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COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

BRYAN W. McLELLAND, D.D.S. and KRISTA McLELLAND, husband
and wife, and the marital community composed thereof, and BRYAN W.
McLELLAND, D.D.S., P.S., a Washington professional services
corporation,

Respondents,

vs.

DIANE S. PAXTON, personal representative of the ESTATE OF MARK
C. PAXTON, D.D.S., and DIANE S. PAXTON, individually, and MARK
C. PAXTON, D.D.S., P.S., a Washington professional services
corporation,

Appellants.

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A INTRODUCTION

When a professional partnership dissolves and each professional continues practicing independently, the dissolved business has no goodwill to distribute. It ceases to be a going concern with the expectation of future business, which is the definition of goodwill. As a matter of law, the trial court erred here in concluding that a dissolved business had goodwill value.

B. REPLY ON STATEMENT OF THE CASE

Dr. McLelland does not dispute Dr. Paxton's statement of the case, but a few points of clarification may be useful for the Court. Dr. McLelland claims that after he gave notice of his intent to dissolve the practice, "he took no action to divide the practice's assets or to operate his own practice separate from Dr. Paxton..." Br. of Resp. at 5. He does not mention that he sued Dr. Paxton before the PLLC was dissolved, an action to divide the practice's assets and separate his practice from Dr. Paxton's. CP 1.

Dr. McLelland states that Dr. Paxton failed to engage in "fair dealing" when, three months after the PLLC dissolved, he entered into a lease agreement with the owners of the South Hill office which the PLLC had been leasing on a month-to-month basis. Br. of Resp. at 6. However, when Dr. Paxton entered into the lease the PLLC did not exist because Dr. McLelland had dissolved it, and Dr. Paxton, not the PLLC, had previously held the month-to-month tenancy on the property. CP Ex. D-188; RP 140.

The owners of the building demanded a new lease if Dr. Paxton wanted to keep seeing patients there. CP RP 599-600.

Dr. McLelland states that the trial court granted summary judgment on his claims for breach of contract, breach of fiduciary duty, and constructive fraud. Br. of Resp. at 8. However, summary judgment was partial; the question of damages was tried. CP 3079-90. The trial court ruled that Dr. McLelland failed to prove damages at trial. CP 3086.

Dr. McLelland claims that Dr. Paxton's experts "failed" to testify as to the PLLC's goodwill value after its dissolution date. Br. of Resp. at 10. This is incorrect; Dr. Paxton's experts valued the PLLC's goodwill, they simply valued it at zero because any goodwill followed the doctors into their new respective practices. They testified that a dissolved entity has no expectation of future earnings, and cannot have goodwill. RP 436-37, 547.

Finally, Dr. McLelland concedes facts that are material to Dr. Paxton's appellate arguments, including: (1) the PLLC was dissolved in March 2015 and conducted no further regular business outside of winding up activities (Br. of Resp. at 6); (2) the PLLC had no assets, they were owned by each doctor's professional service corporation, which both still exist and practice (Br. of Resp. at 10); and (3) each doctor's respective professional service corporation continued to practice separately (*Id.*).

C. SUMMARY OF ARGUMENT

Dr. McLelland has no substantive answer to the legal arguments on appeal and concedes the material facts. The PLLC here had no goodwill value to distribute as a matter of law. Goodwill is an asset; it is undisputed that the professional service corporations, not the PLLC, held the assets of the business. Dr. McLelland has no answer for the indistinguishable authority holding that goodwill is the expectation of future earnings and cannot exist in a dissolved entity that is not a going concern. The PLLC was dissolved. Even if the dissolved PLLC had some goodwill value, the trial court abused its discretion in accepting a valuation at a “fair market” rate that would be assigned to a business where one member dissociates from a going concern. The partnership was dissolved.

There is neither an equitable nor a statutory basis for the trial court’s award of prejudgment interest. As with the goodwill issue, Dr. McLelland relies on inapplicable statutes and inapposite authority. There is no equitable basis for prejudgment interest because the amount in controversy here was unliquidated, and there is no statutory basis for fees because this was a dissolution, not a dissociation.

Dr. Paxton timely raised the issue of Dr. McLelland’s breach. It is indisputable that Dr. McLelland defaulted on the agreement and should not have been able to enforce it.

Attorney fees at trial should not have been awarded to Dr. McLelland, or at least should have been scrutinized and substantially reduced based upon proper segregation. Goodwill, the central issue at trial, did not exist and Dr. Paxton should have prevailed. Dr. McLelland failed to prove an essential element of his other claims at trial, and thus cannot be said to have prevailed on those claims either. Dr. McLelland failed to adequately segregate and the trial court failed to scrutinize his request.

