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Division II
State of Washington

No. 49640-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DOUGLAS C. NELSON and KARINA NELSON, husband and wife; LANDMARK, LLC, a Washington limited liability company,

Respondents/Cross-Appellants,

vs.

ANTONE PRYOR, individually, and the marital community composed of ANTONE PRYOR and KIM YOUNG OAK, husband and wife,

Appellants/Cross-Respondents,

APPEAL FROM THE SUPERIOR COURT
FOR KITSAP COUNTY
THE HONORABLE KEVIN D. HULL

AMENDED
BRIEF OF RESPONDENTS/CROSS-APPELLANTS

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I. INTRODUCTION

Appellant Antone Pryor and respondent Douglas Nelson shared ownership of various companies for more than a decade spanning the Great Recession. When their relationship fell apart, Pryor accused Nelson of misrepresenting the finances of their shared companies. After a ten-day trial involving a dozen witnesses, including the parties' bookkeeper, and hundreds of exhibits, the trial court entered 106 detailed findings rejecting each of Pryor's claims and finding that Pryor had breached his repeated agreements to share the costs and risks of litigation involving one of the parties' shared companies.

Pryor now recasts his claims on appeal, raising arguments never presented below and inviting this Court to engage in de novo fact-finding. This Court should reject that invitation and affirm the trial court's decision, which rests on the trial court's largely unchallenged findings and substantial evidence presented below.

II. RESTATEMENT OF ISSUES

1. Did the trial court correctly reject Pryor's fraud claim based on unchallenged findings of fact that Nelson kept Pryor "regularly informed what was happening with the various business entities they shared an interest in," "that if Nelson were unable to answer a question, Nelson would refer him to [their bookkeeper],"

and "that Nelson had offered Pryor the opportunity to audit and review all the books"?

2. Do the trial court's unchallenged findings that Nelson kept Pryor informed about their businesses and that Pryor's failure to appreciate the transactions he entered willingly was caused by his own lack of diligence support its conclusion rejecting Pryor's claim for breach of fiduciary duty?

3. Did the trial court correctly reject Pryor's claim that he was still owed for a promissory note based on its unchallenged finding that Pryor agreed to fully forgive the note?

4. Does Pryor's agreement to release Nelson "from any and all claims, liabilities, damages, attorneys' fees and other costs arising from or related to his ownership of" Sportsman Park, "whether such claims are known or unknown," bar his claims against Nelson?

5. Can Pryor recover on an equitable indemnity theory he never raised below for the attorney's fees he incurred in litigation that he helped start?

6. Is the trial court finding that Pryor had breached two agreements to share the expense and risks of litigation involving the parties' shared business supported by the language of those agreements and extrinsic evidence?

7. Did the trial court abuse its discretion in awarding attorney's fees incurred in defending Pryor's claims based on the party's 2006 agreement that contains a prevailing party attorney's fees provision and was central to Pryor's claims?

8. Did the trial court abuse its discretion in awarding Nelson prejudgment interest on the breach of contract damages Nelson pled in his complaint?

III. RESTATEMENT OF THE CASE

Despite making sweeping challenges to the trial court's decision, Pryor disputes few of the over 100 findings entered by the trial court.[1] The trial court's unchallenged findings are now verities on appeal. *Estate of Barnes*, 185 Wn.2d 1, 9, ¶ 7, 367 P.3d 580 (2016). Pryor's statement of the case is replete with argument and innuendo. This restatement relies on the trial court's detailed findings and the evidence it found credible:

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[1] Pryor failed to include a "separate assignment of error for each finding of fact [he] contends was improperly made . . . with reference to the finding by number" in violation of RAP 10.3(g). Regardless, Pryor provides argument disputing only nine of the trial court's 106 findings of fact. (*See* App. Br. 20, 34, 39, 41, 44-45 (disputing FF 16, 27A, 33, 44, 92, 93, 96, 104, and 106))

A. Pryor and Nelson met in the late 1990s, becoming partners in a number of business ventures, including Landmark LLC.

In the late 1990s Douglas Nelson met Dr. Antone Pryor and his spouse, Kim Young Oak, when the Pryors were looking to buy a home on Bainbridge Island, Washington. (FF 1, CP 425) Nelson was a realtor and assisted the Pryors in their search. (FF 1, CP 425)

In 1999, Nelson formed a real estate development company called Retirement Ventures, LLC, which later became known as Landmark, LLC ("Landmark"). (FF 2, CP 425) Landmark became a builder of "spec homes," primarily on Bainbridge Island. (FF 2, CP 425) In 2000, Pryor purchased a 50% interest in Landmark for $60,000, signing a promissory note in favor of Landmark in the same amount. (FF 3, CP 426; Ex. 1)

In addition to Landmark, Nelson and Pryor invested in and formed other companies together. (FF 9, CP 427) Nelson and Pryor formed Sportsman Park, LLC, which they formed to develop a commercial condominium complex on Bainbridge Island, each owning 50%. (FF 9, CP 427; Ex. 53) Nelson and Pryor agreed that Landmark would be the contractor for the Sportsman Park complex. (FF 9, CP 427)

Pryor and Nelson signed an operating agreement governing Sportsman Park. (FF 105, CP 449; Ex. 53) The agreement provided that Sportsman Park would be a manager-managed LLC; Nelson acted as manager at all relevant times, though the parties had regular and annual meetings to discuss the business and ratify manager actions. (FF 105; CP 449; Ex. 53 at 4, 55, 63; RP 64) The operating agreement gave Nelson broad authority, stating he had "full and complete authority, power and discretion to manage and control the business . . . ." (FF 105; CP 449; Ex. 53 at 4) The operating agreement also limited Nelson's liability for actions he took as manager, adopting the business judgment rule: "Neither the Manager nor any Affiliate of the manager shall be liable, responsible or accountable in damages or otherwise to the Company or the Members for any act or omission by any such Person performed in good faith pursuant to the authority granted to such Person by this Agreement. . . ." (Ex. 53 at 6) The Agreement provided that Nelson could be liable only for "fraud, misconduct, bad faith or gross negligence." (Ex. 53 at 6)

B. Pryor sold his interest in Landmark in 2006 in exchange for a $480,000 promissory note from a new entity called Green Rock Holdings, LLC.

In 1998 Landmark entered into a purchase and sale agreement to buy land from two trusts run by the Sakai family. (RP 51-52) After the Sakai family refused to close on the purchase and sale agreement, in 2004 Pryor and Nelson decided that Landmark would sue the Sakai trusts for breach of contract, specific performance, unjust enrichment, and equitable estoppel. (FF 12, CP 428; RP 54-55, 1261; *see generally Landmark LLC v. Sakai QTIP Trust*, 151 Wn. App. 1003, 2009 WL 1930174 (2009), *rev. denied*, 168 Wn.2d 1013 (2010) (unpublished).[2] The Sakais counterclaimed for trespass, alleging that Landmark had improperly installed storm water detention tanks on their property. 2009 WL 1930174 at *3. The ongoing Sakai litigation would hang over Pryor's and Nelson's relationship most of the next decade. (FF 12-16, 58-61, 74-75, 80-81, 92, 100, CP 437-38, 440, 442, 445, 447, 428-29)

In 2006, Pryor and Nelson began discussions regarding a buyout of Pryor's interest in Landmark. (FF 17, CP 429) At their request, Landmark's accountant James Davidson, CPA, prepared a valuation of Pryor's interest in Landmark. (FF 17, CP 429; Ex. 57; RP 77-79) Based on Davidson's valuation, Nelson and Pryor agreed to a purchase price of $480,000, as well as other terms, in transaction documents collectively referred to as the 2006 Redemption Agreement. (FF 18, CP 429; Ex. 2)

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[2] The trial court did not admit as an exhibit this Court's *Sakai* decision. Nelson agrees that this Court may take judicial notice of it. *State v. Barnes*, 85 Wn. App. 638, 652, n. 1, 932 P.2d 669 ("We take judicial notice of an unpublished opinion in our court"), *rev. denied*, 133 Wn.2d 1021 (1997); App. Br. 8.

