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NO. 64578-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

WOODINVILLE BUSINESS CENTER NO. 1, a Washington Limited Partnership,

Respondent/Third-Party Plaintiff,

v.

ALBERT L. DYKES, an individual and former General Managing Partner of Woodinville Business Center No. 1, and MARGARET RYAN-DYKES, an individual, and the marital community composed thereof,

Appellants/Third-Party Defendants.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	<i>Page</i>
I. INTRODUCTION	1
II. SUPPLEMENTAL STATEMENT OF THE CASE.....	2
A. WBC.....	2
B. DYKES' COMMISSION RIGHTS AND CONTROL OF WBC AS MANAGING GENERAL PARTNER	3
C. DYKES' FIDUCIARY DUTY	3
D. FIRST LAWSUIT BETWEEN LUMPKIN AND DYKES	4
E. DYKES CONTRACTS WITH PERALEZ AND UBI	4
F. DYKES' TERMINATION AS WBC'S MANAGING GENERAL PARTNER.....	5
G. DYKES PAYS HIMSELF AN EXCESSIVE COMMISSION UPON THE SALE OF THE WBC REAL PROPERTY	5
H. THIS LAWSUIT	6
I. THE COURT WITHHOLDS FROM THE JURY ALL EQUITABLE BREACH OF FIDUCIARY DUTY CLAIM DETERMINATIONS.....	8
J. TESTIMONY ON DYKES' EXCESSIVE COMMISSION	8
K. UBI'S CLAIMS DISMISSED WITH PREJUDICE.....	9
L. JUDGE MCCARTHY RULED DYKES BREACHED HIS FIDUCIARY DUTY	9
M. THE JURY AWARDED WBC \$206,000 AS DAMAGES FOR DYKES' BREACH OF CONTRACT BY PAYING HIMSELF THE EXCESSIVE COMMISSION.....	10
N. POST-JUDGMENT MOTIONS	10
O. JUDGE MCCARTHY AWARDED WBC \$100,000 AGAINST DYKES FOR HIS BREACH OF FIDUCIARY DUTY AND PREJUDGMENT INTEREST TO WBC ON THE BREACH OF CONTRACT DAMAGES	11
III. ARGUMENT	12
A. THE COURT PROPERLY AWARDED WBC PREJUDGMENT INTEREST BECAUSE WBC'S DAMAGES WERE LIQUIDATED	12

1.	An award of prejudgment interest is reviewed for an abuse of discretion, not <i>de novo</i> as Dykes contends	12
2.	An award of prejudgment interest is not reviewed under a different standard than a determination that damages are liquidated	15
3.	The trial court did not abuse its discretion when it awarded prejudgment interest	19
4.	The timing of the “act of discretion” does not determine whether damages are liquidated.	27
B.	THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY REMOVING THE EQUITABLE BREACH OF FIDUCIARY DUTY CLAIM FROM THE JURY	29
1.	The factors listed in <i>Brown</i> are not mandatory and a trial court does not abuse its discretion by failing to analyze each	29
2.	Dykes was not prejudiced by WBC’s request to remove the action for breach of fiduciary duty from the jury	32
C.	THE TRIAL COURT’S RULING THAT DYKES BREACHED HIS FIDUCIARY DUTY TO WBC IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND IS CONSISTENT WITH WASHINGTON LAW.....	34
1.	Dykes owed WBC a fiduciary duty.....	35
2.	Judge McCarthy’s ruling that Dykes breached his fiduciary duty is supported by substantial evidence.....	38
D.	THE TRIAL COURT APPROPRIATELY AWARDED JUDGMENT OF \$100,000 AGAINST DYKES FOR BREACHING HIS FIDUCIARY DUTY TO WBC	39
1.	Disgorgement of an agent’s commission is an appropriate remedy for breach of fiduciary duty.....	39
2.	The trial court did not improperly rely upon evidence from the First Lawsuit.....	40
IV.	CONCLUSION	43

TABLE OF AUTHORITIES

	<i>Page</i>
Cases	
<i>Aker Verdal A/S v. Neil F. Lampson, Inc.</i> , 65 Wn. App. 177, 828 P.2d 610 (1992).....	passim
<i>Allard v. Pac. Nat. Bank</i> , 99 Wn.2d 394, 663 P.2d 104 (1983)	29
<i>Bassan v. Investment Exchange Corp.</i> , 83 Wn.2d 922, 524 P.2d 233 (1974)	36, 37
<i>Bishop of Victoria Corp. Sole v. Corporate Business Park, LLC</i> , 138 Wn. App. 443, 158 P.3d 1183 (2007).....	38
<i>Bland v. Mentor</i> , 63 Wn.2d 150, 385 P.2d 727 (1963)	34
<i>Bovy v. Graham, Cohen & Wampold</i> , 17 Wn. App. 567, 564 P.2d 1175 (1977).....	35
<i>Brown v. Safeway Stores</i> , 94 Wn.2d 359, 617 P.2d 704 (1980)	29, 30, 31, 33
<i>Coast Trading Co., Inc. v. Parmac, Inc.</i> , 21 Wn. App. 896, 587 P.2d 1071 (1978).....	29
<i>Cotton v. Kronenberg</i> , 111 Wn. App. 258, 44 P.3d 878 (2002).....	39, 40
<i>Coulter v. Asten Group, Inc.</i> , 155 Wn. App. 1, 230 P.3d 169 (2010).....	12
<i>Dautel v. Heritage Home Center, Inc.</i> , 89 Wn. App. 148, 948 P.2d 397 (1997).....	passim
<i>Davis v. Dep't of Labor & Indus.</i> , 94 Wn.2d 119, 615 P.2d 1279 (1980)	34
<i>Dorsey v. King County</i> , 51 Wn. App. 664, 754 P.2d 1255 (1988).....	34
<i>Douglas NW, Inc. v. Bill O'Brien & Sons Constr., Inc.</i> , 64 Wn. App. 661, 828 P.2d 565 (1992).....	28
<i>Egerer v. CSR West, LLC</i> , 116 Wn. App. 645, 67 P.3d 1128 (2003).....	passim
<i>Endicott v. Icicle Seafoods, Inc.</i> , 167 Wn.2d 873, 224 P.3d 761 (2010)	12, 15
<i>Ernst Home Center, Inc. v. Sato</i> , 80 Wn. App. 473, 910 P.2d 486 (1996).....	15

<i>Fisher Properties, Inc. v. Arden-Mayfair, Inc.</i> , 115 Wn.2d 364, 798 P.2d 799 (1990)	35
<i>Gillespie v. Seattle-First Nat'l Bank</i> , 70 Wn. App. 150, 855 P.2d 680 (1993).....	29
<i>Goucher v. J.R. Simplot Co.</i> , 104 Wn.2d 662, 709 P.2d 774 (1985)	33
<i>Green v. Hooper</i> , 149 Wn. App. 627, 205 P.3d 134 (2009).....	30, 31
<i>Hadley v. Maxwell</i> , 120 Wn. App. 137, 84 P.3d 286 (2004).....	13
<i>Horne v. Aune</i> , 130 Wn. App. 183, 121 P.3d 1227 (2005).....	38
<i>J&J Celcom v. AT&T Wireless Servs., Inc.</i> , 162 Wn.2d 102, 169 P.3d 823 (2007)	36, 37
<i>Jackowski v. Borchelt</i> , 151 Wn. App. 1, 209 P.3d 514 (2009).....	31
<i>Karle v. Seder</i> , 35 Wn.2d 542, 214 P.2d 684 (1950)	36, 37
<i>Kiewit-Grice v. State</i> , 77 Wn. App. 867, 895 P.2d 6 (1995).....	13, 14, 16, 17
<i>King Aircraft Sales, Inc. v. Lane</i> , 68 Wn. App. 706, 846 P.2d 550 (1993).....	31
<i>Maryhill Museum of Fine Arts v. Emil's Concrete Constr. Co.</i> , 50 Wn. App. 895, 751 P.2d 866, review denied, 111 Wn.2d 1009 (1988).....	25
<i>McConnell v. Mothers Work, Inc.</i> , 131 Wn. App. 525, 128 P.3d 128 (2006).....	13, 14
<i>Mega v. Whitworth College</i> , 138 Wn. App. 661, 158 P.3d 1211 (2007).....	13, 19
<i>Polygon Northwest Co. v. American National Fire Ins. Co.</i> , 143 Wn. App. 753, 189 P.3d 777 (2008).....	passim
<i>Prier v. Refrigeration Eng'g Co.</i> , 74 Wn.2d 25, 442 P.2d 621 (1968)	19, 20
<i>Scavenius v. Manchester Port Dist.</i> , 2 Wn. App. 126, 467 P.2d 372 (1970).....	31
<i>Scoccolo Constr., Inc. v. City of Renton</i> , 158 Wn.2d 506, 145 P.3d 371 (2006)	passim
<i>St. Hilaire v. Food Servs. Of Am., Inc.</i> , 82 Wn. App. 343, 917 P.2d 1114 (1996).....	24, 25, 26, 27
<i>State ex rel. Carroll v. Junker</i> , 79 Wn.2d 12, 482 P.2d 775 (1971)	19

