Supreme Court No. 95517-4
Court of Appeals No. 74544-1-I

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**IN THE SUPREME COURT**
**OF THE STATE OF WASHINGTON**

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KING AND MOCKOVAK EYE CENTER, INC., P.S., a Washington professional service corporation; and CLEARLY LASIK, INC., a Nevada corporation,

*Respondents,*

v.

MICHAEL MOCKOVAK, M.D., an individual,

*Petitioner*

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# ANSWER TO PETITION FOR REVIEW

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David R. Goodnight, WSBA #20286
Jill D. Bowman, WSBA #11754
Rachel D. Groshong, WSBA #47021
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
206.624.0900

*Attorneys for Respondents Joseph King, M.D., et al.*

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## I. INTRODUCTION

The Court should deny review of the Court of Appeals' unpublished opinion because the case arises out of highly unusual circumstances (the economic fallout from one partner's attempt to have the other murdered) and because the Court of Appeals' analysis is entirely consistent with well-established precedent. Petitioner's mischaracterization of the Court of Appeals' statute of frauds ruling does not warrant review under RAP 13.4(b). As for the challenged jury instruction, it was properly rejected because it was confusing, misleading, and argumentative. No constitutional issue is raised by the rejection of such an instruction; there is no substantial public interest in confirming that to be the case; and the decision to affirm the rejection of this instruction is not in conflict with any precedent.

## II. IDENTITY OF RESPONDENTS

Respondents are King and Mockovak Eye Center, Inc., P.S. (KMEC), Clearly Lasik, Inc. (CLI or Clearly Lasik), Christian Monea (chief executive officer of KMEC and CLI), King Lasik, Inc., and Joseph King, M.D.

## III. RESTATEMENT OF ISSUES PRESENTED

1. Whether the Court of Appeals' reversal of the trial court's misapplication of the statute of frauds created an issue of substantial public importance.

2. Whether the Court of Appeals' decision that the trial court did not abuse its discretion in refusing to give a confusing, misleading, and argumentative jury instruction is in conflict with precedent, or created an issue of significant constitutional dimension or substantial public interest.

## IV. RESTATEMENT OF THE CASE

For purposes of answering the Petition for Review, Respondents largely rely on the Court of Appeals' statement of facts,[1] but also offer the following short summary of facts and proceedings in the courts below.

Joseph King and Michael Mockovak jointly owned and operated several Lasik eye surgery practices in the United States and Canada. Op. at 1. When the economic downturn led to a substantial decrease in demand for eye surgeries, the partners found themselves millions of dollars in debt. Op. at 1, 3. They decided to part ways, but could not agree on the terms of their separation. Op. at 3. Mockovak decided to have King murdered, so he could

[1] The Court of Appeals' unpublished opinion is attached as Appendix A to the Petition for Review. It can also be found at *King & Mockovak Eye Center, Inc., P.S. v. Mockovak,* No. 74544-1-I, 2017 WL 4898237 (Wash. Ct. App. Oct. 30, 2017). The statement of facts can be found at Op. 2-7.

take over the businesses and collect on a $4 million key man life insurance policy. *Id.* His plan was foiled by the FBI. *See State v. Mockovak,* No. 66924-9-I, 2013 WL 2181435, at *1-5 (Wash. Ct. App. May 20, 2013) (unpublished). He was arrested and ultimately convicted of attempted murder and attempted theft. *Id.* at *5. The media firestorm that hit when the arrest was announced, and the loss of half the partnership's surgical team, destroyed the existing practices in Washington. RP 116:5-118:6, 119:19-120:5, 120:12-124:11 (G); Exs. 28-31; RP 495:22-496:17, 497:2-498:22 (R).

Mockovak went to prison for attempted murder and other crimes, but that has not stopped him from trying to profit from his wrongdoing. When King and Mockovak's businesses[2] sued Mockovak for breach of fiduciary duty, he turned around and countersued his would-be murder victim and the businesses' chief executive officer for fraud, breach of fiduciary duty, conversion, unjust enrichment, and civil conspiracy. CP 912-16.

The case went to trial on Mockovak's personal tort claims and his derivative claims on behalf of CLI. Op. at 6-7. Also at issue were (a) the fair

[2] KMEC was a Washington professional services corporation that owned and operated the eye surgery clinics in Washington. CLI was a Nevada corporation that indirectly owned and operated the clinic in Edmonton, Alberta. King and Mockovak each owned 50 percent of the shares of KMEC and CLI, and 50 percent of the shares of the separate Canadian corporation that owned and operated the clinic in Burnaby, British Columbia. Op. at 2.

value of Mockovak's KMEC shares,[3] (b) KMEC's and CLI's breach of fiduciary duty claims against Mockovak, and (c) a breach of contract claim asserted by King against Mockovak. *Id.* The breach of contract claim was based on King and Mockovak's partnership agreement. Op. at 5.