Under the 2006 Redemption Agreement, Pryor and Nelson each contributed their interests in Landmark to a holding company called Green Rock Holdings, LLC. (FF 21, CP 429; Ex. 2) Green Rock then redeemed Pryor's 50% interest in Green Rock for $480,000, which was reflected in a promissory note in favor of Pryor from Green Rock in the same amount. (FF 21, CP 429; Ex. 2, Ex. A) Green Rock became the sole owner and member of Landmark and Nelson became the sole owner and member of Green Rock. (FF 21, CP 429) Nelson and Pryor adopted the structure for this transaction based on the advice of their attorney, Pamela Grinter, who told them "you need to restructure Landmark . . . . to protect other assets from any claims that may arise in the construction activity" and recommended forming a new LLC as a holding company. (FF 18, CP 429; Ex. 94)

In the 2006 Redemption Agreement, Pryor and Nelson acknowledged that Landmark would continue building the Sportsman Park development at cost plus 6% overhead. (FF 22, CP 429; Ex. 2 at 3) Pryor also agreed under the 2006 Redemption Agreement "to reimburse Landmark for one half of all costs and expenses, including, without limitation, attorney's fees and costs, damages, judgments and amounts paid in settlement, incurred by Landmark or an affiliate in prosecution or defense of the [Sakai] Lawsuits." (FF 23, CP 430; Ex 2 at 3)

C. In 2008, Pryor and Nelson agreed to restructure various debts in a transaction known as the "Debt Swap."

In 2006, Landmark, acting as the general contractor for the Sportsman Park development, began accruing expenses on behalf of Sportsman Park and by the end of 2007, Sportsman Park owed Landmark approximately $746,330.66. (CP 430)[3] Landmark's longtime bookkeeper, Helen Stevenson, calculated the amount of this debt, and explained Sportsman Park's indebtedness to Pryor via email and at a lengthy meeting in the fall of 2007 attended by both Pryor and his wife. (FF 35-38, CP 432-33; RP 916, 995, 1003-07; Ex. 126, 136, 142, 145) Sportsman Park was not financially able to pay this debt and could not borrow money to pay it because of encumbrances against its assets. (FF 29, CP 431)

On January 5, 2008, the parties agreed to restructure debts via a transaction they called the "Debt Swap." (FF 28, CP 431) Under the Debt Swap, Pryor agreed to forgive the balance due to him on the Green Rock Note ($412,000), and Landmark agreed to forgive the balance it was owed by Sportsman Park ($746,000). (FF 30, CP 431; *see also* Ex. 434; RP 1059-60) Pryor thus "swapped" the $412,000

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[3] Pryor refers to the unnumbered finding as "27A" in his brief. (App. Br. 7)

balance on the Green Rock note for not having to contribute one-half of the capital, $373,000, required to pay Sportsman Park's receivable to Landmark – cash he did not have available. (FF 29-30, CP 431; Ex. 434) Though Pryor appeared to give up $39,000 more than he owed, Pryor agreed to forego that amount because Nelson had not charged interest on unpaid leasing commissions he earned at the Sportsman Park complex. (FF 55, CP 436; Ex. 161; RP 304, 1325) As Pryor stated, "That would seem, to me, to be a very fair arrangement." (Ex. 161 at 7)

Nelson, like Pryor, did not have cash to contribute to Sportsman Park. (FF 29, CP 431) Thus, Nelson, who owned 100% of Green Rock and 50% of Sportsman Park, offset the $373,000 of Landmark's receivable he would have received as sole owner of Green Rock (the other half having been used to pay Green Rock's note) against the $373,000 capital contribution he would have otherwise had to make to Sportsman Park. (FF 30, CP 431; Ex. 434)

The parties documented their Debt Swap in a "Consent of All Members of Sportsman Park, LLC," dated January 5, 2008, signed by both Nelson and Pryor. (FF 30, CP 431; Ex. 44) When the parties modified the Redemption Agreement two years later, they confirmed that the Green Rock note had "been satisfied and paid in full." (FF 56, CP 436; Ex. 417)

D. In 2012 Pryor sold his interest in Sportsman Park to avoid badly needed capital contributions and to distance himself from the Sakai litigation.

Nelson and his wife Karina decided to wind down Landmark and create a new company in June 2009 because the market for speculative home building had crashed after the Great Recession, and they believed they could be more successful performing remodel work. (RP 344, 374-75, 758, 773; Ex. 49, 50) The Nelsons thus created Apex Construction, LLC, in mid-2009. Karina owned a majority interest in Apex, which was formed, in part, to qualify Apex to bid on construction contracts set aside specifically for women-owned small business. (FF 15, CP 428; RP 344, 771-72)[4] Apex took over Landmark's accounts and remaining jobs, including a $124,131.87 payable owed by Sportsman Park to Landmark. (FF 15; CP 428; RP 344-45, 355, 360) In exchange for this payable, Apex performed all the warranty work on Landmark's projects and paid Landmark's outstanding bills. (RP 355, 360, 374-75, 380, 770)

The superior court in the Sakai litigation had awarded Landmark $125,000 on its unjust enrichment claim, and rejected the Sakai's trespass counterclaim. 2009 WL 1930174 at *3-5. Both parties appealed. (FF 12-13, CP 428) In July 2009, this Court reversed the

[4] Nelson married Karina Nelson, in March 2009, around the time that she started handling the bookkeeping duties for Nelson's business entities. (RP 318, 336-37)

unjust enrichment award in favor of Landmark, and remanded for the trial court to grant Sakai relief on Sakai's trespass claim. (FF 13, CP 428; 2009 WL 1930174 at *11) On remand, the trial court entered two judgments in favor of Sakai and against Landmark for $50,189.95 and $77,702.70. (FF 14, CP 428) The Sakais then filed another lawsuit to enforce their judgments against Landmark, Nelson, Pryor, and Sportsman Park. (FF 74, CP 440)[5]

In 2011, the Sakias obtained an order for supplemental proceedings directed to Pryor. (FF 58, 60, CP 437) The Sakais alleged the Debt Swap was fraudulent and attempted to "pierce the corporate veil" and enforce their judgments personally against Pryor and Nelson. (FF 75, CP 440) The Sakai litigation was stressful to both parties, but especially for Pryor who, unlike Nelson, was ready to retire. (RP 118, 1237, 1394; Ex. 346 at 2) Pryor told Nelson that "neither of us has any intention of paying the Sakai's anything." (FF 16, CP 428-29; Ex. 346 at 2)

While defending against enforcement of the Sakai judgments, Sportsman Park was also facing significant tenant improvement costs that required an infusion of capital from Pryor and Nelson. (FF 61, 63,

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[5] The trial court referred to this lawsuit in its findings as "the Second Lawsuit" and the parties often referred to it as "Sakai II."

CP 438; RP 738, 1273, 1395; Ex. 696, 697) Pryor and Nelson were also losing large commercial tenants from Sportsman Park and another property they co-owned, Central Plaza. (FF 62, 69, CP 438-39; RP 100-03, 116, 1273) Sportsman Park also received a notice of default from one of its lenders, stating it would foreclose on its deed of trust encumbering a building at the Sportsman Park complex. (FF 67, CP 439; Ex. 235, 289) As Pryor told Nelson, "I guess this means what we both feared is likely to come to pass.... Obviously we are not in a position to support two empty buildings." (FF 69, CP 439; Ex. 241)

Given the pressure from the Sakais and the need to fund their co-owned properties, Pryor wanted to sell his interest in Sportsman Park and Central Plaza, and execute an agreement that would limit Pryor's exposure to the Sakais. (FF 76-78, CP 440-41; RP 1273; Ex. 297) Though Pryor considered hiring an appraiser to formally deter-mine the value of his interest in Sportsman Park, he decided against it, deeming the process was too lengthy and expensive. (FF 73, CP 440; RP 1274) Pryor also declined his attorney's recommendation to hire a forensic accountant, as well as Nelson's offer to have the company books audited. (FF 82-83, CP 442-43; RP 1343-44; Ex. 337 at 5, 636 at 1)

On June 7, 2012, Pryor and Nelson executed a Purchase and Sale Agreement in which Pryor sold his interest in Sportsman Park and Central Plaza for $550,000. (FF 94, CP 445; Ex. 3) Pryor described the negotiations leading to the agreement as "vigorous," and both parties were represented by counsel that jointly drafted the agreement. (FF 94, CP 445; RP 121-22, 1275-77; *see also* Exs. 337, 346) The trial court found that "[a]lthough Pryor testified that he did not feel like he had a lot of options, Pryor accepted all of the terms and admitted that he was satisfied with the final form of the 2012 Purchase Agreement." (FF 94, CP 445)

Under the parties' agreement, they would "*continue* to share equally in the cost of [the Sakai] litigation, including all attorneys fees and costs" and that if Pryor and Nelson were held "personally liable for the Landmark Judgment, then [Pryor's] total liability for the final judgment and accrued interest (but not for attorneys' fees and costs) . . . will not exceed $200,000." (Ex. 3 at 3 (emphasis added)) Under Paragraph 5 of the agreement, Pryor also agreed to fully and completely release any and all claims known or unknown against Nelson, Sportsman Park, and Central Plaza. (Ex. 3 at 3)

After mediation in December 2013, Nelson settled the Sakai litigation by paying the Sakais $70,000 on Landmark's behalf. (FF 100, CP 447; RP 140; Ex. 5, 548) Pryor, however, refused to pay his $35,000 share of the settlement, refused to pay fifty percent of the

$131,212.29 in attorney's fees and refused to pay $10,785.83 in costs that were incurred defending the Sakai litigation. (FF 102-04, CP 448-49; RP 141, 150, 157-63)

E. After a ten day trial, the trial court entered over 100 findings of fact supporting its decision to reject each of Pryor's claims and to hold that Pryor breached his agreement to share the Sakai expenses.