D. ARGUMENT

- (1) The Undisputed Fact that the PLLC Held No Assets Ends the Goodwill Inquiry; As a Matter of Law the Trial Court Erred Concluding Goodwill Existed in the PLLC

In his opening brief, Dr. Paxton argued that the trial court erred in concluding that the dissolved PLLC had goodwill value. Br. of App. at 14. He noted that because the ruling was made on summary judgment, this Court's review of the issue is *de novo*. *Id.* Dr. McLelland responds that goodwill could and did exist, and that *de novo* review is inappropriate. Br. of Resp. at 13-24.

- (a) Review of the Trial Court's Summary Judgment Ruling on Goodwill Is *De Novo*

Dr. McLelland argues that goodwill is a factual issue for trial, not a legal one for summary judgment. Br. of Resp. at 13-15. He thus claims that this Court's review should be for substantial evidence. *Id.*

Dr. McLelland misapprehends the argument. The trial court wrongly believed that there was a fact issue with respect to goodwill, because it applied the wrong legal standard. There was no dispute of *material* fact relating to the existence of goodwill. Thus, the trial court erred and summary judgment should have been granted to Dr. Paxton on that issue. Review of that legal error is *de novo*; it is not reviewed for substantial evidence. *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 407, 282 P.3d 1069 (2012).

- (b) The Undisputed Facts Leave No Doubt that the PLLC Had No Goodwill Value Based on Long-Standing Supreme Court Precedent that Dr. McLelland Cannot Distinguish

Dr. Paxton argued in his opening brief that the PLLC had no goodwill value because it was merely an umbrella corporation that held no assets. Br. of App. at 14-16. He explained that the PLLC was the business manager of each of the doctor's professional service corporation. *Id.* He explained that neither of the two types of goodwill at issue – enterprise goodwill and professional goodwill – existed in the PLLC. He contended that any enterprise goodwill value was inherent in each doctor's professional service corporation, not the umbrella PLLC. *Id.* He noted that the professional goodwill of the doctors was their property. *Id.*

Dr. McLelland's response is somewhat perplexing. He concedes that the PLLC held no assets. Br. of Resp. at 10. However, he does not directly refute the argument that the trial court erred by finding that the PLLC held the goodwill value of the business, which is a category of asset. Br. of Resp. at 15-17. Rather, he simply observes that goodwill is an asset of a business. He also takes umbrage at the notion that professional goodwill is the sole asset of the professional, citing *In re Marriage of Knight*, 75 Wn. App. 721, 880 P.2d 71 (1994), *review denied*, 126 Wn.2d 1011 (1995). *Id.*¹

Dr. Paxton does not dispute that enterprise goodwill attaches to a business. That is what the term "enterprise" signifies. However, there are three "businesses" at issue here: the PLLC, and each doctor's professional service corporation. Dr. Paxton has argued that any goodwill did not inhere in the PLLC, which was a vehicle for co-managing the professionals' corporations. Dr. McLelland does not explain how, as a matter of law, the PLLC not only *had* goodwill value of its own, but had *all* of the goodwill, while the professional service corporations and the professionals themselves, which actually provided the revenue generating services, had none. *Id.*

¹ Dr. McLelland also avers that enterprise goodwill is distinct from professional goodwill, even though Dr. Paxton did not argue otherwise. Br. of Resp. at 15-16.

Dr. McLelland's general statement that goodwill can be an asset of a business, and is not an asset of the individual professional, does not refute Dr. Paxton's argument. The question before this Court is where the trial court erroneously assigned goodwill value to the PLLC, as opposed to the other business entities or the professionals themselves.

Also, Dr. McLelland provides no relevant authority for the proposition that in the context of two doctors' PLLC, the professional goodwill of each is not the asset of that professional. Dr. McLelland relies instead on marriage dissolution cases, which state that goodwill is a marital asset to be divided. Br. of Resp. at 16, citing *In re Marriage of Hall*, 103 Wn.2d 236, 241, 692 P.2d 175 (1984) and *In re Marriage of Lukens*, 16 Wn. App. 481, 484, 558 P.2d 279 (1976), *review denied*, 88 Wn.2d 1011 (1977). The fact that goodwill can be divided in a marriage dissolution has nothing to do with whether it is personal to the professional, rather than inherent in the business. All property in a marriage dissolution is subject to division. *Friedlander v. Friedlander*, 80 Wn.2d 293, 305, 494 P.2d 208 (1972). That does not change the fact that a doctor's goodwill "is personal in nature and not a readily marketable commodity," *Lukens*, 16 Wn. App. at 484, which is the issue here.

