tachtronic Instruments, Inc.*, an action for rent due under a commercial lease, in which this court upheld the district court's decision to not give collateral estoppel effect to two previous unlawful-detainer actions involving the same rental periods when the first unlawful-detainer action was stricken from the calendar after the tenant made a partial payment and the second was stricken when the landlord failed to appear. 394 N.W.2d 161, 167 (Minn. App. 1986). This court noted that both unlawful-detainer actions were

administratively dismissed without hearings and that there was no final judgment and no actual litigation of the issues. *Id.*

Appellant has not shown that the district court erred in concluding that res judicata does not apply.

2. Statute of Limitations

Appellant argues that respondent's claim regarding the 1993 adjustment of partnership capital accounts is barred by the six-year statute of limitations in Minn. Stat. § 541.05(1). "The construction and application of a statute of limitations, including the law governing the accrual of a cause of action, is a question of law and is reviewed de novo." *MacRae v. Group Health Plan, Inc.*, 753 N.W.2d 711, 716 (Minn. 2008).

The Minnesota Uniform Partnership Act provides that "[a] partner may maintain an action against the partnership or another partner for legal or equitable relief, with or without an accounting as to partnership business." Minn. Stat. § 323A.0405(b) (2008). The Act further provides that "[t]he accrual of, and any time limitation on, a right of action for a remedy under [section 323A.0405] is governed by other law. A right to an accounting upon a dissolution and winding up does not revive a claim barred by law." Minn. Stat. § 323A.0405(c) (2008). Thus, to determine when respondent's claim regarding the 1993 adjustment of partnership capital accounts accrued and what statute of limitations applies to the claim, we must look beyond the Act.

Minn. Stat. § 541.05(1) requires that an action "upon a contract or other obligation, express or implied, as to which no other limitation is expressly prescribed"

shall be commenced within six years. But section 541.05(1) does not address when an action accrues.

"[A]s a general matter, a statute of limitations will not commence to run on a cause of action for an accounting of partnership affairs before the dissolution of the partnership in question." Russell G. Donaldson, *When Statute of Limitations Commences to Run on Right of Partnership Accounting*, 44 ALR4th 678, 691 (1986). The supreme court long ago applied this general rule in *Broderick v. Beaupre*, 40 Minn. 379, 380-81, 42 N.W. 83, 83-84 (1889), in which the court explained:

> At the close of each year during the partnership (which continued from January, 1881, to November, 1887) the parties had an accounting of the business, from which they ascertained the amount of profits for the year. The plaintiff's share (one-eighth) of the profits, as thus ascertained, for the years 1881, 1883, and 1884, was less than $5,000,- the amount guaranteed by the articles of partnership. Each year plaintiff's share of the profits was credited to him on the books of the firm, but he was not credited with the amounts necessary to make it up to $5,000 for the three years referred to, when his one-eighth fell below the sum. Defendants claim that these yearly accountings and entries on the firm books amounted to full and final settlements, by which the plaintiff accepted, in full of all claims, the amounts placed to his credit, to-wit, one-eighth of the actual yearly profits of the business. But, as well remarked by the trial judge, these annual accountings were evidently had merely for the purpose of ascertaining the net profits of the business, and settled nothing but that. The apportionment of these profits, when thus ascertained, and the amount for which each partner was entitled to credit, was fixed by the terms of the articles themselves, and the entry of these credits was a mere matter of book-keeping. . . . Moreover, it appears that he had nothing to do with keeping the firm books, and was not at all responsible for the entries made therein. The further claim is made that the amount due him for deficiency in the profits of 1881 was barred by the statute of limitations, on the theory

> that the right of action for it accrued January 1, 1882, while this action was not commenced until January 7, 1888. This position is utterly untenable. *Whatever plaintiff had invested in the business, whether original capital or accrued profits, was in as capital in the partnership, and the statute of limitations against his right to recover this interest did not begin to run, in any event, before the dissolution of the firm by his retirement in November, 1887*.

(Emphasis added.)

Relying on *Broderick*, the district court concluded:

> The issues concerning [appellant's] unilateral change in the percentage of the capital accounts in 1993 were properly considered at trial, not for the purpose of proving or collecting damages in connection with breach of contract or breach of fiduciary duty, but rather for the limited purpose of the valuation of each partnership interest when winding up the partnership. Evidence of the proportional shares may be admitted for the purpose of distribution.

Appellant argues that this case is distinguishable from *Broderick* because *Broderick* "merely gives a partner a right to recover its interest in the partnership[,] which does not begin to run before dissolution." But respondent's claim regarding the 1993 adjustment of partnership capital accounts was raised to recover the partnership interest that was lost due to the change in the capital accounts. As the district court found, respondent was not trying to recover damages caused by appellant's actions in 1993; respondent was seeking to establish the partners' correct ownership interests in the partnership upon dissolution. Under *Broderick*, the statute of limitations on respondent's right to recover his interest in the partnership did not begin to run until dissolution of the partnership in this action.