On January 9, 2014, Nelson, his wife, and Landmark sued Pryor for failing to pay the $60,000 Landmark promissory note and for breach of the 2006 Redemption Agreement and 2012 Purchase and Sale Agreement by refusing to pay 50% of the Sakai expenses and settlement. (CP 3-14) In his March 5, 2014 answer, Pryor counterclaimed for fraud, breach of fiduciary duty, breach of the Green Rock note, indemnification, and an accounting. (CP 56, 70-74)

After a ten day bench trial with over 200 admitted exhibits, Kitsap County Superior Court Judge Kevin Hull ("the trial court") entered 106 findings of fact and 22 conclusions of law. (CP 424-56) The trial court entered its findings and conclusions after soliciting from each side proposed findings and conclusions that were not filed with the court and were not disclosed to the other party. (RP 1099, 1795; CP 425-26) As detailed below, the trial court rejected the vast majority of Pryor's proposed findings and conclusions, including a proposed finding that "Mr. Nelson's testimony is on the whole not credible." (CP 2003)

The trial court found "there is insufficient evidence establishing that Pryor paid the [Landmark] Note," but concluded that Pryor was not obligated to pay it because Nelson had not complied with the demand provision of the note. (CL 1, CP 450) The trial court also ruled in Pryor's favor on a claim disputing title to a piece of property called Pinnacle Park. (CL 22, CP 455; *see also* FF 24-27, CP 430)

The trial court concluded that Pryor had breached both the 2006 Redemption Agreement and 2012 Purchase Agreement by not paying any of the settlement, fees, or costs arising from the defense of the Sakai litigation. (CL 2-3, CP 450) The trial court concluded that "Pryor is obligated to Landmark in the principal amount of $105,999.05, plus prejudgment interest through the date of judgment." (CL 3, CP 450)

The trial court rejected each of Pryor's claims. (CL 4-21, CP 450-55) At trial, Pryor alleged that Nelson induced Pryor to enter into the Debt Swap by misrepresenting material facts, including that Nelson was going to contribute $373,165.22 in cash as a matching contribution to Pryor's contribution (*i.e.*, forgiving the balance of the Green Rock note). (FF 33, CP 431-32) The trial court found "there is insufficient corroboration or documentation to prove" this allegation and that Pryor had "not met [his] high burden of proof of fraud by clear, cogent, and convincing evidence." (FF 33, CP 432; CL 12-13, CP 453) The trial court also held that the alleged misrepresentation was a promise of future performance that could not support a fraud claim. (CL 12, CP 453)

The trial court also rejected Pryor's breach of fiduciary duty claim, finding that Nelson kept Pryor "regularly informed what was happening with the various business entities they shared an interest in," "that if Nelson were unable to answer a question, Nelson would refer him to [their bookkeeper] Stevenson," and "that Nelson had offered Pryor the opportunity to audit and review all the books." (FF 40, CP 433)[6] Pryor conceded that his own lack of diligence, not Nelson's conduct, was to blame for Pryor's failure to fully appreciate the documents and agreements he had executed. (FF 42, CP 434) Indeed, the trial court found that "Pryor . . . did not read the majority of the documents before he signed his name" and that "the agreements and business minutes presented by Nelson to Pryor for signature are not [complicated]." (FF 43, CP 434) As Pryor admitted, "My not being more involved with the company is indeed my fault and I blame myself

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[6] The trial court also found that Stevenson never ignored a question or request for information from Pryor and that Nelson never prohibited Pryor from speaking with Stevenson. (FF 37-41, CP 432-33)

for not learning more." (FF 84, CP 443; Ex. 337) The trial court concluded that "Pryor knowingly acquiesced to the Debt Swap and all other transactions complained of in this matter," and also that Pryor's breach of fiduciary duty claim was barred by the "business judgment rule." (CP 6-8, CP 452) The trial court further held that "Pryor fully and completely released any and all claims against Nelson, Sportsman Park, and Central Plaza, including known or unknown claims." (CL 14, CP 453)

The trial court rejected Pryor's breach of contract claim alleging Green Rock failed to pay its note, finding "Pryor agreed to forgive the balance of the Green Rock Note in 2008." (CL 19, CP 454) The trial court again stressed that "Pryor was provided all relevant documents for signature. Pryor is highly intelligent and the documents are not ambiguous. The documents in controversy are clear as to what the expectations are of the parties. Unfortunately for his case, Pryor, by his own admission, did not read the documents. Nevertheless, Pryor signed the documents on his own volition." (CL 18, CP 454)

The trial court also rejected Pryor's claims for indemnification and accounting because Pryor failed to "demonstrate that there exists a contract containing an indemnity provision that binds [Nelson] to reimburse [Pryor]" and Pryor never "request[ed] or argu[ed] in favor of" an accounting at trial. (CL 20-21, CP 455) The trial court's last finding characterized the parties' relationship as one besieged by the ups and downs of any partnership, especially in troubled economic times: "Throughout their relationship, Nelson and Pryor went through various stages of trust and distrust. . . . [M]oments in their relationship indicated understandable uncertain[ty], frustration, and tension." (FF 106, CP 449-50 (citing Exs. 297, 337, 346, 621, 622, 623, 624))

The trial court entered judgment against Pryor in the principal amount of $105,999.05 and $32,346.47 for prejudgment interest. (CP 678-81) It also entered findings of fact and conclusions of law awarding Nelson $104,399.86 in attorney's fees and $10,443.08 in costs based on the prevailing party fee provision in the 2006 Redemption Agreement. (CP 673-77)[7]

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[7] On May 30, 2017, Nelson filed his Brief of Respondent in this Court, arguing, among other things, that Pryor failed to preserve any claim for equitable indemnity. Pryor then filed a RAP 9.11 motion asserting that his unfiled, undisclosed proposed findings were "additional evidence" that he had preserved an equitable indemnity claim. This Court's Commissioner granted Pryor's motion (CP 1999-2000), allowing Pryor to file and designate as Clerk's Papers his proposed findings (CP 2001-29), and allowing Nelson to file an amended Brief of Respondent responding to Pryor's new contention that his previously undisclosed proposed findings preserved his equitable indemnity claim.

IV. ARGUMENT

A. This Court reviews the trial court's findings for substantial evidence, deferring to the trial court's assessment of conflicting evidence, witness credibility, and the persuasiveness of evidence.

On appeal, Pryor challenges just nine of the trial court's 106 findings. The trial court's unchallenged findings are now verities on appeal. *Estate of Barnes*, 185 Wn.2d at 9, ¶ 7. This Court reviews the challenged findings to determine whether they are supported by substantial evidence, deferring to "the trial court on issues of conflicting evidence, witness credibility, and persuasiveness of the evidence." *Scott's Excavating Vancouver, LLC v. Winlock Properties, LLC*, 176 Wn. App. 335, 341-42, ¶ 11, 308 P.3d 791 (2013), *rev. denied*, 179 Wn.2d 1011 (2014); *see also Currier v. Northland Servs., Inc.*, 182 Wn. App. 733, 741-42, ¶ 13, 332 P.3d 1006 (2014) ("The trial court is in a better position to make credibility determinations, and if substantial evidence exists, this court will not substitute its judgment for that of the trial court on appeal."), *rev. denied*, 182 Wn.2d 1006 (2015). This Court must view all reasonable inferences from the evidence in the light most favorable to Nelson, the prevailing party. *Scott's Excavating*, 176 Wn. App. at 342, ¶ 11.

Deference to the trial court is especially appropriate where the burden of proof is clear, cogent, and convincing – as it is for Pryor's fraud claim – because whether the evidence is clear, cogent, and convincing, "necessarily requires a process of weighing, comparing, testing, and evaluating – a function best performed by the trier of the fact." *Proctor v. Huntington*, 146 Wn. App. 836, 846, ¶ 17, 192 P.3d 958 (2008), *aff'd*, 169 Wn.2d 491, 238 P.3d 1117 (2011), *cert. denied*, 562 U.S. 1289 (2001) (quoted source omitted).

After a ten-day trial – involving hundreds of exhibits and twelve witnesses – the trial court rejected each of Pryor's claims and held that he had breached the 2006 Redemption Agreement and 2012 Purchase and Sale Agreement. This Court should affirm the trial court's decision, which is based on its first-hand weighing of the evidence and evaluations of credibility.

B. The trial court correctly found that Pryor had failed to prove his claim for fraud based on the Debt Swap.

This Court should affirm the trial court's rejection of Pryor's fraud claim because 1) Pryor did not preserve the arguments he makes on appeal, 2) Pryor failed to prove any misrepresentation, 3) Pryor suffered no damages, and 4) the fraud claim is barred by the three-year statute of limitations.

1. This Court should reject Pryor's newly minted fraud claim, which rests on conduct that allegedly defrauded the Sakais, not Pryor.

Pryor presents a plethora of newly minted arguments in an effort to undermine the trial court's detailed findings rejecting the arguments Pryor actually advanced below. This is particularly true of Pryor's fraud claim. Both before and at trial Pryor based his fraud claim on the 2008 Debt Swap in which Pryor forgave the balance of the Green Rock note – not the 2009 transfer of assets from Landmark to Apex, the basis for his arguments on appeal. In his trial brief Pryor alleged "Nelson concocted a complicated, multi-party transaction designed to trick Pryor into writing off most of the balance of $412,678 owed by Green Rock." (CP 304) When asked at trial Pryor stated that "other than the $412,000 that was defrauded of me, I don't know of [any misrepresentations that Mr. Nelson had made]." (RP 1280; *see also* RP 1281 ("What fraud is that? A. The Debt Swap.")) Pryor's counsel mentioned the Apex transfer only once in closing argument (RP 1772), but never explained how it established any elements of his common law fraud claim, asserting it was instead a fraudulent transfer "of the assets of Landmark to Apex."

Pryor's arguments below – not any "confusion" by the trial court (App. Br. 11) – explain why the trial court found "Pryor contends Nelson misrepresented material facts regarding the Debt Swap to induce him to enter into it." (FF 33, CP 431) The trial court was never given the chance to address Pryor's new contention on appeal that he met his "burden of proving fraud" "[b]ecause ... the Nelsons' fraudulently transferred Landmark's assets... in 2009." (App. Br. 24) This Court should reject Pryor's unpreserved arguments. RAP 2.5(a); *Gardner v. First Heritage Bank*, 175 Wn. App. 650, 674, ¶ 37, 303 P.3d 1065 (2013).