A few days into trial, Mockovak brought a CR 50 motion seeking dismissal of King's contract claim because King and Mockovak's oral partnership agreement allegedly did not satisfy the statute of frauds. CP 6252-72; RP 150:11-151:16, 454:21-466:5 (G). Over King's objection, the court granted the motion in part. CP 6280-87, 7083-85. King was permitted to ask the jury whether he and Mockovak had a partnership, and whether Mockovak had committed acts that, under RCW 25.05.225(5), warranted his judicial expulsion from the partnership, but he was prohibited from asking for breach of contract damages. *See* CP 7156-60.

Mockovak was given wide latitude to present his theories and claims to the jury and ask for millions of dollars in damages. In the end, however, he was unable to prove his claims. The jury rejected all of his personal and derivative tort claims and found, based on expert testimony, that his KMEC shares had a negative value. CP 7156-60; Op. at 7.

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[3] Because Mockovak's medical license was suspended, he could not continue to own shares in a professional services corporation. *See* RCW 18.100.100; Op. at 8-9.

The jury also found that King had proved he and Mockovak had a partnership. CP 7157. But the jury did not decide whether to award King damages for Mockovak's breach of the partnership contract because the trial court refused to allow that question to be asked.

Mockovak appealed the final judgment on several grounds, and King cross-appealed. Op. at 2. The Court of Appeals issued an unpublished opinion affirming the judgment in part, reversing it in part, and ordering the matter remanded. Op. at 1-26. Specifically, the appellate court reversed the determination of the fair value of Mockovak's KMEC shares (based on concluding that the valuation was to be performed by the court instead of the jury), Op. at 7-10; reversed the trial court's ruling prohibiting King from asking the jury for breach of contract damages (based on concluding that the trial court had erred in applying the statute of frauds), Op. at 19-22; and affirmed the remainder of the judgment, Op. at 26.

## V. ARGUMENT WHY REVIEW SHOULD BE DENIED

Mockovak is now petitioning this Court to accept review of two different aspects of the Court of Appeals' ruling: the "partnership at will" component of the statute of frauds ruling and the affirmance of the trial court's rejection of a confusing, misleading, and argumentative jury instruction. As discussed

below, Mockovak has failed to establish any of RAP 13.4(b)'s grounds for review.

### A. There is no substantial public interest in the Court of Appeals' reversal of the trial court's erroneous statute of frauds ruling.

Although Mockovak frames his first issue as arising under Washington's version of the Revised Uniform Partnership Act, specifically the provision defining a "partnership at will" (*i.e.,* RCW 25.05.005(8)), the actual question presented at trial and addressed by the Court of Appeals was whether the statute of frauds, RCW 19.36.010, barred King from pursuing his breach of contract claim.[4]

The Court of Appeals correctly observed that this Court "has long held that the provision of the statute of frauds invalidating an oral agreement that by its terms is not to be performed within one year, is not applicable to oral partnership agreements that are for an indefinite length of time and terminable at will." Op. at 21 (citing *Malnar v. Carlson,* 128 Wn.2d 521, 533-34, 910 P.2d 455 (1996); and *Davis v. Alexander,* 25 Wn.2d 458, 466, 171 P.2d 167

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[4] Mockovak did not plead the statute of frauds as an affirmative defense or raise it at any point during the almost six years of pretrial proceedings. *Cf. Gunn v. Riely,* 185 Wn. App. 517, 528-29, 344 P.3d 1225 (upholding trial court's refusal to consider an affirmative defense raised for first time in party's trial brief), *review denied,* 183 Wn.2d 1004 (2015); *McNaughton Grp., LLC v. Park,* No. 70064-2-I, 2014 WL 1289468, at *1-2 (Wash. Ct. App. Mar. 31, 2014) (unpublished) (holding trial court did not err in finding defendants waived statute of frauds defense by not raising it until discovery had concluded).

(1946)). Because the oral partnership agreement between King and Mockovak "was for an indefinite length of time and terminable at will," the appellate court ruled that the statute of frauds "did not apply." Op. at 22. This conclusion was solidly based on the facts of the case and long-established precedent from this Court.

Mockovak tries to argue otherwise by pointing to RCW 25.05.005(8)'s definition of a partnership at will and suggesting that the Court of Appeals ignored the second prong of that definition. According to Mockovak, the Court of Appeals ruled that the King and Mockovak partnership agreement was for an indefinite term, but ignored that the partners had agreed to remain partners until the completion of a particular undertaking. Mockovak's argument misses the mark for at least three reasons.