Tri-M Erectors, Inc. v. Donald M. Drake Co.,
27 Wn. App. 529, 618 P.2d 1341 (1980)..... 16, 17, 18

Wenatchee Sportsmen Ass'n v. Chelan County,
141 Wn.2d 169, 4 P.3d 123 (2000) 34

Statutes

RCW 25.05.165..... 35

RCW 25.05.165(1)-(5) 36

RCW 25.05.165(2)(a)-(c)..... 38

RCW 25.10.240(1)..... 35

Other Authorities

C. McCormick, Damages (Hornbook Series) § 54, at 213 (1935) 20

Restatement (Third) of Agency, §§ 8.01, 8.02 cmt d(2) (2006)..... 40

Rules

CR 6(d)..... 32, 33

KCLCR 7(b)(4)(A)..... 32

I. INTRODUCTION

This is an appeal from the second lawsuit arising out of Appellant/Third-Party Defendant Albert Dykes' ("Dykes")¹ conduct acting as the Managing General Partner of Respondent/Third-Party Plaintiff Woodinville Business Center No. 1, a Washington limited partnership ("WBC"). In both lawsuits, Dykes was found to have breached his fiduciary duties to his partners, resulting in money judgments in each instance. As with the First Lawsuit, Dykes' appeal in this lawsuit is completely unsupported by either the facts presented at trial or the controlling law.

In his brief, Dykes assigns error to the following four rulings by Judge McCarthy: 1) the award to WBC of prejudgment interest on the jury verdict against Dykes; 2) the decision to withhold from the jury and reserve to the court the decision on WBC's equitable claim that Dykes breached his fiduciary duty; 3) the ruling that Dykes breached his fiduciary duty to WBC; and 4) the subsequent ruling that Dykes disgorge \$100,000 from his excessive commission as damages for his breach of his fiduciary duty to WBC. Each of these rulings was within the discretion of

¹ Dykes' wife, Margaret Ryan-Dykes, is also an appellant named in this appeal, although she was not a party in the trial below and her individual conduct is not at issue in this matter. For simplicity, all references to "Dykes" in this brief should be read to include a reference to both appellants where appropriate.

Judge McCarthy, who properly ruled in each instance in accord with controlling Washington law. Dykes has failed to meet his burden to demonstrate any abuse of discretion by Judge McCarthy. This Court should affirm each of Judge McCarthy's challenged rulings.

II. SUPPLEMENTAL STATEMENT OF THE CASE

A. WBC

WBC is a Washington limited partnership formed in 1980. WBC's purpose was to acquire, develop and operate a warehouse/office complex of approximately 80,000 square feet located at the northeast corner of Northeast 177th Place and 134th Avenue Northeast in Woodinville, Washington. [Ex. 11, p. 4]. WBC's original general partners were Dykes, John Kloster ("Kloster") and Ned Lumpkin ("Lumpkin"). Shortly after WBC's formation, Robert Shepherd ("Shepherd") also became a general partner. [Ex. 11, p. 12-14, Ex. 31; RP 367-68, 401, 404, 499-500]. WBC initially had approximately 34 limited partners. [RP 421]. In 1988, Shepherd withdrew as a WBC general partner. [RP 368, 405]. Subsequently, Kloster assigned his WBC general partnership interest to Lumpkin, leaving only Dykes and Lumpkin as general partners. [Ex. 100; RP 403, 406, 500].

B. Dykes' Commission Rights and Control of WBC as Managing General Partner

The WBC formation documents provide for Dykes to earn a commission on the leasing or sale of the WBC property provided that WBC would not be obligated to pay Dykes “a commission larger than is normal for the real estate industry in the area and the total commissions at time of sale are not to exceed 6 percent.” [Ex. 11, p. 13; RP 341-42, 434-35]. Dykes also required that he be named as WBC’s Managing General Partner, and served as such until he was removed by the limited partners effective January 16, 2008. [Ex. 16, 17, 32; RP 369, 422-23].

C. Dykes' Fiduciary Duty

Dykes, as WBC’s managing general partner, had complete authority to manage WBC’s affairs. [Ex. 11; RP 373-74, 605]. Commensurate with Dykes’ authority was a corresponding fiduciary responsibility. [RP 372]. Dykes was the only general partner acting on behalf of WBC. The normal checks and balances which would have been present if all of the general partners were required to act were not present. [Ex. 11; RP 373-74, 605-06]. Dykes understood his fiduciary responsibility and even testified regarding that responsibility here and in the First Lawsuit. [Ex. 104, p. 47, Ex. 105, p. 6; RP 372, 469-72].

D. First Lawsuit Between Lumpkin and Dykes

In August 2005, Lumpkin and his construction company, Lumpkin, Inc., sued Dykes and WBC (Dykes was Managing General Partner at the time) because Dykes failed to allow Lumpkin, Inc. to build the final building on the WBC property as had been agreed to in the WBC formation documents (“First Lawsuit”). [Ex. 105]. The matter was decided adversely to Dykes after a bench trial before Judge William Downing. [Ex. 105]. Among other things, Judge Downing found that Dykes had breached his fiduciary duty to Lumpkin as WBC’s Managing General Partner. [Ex. 105, p. 11].

E. Dykes Contracts with Peralez and UBI

In late 2005, Dykes contracted with Roger Harman (“Harman”), the designated broker for Peralez Real Estate (“Peralez”), to assist Dykes in the leasing of WBC’s business park. [RP 118, 125, 377]. Dykes expanded his use of Harman in October 2006 when he executed a consulting agreement with Harman’s solely owned corporation, UBI, to assist Dykes with sales strategy and analysis. [Ex. 14; RP 100, 130-31, 155]. Less than a month later, Dykes and Harman executed a second contract, which increased UBI’s compensation to include a commission set as a percentage of Dykes’ commission without any corresponding change to UBI’s responsibilities or duties. [RP 134-35, 382].

F. Dykes' Termination as WBC's Managing General Partner

In August 2007, just four months after being found to have breached his fiduciary duties related to managing WBC in the First Lawsuit, the WBC limited partners voted to remove Dykes as WBC's Managing General Partner if a contract to sell WBC's property had not been obtained by December 31, 2007 and the sale had not been closed by January 15, 2008. [Ex. 16, 17; RP 327-28]. A process was established to effectuate this change with retired Judge Robert Winsor acting on behalf of the limited partners as the decision maker. [Ex. 16, 17; RP 328]. Dykes was removed as WBC's Managing General Partner effective January 16, 2008. However, Dykes retained the authority to effect the sale closing of WBC's property. [Ex. 17; RP 198-99, 329-30, 343, 352, 425-26, 501-02]. Lumpkin, WBC's sole remaining general partner, took over as managing general partner upon Dykes' removal. [Ex. 16, 17; RP 343].

G. Dykes Pays Himself an Excessive Commission upon the Sale of the WBC Real Property

In late January 2008, the sale of the WBC property closed for a purchase price of \$10.3 million dollars. [RP 186, 189-90]. Despite the commission language limiting Dykes' sales commission to a normal market commission with the total commissions paid not to exceed six percent, Dykes, who had control of the closing, paid himself a sales commission equal to the full six percent, \$618,000. [Ex. 37; RP 341, 429-

30, 434]. Not only was this substantially above market, but when combined with the other commissions, exceeded six percent. [Ex. 36, 41; RP 217-18, 440-43, 547-48, 551-52]. Dykes did not disclose to Lumpkin or any of the limited partners his intention to take a six percent commission on the sale until sending the closing statement to Lumpkin on the eve of closing. [Ex. 36, 45, 114; RP 191-93, 341, 356, 508-15, 592]. Dykes also failed to disclose that he had agreed as WBC's Managing Partner to pay UBI an additional \$123,000 out of the proceeds of the closing. [Ex. 65, p. 7, Ex. 102, 20; RP 204, 207-08, 508-15, 592, 616, 632-33].