Appellant argues that this court should follow *Davies v. West Publ'g Co.*, 622 N.W.2d 836, 842 (Minn. App. 2001), in which this court rejected the argument that the statute of limitations was tolled under the continuing violation doctrine as to 16 separate income distributions from an employees' preferred-stock association. But in *Davies*, the plaintiff contested income distributions that were made over a period of several years, claiming that the distributions were not made to the correct group of employees; there was not a challenge to the ownership of the association. *Id.* at 839. Because this case does not involve income distributions, *Davies* is not controlling.

Also, we recognize that the supreme court decided *Broderick* long before the legislature enacted the Uniform Partnership Act. But we have not found any authority that indicates that *Broderick* no longer accurately states the law in Minnesota. Furthermore, *Broderick* is consistent with Minn. Stat. § 323A.08087(b) (2008), which states that "[e]ach partner is entitled to a settlement of all partnership accounts *upon winding up the partnership business*." (Emphasis added.)

3. Evidence of conduct that occurred before 2001

In a May 14, 2008, order granting partial summary judgment, the district court concluded that "the six year statute of limitations applies to the allegations made by [respondent] concerning conduct which may or may not have occurred in 1993, any conduct prior to the year 2001, and for conduct concerning the twenty years of the Partnership." The order also states:

> The Statute of Limitations indeed limits this matter to causes of actions accruing after 2001. [Appellant] has failed to allege material facts in support of its claim that

> [respondent] breached contractual duties to assist the partnership, so that claim will not go forward. There remain material facts in dispute as to whether or not the distribution made in 2006 should have decreased the capital accounts and whether the management and accounting fees were excessive. Thus the matter will go on to a trial on these issues and to ultimately determine the capital accounts and the partnership value. . . . [Respondent's] request that the Court declare the amount of ownership interest in the partnership is premature and the request that the Court find [respondent] hold[s] 50% ownership after allowing an offset pursuant to paragraph 6 [governing income distributions] of the agreement is also not ripe.

Appellant argues that based on this order, he understood that the 1993 capital-accounts adjustment would not be an issue at trial and, therefore, he was not prepared to address it.

Appellant objected to the admission of (1) the 1995 letter from Smith about the $2,500 payment Smith made to the partnership and (2) a 1993 check register. The district court admitted the evidence but stated that the court would not consider the evidence if precluded by the summary-judgment order. In the order denying a new trial, the district court upheld its ruling admitting the evidence.

Absent an erroneous interpretation of the law or an abuse of discretion, we will not disturb the district court's ruling on whether to admit evidence. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997). To obtain a new trial on the grounds of improper evidentiary rulings, the complaining party must demonstrate prejudicial error. *Id.* at 46.

The district court's interpretation of its summary-judgment order is supported by the complaint because both claims for dissolution of the partnership include the allegation regarding the 1993 capital-accounts adjustment. "We defer to a district court's

interpretation of its own order." *LaChapelle v. Mitten*, 607 N.W.2d 151, 162 (Minn. App. 2000), *review denied* (Minn. May 16, 2000). Also, the summary-judgment order states that respondent was seeking 50% ownership, and the claim for 50% ownership required reversal of the 1993 capital-accounts adjustment.

Even if the evidentiary rulings were erroneous, appellant does not explain how he was prejudiced. Appellant was familiar with both documents, and he makes no claim that he would have presented additional evidence to rebut them.

4. Overpayment of management fees

Findings of fact will not be set aside on appeal unless they are clearly erroneous. Minn. R. Civ. P. 52.01. "[W]e view the record in the light most favorable to the judgment of the district court." *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). We will not reverse the district court's judgment merely because we view the evidence differently. *Id.* "That the record might support findings other than those made by the trial court does not show that the court's findings are defective." *Vangsness v. Vangsness*, 607 N.W.2d 468, 474 (Minn. App. 2000).

The district court found:

> Section 20 of the Partnership Agreement provided that the Agreement "may be altered or amended at any time by written amendment executed by the partners." [Respondent] acknowledges that Mr. Smith agreed in writing to the management fee increase to $660.00 per month.
>
> [Appellant] testified that it was the intent of the Partnership to increase the fees after the approved 1991 increase. However there was no written evidence of Mr. Smith's assent. In fact there is a written letter from Smith referring to [appellant's] unilateral increase in management

> fees. . . . The letter implies Smith did not consent to the increase. Although increased management fees were submitted to the housing authority for approval there is no written agreement between the partners of S&G. The unapproved management fees were paid by [appellant] to himself in breach of the Partnership Agreement. [Respondent] is hereby granted an award in the amount of $21,268.00 for the over payment of the management fees . . . .

Appellant testified that the MHFA suggested that the management fee be increased because rent could then be raised, and there would be no net effect on partnership profit. Appellant argues that the district court erred as a matter of law and that respondent could not establish a breach-of-contract claim with respect to the management fees because respondent could not establish that it had been damaged. Appellant argues further that it would be unjust to enrich respondent for appellant's sole labor as manager when there could be no effect on partnership income.