Dr. McLelland's answer also fails to distinguish our Supreme Court's controlling decision in *Harstad v. Metcalf*, 56 Wn.2d 239, 351 P.2d

1037 (1960), which held that there is no goodwill to distribute when a professional partnership dissolves and the partners continue to practice separately. He brushes away *Harstad* as not drawing a “bright-line rule” and argues that *Harstad* was determined on its facts. Br. of Resp. at 18. However, Dr. McLelland does not explain how the facts of the case at bar differ in any way from *Harstad*. *Id.* Instead, he analyzes *Berg v. Settle*, 70 Wn.2d 864, 425 P.2d 635 (1967), a case that bears no factual resemblance to this matter. *Id.* at 18-19. In short, Dr. McLelland insists that the legal analysis should be based on the facts, but then ignores the factually analogous precedent and relies on the factually inapposite one. *Id.*

Dr. McLelland’s response does simplify matters for this Court. If this Court’s resolution of this issue depends on whether the facts here are more analogous to *Harstad* or *Berg*, then the answer is clear. In *Harstad*, two professionals who had been operating a partnership together dissolved that business and went into business separately going forward. In *Berg*, one professional withdrew from the partnership, but the business continued to exist as a going concern with the remaining partner and one doctor who was an employee. *Berg*, 70 Wn.2d at 865.

Dr. McLelland also misrepresents a quotation from *Berg* to suggest that *Harstad* is not controlling here. This is the precise quotation from his brief where he claims that the *Berg* court is discussing *Harstad*:

Indeed, Dr. Paxton fails to cite, much less discuss, *Berg v. Settle* in which the Court held seven years after *Harstad* that the existence of goodwill had been a factual determination. *Berg*, 70 Wn.2d at 868 (“[o]n these facts it was determined that there was no good will to be distributed” in *Harstad*).

Br. of Resp. at 18 (emphasis in original, citation omitted). However, the *Berg* quotation Dr. McLelland cites is not discussing *Harstad*, but a different case, *Kalez v. Miller*, 20 Wn.2d 362, 147 P.2d 506 (1944):

In *Kalez v. Miller*, 20 Wash.2d 362, 147 P.2d 506 (1944), four doctors formed a partnership doing business under the assumed name of a clinic. One partner, the plaintiff, was subject to military duty. Thereafter, the remaining three doctors dissolved the partnership, excluding the absent partner from further relations with the business. The business of the old partnership was not continued, no old business contracts were renewed, and the new partnership was created under the names of the three remaining doctors. ***On these facts it was determined that there was no good will to be distributed.*** Two judges dissented.

Berg, 70 Wn.2d at 868 (emphasis added). This full quotation clarifies that the “on these facts” language is referring to *Kalez*, not *Harstad*. Also, the *Berg* court’s inclusion of the caveat “on these facts” and its notation that two of the judges dissented, suggests that the *Berg* court believed *Kalez* to be a closer case than *Harstad*.

In fact, the *Berg* court’s treatment of *Harstad* reinforces Dr. Paxton’s argument that *Harstad* controls here. The *Berg* synopsis of *Harstad* is indistinguishable from the facts here, and it says that goodwill

does not exist when two partners dissolve their joint business and continue forward in separate businesses:

In the cases cited by appellant, good will did not exist. ...In *Harstad v. Metcalf*, one partner was a civil engineer and the other was an electrical engineer. When the partnership was dissolved and the assets divided, each continued his own particular portion of the business and there was accordingly no good will.

Id. The undisputed facts of this case are exactly like *Harstad*, and are not like *Berg*. The PLLC was dissolved, and each former partner moved forward, doing business separately through his professional service corporation. Dr. McLelland did not withdraw from the PLLC like the partner in *Berg*. He dissolved the PLLC.

Ultimately, Dr. McLelland has no answer to Dr. Paxton's argument that the dissolved PLLC had goodwill value. The PLLC was no longer a going concern and had no goodwill value. The trial court erred in failing to apply *Harstad* to conclude that the dissolved PLLC had no goodwill value to distribute.

(c) A "Going Concern" Is a Business that Is Conducting Normal Profit-Generating Operations, a Dissolved PLLC that Is Winding Up Cannot Be, by Definition, a Going Concern

Dr. Paxton argued in his opening brief that a business must be a "going concern" to have goodwill value. Br. of App. at 15-16. He noted the dissolved PLLC was not a going concern. *Id.*

Dr. McLelland concedes that a dissolved entity is not a “going concern” because it has no “future earning power” but insists that the dissolved PLLC was a going concern until trial. Br. of Resp. at 20-21. He argues that the receiver had statutory and court-ordered authority to keep the PLLC going during its windup and until trial. *Id.* He does not cite to any evidence that the PLLC engaged in regular business activities under this authority. *Id.* He also cites no case law for the proposition that a dissolved entity that has ceased business operations has goodwill value based on the mere fact that it *could have* continued to conduct those operations during windup.