H. This Lawsuit

On March 25, 2008, UBI sued WBC and Lumpkin for damages alleging breach of the contract between UBI and WBC. [CP 25-29, 109-14]. Specifically, UBI alleged WBC agreed to pay UBI a fee at the time of the sale of the WBC property in an amount equal to 20% of the sales commission paid to Dykes, which UBI claimed amounted to \$123,600. [CP 112-113]. On the same day, Peralez also filed a lawsuit against WBC and Lumpkin alleging breach of contract related to leasing services provided to WBC by Peralez pursuant to another agreement negotiated by Dykes. [CP 3-6, 25-29]. Harman was the principal broker for both

Peralez and UBI. [RP100, 104]. On May 8, 2008, the two lawsuits were consolidated.²

On May 29, 2008, WBC and Lumpkin filed their Answer, Affirmative Defenses, and Third Party Complaint, which stated claims against Dykes, including breach of fiduciary duty, contribution for any amounts WBC may be found to owe to UBI and/or Peralez, breach of contract for Dykes paying himself excessive leasing commissions, breach of contract for Dykes paying himself excessive sales commissions, breach of contract for Dykes paying himself excessive management fees, and breach of contract for Dykes paying himself excessive construction fees. [CP 7-15].

On August 25, 2009, the parties mediated and resolved all claims related to Peralez and several of the claims between UBI, WBC, and Dykes, leaving unresolved only WBC's claims against Dykes for breach of fiduciary duty, breach of contract related to his sales commission, and contribution, and UBI's claims against WBC and Dykes for its alleged fees. [CP 219]. On September 15, 2009, UBI, WBC, and Dykes

² See Order to Consolidate, identified in WBC's Supplemental Designation of Clerks Papers, which WBC filed in conjunction with this brief. Unless requested to do so by the Court, WBC will not amend this brief to include the forthcoming designated page numbers for the citations to WBC's Supplemental Designation of Clerks Papers.

proceeded to a jury trial in King County Superior Court before the Honorable Harry McCarthy. [RP 1].

I. The Court Withholds from the Jury all Equitable Breach of Fiduciary Duty Claim Determinations

In its Trial Brief, WBC argued that its breach of fiduciary duty claim against Dykes was equitable in nature, and therefore requested that the trial court, instead of the jury, make all relevant determinations regarding this claim. [CP 225]. Dykes' counsel agreed the claim was equitable, but argued it should be decided by the jury. [RP 6]. On the first day of trial, the court heard the arguments of counsel and reserved its ruling on whether to allow the jury to determine the breach of fiduciary duty claim. [RP 17-18]. On the morning of the second day of trial, after Judge McCarthy had an adequate opportunity to review the trial briefs, he ruled that the court, not the jury, would make all determinations regarding WBC's equitable claim that Dykes breached his fiduciary duty. [RP 30-31].

J. Testimony on Dykes' Excessive Commission

During the trial, the jury heard considerable testimony regarding what a "normal" real estate commission would be for the sale of the WBC property, and whether the six percent commission Dykes paid himself exceeded that "normal" commission: Dykes, Harman, the buyer's agent, Lumpkin, Dykes' expert, and WBC's expert all testified regarding their

opinion of whether Dykes' six percent commission was a "normal" commission. [Ex. 62; RP 281-93; 369-71, 523-28, 591, 687-99, 718-21].

K. UBI's Claims Dismissed with Prejudice

On the morning of the fifth day of trial, WBC requested the court dismiss UBI's breach of contract claim against WBC for lack of consideration. [RP 652-667]. After hearing arguments of counsel and reviewing the briefing of UBI and WBC, the court ruled that there was inadequate consideration to form a binding contract and dismissed UBI's claim against WBC. [RP 667-673]. Later that same day, UBI informed the court that it had reached a resolution of its remaining claims against Dykes and requested that those claims be dismissed, leaving only WBC's claims against Dykes for resolution by the judge and jury. [RP 811].

L. Judge McCarthy Ruled Dykes Breached his Fiduciary Duty

On the morning of the sixth day of trial, after closing arguments, Judge McCarthy instructed the jury and excused them to deliberate on the question of whether Dykes breached his contractual duty by taking an excessive commission, and if so, what the proper amount of the commission should be. [RP 897-98]. While the jury deliberated, the court heard oral argument on WBC's claim that Dykes breached his fiduciary duty to his partners. [RP 902-14]. After hearing argument of counsel, the court ruled that Dykes had breached his fiduciary duty to his partners by failing to disclose to them material information about his commission and

the other fees associated with the sale of the WBC property. [RP 914-18]. The court reserved its decision on the remedy for Dykes' breach of fiduciary duty until after the jury returned its verdict on the breach of contract claim. [RP 918-19].

M. The Jury Awarded WBC \$206,000 as Damages for Dykes' Breach of Contract by Paying Himself the Excessive Commission

On September 24, 2009, the jury returned a verdict finding that Dykes was not entitled to take a \$618,000 six percent commission, and further finding that WBC was awarded \$206,000 against Dykes, being the difference between the \$618,000 six percent commission Dykes paid himself and the \$412,000 four percent commission the jury found Dykes should have received. [RP 925-27; CP28]. Judge Bruce Hilyer received the verdict because Judge McCarthy was unavailable. [RP 925].

N. Post-Judgment Motions

On October 1, 2009, WBC filed a motion for an award of attorney fees against both Dykes and UBI. [CP 46-52]. Also on October 1, 2009, Dykes filed a motion for reconsideration regarding the Court's ruling that Dykes breached his fiduciary duty. [CP 32-39]. WBC responded to Dykes' motion for reconsideration, and Dykes filed a reply. [CP 56-72, 73-80]. The motions were set for hearing on November 6, 2009. WBC filed proposed judgments against Dykes and WBC for presentation at the hearing, supported by a memorandum in support of WBC's request for an

award of prejudgment interest on the jury award against Dykes for his breach of contract. [CP 13, 14].³

O. Judge McCarthy Awarded WBC \$100,000 Against Dykes for His Breach of Fiduciary Duty and Prejudgment Interest to WBC on the Breach of Contract Damages

At the hearing on November 6, 2009, Judge McCarthy ruled on Dykes' Motion for Reconsideration of WBC's breach of fiduciary duty claim and WBC's motion for prejudgment interest on the \$206,000 jury award. [RP 3 (RP Nov. 6, 2009)]. After hearing argument and considering the briefing of both parties, the Court awarded a \$100,000 judgment against Dykes in favor of WBC for Dykes' breach of fiduciary duty. [RP 11-16 (RP Nov. 6, 2009)]. After hearing argument and citing what Petitioners now assert in their appellate brief to be the controlling law, the court went on to rule that the \$206,000 damages constituted a liquidated amount under Washington law because the jury did not exercise discretion in awarding these damages. [RP 4-11, 16-18 (RP Nov. 6, 2009)]. The Court subsequently ruled in favor of WBC on its motion for attorney fees. On November 23, 2009, the Court entered judgment against Dykes in favor of WBC for \$407,865.62, consisting of the \$206,000 jury award for breach of contract, the \$100,000 award for breach of fiduciary duty,

³ See also, Memorandum Supporting Award of Prejudgment Interest to WBC, identified in WBC's Supplemental Designation of Clerks Papers.

\$45,579.70 in prejudgment interest on the breach of contract award, attorney fees of \$47,529.73, and costs of \$700.27. [CP 84-85].⁴

Dykes timely appealed. [CP 87-88].

III. ARGUMENT

A. The court properly awarded WBC prejudgment interest because WBC's damages were liquidated

1. An award of prejudgment interest is reviewed for an abuse of discretion, not *de novo* as Dykes contends

In *Scoccolo Constr., Inc. v. City of Renton*, 158 Wn.2d 506, 519, 145 P.3d 371 (2006), the Washington Supreme Court stated that “[t]he award of prejudgment interest is reviewed for abuse of discretion.” It recently affirmed this standard in *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 886, 224 P.3d 761 (2010), where it cited to *Scoccolo* and stated that it “review[s] a prejudgment interest award for abuse of discretion.” This Court has also stated that the appropriate standard is abuse of discretion. *Polygon Northwest Co. v. American National Fire Ins. Co.*, 143 Wn. App. 753, 790, 189 P.3d 777 (2008); *Coulter v. Asten Group, Inc.*, 155 Wn. App. 1, 12, 230 P.3d 169 (2010).

Though the standard of review for an award of prejudgment interest appears to be a settled matter, Dykes now asks this Court to

⁴ See, Order Concerning Attorney's Fees and Costs, identified in WBC's Supplemental Designation of Clerks Papers.

overrule both itself and the Washington Supreme Court and apply a different standard. Brief of Appellants at 20.