First, Mockovak ignores case law explaining that the Uniform Partnership Act's "particular undertaking" reference "has been defined to require a specific objective or project that may be accomplished at some future time, although the precise date need not be known or ascertainable at the time the partnership is created." *Gelman v. Buehler*, 20 N.Y.3d 534, 537, 986 N.E.2d 914, 964 N.Y.S.2d 80 (2013). "Business activities which may continue

indefinitely are not 'particular' in nature and do not constitute particular undertakings." *Tropeano v. Dorman,* 441 F.3d 69, 77-78 (1st Cir. 2006).[5]

Second, Mockovak ignores the Court of Appeals' description of the parties' agreement. Op. at 19-20. The two doctors

> agreed to perform surgeries, contribute capital, share in administrative functions, and share debts and profits equally. Together they opened surgical centers in Washington and Canada and later agreed to expand their practice by opening clinics in Wisconsin, Idaho, Oregon, and Nevada. To make this possible, Clearly Lasik and KMEC leased space, bought equipment, paid clinic operating costs, sometimes using funds provided by bank loans and lines of credit personally guaranteed by the partners.

*Id.* Based on the evidence admitted at trial, the Court of Appeals concluded that King and Mockovak entered into a partnership agreement "to build an ophthalmological practice together." Op. at 19. This type of agreement is "too amorphous to meet the statutory 'particular undertaking' standard." *Gelman,* 20 N.Y.3d at 538, 964 N.Y.S.2d 80, 986 N.E.2d 914; *see also, e.g., Page v. Page,* 55 Cal. 2d 192, 195-96, 359 P.2d 41, 10 Cal. Rptr. 643 (1961).

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[5] *See, e.g., Chandler Med. Bldg. Partners v. Chandler Dental Grp.,* 175 Ariz. 273, 279-80, 855 P.2d 787 (1993) (rejecting argument that partnership to develop and lease or sell a medical building was for a particular undertaking, because the building could be leased indefinitely); *Canter's Pharmacy, Inc. v. Elizabeth Assocs.,* 396 Pa. Super. 505, 511-12, 578 A.2d 1326 (1990) (holding partnership to renovate, equip, and operate a personal care facility was not a partnership for a particular undertaking because the facility could be operated indefinitely); *Page v. Page,* 55 Cal. 2d 192, 195-96, 359 P.2d 41, 10 Cal. Rptr. 643 (1961) (holding that individuals who had contributed personal funds and agreed to develop and operate a linen supply business had not agreed to remain partners until the expiration of a particular undertaking).

Mockovak also ignores that the Court of Appeals' conclusion that he and King "formed a partnership to build an ophthalmological practice for profit ***and*** the partnership was to continue indefinitely," Op. at 22 (emphasis added), was implicitly an acknowledgment that both prongs of RCW 25.05.005(8) were satisfied. He is mistaken when he argues there was a failure to consider the second prong. Because both prongs were met, the court committed no error when it held that the statute of frauds did not apply.

Third, Mockovak misrepresents the record. King never "conceded" that he had agreed to remain partners with Mockovak until their multi-year leases were fully satisfied and until they had honored the lifetime guarantees given to certain patients. Pet. at 13. King did not dispute that he and Mockovak were responsible for paying partnership debts that were incurred with the expectation that the multi-year transactions (*e.g.,* leases) would inure to the partners' benefits. CP 6284. But these statements do not reflect any "concession" that there was an agreement to remain partners ***until*** the obligations were satisfied. In fact, with respect to the multi-year lease obligations, King made it clear that if a lease was a partnership obligation, even if the individual partners had not signed personal guarantees, they "were both responsible for" paying the debt. RP 84:19-85:5 (G). In other words, they did not have to stay together so that the *partnership* could satisfy the

obligation, but rather, both King and Mockovak were individually responsible for repayment of the partnership's liabilities.[6]

Mockovak is not helped by his citation to *Owen v. Cohen,* 19 Cal. 2d 147, 119 P.2d 713 (1941). In *Owen,* the court held that when a partner advances a sum of money to a partnership ***with the understanding that the amount contributed was a loan to the partnership and was to be repaid as soon as feasible*** from the prospective profits of the business, the partnership is for the term reasonably required to repay the loan. The California Supreme Court has distinguished *Owen,* explaining that in that case, the court "properly held that the partners impliedly promised to continue the partnership for a term reasonably required to allow the partnership to earn sufficient money to accomplish the understood objective," but that is not the case when the defendant fails "to prove any facts from which an agreement to continue the partnership for a term may be implied." *Page,* 55 Cal. 2d at 195-96, 359 P.2d 4, 10 Cal. Rptr. 643. "The understanding to which [the *Page*] defendant testified was no more than a common hope that the partnership earnings would