The fact that the PLLC *could have* legally continued as a going concern during windup is irrelevant. The PLLC did not have goodwill value if it was not a going concern with future earning power after its dissolution. *Denver v. Denver Union Water Co.*, 246 U.S. 178, 38 S. Ct. 278, 62 L. Ed. 649 (1918). It is undisputed that after the February 2015 judicial dissolution, the PLLC no longer engaged in business activities or had any earnings, other than winding up activities. Br. of Resp. at 6-7. Each doctor’s professional service corporation conducted business activities. *Id.*

- (d) The PLLC Abandoned Its Leases When Dr. McLelland Dissolved It; a Dissolved Business Entity Cannot Hold Leases

Dr. Paxton argued in his opening brief that the trial court also erred in finding that the PLLC had goodwill value in the practice locations that it had abandoned upon dissolution. Br. of App. at 18-19. Dr. Paxton cited *Bank of Washington v. Burgraff*, 38 Wn. App. 492, 499, 687 P.2d 236 (1984). *Id.*

Dr. McLelland responds that *Burgraff* turned on its facts, and that the facts here are different. Br. of Resp. at 22-23. He avers that here, unlike in *Burgraff*, the PLLC did not “abandon” its leases, because the doctors continued practicing out of them after the PLLC’s dissolution. *Id.* With respect to the South Hill location, Dr. McLelland argues that the PLLC did not abandon it, but then admits that Dr. Paxton “evicted” him, not the PLLC, because Dr. McLelland concedes the PLLC was dissolved. *Id.* at 24.

Dr. McLelland’s claim that the PLLC did not abandon its leases because the doctors continued practicing from them is without merit. They did so through their professional service corporations, not the dissolved PLLC. RP 58, 601, 6364. The question concerning this Court is whether the *dissolved PLLC* had goodwill value, not whether the doctors’ professional service corporations did. It is indisputable that the dissolved PLLC abandoned its leases in the Spokane Valley and Post Falls locations, because a non-existent entity cannot lease property. RCW 23B.14.050

(dissolved corporation may only transact business relating to the winding up of its business affairs, including the transfer of property).

Finally, Dr. McLelland's claim that he was "evicted" from the South Hill location is without merit. Dr. McLelland, not Dr. Paxton, decided to dissolve the PLLC. Neither the PLLC, nor Dr. Paxton and Dr. McLelland's professional service corporations had long-term leases of that property, they were month-to-month tenants. RP 598-99. After the PLLC dissolved, the lessor, South Stone LLC, chose not to offer Dr. McLelland a new lease because he was not a member of South Stone. RP 593, 599-600.

(e) Dr. McLelland's Argument Relies on the Wrong Standard of Review for Summary Judgment and Does Not Raise Any Issue of Material Fact

Dr. McLelland's last argument on goodwill is that substantial evidence supported the trial court's summary judgment ruling that goodwill existed. Br. of Resp. at 24-27. He avers that goodwill is mentioned in the partnership agreement, and that when Dr. McLelland joined the practice and Dr. Lang left the practice, goodwill value was included in the purchase price. *Id.* He also claims that before trial, the doctors were still practicing out of all three locations in "'generally' the same way as they always had under the Agreement." *Id.* at 26.

First, Dr. McLelland cannot rely on the substantial evidence standard here. The correct standard of review for a summary judgment

ruling is not a review for substantial evidence in the record. It is whether there is a disputed issue of material fact.

Second, the evidence Dr. McLelland cites does not raise an issue of “material” fact. When Dr. McLelland joined Dr. Paxton and Dr. Lang in forming the PLLC, and then when Dr. Lang left, the PLLC *was still a going concern*. Of course it had goodwill value then, because it was a going concern with an “expectation of continued public patronage.” *Bank of Washington v. Burgraff*, 38 Wn. App. 492, 499, 687 P.2d 236 (1984); *Matter of Marriage of Fleege*, 91 Wn.2d 324, 325, 588 P.2d 1136 (1979). The question here is whether the dissolved PLLC had goodwill value. Equally immaterial is the suggestion that the dissolved PLLC had goodwill value to distribute because the doctors were still practicing out of all three locations after the PLLC dissolved. Goodwill value is based on the expectation of patronage *in the future*. *Id.* Whether the doctors temporarily benefited from the dissolved PLLC’s past public patronage until trial is irrelevant.

Dr. McLelland dissolved the PLLC, forced the abandonment of its leases and regular business activities, and rendered it nonexistent. It was not a going concern, and as such possessed no “expectation of future earnings,” or goodwill, to distribute. The trial court erred in ruling that the dissolved PLLC had goodwill value.

(2) Even If the Dissolved PLLC Had Some Residual Goodwill Value, the Trial Court Abused Its Discretion in Accepting a Valuation at a “Fair Market” Rate that Would Be Assigned to a Going Concern

Dr. Paxton argued in his opening brief that even assuming the dissolved PLLC legally possessed some amount of goodwill value, the trial court abused its discretion by accepting a legally insupportable valuation. Br. of App. at 20-25. Dr. McLelland’s expert erred in valuing the PLLC locations as though the PLLC was still a going concern – as though this were a marriage dissolution where the professional spouse continues practicing – even though she acknowledged that this is a dissolved partnership. *Id.* She also included in her valuation the future profits of Dr. Paxton’s practice, which are separate from goodwill and to which Dr. McLelland had no right. *Id.* She also included the total income from each doctor’s professional service corporations, even though that is distinct from any goodwill value the PLLC may have had before it was dissolved. *Id.*

(a) Dr. McLelland Did Not “Dissociate” From an Ongoing Partnership, He Dissolved It; *Dixon* Is Inapplicable Because the Partnership There Was Still a Going Concern

Dr. McLelland concedes that his expert, Lenore Romney, valued the dissolved PPLC’s goodwill “based on a ‘fair market value on a going concern basis.’” Br. of Resp. at 30. However, he argues that valuing the dissolved PLLC as a going concern was appropriate. Br. of Resp. at 27-31.