Instead of the abuse of discretion standard applied by this Court as recently as January 2010, Dykes urges the Court to follow the lead of Division III and apply a *de novo* standard of review, as it did in *McConnell v. Mothers Work, Inc.*, 131 Wn. App. 525, 536, 128 P.3d 128 (2006). However, the *McConnell* court did not discuss how it arrived at that standard, nor did it explain why it applied a different test than that which it applied just two years earlier, in *Hadley v. Maxwell*, 120 Wn. App. 137, 141, 84 P.3d 286 (2004), where it stated that it “review[s] a trial court’s decision regarding prejudgment interest for abuse of discretion.” Furthermore, just one year **after** its decision in *McConnell*, Division III stated, in direct contrast to *McConnell*, that it “review[s] prejudgment interest awards for abuse of discretion.” *Mega v. Whitworth College*, 138 Wn. App. 661, 670, 158 P.3d 1211 (2007).

Adding to the confusion, the *McConnell* court cited to *Kiewit-Grice v. State*, 77 Wn. App. 867, 895 P.2d 6 (1995), a Division II case, to support its assertion that review is *de novo*. Interestingly, the Washington Supreme Court, in *Scoccolo*, cited to the exact same section of *Kiewit-Grice* to support its assertion that review is for abuse of discretion. In *Kiewit-Grice*, the court said, without qualification: “We review a trial

court's award of prejudgment interest for abuse of discretion." *Id.* at 872. As such, it is difficult to see how either the *McConnell* court or Dykes arrived at a different conclusion. This Court, in *Polygon*, was similarly confused, and it addressed this very issue, stating:

The parties disagree on the standard of review of the trial court's award of prejudgment interest. Citing *Scoccolo*, Assurance states that a "trial court's award of prejudgment interest is reviewed for abuse of discretion." In contrast, Great American cites *McConnell v. Mothers Work, Inc.* for the proposition that "whether damages are liquidated for purposes of prejudgment interest is reviewed *de novo*." Both cases in turn cite *Kiewit-Grice v. State* for their differing standards. The source of confusion is not readily apparent; all three cases involve the question of whether damages are liquidated, and *Kiewit-Grice* clearly states that the appellate courts "review a trial court's award for abuse of discretion." This correct statement of the law was adopted by the Supreme Court in *Scoccolo*, whose pronouncement is of course final, in any event."

143 Wn. App. at 790 n.13 (citations omitted). This Court has already considered the exact issue Dykes argues now and made itself completely clear.

Despite this Court's unequivocal statements, Dykes continues to question its decision. He argues that the Supreme Court's application of the abuse of discretion standard suggested in *Scoccolo* is inapplicable here, because the decision in *Scoccolo* is limited to its facts, apparently because the case under review was published only in part. Brief of Appellants at 21. However, in January of 2010, the Supreme Court once

again concluded that the standard of review was abuse of discretion. *Endicott*, 167 Wn.2d at 886. It cited to its decision in *Scoccolo* and made no mention of the limited application of *Scoccolo* suggested by Dykes.

At the time of its decision in *Endicott*, the Supreme Court had available to it the previously discussed case law, including this Court's comments in *Polygon*. Furthermore, in the appellant's brief to the Supreme Court in *Endicott*, it was specifically pointed out that there is a Division I case, *Ernst Home Center, Inc. v. Sato*, 80 Wn. App. 473, 492-94, 910 P.2d 486 (1996), where the concurrence suggests, similar to Dykes' assertion, that whether prejudgment interest is authorized is a question of law to be reviewed *de novo*. Brief of Appellant Icicle Seafoods, Inc. at 27 n.8, *Endicott* (No. 61538-6-I), attached hereto in relevant part as an Appendix. Though the standard proposed by Dykes was brought to the attention of the Supreme Court, the court clearly did not find this argument persuasive, as it chose instead to affirm its decision in *Scoccolo* that the standard of review is abuse of discretion.

2. An award of prejudgment interest is not reviewed under a different standard than a determination that damages are liquidated

Dykes attempts to draw a distinction between the standard of review for an award of prejudgment interest and the standard of review for a determination that damages are liquidated. Brief of Appellants at 23.

There is absolutely no support for this distinction. Dykes points to *Kiewit-Grice*, 77 Wn. App. at 872, *Tri-M Erectors, Inc. v. Donald M. Drake Co.*, 27 Wn. App. 529, 618 P.2d 1341 (1980), and *Aker Verdal A/S v. Neil F. Lampson, Inc.*, 65 Wn. App. 177, 828 P.2d 610 (1992), to support this contention; however, Dykes mischaracterizes these cases.

As noted previously, *Kiewit-Grice* states **only** that the review of an award of prejudgment interest is for abuse of discretion. It makes no mention of *de novo* review, nor does it attempt to distinguish between the determination that damages are liquidated and the decision to award prejudgment interest for those liquidated damages. It simply states the sole applicable standard, determines that damages were not liquidated, and finds that the trial court abused its discretion in awarding prejudgment interest. This was not a process which required two different standards of review.

Dykes also asserts that this Court – despite its clear statement in *Polygon* that the proper standard of review where there is a question as to whether damages are liquidated is abuse of discretion – applied a *de novo* standard of review in both *Aker Verdal* and *Tri-M Erectors*. Dykes' assertions misrepresent the opinions in both cases.

As a threshold matter, it should be noted that neither *Aker Verdal* nor *Tri-M Erectors* mention the standard of review applied. Both were

decided before the line of cases such as *Kiewit-Grice*, *Polygon*, and *Scoccolo* established that the appropriate standard is abuse of discretion. Therefore, if *Aker Verdal* and *Tri-M Erectors* did in fact hold that the appropriate standard of review is *de novo*, then they have clearly been overruled. However, an analysis of the opinions reveals that this Court applied an abuse of discretion standard, consistent with its later decisions.

Whether the trial court's decision is being reviewed *de novo* or for an abuse of discretion, an appellate court must look at the evidentiary record and the evidence that was before the trial court. Otherwise, it would have no basis for its review. Contrary to Dykes' assertion, the simple fact that an appellate court reviews the record does not demonstrate *de novo* review, since a review of the record is required under either standard.

In *Aker Verdal*, this Court reviewed the basis for the trial court's decision and agreed with the trial court that there was a genuine dispute as to what the measure of damages should be, so damages were not liquidated and an award of prejudgment interest was not appropriate. 65 Wn. App. at 192. It did not make this decision without deference to the trial court's ruling; it determined that the trial court's decision was reasonable, and therefore, should not have been disturbed. This was not

de novo review; it was an application of the reasonableness standard, even if this Court did not specifically label it as such.

Similarly, in *Tri-M Erectors*, the court used exactly four sentences to find that the trial court's determination that damages were unliquidated was reasonable. 27 Wn. App. at 537. Clearly, the court did not engage in its own thorough analysis of the law and its application to the facts. It determined that the trial court's decision was based on tenable grounds and could not be disturbed. Again, this was not an independent *de novo* review; this was a review of the trial court's decision for abuse of discretion.

This Court's review of the trial court decisions in *Aker Verdal* and *Tri-M Erectors* is identical to the review done in *Polygon*, where it affirmatively stated that the standard of review is abuse of discretion. In *Polygon*, this Court noted the evidence that was before the trial court and directly quoted from the trial court's observations. 143 Wn. App. at 793. The affirmation of the trial court's award of prejudgment interest was based on a determination of reasonableness, not on a separate, independent *de novo* determination. *Id.* at 794.

The standard of review for an award of prejudgment interest is abuse of discretion. Both the Washington Supreme Court and this Court

have consistently applied that standard. Dykes has failed to show that this Court would be incorrect in applying that standard.

3. The trial court did not abuse its discretion when it awarded prejudgment interest

As discussed above, an appellate court reviews a trial court's award of prejudgment interest for abuse of discretion. Under such a standard, this Court "will not disturb the ruling absent a manifest abuse of discretion." *Mega*, 138 Wn. App. at 671. "Discretion is abused when the decision is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *Id.* (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

(a) Washington courts award prejudgment interest for liquidated claims

An award of prejudgment interest is based on the principle that a party should be charged interest for money it wrongfully withholds from another party. *E.g., Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 34-35, 442 P.2d 621 (1968). "It may be safely said that the tendency has been in favor of allowing interest rather than against it," and "[m]ere difference of opinion as to amount is, however, no more a reason to excuse [one] from interest than difference of opinion whether [they] legally ought to pay at all, which has never been held an excuse." *Id.* (Underline added.)

Washington courts award prejudgment interest when the claim is liquidated. *E.g., Scoccolo*, 158 Wn.2d at 519. A "liquidated" claim is

“one where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion.” *Prier*, 74 Wn.2d at 32; *accord* C. McCormick, *Damages* (Hornbook Series) § 54, at 213 (1935). By contrast, a claim is unliquidated “where the exact amount of the sum to be allowed cannot be definitely fixed from the facts proved, disputed or undisputed, but must in the last analysis depend upon the opinion or discretion of the judge or jury as to whether a larger or a smaller amount should be allowed.” *Scoccolo*, 158 Wn.2d at 519.