Regardless, Pryor's new argument is fatally flawed. Pryor cannot establish *his fraud claim* by establishing that *the Sakais* may have had a colorable fraudulent transfer claim.[8] Pryor nowhere acknowledges the nine elements of a common law fraud claim, let alone explain how the Apex transfer established those elements by clear, cogent, and convincing evidence, including that the transfer constituted a "representation of an existing fact" by Nelson to Pryor

[8] Pryor overstates the trial court's finding regarding the transfer of Landmark's assets (FF 15, CP 428), asserting it constitutes a finding of a fraudulent transfer under RCW 19.40.041 and RCW 19.40.051. (App. Br. 14) Pryor never asked the court to resolve that issue. The trial court did not cite those statutes, nor did it find that Landmark did not receive reasonably equivalent value (a necessary element of a fraudulent transfer claim) or "clearly and satisfactory proof" of an actual intent to defraud, or address any of the defenses under RCW 19.40.081 that could have been raised in litigation actually resolving a fraudulent transfer claim. *See Burton v. Twin Commander Aircraft LLC*, 171 Wn.2d 204, 223 n.8, ¶ 38, 254 P.3d 778 (2011) (actual intent to defraud must be demonstrated by 'clear and satisfactory proof'"). Pryor also overlooks the fact that Nelson, whatever his intent in 2009, paid the Sakais $70,000 in 2013.

and that Pryor relied on that "representation" to his detriment. *See Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996) (listing nine elements). Indeed, Pryor argues *he was not even aware of the Apex transfer*. (App. Br. 21) Pryor could not have relied on a "representation" of which he had no knowledge.

Though not called upon to address *Pryor's* newly minted fraud claim, the trial court was clearly cognizant of Pryor's strategy of tarring Nelson with the *Sakai's* potential fraudulent transfer claim that they never asserted: "put[ting] this over here so the Sakais can't get to it . . . is a mode of self-protection here that isn't necessarily fraud against Dr. Pryor." (RP 1766; *see also* RP 1790 (noting that Pryor's expert did not testify "to Mr. Nelson actually committing fraud against Dr. Pryor")) This Court should reject Pryor's newly minted and fundamentally confused fraud claim.

2. The trial court correctly found that Nelson did not misrepresent the finances of the parties' shared entities.

The trial court correctly found that Pryor failed to prove by clear, cogent, and convincing evidence the fraud claim he actually alleged below – that Nelson misrepresented the finances of Landmark and Sportsman Park prior to the Debt Swap. Many of the findings underlying the trial court's decision to reject Pryor's fraud claim are unchallenged on appeal and the others are supported by substantial evidence. This Court should reject Pryor's invitation to reweigh the evidence on appeal.

"The nine elements of fraud are: (1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff." *Stiley*, 130 Wn.2d at 505. "*Each element* of fraud must be established by 'clear, cogent and convincing evidence.'" *Stiley*, 130 Wn.2d at 505 (emphasis added).

The trial court correctly found that Pryor had "not met this high burden of proof." (CL 13, CP 453) Relying on evidence the trial court did not find persuasive, Pryor now asks this Court to find on appeal that Nelson made two fraudulent "misrepresentations" to Pryor: (1) that Nelson would contribute cash to Sportsman Park during the Debt Swap, and (2) that Nelson misrepresented the amount of debt owed by Sportsman Park to Landmark prior to the Debt Swap. (App. Br. 40-45)

The trial court found that Pryor had failed to prove the first alleged misrepresentation was made, stating "there is insufficient corroboration or documentation to prove" "Nelson falsely represented that he was going to put [in] $373,165.22 of his own money." (FF 33, CP 431-32) This Court cannot second guess the trial court's factual determination that this misrepresentation never occurred. *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, ¶ 17, 225 P.3d 266 (2009) ("where a trial court finds that evidence is insufficient to persuade it that something occurred, an appellate court is simply not permitted to reweigh the evidence and come to a contrary finding"), *rev. denied*, 168 Wn.2d 1041 (2010). And even if Nelson had made this statement, the trial court correctly rejected it as a basis for a fraud claim because it is not a statement of existing fact, but "a promise of future performance," which cannot support a fraud claim. *Stiley*, 130 Wn.2d at 505-06.

The trial court likewise found – in an unchallenged finding – that Nelson did not misrepresent any debt, but instead Nelson kept Pryor "regularly informed what was happening with the various business entities they shared an interest in," "that if Nelson were unable to answer a question, Nelson would refer him to [their bookkeeper]," and "that Nelson had offered Pryor the opportunity to audit and review all the books." (FF 40, CP 433; *see also* RP 1005, 1344, 1605; Ex. 145, 148, 636) Pryor admitted at trial that "Nelson kept [him] informed of what was happening with various business entities that [he] shared an interest in," and that Nelson "offered to have [him] audit the books and review all of the books." (RP 1263, 1279-80) And it was the parties' bookkeeper, Helen Stevenson, not Nelson, who calculated the debt Sportsman Park owed to Landmark, a debt that "changed often." (FF 35, 37, CP 432; Ex. 145; RP 1005-06) Stevenson, like Nelson, "kept Pryor informed of the nature and amount of the debt Sportsman Park owed to Landmark," including at a lengthy meeting with Pryor and his wife (and without Nelson) just before the Debt Swap. (FF 37-38, 41, CP 432-33; RP 916, 992-95, 1003-07, 1021, 1264; Ex. 136, 142, 145) As Pryor admitted, "Nelson never prohibited [him] from contacting . . . Stevenson to ask her questions." (CP 1264)

The trial court rejected Pryor's attempt, repeated on appeal (App. 40-47), to prove fraud by cherry-picking a series of disparate accounting records. Stevenson's testimony supports its decision. (*See* RP 855 ("I'd have to get in and see the details of it"), 891 ("You just have single sheets of paper, so it's pretty hard to definitively tell what's going on"), 945 ("I would have to look at the guts of that to see what it was . . . I have no idea without looking at this source document"), 981 ("I would need to see the whole context . . . . I can't tell when I look at like a little snippet here"))

Stevenson also debunked Pryor's charge that Nelson inflated the debt owed by Sportsman Park to Landmark in an attempt to defraud him and defended her calculation of that debt. (RP 1007-09, 1013; *see also* Ex. 346 at 1 (Pryor acknowledging in 2012 that Stevenson was "satisfied with the transaction")) Indeed, *every witness* involved with the finances of Sportsman Park and Landmark – their bookkeeper, as well as their current and former CPAs – testified that they did not believe Nelson had done anything fraudulent. (CP 1150 (former CPA), 1550, 1588 (current CPA and certified fraud examiner); *see also* RP 1129-30, 1133-34 (attorney hired to formalize corporate minutes); FF 48-52, CP 435-36) The trial court rejected Pryor's repeated allegation that exhibit 43, a January 5, 2008, Landmark company meeting minute stating that "Sportsman Park owed us a couple hundred thousand," proved Nelson misrepresented Sportsman Park's debt. (*See* App. Br. 41; RP 1669) As the trial court noted (RP 1790), even Pryor's expert could not support the notion that Nelson had defrauded Pryor. Pryor's expert, Frank Miller, testified only that the Debt Swap was not reported properly for tax purposes, and repeated his opinion first offered in the Sakai litigation that the Debt Swap was improper as to the Sakais.[9] (*See* RP 1449, 1495)

This Court "do[es] not hear or weigh evidence. . . . The trial judge weighed th[e] conflicting evidence and chose which of it to believe. That is the end of the story." *Quinn*, 153 Wn. App. at 717, ¶¶ 16-17. The trial court relied on the testimony of those most familiar with the accounting of these companies in rejecting Pryor's contention that Nelson somehow "tricked" Pryor into entering the Debt Swap. This Court should affirm the trial court's conclusion that Pryor failed to prove his fraud claim by clear, cogent, and convincing evidence.

3. The Debt Swap did not cause Pryor any damages.

On appeal, Pryor alleges a sweeping array of damages caused by Nelson's purported fraud (App. Br. 30-33), but none of these alleged damages arise from the Debt Swap, and instead relate to his unpreserved allegation that he was defrauded by the Apex transfer. Pryor's inability to establish damages from the alleged misrepresentations provides an independent basis to affirm.

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[9] Miller was previously hired by the Sakais to support their efforts to enforce their judgments against Landmark. (FF 44, CP 434) Before testifying at trial in this case, Miller did not speak with Pryor or any witnesses. (FF 47, CP 435; RP 1459-60)

The Debt Swap in fact benefited Pryor. Neither Pryor nor Nelson had the cash on hand necessary to pay Sportsman Park's liabilities. (FF 29, CP 431) By swapping the balance of the Green Rock note for his half of Sportsman Park's liability, Pryor avoided having to liquidate assets for cash or having to pay interest on a loan for Sportsman Park. Moreover, as his own expert testified, Pryor avoided tax liability because he failed to report forgiveness of $373,000 debt as income. (RP 1510-11; FF 45, CP 434) Pryor cannot base a fraud claim on a transaction that benefited him.