He relies and closely analyzes *Dixon v. Crawford, McGilliard, Peterson & Yelish*, 163 Wn. App. 912, 262 P.3d 108 (2011), *review denied*, 173 Wn.2d 1015 (2012). *Id.* at 28-30. He says that valuing the dissolved PLLC as a going concern was appropriate because it was done in *Dixon*. *Id.* In fact, Dr. McLelland criticizes Dr. Paxton for failing to discuss *Dixon*, suggesting that he believes it is not just relevant here, but controlling. *Id.* at 30.

Dixon, like the other goodwill valuation cases upon which Dr. McLelland has relied, is irrelevant here because it does not involve the *dissolution* of a partnership. *Dixon*, 163 Wn. App. at 921. It involves the *dissociation* of one law partner from a law firm that continued to operate as a going concern after that partner left. *Id.* Obviously, if one partner leaves and the business entity continues to operate as normal, then the business is a going concern, and valuation based on that status is appropriate.² That is untrue if the entity ends by dissolution.

Dr. McLelland claims that the *Dixon* court rejected any distinction between the appropriate valuation of goodwill after a marriage dissolution as opposed to a partnership dissolution. Br. of Resp. at 30. However, *Dixon* is a dissociation case, and the cited paragraph from *Dixon* discusses

² Dr. McLelland's insistence that *Dixon* controls here encapsulates how he, his expert, and the trial court misunderstood the goodwill issue.

partnership “dissociation,” not partnership dissolution. *Dixon*, 163 Wn. App. at 921 ¶ 21. When one partner dissociates, but the others continue in the partnership, the business is still a going concern. *Id.*

All the cited proposition from *Dixon* says is that the method for valuing a going concern may be the same in the marriage dissolution and the partnership dissociation setting. *Id.* That is not the issue here. It is whether a discontinued business can be valued as if it were a going concern.

Partnership dissolution was the issue squarely addressed in *In re Marriage of Lopez*, 113 Cal. Rptr. 58 (Cal. App. 1974), *overruled on other grounds*, *In re Marriage of Morrison*, 143 Cal. Rptr. 139 (Cal. 1978) a case that our Supreme Court cited with approval in *Fleege*, 91 Wn.2d at 333. Dr. McLelland cannot distinguish *Lopez*, he simply argues that it was decided before *Dixon*. Br. of Resp. at 30. However, as explained *supra*, *Dixon* is an inapposite case about partnership dissociation. Its recency is immaterial.

Here, it is indisputable that the PLLC was not a going concern that continued normal business operations after Dr. McLelland dissolved it. This case is not like marriage dissolution or partnership dissociation cases where the business continues to operate, and someone who has lost an interest must be compensated for the lost access to goodwill value that the operating business retains.

Dr. McLelland cannot muster a single authority to support the notion that a dissolved business, which is not a going concern, can have “fair market value on a going concern basis.” Dr. Paxton, on the other hand, has cited authority stating that such a valuation is legally insupportable. Br. of App. at 15 (citing *Burgraff*); 17 (citing *Harstad*); 21 (citing *Lopez*). Romney’s valuation was unsustainable and could not have persuaded a fair-minded person of its truth. The trial court abused its discretion in failing to reject Romney’s valuation as logically and legally deficient.

(3) There Is No Statutory or Equitable Basis for an Award of Prejudgment Interest; the Trial Court Made a Legal Error in Concluding Otherwise

In his opening brief, Dr. Paxton argued that the trial court erred in awarding Dr. McLelland prejudgment interest from the date the PLLC dissolved to the date of judgment. Br. of App. at 25-27. He noted that prejudgment interest is only available when damages are liquidated and can be ascertained without reference to discretion, opinion, or judgment. *Id.* Here, the amount of the award to Dr. McLelland could only be ascertained after a trial, thus prejudgment interest was unavailable. *Id.*

(a) Statutory Interpretation and Application Is a Question of Law Reviewed *De Novo*

Dr. McLelland first responds that this Court should review the trial court’s prejudgment interest award for abuse of discretion, citing *Simpson*

v. Thorslund, 151 Wn. App. 276, 288, 211 P.3d 469 (2009). Br. of Resp. at 34.