Critically, “[t]he existence of a dispute over the whole or part of the claim should not change the character of the claim from one for a liquidated, to one for an unliquidated, sum” *Id.*; *accord* *Egerer v. CSR West, LLC*, 116 Wn. App. 645, 653, 67 P.3d 1128 (2003) (dispute over dollar value to associate with “fair market value” did not render claim unliquidated). Further, a claim remains liquidated “even though the adversary successfully challenges the amount and succeeds in reducing it.” *Scoccolo*, 158 Wn.2d at 520.

Thus, a party is entitled to prejudgment interest where his claim is liquidated. A dispute over the amount of damages will not alter the liquidated character of the claim.

(b) This Court should be guided by the *Dautel* and *Egerer* decisions in affirming the trial court's award of prejudgment interest

The trial court's determination that WBC's damages were liquidated is supported by several Washington cases, including *Dautel v. Heritage Home Center, Inc.*, 89 Wn. App. 148, 948 P.2d 397 (1997), which was cited by the trial court. In *Dautel*, an employee sued her former employer for lost wages consisting of hourly wages and two commissions the employee argued should be paid at 20% and the employer argued should only be paid at 10%. *Id.* at 151. This Court determined that both the disputed commission amounts and the lost wages were liquidated sums. It described its reasoning about the disputed commissions being liquidated as follows:

Regarding the claim for unpaid commission, the dispute between the parties related to the proper percentage [the employee] was entitled to be paid. The amount actually owing could be computed with exactness once the trial court determined that [the employee] was entitled to her full commission rate of 20 percent. Therefore, the amount was a liquidated sum.

Id. at 155.

Dykes attempts to limit the holding in *Dautel* to a very narrow set of circumstances, where the trier of fact is simply presented with two options, and they need only choose between those two options. Brief of Appellants at 29. However, the *Dautel* court did not find that damages were liquidated because the fact-finder was presented with only two

options. Rather, it determined that damages were liquidated because the fact-finder was deciding upon the amount of damages – 10% or 20% – **not** the measure of damages. Once the trial court made the determination that a 20% commission was appropriate, it “was able to enter the judgment without any exercise of discretion or opinion regarding the amount due. Because the amounts owed to [the employee] could be determined exactly, without reliance on opinion or discretion, the claims were liquidated, and thus an award of prejudgment interest is proper.” *Id.*

The trial court’s determination that WBC’s damages were liquidated is further supported by the *Egerer* decision. In *Egerer*, a landowner contracted with an excavation contractor to have fill material hauled and deposited on the landowner’s property. The contractor found a cheaper way to dispose of the fill and refused to perform under the contract. The landowner’s claim was governed by the Uniform Commercial Code, which provided that the measure of damages was the difference between the contract price and the market price at the time of the breach. 116 Wn. App. at 648-49. The parties presented conflicting evidence of market price for the fill. The trial court ultimately ruled in favor of the landowner, ruled on the appropriate market price, and awarded prejudgment interest to the landowner. This Court, citing to

Dautel, agreed that the landowner's damages were liquidated and reasoned:

Like *Dautel*, where the trial court exercised discretion only to find the appropriate commission percentage, the trial court here exercised discretion only to find the appropriate market price. The amount [the contractor] actually owed could be computed with exactness once the trial court found that \$8.25 per cubic yard was the market price at the time [the landowner] learned of [the contractor's] breach.

Id. at 654.

Once again, this Court focused on the fact that the measure of damages was already set, this time by the UCC. Just because the contractor "proposed a lower market price [did] not render the claim unliquidated. The fact finder believed evidence showing that \$8.25 was the market price, and that evidence made it possible to compute exact damages without reliance on opinion or discretion." *Id.* Nothing in *Egerer* suggests that the damages were liquidated because the trial court was faced with only two choices, nor does it rely on *Dautel* for that proposition. Of critical importance was the predetermined measure of damages, and once the fact-finder decided on the market price, it could calculate damages without reliance on opinion or discretion.

The reasoning in both *Dautel* and *Egerer* applies directly to the facts of this case. The trial court held that the damages were liquidated because the jury did not exercise discretion in determining the measure of

damages. The measure of damages was already set as “the difference between a commission that Dykes took and a commission the jury determined would have been normal at that time.” [RP 17 (RP Nov. 6, 2009)]. The only decision the jury needed to make was the appropriate percentage of commission. The jury concluded, based on the evidence at trial, that the appropriate commission was 4%. Though different amounts were suggested by the parties, the claim was not rendered unliquidated. Once the jury chose 4% as the appropriate percentage of commission, it could calculate the damages without relying on opinion or discretion.

(c) The decision in *St. Hilaire* is not controlling

Despite the fact that the holding in *Dautel* speaks directly to the facts of this case, Dykes claims that *Dautel* does not apply, and argues instead that *St. Hilaire v. Food Servs. Of Am., Inc.*, 82 Wn. App. 343, 917 P.2d 1114 (1996), is controlling. Brief of Appellants at 29-32. In *St. Hilaire*, expert testimony was presented on the correct amount of damages. The jury awarded damages in amounts which fell in-between the figures presented by the experts, which led Division III to conclude that the damages were not liquidated, because “[t]he jurors necessarily used opinion and discretion in deciding what amount to award each grower.” 82 Wn. App. at 354.

The respondents in *St. Hilaire* argued that, “so long as the *measure* of damages is certain, prejudgment interest is appropriately awarded.” *Id.* (emphasis in original). However, the court disregarded this claim, stating that the cited cases, which included *Aker Verdal* and *Maryhill Museum of Fine Arts v. Emil’s Concrete Constr. Co.*, 50 Wn. App. 895, 903, 751 P.2d 866, *review denied*, 111 Wn.2d 1009 (1988), did not support that position. *Id.*

Dykes is incorrect that Division III’s holding in *St. Hilaire* requires that this Court overturn WBC’s award of prejudgment interest. *St. Hilaire* was decided before *Dautel* and *Egerer*, where this Court clearly articulated the distinction between a jury using discretion to determine the **measure** of damages and a jury using discretion to determine the **amount** of damages. It was not until *Egerer*, which was decided seven years after *St. Hilaire*, that this Court relied on *Aker Verdal* to support the very argument that was rejected in *St. Hilaire* – that damages are liquidated where the measure of damages is certain. In *Egerer*, this Court specifically noted that, “unlike in *Aker Verdal A/S* and *Maryhill Museum of Fine Arts*, here the measure of damages to be used was not left to the discretion of the fact-finder.” *Egerer*, 116 Wn. App. at 654. Because the measure of damages was certain in *Egerer*, the damages were liquidated and an award of prejudgment interest was appropriate.

This Court has clarified its position on this issue in the years following Division III's decision in *St. Hilaire*. It is clear from *Dautel* and *Egerer* that damages are liquidated when the measure of damages is predetermined and the jury uses discretion in determining the appropriate percentage or value. Therefore, under the most recent applicable case law, WBC's award of prejudgment interest was appropriate because the measure of damages was certain.

It should also be pointed out that, if this Court did rely on Division III's reasoning in *St. Hilaire*, it would not necessarily dictate a different outcome in this case. In *St. Hilaire*, the correct measure of damages was in dispute before the trial court, and the trial court's determination of the appropriate measure of damages was actually overruled on appeal. *St. Hilaire*, 82 Wn. App. at 351. Therefore, it cannot be said that the measure of damages was certain, in which case the court correctly refused to award prejudgment interest. Furthermore, Dykes himself admits that the jury's verdict in *St. Hilaire* was "proof that it had exercised discretion to determine *the measure of damages*." Brief of Appellants at 31 (emphasis added). If, as Dykes suggests, discretion was exercised to determine the measure of damages, the holding in *St. Hilaire* that damages were unliquidated is perfectly in line with *Dautel*, *Egerer*, and the trial court's decision here.

Division III's decision in *St. Hilaire* is not controlling in this case. Both *Dautel* and *Egerer*, which are controlling, dictate that WBC's damages were liquidated because the measure of WBC's damages was fixed prior to the jury's exercise of discretion. Therefore, the trial court's award of prejudgment interest was not an abuse of discretion and should not be disturbed by this Court.

4. The timing of the "act of discretion" does not determine whether damages are liquidated.

Dykes' final argument is that the "act of discretion" that renders damages unliquidated is one that takes place **before** the damages are calculated, such as a determination of the appropriate commission percentage. This argument is directly contradicted by the holdings in *Dautel* and *Egerer*. Furthermore, the cases cited by Dykes in support of this argument are inapposite.