The district court found: "The money that [appellant] diverted to himself through overpayment of management fees could have inured to the benefit of the Partnership, and in turn to Smith (according to his 50% share). Instead it inured solely to the benefit of [appellant]." This indicates that the district court found appellant's testimony incredible. The district court is in the best position to assess the credibility of testimony because it is able to evaluate directly the content of the testimony, the manner in which it is delivered, and the demeanor and sincerity of the witnesses through whom it is given. *See In re Welfare of A.D.*, 535 N.W.2d 643, 648 (Minn. 1995) (noting that the district court stands in a superior position to appellate courts in assessing credibility of witnesses). Thus, this

court is required to give deference and due regard to the district court's credibility determinations. *Novack v. Nw. Airlines, Inc.*, 525 N.W.2d 592, 598 (Minn. App. 1995).

Although it may have been permissible for appellant to receive a management fee directly from the MHFA, appellant has not cited any evidence or authority that demonstrates that the district court erred in finding that the increased management fee could have inured to the benefit of the partnership, rather than to appellant alone.

5. Interest on $5,000 payment appellant made in 1993

Appellant argues that if the 1993 adjustment to capital accounts is not permitted, the $5,000 payment that he made in 1993 should be treated as a loan, and he is entitled to six percent statutory interest on the loan. In Minnesota, "[t]he interest for any legal indebtedness shall be at the rate of $6 upon $100 for a year, unless a different rate is contracted for in writing." Minn. Stat. § 334.01 (2008). The supreme court has explained:

> As between ordinary persons, interest on money runs from the time the money becomes due and payable until the payment is made. Where money has been paid and received under a mistake of fact, and no fraud or misconduct can be imputed to the party receiving it, money does not become due and payable, and is not considered in default, until a demand for payment has been made.

In re Defenses and Objections to Personal Property Taxes for 1969 Assessment, 303 Minn. 66, 71, 226 N.W.2d 296, 299-300 (1975).

The district court found:

> The record shows that the Partnership could have paid [appellant] back the $5,000 at almost any time since 1993. [Appellant], of course, is aware of this fact because he kept

> the books for the Partnership. Rather than paying himself back right after making the loan, [appellant] chose to keep the $5,000.00 in his capital account in an attempt to wrongfully assert a greater interest in the partnership. This was a completely inequitable course of conduct, and the principles of equity dictate that [appellant] cannot now be awarded 6% interest on an unauthorized 16 year-old loan for which he could have reimbursed himself 16 years ago.

Appellant has not alleged that any fraud or misconduct can be imputed with respect to the $5,000 payment that the partnership received, and appellant has not shown that he made any demand for payment of the $5,000. Consequently, although the district court based its decision on principles of equity, appellant is not entitled to interest on the $5,000 as a matter of law because the amount did not become due and payable without a demand for payment.

6. Portions of Brief Outside the Record

In his reply brief, appellant argues that portions of respondent's brief are not supported by the record. Because, with one exception, we have not relied on the items to which appellant objects when reaching our decision, we will not address each item in detail.

The one item that we have cited is appellant's testimony regarding the partnership's need for the $5,000 contribution that appellant made in 1993. In its brief, respondent states, "[Appellant] admitted that, in retrospect, the $5,000 was <u>not</u> needed to fund the [balloon] payment." Appellant argues that

> the transcript does not say there was a lack of need. The only testimony was that the partnership at the time of the payment of the balloon, <u>after</u> the $5,000.00 had already been contributed, was not in danger of depletion or incurring a

> negative balance. Respondent ignores the fact that there were many other bills and obligations of the partnership that needed to be paid around the same time.

Appellant is correct that the transcript does not indicate that appellant said that there was no need for the $5,000. Appellant said that, as it turned out, there was no danger of the partnership accounts going to zero or negative. But this was after the $5,000 had been contributed to the partnership account, and the $5,000 could have kept the accounts from dropping to zero or less. Therefore, when read carefully, appellant's statement should not be interpreted as an admission that there was no need for the $5,000.

However, as noted by respondent, the partnership's bank account contained more than $10,000 after the balloon payment was made. Appellant acknowledged during his testimony that after the balloon payment was made, the account from which it was made had a balance of $10,041.18. And the district court stated in its February 4, 2009, memorandum that "[t]he check for the $20,000.00 balloon payment cleared the Partnership account on June 2, 1993. The June, 1993 Partnership statement showed that after the payment was made there was a remaining balance of approximately $10,041.18 in the Partnership accounts. (Exhibit 21)."

Appellant argues that there were other expenses in addition to the balloon payment that needed to be paid. But he does not cite any evidence that indicates that paying these expenses either could have, or did, bring the balance of the partnership account below $5,000. In the absence of such evidence, respondent's statement that appellant admitted that, in retrospect, the $5,000 was not needed to fund the balloon payment, might

misinterpret what appellant meant, but it is supported by evidence in the record. Therefore, we will not strike this portion of respondent's brief.

Affirmed.