However, review is *de novo*. As Dr. McLelland acknowledges on the next page of his brief, prejudgment interest was not a question of equitable discretion, but a statutory requirement of RCW 25.05.250, a provision of the Revised Uniform Partnership Act, RCW 25.05 (“RUPA”). Br. of Resp. at 35. The question of whether RCW 25.05.250(2) applied here is a legal issue involving statutory interpretation, which is reviewed *de novo*. *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 443, 842 P.2d 956 (1993).

Any belief by the trial court that it had equitable power to award prejudgment interest was also legal error reviewed *de novo*. *Guntle v. Barnett*, 73 Wn. App. 825, 833, 871 P.2d 627, 631 (1994), *review denied*, 138 Wn. App. 1067 (1999) (“Before the enactment of Laws of 1945, ch. 137, Washington courts may have dealt with partnerships by using their ‘equitable powers’, ... but at least since 1945 their “equitable powers” have been subject to partnership statutes.”).

Finally, even if this Court concludes that trial courts retain common law equitable discretion to award prejudgment interest in partnership dissolution cases, it is an abuse of discretion to predicate a discretionary decision upon legal error. *Mayer v. Sto Indus. Inc.*, 156 Wn.2d 677, 684,

132 P.3d 115 (2006). The common law allows prejudgment interest only on liquidated claims, and awarding prejudgment interest on an amount that had to be determined by a finder of fact is error. *Kiewit-Grice v. State*, 77 Wn. App. 867, 874, 895 P.2d 6, 10, *review denied*, 127 Wn.2d 1018 (1995); *see also, Hansen v. Rothaus*, 107 Wn.2d 468, 472, 730 P.2d 662, 664 (1986); *Wright v. Tacoma*, 87 Wash. 334, 151 P. 837 (1915) (amount alleged due on contract for public improvements; claim held unliquidated, prejudgment interest not allowed).

(b) There Is No Equitable Basis for Prejudgment Interest Because the Amount in Controversy Was Unliquidated, and There Is No Statutory Basis for Fees Because This Was a Dissolution, Not a Dissociation

Dr. McLelland concedes that the damages here were unliquidated, but claims that this is a case where the equitable “liquidated funds rule” does not apply because this is a partnership case, and thus a statutory basis for prejudgment interest. Br. of Resp. at 34-37. He cites RCW 25.05.250(2), *Dixon*, and *Green v. McAllister*, 103 Wn. App. 452, 14 P.3d 795 (2000), *as amended on clarification* (Nov. 22, 2000). *Id.* He contends that *Dixon* and *Green* control here. *Id.* at 35-36. He chastises Dr. Paxton for failing to cite or distinguish *Green* and *Dixon*. *Id.* at 36.

Dr. McLelland is mistaken in his belief that RCW 25.05.250, or cases applying other irrelevant statutory provisions of RUPA, apply here.

RCW 25.05.250 applies only to partnership dissociations when the partnership is *not* wound up, or where one partner is wrongfully dissociated. This is clear from the title of Article 7 of the RUPA (where the statute appears): “Article 7. Partner’s Dissociation *when Business Not Wound Up.*” RCW ch. 25.05 art. 7 (emphasis added). It is also clear from the text of RCW 25.05.250 itself:

(1) If a partner is dissociated from a partnership ***without resulting in a dissolution and winding up of the partnership*** business under RCW 25.05.300, the partnership shall cause the dissociated partner's interest in the partnership to be purchased for a buyout price determined pursuant to subsection (2) of this section.

RCW 25.05.250 (emphasis added). This statute on its face does not apply to partnership dissolutions.

The statute applicable to this partnership dissolution – which is the subject of Article 8 of the RUPA – says nothing about prejudgment interest. RCW 25.05.330. It discusses the settlement of accounts and contributions among partners and does not authorize prejudgment interest to be awarded in the event that one partner claims that the distribution was improper. *Id.*

Green and *Dixon* are inapplicable here. *Green* involved the wrongful dissociation of a minority partner by the majority partners. *Green*, 103 Wn. App. at 471. The *Green* court applied former RCW 25.05.450 and

.220(1),³ the statutes requiring prejudgment interest when a partner withdraws from a going concern or is wrongfully dissociated. *Id. Dixon* is a dissociation case involving a business that was not wound up, thus prejudgment interest was mandated by RCW 25.05.250. Those decisions correctly conclude RCW 25.05.250 and former RCW 25.04.010 of the RUPA mandated prejudgment interest. However, they are irrelevant in this partnership dissolution case governed by RCW 25.05.330.

It is undisputed that this was a partnership dissolution, not a dissociation. It is also undisputed that Dr. McLelland requested the dissolution, and was not ousted from the PLLC by Dr. Paxton. It is also undisputed that Dr. McLelland's claim was unliquidated. Because the trial court lacked statutory or equitable authority to award prejudgment interest, the award was erroneous and should be reversed.