First, Dykes cites to *Aker Verdal* and erroneously claims that this Court held that plaintiff's damages were unliquidated because the jury had used discretion to determine a reasonable hourly rate. Brief of Appellants at 33. This is a mischaracterization of the Court's holding. As noted above, this Court already stated in *Egerer* that the damages in *Aker Verdal* were unliquidated **because** the measure of damages was left to the discretion of the fact-finder. It noted in its opinion that "there was a genuine dispute as to whether the *measure* of damages should be the

internal labor rate or the rate the plaintiff could have charged the customer had the crane not collapsed and delayed the work.” *Aker Verdal*, 65 Wn. App. at 192 (emphasis in original). That was the basis for affirming the trial court’s decision not to award prejudgment interest; it had nothing to do with the timing of the jury’s discretion.

Dykes also mischaracterizes the holding in *Douglas NW, Inc. v. Bill O’Brien & Sons Constr., Inc.*, 64 Wn. App. 661, 828 P.2d 565 (1992), claiming it was based on **when** the trial court used its discretion. Brief of Appellants at 34. Again, that was not the holding. The issue in *Douglas NW* was whether the trial court used discretion in determining the measure of damages. The suggested measure of damages included a formula using hours, wage rate, overhead and profit. *Id.* at 690. The trial court awarded a sum that was several thousand dollars less, based on what it considered to be a reasonable sum. *Id.* at 691. This was clearly a different measure of damages, and an award of prejudgment interest was not appropriate. Once again, the case does not stand for what Dykes claims it does, nor does it weigh against the trial court’s findings in this case that prejudgment interest was appropriate.

In summary, it is within a trial court’s discretion to award prejudgment interest. Both *Dautel* and *Egerer* hold that, where the measure of damages is predetermined and the fact-finder uses discretion

only to determine an appropriate price or percentage, the damages are liquidated and an award of prejudgment interest is appropriate. Because the trial court's award of prejudgment interest here was a correct application of Washington law and cannot be characterized as an abuse of its discretion, this Court should not disturb that ruling.

B. The Trial Court did not Abuse its Discretion by Removing the Equitable Breach of Fiduciary Duty Claim from the Jury

“In determining whether a case is primarily equitable in nature or is an action at law, the trial court is accorded wide discretion, the exercise of which will not be disturbed except for clear abuse.” *Brown v. Safeway Stores*, 94 Wn.2d 359, 368, 617 P.2d 704 (1980). An action for breach of fiduciary duty is primarily equitable in nature, and the Court has broad authority to determine equitable issues without a jury. *See, e.g., Allard v. Pac. Nat. Bank*, 99 Wn.2d 394, 395-96, 663 P.2d 104 (1983); *Coast Trading Co., Inc. v. Parmac, Inc.*, 21 Wn. App. 896, 902-03, 587 P.2d 1071 (1978); *Gillespie v. Seattle-First Nat'l Bank*, 70 Wn. App. 150, 173, 855 P.2d 680 (1993).

1. The factors listed in *Brown* are not mandatory and a trial court does not abuse its discretion by failing to analyze each

In *Brown v. Safeway Stores*, the Washington Supreme Court was asked to determine whether the trial court had erred in denying the appellant's motion for a jury trial. In making its decision, the Court noted

that the trial court has wide discretion, and that the “discretion should be exercised with reference to a variety of factors including, but not necessarily limited to” certain listed factors.⁵ 94 Wn.2d at 368.

Dykes argues that a court must “necessarily” consider the factors in *Brown* before it may exercise its discretion in removing a case from the jury’s purview. Brief of Appellants at 38. Dykes contends that the trial court failed to identify the factors from *Brown* in its decision, thereby constituting an abuse of discretion. His contentions are unsupported by case law and by the record.

Dykes failed to produce a single case where an appellate court held that a trial court abused its discretion by failing to analyze each of the factors listed in *Brown*. This most likely is because WBC has been unable to locate any such authority. To the contrary, however, there are several cases where appellate courts, in reviewing trial court decisions to take issues from the jury, cite to *Brown* without making any mention of the specific factors it lists.

In *Green v. Hooper*, 149 Wn. App. 627, 205 P.3d 134 (2009), the Court of Appeals reviewed a trial court’s decision to deny a jury demand and cited to *Brown* for the proposition that a trial court has wide

⁵ The factors listed in *Brown* were quoted straight from *Scavenius v. Manchester Port Dist.*, 2 Wn. App. 126, 129-30, 467 P.2d 372 (1970), and this case, like *Brown*, does not require that a trial court analyze each factor in exercising its discretion.

discretion. *Id.* at 645. However, in determining whether the trial court abused that discretion, it did not mention the factors listed in *Brown*, nor did it discuss whether the trial court made a sufficient analysis before using its discretion. *See also King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 718, 846 P.2d 550 (1993) (this Court also cited to *Brown* in support of a trial court's discretion to decide whether an action is primarily equitable, yet made no mention of the factors listed in *Brown* when it reviewed the trial court's decision).

Even in those cases where the factors in *Brown* are mentioned, the appellate courts do not examine the trial court's analysis of each factor. In *Scavenius*, where the factors were first set forth, the appellate court simply stated that it "would be unable to say as a matter of law that the trial court's action in this case in denying a jury trial on all issues was an abuse of discretion." 2 Wn. App. at 130. Obviously, the trial court had not analyzed each factor, since the factors had not yet been articulated. However, the trial court was not required to go back and make their decision based on an analysis of each factor. *See also Jackowski v. Borchelt*, 151 Wn. App. 1, 20, 209 P.3d 514 (2009) (appellate court listed the factors set forth in *Brown*, but the appellate court applied the factors, not the trial court; trial court was held not to have abused its discretion).

Here, the trial court gave more than sufficient consideration to its decision whether to remove the issue from the jury. It read the trial briefs thoroughly, considered the arguments of each side, and came to the correct conclusion that the action for breach of fiduciary duty was an equitable issue. [RP 30]. Its decision was supported by case law and by the facts of this case. Importantly, Dykes does not provide any case law or legal argument to explain why the issue was one that **should** have been heard by the jury. Thus, the trial court correctly removed the equitable breach of fiduciary duty claim from the jury. Dykes cannot meet his burden of proof to demonstrate this decision should be overturned as an abuse of discretion.

2. Dykes was not prejudiced by WBC's request to remove the action for breach of fiduciary duty from the jury

Dykes mischaracterizes WBC's argument that the action for breach of fiduciary duty was an equitable issue as a motion to strike, thereby arguing that WBC failed to comply with the time requirements under CR 6(d) and KCLCR 7(b)(4)(A). However, WBC did not file a motion to strike; it simply suggested in its trial brief that the action for breach of fiduciary duty is an equitable issue to be determined by the court. This request was not untimely.

Even if this Court were to find that the request was untimely, the Supreme Court has held that "CR 6(d) is not jurisdictional, and...reversal

for failure to comply requires a showing of prejudice.” *Brown*, 94 Wn.2d at 364. In *Brown*, CR 6(d) had clearly been violated by an untimely motion to strike the jury, but the party alleging prejudice “presented countervailing oral argument and submitted case authority in support of its position.” *Id.* Thus, there was no adequate showing of prejudice. *See also Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 665, 709 P.2d 774 (1985) (motion in limine was untimely, but plaintiff was able to provide countervailing oral argument and submit case authority, so there was no prejudice).

Dykes has similarly failed to show adequate prejudice. Early in the trial proceedings, the court addressed the action for breach of fiduciary duty and whether it was an equitable issue to be decided by the court. Both WBC and Dykes presented oral arguments. [RP 4-9]. At no point did Dykes object to WBC’s argument on grounds of surprise. As in *Brown* and *Goucher*, they presented countervailing arguments, and the court simply decided against them. When the court announced its decision in favor of WBC, Dykes made no mention of surprise or prejudice.

The trial court did not abuse its discretion when it took the action for breach of fiduciary duty from the jury. Its decision was supported by case law and by the facts of this case. WBC’s request to remove the issue from the jury was not untimely, and even if it was, Dykes was not

prejudiced by it. Because the court appropriately decided this equitable issue and Dykes can show no prejudice, this Court should affirm the trial court's removal of this decision from the jury.

C. The Trial Court's Ruling that Dykes Breached his Fiduciary Duty to WBC is Supported by Substantial Evidence and is Consistent with Washington Law

This Court reviews findings of fact to determine if they are supported by substantial evidence and whether those findings support the conclusions of law. *Dorsey v. King County*, 51 Wn. App. 664, 668-69, 754 P.2d 1255 (1988). Substantial evidence is a quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

This Court defers to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. *Davis v. Dep't of Labor & Indus.*, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980). In determining the sufficiency of the evidence, this Court need only consider evidence favorable to the prevailing party. *Bland v. Mentor*, 63 Wn.2d 150, 155, 385 P.2d 727 (1963). There is a presumption in favor of the findings, and the party claiming error has the burden of showing that a finding is not supported by

substantial evidence. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990).