4. Pryor's fraud claim is barred by the three-year statute of limitations in RCW 4.16.080.

Pryor's fraud claim, filed in March 2014, alleges misrepresentations that took place before 2008 and is thus untimely under the three-year statute of limitations. RCW 4.16.080 provides another basis to affirm the rejection of Pryor's fraud claim.

RCW 4.16.080(4) gives a claimant three years from the discovery of a fraud to sue: "[T]he cause of action in such case [is] not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." *See Hudson v. Condon*, 101 Wn. App. 866, 875, 6 P.3d 615 (2000) ("the statute of limitations for a damage action based on fraud commences when the aggrieved party discovers, *or should have discovered*, the fact of fraud.")

(emphasis added), *rev. denied,* 143 Wn.2d 1006(2001). Actual knowledge is not required, because a court will "infer actual knowledge of fraud if the aggrieved party, through due diligence, could have discovered it." *Hudson,* 101 Wn. App. at 875. "Even in an action for fraud where a fiduciary relation exists, the burden is upon the plaintiff to show that the facts constituting the fraud were not discovered or could not be discovered until within 3 years prior to the commencement of the action." *Douglass v. Stanger,* 101 Wn. App. 243, 256, 2 P.3d 998 (2000) (quotation and alterations omitted). The question of due diligence is ordinarily a question of fact. *Douglass,* 101 Wn. App. at 256.

The trial court's unchallenged findings establish that Pryor's fraud claim was untimely. Pryor alleged Nelson misrepresented facts leading up to the Debt Swap on January 5, 2008, but he did not bring his fraud claim until March 2014, well after the three-year statute of limitations expired. (CP 56) As the trial court repeatedly found, Pryor did not exercise diligence to discover the facts he now alleges establish fraud. (FF 41-43, 84, CP 433-34, 443; CL 18, CP 454) As Pryor admitted: "if I look at my due diligence, there wasn't any because for years I just let things be as they were . . . . I did not look into a lot of things or investigate or do my own scrutiny." (RP 1270)

Asked if anybody prohibited him from performing that scrutiny, Pryor answered "Oh, no." (RP 1270)

Pryor asserts "[t]here is no evidence that Ex. 43 was available to Pryor" (App. Br. 41 n.14, 48), but Pryor – not Nelson – bore the burden of proving he could not have discovered it with reasonable diligence. *Douglass*, 101 Wn. App. at 256. Pryor's assertion also cannot be squared with the trial court's unchallenged findings that Nelson offered to let him audit and review all books, and encouraged him to hire a forensic accountant. (FF 40, 83, CP 433, 443; *see also* RP 1274-80, 1344; Ex. 337 at 5, 636 at 1) This Court should affirm the trial court's rejection of Pryor's fraud claim for one, or any, of these reasons.

C. The trial court correctly found that Pryor had failed to prove Nelson breached any fiduciary duties.

Pryor similarly argues a breach of fiduciary duty theory he did not argue below. Pryor did not allege at trial that Nelson breached his fiduciary duties to him by transferring assets between two entities in which Pryor had no interest, Landmark and Apex. (*Compare* CP 301 (trial brief); RP 1793-94 (closing argument: "breach of fiduciary duty on the Debt Swap"), *with* App. Br. 22 ("it was the Nelsons' 2009 Apex Fraud that constituted breaches of the fiduciary duties")) Pryor's unpreserved claim fails for this reason alone.

Pryor's breach of fiduciary duty claim fails for any of three additional reasons. First, Nelson kept Pryor well-informed about the businesses in which they actually shared ownership, as the trial court found in unchallenged findings. Second, Pryor cannot establish a breach of fiduciary duty based on Nelson's actions in managing entities in which Pryor owned no interest. Third, Pryor's breach of fiduciary duty claim is barred by the three-year statute of limitations.

1. Nelson complied with his fiduciary duties by keeping Pryor well-informed of the status of their business entities.

A plaintiff alleging a breach of fiduciary duty "must prove (1) existence of a duty owed, (2) breach of that duty, (3) resulting injury, and (4) that the claimed breach proximately caused the injury." *Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 433-34, 40 P.3d 1206 (2002). An LLC manager owes the LLC and its members fiduciary duties analogous to the fiduciary duties of partners. *Bishop of Victoria Corp. Sole v. Corp. Bus. Park, LLC*, 138 Wn. App. 443, 456, ¶ 36, 158 P.3d 1183 (2007), *rev. denied*, 163 Wn.2d 1013 (2008); *see also* RCW 25.15.038 (listing manager duties).[10]

[10] RCW 25.15.038 was not effective until 2016 and does not govern Pryor's claim, though it is still instructive of the duties of an LLC manager.

Under former RCW 25.15.040 (2015), which governed this case, the "manager's duties and liabilities may be expanded or restricted by provisions in a limited liability company agreement." The Sportsman Park operating agreement gave Nelson broad authority to manage the company's affairs; he could be held liable only for "fraud, misconduct, bad faith or gross negligence." (Ex. 53 at 6) The parties' operating agreement thus adopted the "business judgment rule," which bars liability for a transaction where it is within a manager's authority and a reasonable basis exists to show the transaction was made in good faith. *Scott v. Trans-Sys., Inc.*, 148 Wn.2d 701, 709, 64 P.3d 1 (2003) (cited in CL 7, CP 452).

The trial court rejected Pryor's breach of fiduciary duty claim in an unchallenged finding that Nelson kept Pryor informed about their businesses, and that he offered Pryor the opportunity to audit financial records. (FF 40, CP 433) Moreover, the trial court found that any failure by Pryor to understand the Debt Swap (or any other transaction) was the result of his own lack of diligence (including not reading documents he signed), not any failure to disclose information by Nelson. (FF 41-43, 84, CP 433-34, 443; CL 18, CP 454; RP 1253-54, 1270) Indeed, Pryor testified he "absolutely" did not "have a real great understanding" of the Debt Swap, which he blamed not on any "misrepresentation" of Nelson, but his own lack of diligence. (RP 1282; *see also* FF 60, CP 437) As Pryor admitted, "My not being more involved with the company is indeed my fault and I blame myself for not learning more." (Ex. 337 at 2)

The trial court also correctly rejected Pryor's breach of fiduciary duty claim because "Pryor knowingly acquiesced to the Debt Swap and all other transactions complained of in this matter." (CL 7, CP 452) *See Smith v. Pacific Pools, Inc.*, 12 Wn. App. 578, 584, 530 P.2d 658 (party could not "claim breach of a fiduciary obligation not to compete if he consented to the competition"), *rev. denied*, 85 Wn.2d 1016 (1975). As explained above (§ IV.B.2), the trial court correctly rejected Pryor's contention he did not knowingly agree to the Debt Swap because he was "misled into believing that [Sportsman Park] owed $746,330.66 to Landmark." (App. Br. 48)

The trial court likewise correctly rejected Pryor's allegation that Nelson breached fiduciary duties in his accounting of capital contributions or his handling of income from tenants, allegations based on the testimony of Nelson's former employee, Blaine Scott. (App. Br. 31-32, 45-47) The trial court found that Scott's testimony was "clouded," because Scott had wrongfully disclosed proprietary information to Nelson's competitors and had tried to ingratiate himself with Pryor. (FF 88-91, CP 444-45; RP 607-08, 619, 626, 636-37; *see also* RP 1690-91 (Nelson rebutting Scott's allegations)) These "[c]redibility determinations cannot be reviewed on appeal." *Morse v. Antonellis*, 149 Wn.2d 572, 574, 70 P.3d 125 (2003)).

Moreover, Pryor's own expert witness testified that there was nothing improper vis-à-vis Pryor in booking Nelson's unpaid commissions as capital contributions, only that it would not have complied with federal tax reporting requirements. (RP 1455-56) Indeed, Nelson reached the same conclusion after speaking with his CPA and ultimately decided not to book his unpaid commissions as capital contributions. (RP 745) And Pryor ignores that the alleged accounting impropriety in handling tenant income was suggested by Stevenson, who saw nothing wrong with it. (Ex. 171)

Further, former RCW 25.15.175 (2015), disposes of Pryor's argument that Nelson breached his duties by relying on professionals. (App. Br. 26-28) As the trial court found (FF 105, CP 449), Nelson was entitled to rely on information provided by professionals, including Stevenson's evaluation of the debt owed by Sportsman Park to Landmark:

> In discharging the duties of a manager . . . [a] manager of a limited liability company is entitled to rely in good faith . . . upon such information, opinions, reports, or statements presented to the limited liability

> company by . . . any other person, as to matters the member or manager reasonably believes are within such other person's professional or expert competence and who has been selected with reasonable care by or on behalf of the limited liability company, including information, opinions, reports, or statements as to the value and amount of the assets, liabilities, profits, or losses of the limited liability company or any other facts pertinent to the existence and amount of assets from which distributions to members might properly be paid.

RCW 25.15.175 (2015).

The trial court rejected Pryor's allegation that Nelson "manipulated" these professionals, finding Nelson never interfered with Stevenson's efforts to keep Pryor informed and encouraged Pryor to ask Stevenson any questions he could not answer. (FF 37, 40-41, CP 433; RP 995, 1264, 1344; Ex. 126, 136, 145) Pryor admitted he did not avail himself of the opportunities to ask Stevenson questions. (RP 1270) And again, the alleged "manipulation" concerns the 2009 Apex transfer, which was not the basis of Pryor's claims below. (App. Br. 26-27) The trial court correctly found that Nelson breached no fiduciary duties.