(4) Dr. Paxton Timely Raised Dr. McLelland's Breach; It Is Indisputable that Dr. McLelland Defaulted on the Agreement and Should Not Have Been Able to Enforce It

In his opening brief, Dr. Paxton argued that Dr. McLelland filed suit prematurely here, defaulting under the partnership agreement and negating his claim for breach of contract against Dr. Paxton. Br. of App. at 27.

³ These statutes were repealed in 1998 when the RUPA was enacted. Laws of 1998, ch. 103, § 1308, eff. Jan. 1, 1999.

Dr. McLelland responds that Dr. Paxton did not timely raise this argument, and that he had no chance to offer evidence at trial because the default argument was not raised. Br. of Resp. at 37, 39-41. He also argues that there is no evidence to support the claim that Dr. McLelland breached the agreement or that the breach injured Dr. Paxton. Br. of Resp. at 37-38.

Dr. Paxton did not raise the default argument for the first time upon reconsideration, and Dr. McLelland's claim of surprise regarding the default provision and Dr. Paxton's claim that he filed his suit prematurely is unfounded. Dr. Paxton pled that Dr. McLelland breached the partnership agreement, and that his claimed damages were the result of his own actions. CP 303, 311. Dr. McLelland himself testified at trial that he was seeking damages for Dr. Paxton's default, citing the same provision Dr. Paxton relied on for his default argument. RP 92. Dr. McLelland claimed that based on this provision, he was entitled to damages and attorney fees. *Id.*; CP 3088. Whether Dr. McLelland believes the issue was inartfully pled or argued is irrelevant.

On the merits, Dr. McLelland is mistaken that there was no evidence of breach or damages. It is indisputable that Dr. McLelland filed suit against Dr. Paxton in January 2015, while the partnership agreement was still in place. CP 1, 90-92. This was breach under the express terms of the agreement, which state a member who causes suit to be filed against another

is in default. CP 22-23. The agreement says nothing about a restriction to third-party lawsuits, despite how Dr. McLelland may wish to characterize it. *Id.* As far as evidence of prejudice to Dr. Paxton, had Dr. McLelland been considered to have first breached the agreement, as a matter of law he would have no right to enforce the agreement against Dr. Paxton or seek any damages. A party is barred from enforcing a contract that it has materially breached. *Rosen v. Ascentry Techs., Inc.*, 143 Wn. App. 364, 369, 177 P.3d 765 (2008).

(5) Attorney Fees at Trial Should Not Have Been Awarded Because Goodwill Should Not Have Been Awarded and Dr. McLelland Failed to Prove an Essential Element of His Other Claims at Trial

(a) Dr. McLelland Did Not Substantially Prevail at Trial

Dr. Paxton argued in his opening brief that if this Court concludes that goodwill did not exist as a matter of law, or that it was vastly overvalued, Dr. McLelland's attorney fee award should also be reversed. Br. of App. at 29-30. He noted that both parties prevailed on major claims, and that the only major claim upon which Dr. McLelland could be said to have substantially prevailed was the erroneous conclusion about goodwill. *Id.* He observed that the only judgment Dr. McLelland received was for an equalization payment for the division of goodwill.

Dr. McLelland responds that even if the goodwill ruling was erroneous, he is still entitled to attorney fees because he prevailed on more issues. Br. of App. at 41-43. He claims that he prevailed on his claims for breach of contract, constructive fraud, and breach of fiduciary duties, as well as on the goodwill issue. *Id.* at 42. In contrast, he claims that Dr. Paxton “only” prevailed on his breach of contract claim against Dr. McLelland, and on his claim for reimbursement for assets. *Id.* at 42-43.

Again, Dr. McLelland misapprehends the record by overstating the claims upon which he “prevailed” at summary judgment, and omitting claims upon which Dr. Paxton prevailed. Regarding his own claims, Dr. McLelland *did not prevail at trial* on his breach of contract, constructive fraud, or breach of fiduciary duties claims, because the trial court specifically found that he failed to prove any damages. CP 3086. In particular, the trial court ruled that Dr. McLelland did not prevail on the breach of fiduciary duty claim related to his alleged “eviction” from the South Hill office. CP 3503. Damages are an element of each of these claims. *Nw. Indep. Forest Mfrs. v. Dep't of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d 6 (1995) (elements of breach of contract action are (1) duty (2) breach, and (3) damages proximately caused by breach); *Miller v. U.S. Bank of Washington, N.A.*, 72 Wn. App. 416, 426, 865 P.2d 536 (1994) (elements of breach of fiduciary duty are: (1) fiduciary relationship giving

rise to duty of care; (2) breach; (3) damages; and (4) proximate causation); *Adams v. King Cty.*, 164 Wn.2d 640, 662, 192 P.3d 891 (2008) (damages are an element of fraud). Regarding the major claims upon which Dr. Paxton prevailed, Dr. McLelland omits many including the claims of “patient theft” and theft of \$100,000. CP 5303.