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[6] King and Mockovak did not remain partners until termination of the leases for the Wisconsin, Nevada, Oregon, and Idaho clinics. King testified that when those clinics were closed, the leases were assumed or bought out. RP 251:5-14 (R). As for the warranty surgery obligations, *see* Op. at 20, there was no evidence in the record suggesting that King and Mockovak entered into their partnership for the purpose of offering and making good on warranty surgeries, or that they agreed to remain partners until the deaths of all their patients who had purchased lifetime warranties.

pay for all the necessary expenses. Such a hope does not establish even by implication a 'definite term or particular undertaking' ...." *Id.* at 196 (citation omitted). "All partnerships are ordinarily entered into with the hope that they will be profitable, but that alone does not make them all partnerships for a term and obligate the partners to continue in the partnerships until all of the losses over a period of many years have been recovered." *Id.*

Here, too, the evidence shows there was no understanding that King and Mockovak would remain partners until their losses were repaid. Agreeing to be equally responsible for partnership obligations is not the same thing as agreeing to remain partners until all obligations the partnership incurs are satisfied. King and Mockovak's arrangement was a classic partnership at will. The Court of Appeals therefore committed no error when it reversed the trial court's erroneous statute of frauds ruling.

### B. The Court of Appeals' rejection of Mockovak's confusing, misleading, and argumentative jury instruction is consistent with precedent and does not raise a constitutional issue or an issue of substantial public interest.

Mockovak's jury instruction challenges are based on the Court of Appeals' affirmance of the trial court's refusal to give the following instruction:

> Mockovak has been convicted of crimes which will be accepted as fact for purposes of this trial. The Washington Constitution's Declaration of Rights provides that "[n]o conviction shall work a corruption of the

> blood nor a forfeiture of the estate." Mockovak seeks to recover damages and the value of his share of the Clearly Lasik® business, which are part of his "estate." You may consider whether Mockovak's conviction had any effect on the value of his "estate," but you may not, under the Washington Constitution's Declaration of Rights, conclude that he "forfeited" his estate by virtue of his conviction.

Op. at 16 (alteration in original).

The first sentence of the proposed instruction was ambiguous. The fact that Mockovak had been convicted of crimes was indisputable.[7] Characterizing his convictions as something to be "accepted as fact for purposes of this trial" was confusing and argumentative.

In the second sentence, the quotation marks indicated that the constitutional provision was quoted, but that was not the case. Mockovak paraphrased article 1, section 15, of the Washington Constitution. It was misleading to suggest otherwise.

The third sentence was confusing on two fronts. The reference to "value of his share of the Clearly Lasik® business" was misleading because only Mockovak's KMEC shares were to be valued under RCW 18.100.116 and 23B.13.300. As Mockovak still held his shares in Clearly Lasik, those shares

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[7] *See State v. Mockovak*, 2013 WL 2181435, at *1 (affirming Mockovak's convictions for attempted murder in the first degree, solicitation to commit murder in the first degree, attempted theft in the first degree, and conspiracy to commit theft in the first degree), *review denied*, 178 Wn.2d 1022 (2013); *In re Mockovak*, 194 Wn. App. 310, 377 P.3d 231 (2016) (denying post-conviction relief).

were not subject to any valuation procedure. The sentence also was confusing because it suggested that damages were "part of [Mockovak's] 'estate.'" Although choses in action may have been part of Mockovak's estate, damages were not. The jury ruled against him on all of his tort claims, and Mockovak therefore had no right to, or property interest in, any damages.

Finally, the last sentence was more a matter of argument than a statement of applicable law. Concluding that the proposed instruction, as a whole, "could cause confusion for the jury" and fell "in the realm of argument," the trial court refused to give it to the jury. RP 678 (R). The Court of Appeals found there was no abuse of discretion.

**1. The Court of Appeals committed no error in upholding the trial court's rejection of a confusing, misleading, and argumentative instruction.**

It is well established that a trial court has no obligation to give a misleading or argumentative instruction. *See, e.g., Watson v. Hockett,* 107 Wn.2d 158, 163, 727 P.2d 669 (1986) (modern jury instruction practice is aimed at "'avoid[ing] slanted or argumentative instructions'" (citation omitted)); *State v. Rehak,* 67 Wn. App. 157, 165, 834 P.2d 651 (1992) (trial court is not obliged to give misleading instructions). A trial court has a constitutional duty to "declare the law applicable to the case in a general way," *Hiscock v. Phinney,* 81 Wash. 117, 123, 142 P. 461 (1914) (citing Wash.