1. Dykes owed WBC a fiduciary duty

“It is well settled in Washington law that the relationship among partners is fiduciary in character and imposes upon the partners the obligation of candor and utmost good faith in their dealing with each other.” *Bovy v. Graham, Cohen & Wampold*, 17 Wn. App. 567, 570, 564 P.2d 1175 (1977). The good faith obligation of a fiduciary relationship not only demands that a partner should not make any false statement to his copartner, but also that he abstain from any and all concealment concerning matters pertaining to the partnership business. *Id.* A partner owes a fiduciary duty of loyalty and care to both the partnership and to other partners. RCW 25.05.165. The obligations of a general partner in a general partnership apply equally to a general partner in a limited partnership. RCW 25.10.240(1).

Limited partnerships are governed by the Revised Uniform Partnership Act (“RUPA”). RUPA was adopted by the legislature in 1998 as a revision to the Uniform Partnership Act, which RUPA superseded in a variety of ways. However, the changes made by RUPA did not do away with the fiduciary duty of loyalty that a partner owes to the partnership. This is clear from the majority opinion in *J&J Celcom v. AT&T Wireless*

Servs., Inc., 162 Wn.2d 102, 169 P.3d 823 (2007), which does not include the interpretation of RUPA suggested by Dykes. Instead, the majority opinion recites RCW 25.05.165(1)-(5) in full, notes that the trial court specifically found there had been disclosure of material information, the price was fair and the majority partner had acted in good faith, and therefore ruled there had been no breach of fiduciary duty. *Id.* at 107. The majority opinion then cites favorably to two fiduciary duty cases which pre-date the effective date of RUPA. As noted by the Judge McCarthy:

[T]he opinion of the majority in *J&J Celcom* does cite with approval two longstanding cases involving partnerships and fiduciary duty – the [*Karle*] and [*Bassan*] cases – both of which stand for the proposition that a partner does, indeed, have a fiduciary duty of loyalty toward other partnerships, other partners. And [*Bassan*] and [*Karle*], basically affirmed in the majority opinion in *J&J Celcom*, clearly state that a partner does possess the fiduciary duty of loyalty to other partners and violates it when he fails to disclose material facts to other partners regarding partnership matters, partnership transactions.

[RP 13 (RP Nov. 6, 2009)].

In *Karle v. Seder*, 35 Wn.2d 542, 214 P.2d 684 (1950), the court determined that a fiduciary relationship existed between the parties, and one party failed to disclose payment of consideration. The court held that “appellants, occupying this fiduciary relationship to respondent, failed to disclose this material fact to their principal as it was their legal duty to do. The superior court was correct in holding them liable for this breach of

duty.” *Id.* at 552. That the majority in *J&J Celcom* cited to *Karle* to highlight the importance of disclosing material information indicates that the duty of loyalty continues to require a partner to be upfront and truthful with the partnership. *J&J Celcom*, 162 Wn.2d at 107.

In *Bassan v. Investment Exchange Corp.*, 83 Wn.2d 922, 524 P.2d 233 (1974), the issue was whether the general partner derived profits without consent of the limited partners in breach of its fiduciary relationship. The court stated:

The benefit of [the fiduciary] standard is nowhere more apparent than a limited partnership of this nature. The articles give the general partner the authority to conduct “any and all of the business of the Partnership...” Once the limited partner has joined the partnership he has no effective voice in the decision-making process. *He must, then, be able to rely on the highest standard of conduct from the general partner.* Any deviation from this must be clearly stated in terms that would give the limited partner the option of deciding whether or not, in the first instance, to join the partnership.

The duty of loyalty resulting from a partner’s fiduciary position is such that the severity of a partner’s breach will not be questioned. The question is only whether there has been any breach at all.

Bassan, 83 Wn.2d at 927-28 (emphasis added). The court held “that a partner has a duty to account for any benefit of profit held by the partner relating to any aspect of the partnership.” *J&J Celcom*, 162 Wn.2d at 107. Once again, the majority in *J&J Celcom* cited to *Bassan*, a pre-RUPA

case, to highlight the continuing importance of a partner's duty to account to the partnership.

Post-RUPA cases also support the trial court's determination that Dykes breached his fiduciary duty. These cases interpret RCW 25.05.165(2)(a)-(c) as requiring partners to honor their fiduciary duty. See *Bishop of Victoria Corp. Sole v. Corporate Business Park, LLC*, 138 Wn. App. 443, 457, 158 P.3d 1183 (2007) ("A partner owes a duty of loyalty to avoid secret profits, self-dealing, and conflicts of interest.") and *Horne v. Aune*, 130 Wn. App. 183, 200, 121 P.3d 1227 (2005) ("A partner's duty of loyalty is limited to avoiding secret profits, self-dealing, and conflicts of interest."). The prohibition on taking "secret profits" is analogous to the duty to disclose material information on a "normal" commission, as both require a partner to be straightforward and honest with the partnership.

2. Judge McCarthy's ruling that Dykes breached his fiduciary duty is supported by substantial evidence

Here, Judge McCarthy heard testimony over five days of trial and considered dozens of exhibits before ruling on the breach of fiduciary duty claim. In his detailed oral ruling on the claim at the conclusion of the evidence, Judge McCarthy focused on the unremarkable notion that a partner's fiduciary duty and duty of loyalty to his other partners includes a duty to disclose material facts. [RP 916]. Further, after hearing the live testimony of both Dykes and Lumpkin, Judge McCarthy found Lumpkin's

testimony credible that Lumpkin was unaware of Dykes' six percent commission or the other commissions until the closing of the sale. [RP 916]. Judge McCarthy properly concluded that these facts were material, and that Dykes breached his fiduciary duty by concealing them from his partners until the eleventh hour. [RP 918]. This ruling is supported by substantial evidence, including Dykes' own testimony at trial. [Ex. 36, 45, 65, p. 7, Ex. 102, 114, 20; RP 191-93, 204, 207-08, 341, 356, 508-15, 592, 616, 632-33]

Despite changes in RUPA, the fact remains that partners owe the partnership and other partners a fiduciary duty of loyalty. One justice's concurring opinion is insufficient to eliminate an established tenet of partnership law. Under current Washington law, failure to disclose a material fact is a breach of that duty. The trial court's well-reasoned decision that Dykes breached his fiduciary duty to WBC is supported by substantial evidence and should not be disturbed on appeal.

D. The Trial Court Appropriately Awarded Judgment of \$100,000 Against Dykes for Breaching his Fiduciary Duty to WBC

1. Disgorgement of an agent's commission is an appropriate remedy for breach of fiduciary duty

This Court reviews a trial court's remedy for breach of fiduciary duty for abuse of discretion. *Cotton v. Kronenberg*, 111 Wn. App. 258, 275, 44 P.3d 878 (2002). It is within a court's discretion to order a party

who breaches a fiduciary duty to disgorge some or all of his profits. *Id.* “An agent’s breach of fiduciary duty is a basis on which the agent may be required to forfeit commissions and other compensation paid or payable to the agent during the period of the agent’s disloyalty.” *See* Restatement (Third) of Agency, §§ 8.01, 8.02 cmt d(2) (2006).

2. The trial court did not improperly rely upon evidence from the First Lawsuit

Dykes alleges that the trial court improperly relied upon evidence from the First Lawsuit when it ruled that Dykes must disgorge \$100,000 of his sales commission. Dykes mischaracterizes the basis for the trial court’s decision.

In its trial brief, WBC argued that the doctrine of collateral estoppel, or issue preclusion, prevented Dykes from asserting a defense to WBC’s breach of fiduciary duty, since a key issue in the First Lawsuit was that Dykes breached his fiduciary duty by his actions as WBC’s managing general partner. The trial court determined that there was insufficient identity of issues to invoke collateral estoppel. As such, Dykes was not estopped from defending the allegations of breach of fiduciary duty relating to this case. [RP 97].

Dykes alleges that WBC used its collateral estoppel claim as a way to introduce inadmissible evidence regarding the court’s ruling in the First Lawsuit. This meritless accusation calls into question both the trial court

and WBC's integrity. It is based on nothing except the fact that WBC presented a legitimate argument which the trial court ruled against. Furthermore, the record provides clear proof that the trial court's decision that Dykes breached his fiduciary duty was appropriately based on the facts of this case and not the finding of breach in the First Lawsuit.