At the present stage of the proceedings, both parties prevailed on major issues, and each should have borne the cost of their own attorney fees. The trial court erred in awarding them to Dr. McLelland.

(b) Dr. McLelland Failed to Adequately Segregate and the Trial Court Failed to Properly Scrutinize His Request

In his opening brief, Dr. Paxton argued that the trial court abused its discretion in awarding Dr. McLelland an unreasonable fee. Br. of App. at 31-36. He noted that at first, the trial court failed require fee segregation at all by Dr. McLelland, awarding him the full \$286,102.80 in unsegregated fees he requested. *Id.* at 31. When Dr. Paxton noted that this was inappropriate because he had prevailed on major issues, the trial court reduced Dr. McLelland’s fee request by only \$9,194.74, or 3%. *Id.* Dr. Paxton described how the trial court focused exclusively on the number of entries Dr. McLelland had altered, rather than the appropriate measure: whether an award of 97% of the total hours expended in the case to achieve one successful claim was “reasonable” in light of the many claims in which

he was unsuccessful. *Id.* at 34-35. He also noted the fee request *on its face* included claims upon which Dr. McLelland did not prevail. *Id.* at 35-36.

Dr. McLelland responds that the trial court's decision was discretionary, that he provided sufficient time entries, and that the trial court was not required to make deductions "just to prove" that it took an active role in assessing the fee request. Br. of Resp. at 43-47. He cites *Miller v. Kenny*, 180 Wn. App. 772, 823, 325 P.3d 278 (2014). *Id.* at 45-47.

Dr. McLelland's reliance on *Miller* is misplaced. Dr. McLelland suggests that the trial court was not obliged to justify its segregation findings, but it was so obliged. The full holding from *Miller*, which Dr. McLelland ignores, states:

A trial court does not need to deduct hours here and there just to prove to the appellate court that it has taken an active role in assessing the reasonableness of a fee request. ...***But the court's findings must show how the court resolved disputed issues of fact and the conclusions must explain the court's analysis.***

Miller, 180 Wn. App. at 823, citing *Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745 (2013), *review denied*, 179 Wn.2d 1026, 320 P.3d 718 (2014). The *Miller* court went on to explain that the trial court in that case had specifically concluded that fee segregation was not possible. *Id.*

Under *Miller*, the trial court here was obliged to show how it resolved the dispute over fee segregation, how it concluded that a mere

\$9,000 deduction from an almost \$300,000 fee request – when Dr. Paxton had prevailed on major issues both pretrial and at trial – was appropriate segregation. *Id.* It did not. Instead, the trial court simply stated that Dr. McLelland had filed a new segregated fee request and stated that the new request included “92 reductions in the billing for time spent on issues not prevailed on.” CP 3787. The trial court did not explain how the *number of altered entries* has any bearing on the segregation issue. *Id.* It simply accepted Dr. McLelland’s new fee request without scrutiny: “The court finds that the separate filing satisfies the Court’s prior order requiring segregation.” *Id.*

The trial court failed in its duties under *Berryman* and *Miller*. Relying on the number of altered entries to determine proper fee segregation is inappropriate. Also, when the fee request *on its face* reflects time spent on unsuccessful claims, awarding the fees is an abuse of discretion. *Manna Funding, LLC v. Kittitas Cty.*, 173 Wn. App. 879, 902, 295 P.3d 1197, 1209 (2013), *as amended on denial of reconsideration* (2013), *review denied*, 178 Wn.2d 1007 (2013).

(6) This Court Should Award Dr. Paxton His Reasonable Attorney Fees at Trial and on Appeal

In his opening brief, Dr. Paxton argued that he should be awarded attorney fees because even assuming he was not the substantially prevailing

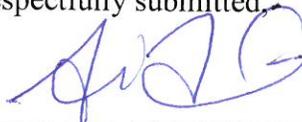
party at trial, that was only because of the trial court's error on goodwill. Br. of App. at 36-37. The agreement at issue provided for reasonable attorney fees to the prevailing party. Dr. McLelland agrees that the prevailing party at trial and on appeal is entitled to an award of attorney fees under the agreement. Br. of Resp. at 48. Thus, because Dr. Paxton should prevail on appeal, he should receive an award attorney fee award on appeal as well as from the trial court on remind.

E. CONCLUSION

The trial court's judgment should be reversed. No goodwill existed here, or it was radically overvalued. Dr. Paxton should have been granted judgment on all of Dr. McLelland's claims based on his default, which breached the agreement. Attorney fees should not have been awarded to him, or should have been substantially reduced.

DATED this 13th day of December, 2018.

Respectfully submitted,



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DECLARATION OF SERVICE

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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: December 13 2018, at Seattle, Washington.



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Comments:

Previous version was inadvertently filed with "Brief of Appellants" on the cover page. The only change is that has been corrected to read "Reply Brief of Appellants".

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