2. Pryor cannot establish a breach of fiduciary duty claim by challenging Nelson's management of two businesses in which Pryor owned no interest.

The crux of Pryor's restyled breach of fiduciary claim is that Nelson breached his fiduciary duty to Pryor by transferring assets between Apex and Landmark in 2009. But Pryor owned no interest in either of those companies, having sold his interest in Landmark in 2006, and Nelson thus owed no duties to Pryor in how he managed those companies. Nelson could not breach a duty he did not owe.

The fiduciary duties imposed on an LLC manager extend to matters concerning the LLC. *Bishop of Victoria*, 138 Wn. App. at 458, ¶ 41. This means that a manager must disclose information "*that is significant and material* to the affairs or property of the" LLC, but not information unrelated to the LLC. *Bishop of Victoria*, 138 Wn. App. at 458, ¶ 41 (emphasis in original); *see also RSD AAP, LLC v. Alyeska Ocean, Inc.*, 190 Wn. App. 305, 321, ¶ 42, 358 P.3d 483 (2015) ("The good faith obligation . . . demands that the partner abstain from any and all concealment *concerning matters pertaining to the partnership*") (emphasis added), *rev. denied*, 185 Wn.2d 1023 (2016). Thus, a manager does not breach any fiduciary duty by taking action that is not adverse to the LLC. *Bishop of Victoria*, 138 Wn. App. at 458, ¶ 40. Where self-dealing by a fiduciary is alleged, each transaction must be analyzed separately, and thus even where "a fiduciary's self-dealing or personal benefit in one transaction has been shown, the burden does not shift to the fiduciary to prove the fairness of all transactions complained of, regardless of whether any evidence has been presented that such transactions involved self-dealing or personal benefit." *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 512, 728 P.2d 597 (1986).

Bishop of Victoria, relied on by Pryor (App. Br. 24), confirms the misguided nature of Pryor's claim. In that case, a corporation, Bishop of Victoria Corporation Sole (BV), which held real property of the Roman Catholic Diocese of Victoria, and an individual, Finley, formed a LLC to buy and resell real estate, financing the purchase with a loan. After BV stopped making payments on the loan, the lender foreclosed, obtaining judgments against BV, Finley, and the LLC. BV eventually bought the judgment through a trustee with funds the Diocese raised from its parishioners.

The Court of Appeals held that BV did not breach any fiduciary duty by failing to disclose to Finley its effort to raise funds from parishioners because it was not material to the LLC and "could not have induced any action of forebearance on" the LLC's part. *Bishop of Victoria*, 138 Wn. App. at 459, ¶ 42. The court likewise held that BV's settlement offers did not breach its fiduciary duties because those offers would not have adversely affected the LLC, analogizing to the rule that "[a] partner does not violate a duty or obligation . . . merely because the partner's conduct furthers the partner's own interest." *Bishop of Victoria*, 138 Wn. App. at 458, ¶ 39 (quoting RCW 25.05.165(5)).

Here, as in *Bishop of Victoria*, Pryor's breach of fiduciary claim must fail because it is based on actions unrelated to the entity, Sportsman Park, giving rise to the fiduciary duties. Pryor complains that Nelson breached fiduciary duties to him by transferring Landmark's assets to Apex in 2009, but Pryor *had no interest* in either of those companies at that time. (*See* App. Br. 22) Nelson could not breach any fiduciary duty to Pryor in his management of his other businesses because he had no duty to disclose information concerning those businesses to Pryor. Pryor's contention that Nelson owed fiduciary duties to manage each of his businesses for Pryor's benefit – regardless of ownership – is both nonsensical and at odds with well-established Washington law that "separate entit[ies] should be respected." *Frigidaire Sales Corp. v. Union Properties, Inc.*, 88 Wn.2d 400, 405, 562 P.2d 244 (1977). Indeed, the Sportsman Park operating agreement confirmed as much, authorizing Nelson to "possess an interest in other business ventures" and that Pryor would not "have any right by virtue of this Agreement in and to such independent ventures." (Ex. 53 at 17)

Nelson violated no fiduciary duties to Pryor by pursuing business opportunities through companies in which Pryor had no interest.

3. Pryor's breach of fiduciary duty claims are barred by the three-year statute of limitations in RCW 4.16.080.

Like his fraud claim, Pryor's breach of fiduciary claim is barred by the three-year statute of limitations. RCW 4.16.080; *Hudson v. Condon*, 101 Wn. App. 866, 874, 6 P.3d 615 (2000) (breach of fiduciary duty claims sound in fraud and are thus governed by three-limitations period in RCW 4.16.080). Pryor's breach of fiduciary duty and fraud claims are based on the same conduct, and thus time barred for the same reasons. § IV.B.4, *supra*.

D. All of Pryor's claims against Nelson are barred by the release in the 2012 Purchase and Sale Agreement.

Pryor agreed in the 2012 Purchase and Sale Agreement to release Nelson, Sportsman Park, and Central Plaza "from any and all claims, liabilities, damages, attorneys' fees and other costs arising from or related to his ownership of" Sportsman Park, "whether such claims are known or unknown." (Ex. 3 at 4) The trial court correctly found that this broad release bars all of Pryor's claims against Nelson and Sportsman Park. (CL 14, CP 453) Though Pryor may regret executing this release, seller's remorse is not a basis for avoiding his voluntary agreement, and his arguments to the contrary confuse this straightforward defense to all of his claims against Nelson.

Washington courts are "loath to vacate properly executed releases because Washington favors finality in private settlements." *Del Rosario v. Del Rosario,* 152 Wn.2d 375, 382, 97 P.3d 11 (2004). A release must be sustained unless induced by fraud, false representations, or overreaching, or mutual mistake. *Del Rosario,* 152 Wn.2d at 382.

Pryor alleges the release is invalid because of the "2009 Apex Fraud" (App. Br. 40), but Pryor elsewhere asserts he was not even aware of the 2009 Apex transfer. (App. Br. 20) He could not have been induced to sign the release by an event of which he was unaware. Moreover, Pryor expressly agreed to release "all claims . . . known or unknown" and thus his lack of knowledge is irrelevant. Pryor's claims against Nelson and Sportsman Park are barred.

E. The trial court correctly rejected Pryor's breach of contract claim against Green Rock.

Pryor again recasts his claims on appeal in arguing the trial court erred in rejecting a breach of contract claim against Nelson. At trial, Pryor did not argue that Nelson breached the 2006 Redemption Agreement by having Apex, rather than Landmark, perform work at the Sportsman Park complex. (*Compare* App. Br. 23, *with* CP 310-

11; RP 1773 (closing argument: "Green Rock [b]reached its obligation to pay its promissory note")) This Court should reject this unpreserved breach of contract claim.

Pryor did (erroneously) argue at trial that Green Rock breached its note and must pay him the balance. (*See* App. Br. 47-48) But the trial court found that "Pryor agreed to forgive the balance of the Green Rock Note in 2008." (CL 19, CP 454) The trial court found he forgave the balance because Nelson had not charged interest on leasing commissions he was owed. (FF 55, CP 436; Ex. 161, 417; RP 1325) Pryor's own statement, "That would seem, to me, to be a very fair arrangement," (Ex. 161 at 7) supports that finding. Pryor's argument that Green Rock breached its contract "[b]ecause the underlying premise of the 2008 'Debt Swap' was fraudulent," (App. Br. 48) is simply a rehash of his fraud claim that this Court should reject it for the reasons discussed in § IV.B.

Pryor's action for breach of contract is also barred by the six-year statute of limitations. RCW 4.16.040(1); RCW 62A.3-118. Pryor alleges that "Green Rock breached its obligations to pay cash . . . as of September 1, 2007," more than six years before he filed his counterclaims in March 2014. (*Compare* App. Br. 48, *with* CP 56)

The statute of limitations provides an independent reason for affirming the dismissal of Pryor's breach of contract claim.

F. Pryor never argued an equitable indemnity theory to the trial court and the trial court correctly rejected his contractual indemnification claim.

Pryor's equitable indemnity theory presents yet another unpreserved argument, a fact he evades by asserting he "did not limit [himself] to either contractual or equitable indemnity." (App. Br. 28 (citing his complaint, CP 73)) Pryor clearly pressed a *contractual* indemnity theory below, referencing in his complaint the rejected tender of his contractual indemnity claim (CP 73) and arguing in his trial brief "[t]he Pryors have *contractual rights* to indemnification." (CP 311 (emphasis added)) Pryor did not argue the elements or mention equitable indemnity during his closing argument. Pryor referred to an "equitable" indemnity claim in the proceedings below only once in a cursory fashion when answering an evidentiary question from the trial court during his opening statement. (RP 32) The trial court confirmed its understanding that Pryor's indemnity claim was purely contractual in its conclusions of law, where it found that Pryor failed to show "there exists a contract containing an indemnity provision" that required reimbursement. (CL 20, CP 455) Pryor did not challenge that finding or direct the court to an equitable indemnity claim in his motion for reconsideration. (CP 457-84)

Pryor's undisclosed, unfiled, and overwhelmingly rejected proposed findings did not preserve his equitable indemnity claim, contrary to his arguments made for the first time in a RAP 9.11 motion. (CP 2001-29) Pryor did not preserve for appeal a stealth equitable indemnity claim – nowhere asserted in Pryor's complaint, trial brief, or closing argument – on the basis of proposed findings presented to the trial court at the conclusion of trial that were never disclosed to Nelson. The preservation rule exists to allow trial courts to correct mistakes, but "[a]n even more important factor . . . is the consideration that the opposing parties should have an opportunity at trial to respond to possible claims of error, and to shape their cases to issues and theories, at the trial level, rather than facing newly-asserted errors or new theories and issues for the first time on appeal." Karl Tegland, 2A Wash. Prac., Rules Practice RAP 2.5 at 212 (8th ed. 2014); *Matter of Det. of Belcher*, 196 Wn. App. 592, 613, ¶ 47, 385 P.3d 174 (2016). It would be patently unfair to Nelson to allow Pryor to pursue on appeal a claim based solely on a document that was not made part of the record below and first disclosed to Nelson *after* Nelson *filed* his original brief of respondent in this Court.