When Judge McCarthy first determined that Dykes breached his fiduciary duty, he made his decision based on the testimony he heard during trial. In his oral ruling, Judge McCarthy pointed to Exhibit 102, where Dykes instructed Harman via email to "ignore Lumpkin," then recognized that the fiduciary duty existed despite the contentious relationship between Dykes and Lumpkin, and stated that he found Lumpkin's testimony that he was not made aware of things until the "eleventh hour" to be credible. [RP 916]. The trial court reiterated that it ruled against the collateral estoppel argument, but it did take note of the prior instance of breach and determined that the breach in this case was "more of the same." [RP 917]. However, this was **not** the basis for its decision. It went on to state:

[T]his was a nondisclosure of material facts that Mr. Lumpkin as general partner and those representing the limited partners would need to know or should have the opportunity to know. And I think Mr. Dykes, in the way that this matter was handled and that he was in charge of the closing of that sale, did not disclose those material facts to the general partner or to those interested limited partners.

Id. Clearly, the trial court's decision was based on the evidence presented at trial, not the findings in the First Lawsuit.

The trial court considered Dykes' motion for reconsideration of its determination that Dykes had breached his fiduciary duty. The parties briefed their arguments and presented oral argument. Once again, the trial court concluded that Dykes had in fact breached his fiduciary duty to WBC. It noted that Dykes had purposefully failed to disclose material facts in order to benefit himself at the expense of the partnership. The trial court did acknowledge that a breach was also found in the First Lawsuit, but this was only to point out that Dykes had clearly failed to learn from that experience, making this instance of breach even more egregious. [RP 14-15 (RP Nov. 6, 2009)]. However, the prior breach was not the basis for Judge McCarthy's decision. Judge McCarthy was simply pointing out that Dykes had once again, in a different manner and time, breached the fiduciary duties he owed his partners.

It is clear from the record that the trial court did not abuse its discretion when it ordered Dykes to disgorge \$100,000 of his commission for breaching his fiduciary duty. The court appropriately concluded that Dykes had breached his duty, and disgorgement is an appropriate remedy. Therefore, this Court should not disturb the trial court's ruling.

IV. CONCLUSION

This is the second trial resulting in a finding that Dykes breached his fiduciary duty and contract obligations to his WBC partners. This is also Dykes' second appeal. As he did in his first unsuccessful appeal, Dykes challenges four of the trial court's rulings, each of which was squarely within Judge McCarthy's discretion.

Judge McCarthy 1) correctly awarded prejudgment interest to WBC because its damages for Dykes' breach of contract were liquidated; 2) appropriately withheld from the jury the decisions related to WBC's equitable claim that Dykes breached his fiduciary duty; 3) correctly found that Dykes breached his fiduciary duty to his partners; and 4) awarded a reasonable and appropriate judgment against Dykes as damages for his breach of his fiduciary duty. Dykes has failed to meet his burden of demonstrating that any of these four rulings were an abuse of discretion justifying reversal on appeal.

WBC respectfully requests this Court deny Dykes' appeal and affirm the trial court on all issues presented here.

RESPECTFULLY SUBMITTED this 16 day of June, 2010.

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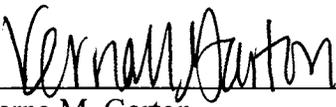
CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 16th, 2010, I caused to be served via personal delivery a true and correct copy of the Brief of Respondent on counsel for Appellants as follows:

Sam B. Franklin
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DATED this 16th day of June, 2010, at Seattle, Washington.



Verna M. Garton

APPENDIX

61538-6

61538-6

82635-8

No. 61538-6-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JUSTIN ENDICOTT,

Respondent,

v.

ICICLE SEAFOODS, INC.,

Appellant.

BRIEF OF APPELLANT ICICLE SEAFOODS, INC.

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COURT OF APPEALS
STATE OF WASHINGTON

B. The Superior Court Abused Its Discretion in Awarding Endicott Prejudgment Interest.

1. Summary of the Issue.

As with the jury demand issue addressed above, a plaintiff's choice of forum determines his entitlement, or lack thereof, to prejudgment interest. Prejudgment interest is generally available in suits brought in federal courts sitting in admiralty. While a state court may hear maritime claims pursuant to the saving to suitors clause, it can never sit in admiralty. As such, the rule regarding prejudgment interest "in admiralty" cannot apply.

A state court hearing Jones Act and unseaworthiness claims is bound to apply federal substantive law. Under federal maritime law, prejudgment interest is not authorized by the Jones Act and it is widely recognized that prejudgment interest is not available for Jones Act claims brought at law in either federal or state courts. In contrast, federal maritime law does authorize prejudgment interest for unseaworthiness claims brought "in admiralty." When Jones Act and unseaworthiness claims are combined in a single action, a number of federal courts have held that prejudgment interest is not available. Washington has joined these federal courts in finding that prejudgment interest should not be awarded in these mixed Jones Act and unseaworthiness cases.

Finally, to the extent that Washington law applies to this question, it, too, dictates that prejudgment interest is not available in a seaman's action for negligence and unseaworthiness. Washington law requires that a claim for damages be liquidated or readily determinable in order to qualify for prejudgment interest. Because claims such as Endicott's involve general damages, which can never be considered liquidated, prejudgment interest is not authorized under Washington law.

Because the trial court's decision to award prejudgment interest was contrary to both federal and state law, the trial court abused its discretion, and its decision must therefore be reversed.

2. Statement of Facts.

After the trial and the issuance of its preliminary opinions, the trial court ordered additional briefing on the issue of an award of prejudgment interest. CP 90-92; 100-112. The trial court issued its Findings of Fact and Conclusions of Law on January 11, 2008. CP 118; A-1. Citing Paul v. All Alaskan Seafoods, Inc., 106 Wn. App. 406, 24 P.3d 447 (Div. I, 2001), the trial court found that as a "successful general maritime plaintiff," Endicott was entitled to prejudgment interest at 12% per annum from May 1, 2003 (the date of injury) to August 29, 2007 (the date of the court's opinion). Id. The final judgment entered by the superior court therefore

included an award of \$143,611 (of this, \$110,000 was for general damages, \$3,000 for past medicals, and \$30,611 for past wage loss) and an additional \$74,646.24 for prejudgment interest. CP 118, 120, 123.

3. Standard of Review.

Under Washington law, a trial court's award of prejudgment interest is reviewed for abuse of discretion. Scoccolo Const., Inc. v. City of Renton, 158 Wn.2d 506, 519, 145 P.3d 371 (2006).⁸ A trial court abuses its discretion when its decision is contrary to applicable law. In re Jannot, 110 Wn. App. 16, 22, 37 P.3d 1265 (Div. III, 2002).

4. Legal Analysis and Argument.

a. While Prejudgment Interest Is Generally Available in Federal Courts Sitting in Admiralty, a State Court Can Never Sit in Admiralty.

In federal courts sitting in admiralty, prejudgment interest is

⁸ It bears noting that federal courts also review an award of prejudgment interest for abuse of discretion, but review *de novo* the question of whether state or federal law determines the availability and amount of such an award. See, e.g., Oak Harbor Freight Lines, Inc. v. Sears Roebuck, & Co., 513 F.3d 949, 954 (9th Cir. 2008). At least one Washington jurist has agreed that the question of whether prejudgment interest is authorized in a given case is a question of law to be reviewed *de novo*. See Ernst Home Center, Inc. v. Sato, 80 Wn. App. 473, 492-94, 910 P.2d 486 (Div. I, 1996) (concurring opinion of J. Forrest). Icicle maintains that it was improper under either the abuse of discretion or *de novo* standard for the trial court to award prejudgment interest in this case.

awarded unless there are peculiar circumstances justifying its denial. City of Milwaukee v. Cement Div., Nat'l Gypsum Co., 515 U.S. 189, 195, 115 S. Ct. 2091, 132 L.Ed.2d 148 (1995). As outlined above, admiralty jurisdiction is exclusive to the federal courts. U.S. Const., Art. III, Sec. 2; 28 U.S.C. § 1333(1). While state courts are granted authority to hear maritime cases under the saving to suitors clause, they may never exercise admiralty jurisdiction. Linton, 964 F.2d at 1487 (“Because admiralty jurisdiction is exclusively federal, a true ‘admiralty’ claim is never cognizable in state court; no ‘designation’ or state procedure can alter this.”) (citing The HINE, supra). Instead, maritime actions brought in state court must necessarily be at law. See, e.g., Mendez v. Ishikawajima-Harima Heavy Industries Co., Ltd., 52 F.3d 799, 800 (9th Cir. 1995) (“The saving-to-suitors clause allows claimants to pursue actions for maritime torts **at law** either in state courts or in federal courts pursuant to diversity jurisdiction.”) (emphasis added). Because a state court can only hear maritime claims brought at law and cannot sit in admiralty, it cannot predicate an award of prejudgment interest on the notion that it is acting in admiralty.