Const. art. IV, § 16), but declaring the law in a misleading fashion can lead to prejudicial error, *see Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 860, 281 P.3d 289 (2012).

Here, the trial court gave instructions stating the elements of Mockovak's tort claims and told the jury that if they found in Mockovak's favor on any of the claims, the jury should award damages in an amount that would provide reasonable and fair compensation. CP 7129-31, 7134-35, 7138-39, 7142-43, 7146. Mockovak has not challenged these instructions, and does not contend that they failed to declare the law. To the extent Mockovak believed it was essential to his case that an instruction based on article 1, section of 15 of the Washington Constitution also be given, he should have provided an instruction that correctly stated the law and was not misleading or argumentative. *See Harris v. Robert C. Groth, M.D., Inc., P.S.*, 99 Wn.2d 438, 447, 63 P.2d 113 (1983). But he did not do so, and the trial court had no duty to revise the proposed instruction so as to eliminate confusing and improper statements. *See Juneau v. Watson*, 68 Wn.2d 874, 880, 416 P.2d 75 (1966).

A trial court's refusal to give a requested instruction is reviewed only for abuse of discretion. *See Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996). Although Mockovak argues that the Court of Appeals erred in upholding the trial court's refusal to give the proposed instruction, that

decision is entirely consistent with the above-cited precedent. None of the cases cited by Mockovak requires a different conclusion. In none of them did a court hold that it is an abuse of discretion to reject a confusing, misleading, and argumentative instruction merely because a reference to a constitutional right is included along with confusing and improper statements.

**2. The trial court's refusal to give the instruction was not prejudicial because Mockovak failed to prove his tort claims and the jury therefore never reached the issue of damages.**

Had the trial court abused its discretion in rejecting the proposed instruction (it did not), the error would have been harmless. Mockovak did not prevail on any of his personal claims for conversion, unjust enrichment, civil conspiracy and fraud. CP 7156-60. He received no award of damages and thus there was no opportunity for the jury to effect an unlawful forfeiture of damages.[8]

There is one additional point to be made. When this case is remanded to the trial court, the only matters at issue will be (1) King's claim for breach of contract damages, and (2) the value of Mockovak's KMEC shares. The jury

[8] It is ironic that Mockovak argues it would be "unconstitutional for the jury to take away any portion of [his] share of the ***partnership property*** because he committed felony offenses." Pet. at 16 (emphasis added). He completely ignores that he was contending at trial (and is still contending) that there was no partnership. According to Mockovak, "[n]o 'partnership' contract" existed between himself and King. CP 5614; *see also id.* ("King and Mockovak indisputably operated using the corporate form. The fact that the parties conducted their business using the corporate form negates the existence of an informal partnership.").

instruction argument is wholly irrelevant to that proceeding because Mockovak will not be seeking damages and the trial court judge, not a jury, will be deciding the value of Mockovak's KMEC shares. Thus, Mockovak's current argument boils down to a request that the Court accept review of a jury instruction issue merely to render an advisory opinion. The Court should decline that request.

In sum, contrary to Mockovak's arguments, the Court of Appeals' ruling with respect to Mockovak's proposed jury instruction does not involve an issue of substantial public interest. It also is not in conflict with other appellate court decisions, or with decisions from this Court or the United States Supreme Court. Mockovak has failed to demonstrate that this issue warrants review under any of the criteria listed in RAP 13.4(b).

## VI. CONCLUSION

For all of the reasons stated, Mockovak's Petition for Review should be denied.

DATED: March 15 2018.

STOEL RIVES LLP

David R. Goodnight, WSBA #20286
Jill D. Bowman, WSBA #11754
Rachel D. Groshong, WSBA #47021
STOEL RIVES LLP
600 University Street, Suite 3600
Seattle, WA 98101
206.624.0900

*Attorneys for Respondents*

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the state of Washington that, on March 15, 2018, I caused the **Answer to Petition for Review** to be filed with the Washington Supreme Court, and caused a true and correct copy of same to be served upon the following parties in the manner indicated below:

James Elliot Lobsenz
CARNEY BADLEY SPELLMAN
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010

☐ hand delivery via messenger
☒ mailing with postage prepaid
☒ via email
lobsenz@carneylaw.com

*Attorney for Petitioner*

DATED: March 15, 2018, at Seattle, Washington.

STOEL RIVES LLP

Nancy Masterson

Nancy Masterson, Practice Assistant

## STOEL RIVES LLP

## March 15, 2018 - 2:04 PM

## Transmittal Information

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