Regardless, Pryor's equitable indemnity theory fails on the merits. To recover for equitable indemnity, a plaintiff must show a "(1) a wrongful act or omission by A toward B; (2) such act or omission exposes or involves B in litigation with C; and (3) C was not connected with the initial transaction or event, *viz.*, the wrongful act or omission of A toward B." *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn. App. 352, 359, ¶ 11, 110 P.3d 1145 (2005) (alterations and quotation omitted). "[A] party may not recover attorney fees under the theory of equitable indemnity if, in addition to the wrongful act or omission of A, there are other reasons why B became involved in litigation with C." *Blueberry Place*, 126 Wn. App. at 359, ¶ 13 (citing *Tradewell Group, Inc. v. Mavis*, 71 Wn. App. 120, 128, 857 P.2d 1053 (1993)).

Pryor's new equitable indemnity theory is fatally flawed for two reasons: (1) the allegedly wrongful act, the 2009 Apex transfer, was not a wrongful act toward Pryor, and (2) Pryor participated in the decision to sue the Sakais. Again, while the Apex transfer may have supported a fraudulent transfer claim brought by the Sakais (though the Sakais never alleged such a claim), it does nothing to support a claim that Pryor was defrauded. (§ IV.B.1) Moreover, Pryor and Nelson *jointly* decided to sue the Sakais in 2004, years before the Apex transfer. (FF 12, CP 428; RP 54-55) As Pryor admitted at trial, "[w]hen Landmark decided to start litigation against the Sakai family in 2004, that was a mutual decision between [him] and Mr. Nelson." (RP 1261; *see also* Ex. 26: Landmark Meeting minutes: "We talked about the Sakai lawsuit. It is agreed we will spend what we have to prove our case.") Pryor cannot claim he bears no responsibility for being involved in litigation he agreed to start.

Pryor's assertion that he played no role in instigating that litigation (App. Br. 22) also ignores the trial court's finding that Pryor and Nelson jointly decided to avoid paying the Sakais, thus prolonging the litigation and causing the Sakais to file a second lawsuit. (FF 16, CP 428-29; *see also* FF 106, CP 449) As Pryor wrote in a May 2012 email, "neither of us has any intention of paying the Sakai's anything." (Ex. 346 at 2) Though Pryor now asserts this statement referred only to the Debt Swap (App. Br. 20), his email makes no such distinction, and is in fact part of his negotiations with Nelson to limit his exposure to the Sakais in the 2012 Purchase and Sale Agreement they executed a month later. Equitable indemnity provides relief for innocent parties involved in litigation due solely to another's wrongful conduct. It does not provide relief to a party such as Pryor who decides to start litigation and then helps to prolong it.

G. The trial court correctly found that Pryor breached the 2006 Redemption Agreement and 2012 Purchase and Sale Agreement by failing to share the expenses of the Sakai litigation.

1. Pryor repeatedly agreed to share the costs and risks of the Sakai litigation, including any settlement.

The trial court correctly held that Pryor breached both the 2006 Redemption Agreement and 2012 Purchase and Sale Agreement by not paying Sakai litigation expenses. Pryor's argument that he should not have to pay the expenses incurred in resolving the Sakai litigation ignores his repeated agreements.

Under the 2006 Redemption Agreement, Pryor agreed "to reimburse Landmark for one half of all costs and expenses, including, without limitation, attorneys fees and costs, damages, judgments and amounts paid in settlement, incurred by Landmark or an affiliate in prosecution or defense of the [Sakai] Lawsuits." (Ex. 2 at 3) Under the 2012 Purchase and Sale Agreement, Pryor agreed the parties "*will continue* to share equally in the cost of [the Sakai] litigation, including *all* attorneys' fees and costs" and that "[i]f the Court in the New Suit holds [Pryor and Nelson] personally liable for the Landmark Judgment, then [Pryor's] total liability for the final judgment and accrued interest (but not for attorneys' fees and costs) . . . will not exceed $200,000." (Ex. 3 at 3 (emphasis added))

The trial court correctly rejected Pryor's contention that he cannot be liable for any portion of the Sakai settlement because it is a "requirement that a court hold Pryor personally liable." (App. Br. 34 (emphasis in original)) The language relied on by Pryor limits his liability to a maximum of $200,000; it makes no mention of changing the parties' longstanding agreement that they would share all costs of the litigation. (Ex. 3 at 3) Indeed, the 2012 Purchase and Sale Agreement states that the parties would "*continue* to share equally" the risks of the litigation (Ex. 3 at 3), and as the parties discussed just a month before signing the 2012 Purchase and Sale Agreement they "will share equally in any potential loss or gain of suit *as has always been the plan*." (Ex. 346 at 4 (emphasis added))

This evidence of context surrounding a contract's execution is admissible as an aid to ascertaining the intent of parties, regardless of whether the contractual language is ambiguous. *Kelley v. Tonda,* 198 Wn. App. 303, 312 ¶ 13, 393 P.3d 824 (2017) (citing *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990)). Moreover, the 2012 Purchase and Sale Agreement's integration clause did not, as Pryor contends (App. Br. 51), preclude the trial court from considering context. *See King v. Rice,* 146 Wn. App. 662, 671, ¶ 14, 191 P.3d 946 (2008) (court may consider extrinsic evidence "even when there is an integration clause"), *rev. denied,* 165 Wn.2d 1049 (2009). The trial court had ample factual grounds to reject Pryor's strained interpretation of the parties' contractual intent. *See Columbia Asset Recovery Grp., LLC v. Kelly,* 177 Wn. App. 475, 484, ¶ 17, 312 P.3d 687 (2013) ("Determining what the parties to a contract intended is generally a question of fact"); *Niemann v. Vaughn Cmty. Church,* 154 Wn.2d 365, 384, ¶ 29, 113 P.3d 463 (2005) ("[w]hen extrinsic evidence allows for conflicting reasonable inferences to be drawn, we generally defer to the trial court's determinations.").

The 2012 Purchase and Sale Agreement also states that Pryor would be liable for "***all*** attorneys' fees and costs," not just those incurred by attorney Bruce Johnston, as Pryor argues. (App. Br. 35) The agreement mentions that the parties "have retained Bruce Johnston to represent them" only in the preamble's recitation, not the provision actually creating the parties' obligations. (Ex. 3 at 3) The trial court correctly held that Pryor breached his agreement to share the costs of the Sakai litigation.

2. The trial court's award of damages is supported by Nelson's testimony regarding the expenses he incurred defending the Sakai litigation.

Nelson provided ample proof of his fees and expenses in defending and resolving the Sakai litigation. No authority supports Pryor's argument that professional fees cannot be proven by testimony and must instead be proven by the invoices of those professionals. (App. Br. 37-39)

"Evidence of damage is sufficient if it gives the trier of fact a reasonable basis for estimating the loss and does not require mere speculation or conjecture." *Holmquist v. King County*, 192 Wn. App. 551, 560, ¶ 16, 368 P.3d 234 (2016). Nelson testified to the fees he paid to each professional as part of the Sakai litigation. (RP 150 ($33,125 to Smith & Hennessey), 153 ($63,000 to Sanchez, Mitchell, Eastman & Cure), 155 ($34,245 to Bruce Johnston), 157 ($8,516 to Miller Nash), 162 ($5,000 to Davidson), 163 ($4,452 to Newman)) Nelson's testimony is competent evidence of his damages and sufficient evidence to support the trial court's damage award. WPI 1.01 ("Evidence includes such things as testimony of witnesses, documents, or other physical objects."). Pryor cites no authority supporting his contention that professional invoices are "needed to establish the fees and expenses." (App. Br. 37 n.12)

None of the cases cited by Pryor supports his contention that expert testimony is necessary to prove attorney's fees as an element of damages, let alone in a bench trial where the trier of fact routinely resolves attorney fee disputes. *Newport Yacht Basin Ass'n of Condominium Owners v. Supreme Northwest, Inc.*, 168 Wn. App. 86, 285 P.3d 70, *rev. denied*, 175 Wn.2d 1015 (2012) (App. Br. 37) stands for the unremarkable proposition that attorney fees, as with all damages, "must be proved to the trier of fact," and reversed a damages award because "[n]o evidence *or testimony*" on damages was presented at trial. 168 Wn. App. at 103, ¶ 31 (emphasis added). *Jacob's Meadow Owners Ass'n v. Plateau 44 II, LLC*, 139 Wn. App. 743, 162 P.3d 1153 (2007) (App. Br. 38) stated that "a jury *may* be aided" by expert testimony when considering attorney's fees as an element of damages and held that the trial court erred by awarding attorney's fees itself instead of putting the issue before the jury as an element of damages. 139 Wn. App. at 761-62, ¶¶ 41-42 (emphasis added). Moreover, unlike the agreements in both those cases, which authorized reimbursement of "reasonable" attorneys' fees, the 2012 agreement simply states Pryor must pay "all attorneys' fees and costs, when and as they become due." (Ex. 3 at 4)

Pryor also makes passing reference to the "affirmative defense of unclean hands," asserting it bars "all of the fees and expenses incurred by the Nelsons and Landmark" (App. Br. 36), but he cites no authority supporting that assertion, nor makes any attempt to apply the doctrine. He instead relies entirely on this Court's unpublished opinion in the Sakai litigation, which is not authority under GR 14.1, apparently believing its resolution of a dispute with the Sakais bars Nelson from obtaining relief against Pryor. But, the clean hands doctrine applies only to equitable relief, not the contractual damages awarded to Nelson, and it does not "disqualify any claimant from obtaining relief [that] has not dealt unjustly *in the very transaction concerning which he complains*." *McKelvie v. Hackney*, 58 Wn.2d 23, 31, 360 P.2d 746 (1961) (emphasis in original; quoting *J.L. Cooper & Co. v. Anchor Securities Co.*, 9 Wn.2d 45, 74, 113 P.2d 845 (1941)). The transaction and dispute at issue in the Sakai lawsuit did not concern Pryor's allegations in this case. This Court should reject Pryor's arguments that Nelson failed to prove his damages or that he is barred from recovering them.

H. The trial court correctly awarded attorney's fees and costs to Nelson based on 2006 Redemption Agreement.

The trial court did not abuse its discretion in awarding the Nelsons and Landmark their attorney's fees in this action based on the prevailing party fee provision in the 2006 Redemption Agreement. The trial court was not required to segregate fees because the 2006 Redemption Agreement was central to all of Pryor's claims and related to the same core of facts.

A trial court's determination that a fee award is reasonable is reviewed for an abuse of discretion, while whether the prevailing party was entitled to attorney fees is reviewed de novo. *Ethridge v. Hwang*, 105 Wn. App. 447, 460, 20 P.3d 958 (2001). Where a party brings tort claims that arise out of a contract authorizing a fee award, fees may be recovered on that claim if the contract is central to the dispute. *Brown v. Johnson,* 109 Wn. App. 56, 58, 34 P.3d 1233 (2001). Where a case involves some claims that authorize a fee award and other that do not, a trial court is not required segregate time if "the claims all relate to the same fact pattern, but allege different bases for recovery." *Ethridge*, 105 Wn. App. at 461; *see also Ewing v. Glogowski*, No. 74773-8-I, 2017 WL 1293484, at *3 (Wash. App. Apr. 3, 2017) ("segregation of attorney fees is not required if the trial court determines that the claims are so related that no reasonable segregation can be made"). A trial court's determination that segregation is not necessary is reviewed for abuse of discretion. *Ewing*, 2017 WL 1293484, at *3.

Here, the trial court found that the Nelsons and Landmark were entitled to recover their fees incurred defending Pryor's tort claims because the 2006 Redemption Agreement was central to all of Pryor's claims and no reasonable segregation was possible. (CP 674, 676) Pryor alleged the "breaches of fiduciary duties have caused [him] substantial damages, including the unpaid promissory note balance of $412,000 *from the 2006 Transaction*." (CP 71 (emphasis added)) Pryor likewise alleged Nelson "defrauded him by intentionally proposing a price for the 2006 Transaction that was based on an accounting that was materially and intentionally false" (CP 66), and that Nelson was liable "for those amounts . . . fraudulently concealed from the Pryors during . . . the 2006 Transaction." (CP 67)

Pryor's argument that the trial court erred in awarding attorney's fees because Nelson was not a party to the 2006 Redemption Agreement (App. Br. 53-54) ignores that this action was brought on behalf of Nelson and Landmark, and that Pryor counterclaimed against Landmark, accusing "[t]he Nelsons [and]

Landmark . . . [of] falsely represent[ing] to the Pryors the true value of the Pryors' financial interests in Landmark." (CP 72) Indeed, Pryor continues to seek relief against Landmark on appeal, asking this Court to enter judgment against it. (App. Br. 57) Because Landmark had a contractual right to recover attorney's fees, it was properly listed as a judgment creditor.

Pryor's contention that Nelson cannot recover fees related to the Green Rock note is also unavailing. (App. Br. 50-51) Pryor's attempt to enforce the note was based on the same allegation that he had been defrauded by a false accounting. (Ex. 2 at 7-8) Given the interrelated nature of all of Pryor's claims, the trial court was well within its discretion to find that no reasonable segregation of fees could be made.

Pryor also erroneously asserts the trial court did not award him fees related to claims on which he prevailed – the 2000 promissory note, a dispute over title to the Pinnacle Park property, and a claim voluntarily dismissed by the Nelsons. (App. Br. 50, 52, 54) In fact, the trial court awarded Pryor those fees and offset them against its award to Nelson. (CP 668-69, 675) This Court should affirm the trial court's award of fees to the Nelsons and Landmark.

I. The trial court did not err in awarding prejudgment interest.

The trial court did not err in calculating prejudgment interest from the date of Nelson's complaint, rather than the date of its decision, as Pryor contends. (App. Br. 55) The trial court included $32,346.47 in prejudgment interest based on Nelson's complaint that sought prejudgment interest on damages in "an amount not less than $98,000.00." (CP 11, 581-82) If a complaint prays for prejudgment interest on a specific amount stated in the complaint, as Nelson's did, prejudgment interest may be awarded on that amount from the date the complaint was filed. *See, e.g., Stryken v. Panell*, 66 Wn. App. 566, 569-71, 832 P.2d 890 (1992) (affirming calculation from date complaint was filed and directing additional items to be included).

J. Nelson is entitled to his attorney's fees on appeal.

"A contract providing for an award of attorney fees at trial also supports such an award on appeal." *Hall v. Feigenbaum*, 178 Wn. App. 811, 827, ¶ 37, 319 P.3d 61, *rev. denied*, 180 Wn.2d 1018 (2014). Pursuant to RAP 18.1, this Court should award the Nelsons and Landmark their attorney's fees incurred in defending Pryor's sweeping challenges to the trial court's decision. As the trial court found, Pryor's claims are intrinsically related and this Court should likewise decline to require segregation of fees.

V. CROSS-APPEAL

A. ASSIGNMENT OF ERROR ON CROSS-APPEAL

1. The trial court erred in entering Finding of Fact 3 and Conclusion of Law 1. (CP 450)

B. STATEMENT OF ISSUE ON CROSS-APPEAL

1. Did the trial court err in absolving Pryor of liability for the $60,000 promissory note he signed by finding that "[t]he Note has specifically agreed upon terms with regards to demand for payment" and concluding that "Nelson breached the terms of the Note by failing to properly make demand on the Note"?

C. ARGUMENT ON CROSS-APPEAL

The trial court expressly found "there is insufficient evidence establishing that Pryor paid the [$60,000] Note" he signed when he purchased his interest in Landmark. (CL 1, CP 450) But despite finding Pryor never paid the note, the trial court erased his debt by erroneously conflating the notice requirements in Landmark Purchase and Sale Agreement and the promissory note Pryor used to purchase his interest in Landmark. This Court should reverse the trial court's conclusion that Pryor is not liable on the $60,000 promissory note and remand for entry of a supplemental $60,000 judgment in Nelson's favor.

The trial court erroneously relied on the notice requirements in the Landmark Purchase and Sale Agreement to require a written demand, served by registered mail, for payment of the promissory note. The Landmark Purchase and Sale Agreement required that "[a]ll demand and notices hereunder shall be sent by registered mail . . . ." (Ex. 1 at 1) That requirement is not in the promissory note, which simply requires "a minimum of seven days notice to Buyer" for any demand for payment. (Ex. 1 at 3) Because the trial court relied on the wrong notice provision, the trial court erred in holding that noncompliance with this requirement of a demand via registered mail excused Pryor's obligation to pay the note. (*See* FF 3, CP 426 ("The Note has specifically agreed upon terms with regards to demand for payment"); RP 1779 (trial court: "it was supposed to be a registered mail"))

The trial court's ruling allowed Pryor to receive the benefit of years of ownership in Landmark without ever paying for that ownership. This Court should reverse the trial court's conclusion excusing Pryor's refusal to pay the note, and award Nelson the attorney's incurred in enforcing the note, as authorized by the note. (Ex. 1 at 3)

VI. CONCLUSION

This Court should affirm the trial court's rejection of each of Pryor's claims, its decision that Pryor breached his agreements to share the costs of the Sakai litigation, its attorney fee award, and should award Nelson his attorney's fees on appeal. This Court should reverse the trial court's decision that Pryor is not liable on the $60,000 promissory note and remand for entry of judgment in Nelson's favor for $60,000, plus attorney fees at trial and on appeal.

Dated this 3rd day of August, 2017.

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DECLARATION 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 August 3, 2017, I arranged for service of the foregoing Amended Brief of Respondents/Cross-Appellants, to the court and to counsel for the parties to this action as follows:

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