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

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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.

MARK C. PAXTON, D.D.S. and DIANE S. PAXTON, husband and wife,  
and the marital community composed thereof, and MARK C. PAXTON,  
D.D.S., P.S., a Washington professional services corporation,

Appellants.

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BRIEF OF APPELLANTS

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A. INTRODUCTION

This case arises out of the dissolution of the business relationship between two Spokane oral surgeons, Dr. Mark C. Paxton and Dr. Bryan W. McLelland. The trial court erred in its treatment of the goodwill of the business, confusing the principles for valuing an ongoing business with the proper principles for addressing the putative goodwill value of an enterprise that no longer exists. This error resulted in an improper award of a goodwill value transfer payment to Dr. McLelland.

The trial court also erred in awarding prejudgment interest to Dr. McLelland where his claims were not liquidated, and in awarding attorney fees and costs to Dr. McLelland, and abused its discretion in the calculation of the award.

B. ASSIGNMENTS OF ERROR

(1) Assignments of Error

1. The trial court erred in denying Paxton's motion for partial summary judgment in its order dated June 17, 2016.
2. The trial court erred in concluding that the PLLC had goodwill value as a matter of law in its order dated April 13, 2017.
3. The trial court abused its discretion in valuing the goodwill of the PLLC in its order dated April 13, 2017.
4. The trial court erred in concluding that McLelland was entitled to an award of attorney fees as the prevailing party

in its orders dated January 17, 2017, August 25, 2017, December 13, 2017, May 21, 2018, and June 8, 2018.

5. The trial court abused its discretion in failing to adequately scrutinize McLelland's request for attorney fees and in setting the amount of those fees in its orders dated August 25, 2017, December 13, 2017, May 21, 2018, and June 8, 2018.
6. The trial court abused its discretion in entering finding of fact 15.
7. The trial court abused its discretion in entering finding of fact 16.
8. The trial court abused its discretion in entering finding of fact 17.
9. The trial court abused its discretion in entering finding of fact 19.
10. The trial court erred in entering finding of fact 20, which contains a conclusion of law mislabeled as a finding of fact.
11. The trial court abused its discretion in entering finding of fact 21.
12. The trial court both erred and abused its discretion in entering finding of fact 33.
13. The trial court abused its discretion in entering finding of fact 34.
14. The trial court erred in entering "finding of fact" 35, which is a conclusion of law mislabeled as a finding of fact.
15. The trial court erred in entering conclusion of law 1.
16. The trial court erred in entering conclusion of law 2.D.
17. The trial court erred in entering conclusion of law 11.

18. The trial court erred in entering conclusion of law 14.

19. The trial court erred in entering conclusion of law 15.

(2) Issues Pertaining to Assignments of Error

1. If goodwill in a business is the expectation of continued patronage, did the trial court err in concluding that there was goodwill value to be distributed after dissolution of a PLLC that is not a going concern?

2. Is there any goodwill value as a matter of law in a PLLC that was used to manage the business affairs of two medical professional service corporations, when those professional service corporations continued to exist and earn after that PLLC management entity was dissolved?

3. Is there any goodwill value to be allocated to a dissolved business entity based on office space lease when the leases have been abandoned by the dissolved entity?

4. Even if a dissolved PLLC has some residual goodwill, is that goodwill properly valued at the income of each location, a valuation which by definition includes the goodwill inherent in each individual professional's continuing business practice?

5. When undisputed evidence demonstrates that a party committed breach of contract, does a trial court err in failing to find breach?

6. When a party breaches a contract, does the trial court err in failing to find that the contract's breach provisions apply to the breaching party?

7. If the trial court erred with respect to the above, did it also err in awarding attorney fees to the party who did not prevail?

8. Even if the trial court correctly concluded that attorney fees were available to the party it said prevailed, did it err in failing to scrutinize a request for attorney fees that, on its face, does not segregate fees for all of the claims upon which the requestor did not prevail?

C. STATEMENT OF THE CASE

In March 2005, Mark C. Paxton, D.D.S., P.S., Bryan W. McLelland, D.D.S., P.S., and Melanie S. Lang, M.D., D.D.S., P.S, agreed to start a new partnership. CP 25-89. These three professional service corporations entered into a partnership agreement (hereinafter “Agreement”) and set up the practice as a general partnership. CP 30, 3084. The partnership agreement specified the name of the partnership as: “Paxton, Lang, and McLelland Oral and Maxillofacial Surgery Partnership.” CP 32. The Paxton, Lang, and McLelland Oral and Maxillofacial Surgery Partnership general partnership existed for a brief time.

Thereafter, the doctors elected to change the form of the business from a general partnership to a professional limited liability company. RP 83. The Agreement was still the governing document for the business.<sup>1</sup> By changing the entity structure, the partnership was extinguished and replaced

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<sup>1</sup> The partnership agreement provided that the parties could elect to form another business organization, *i.e.*, limited liability partnership or limited liability company (“LLC”). CP 31-32. Once the parties established a PLLC, the Agreement provided that all of the parties’ documentation was deemed amended to reference the PLLC. *Id.*

by Spokane OMS, PLLC (“PLLC”).<sup>2</sup> RP 83.

Spokane OMS, PLLC was an “operations hub” that allowed the three professional service corporations to hold a common bank account and file taxes. *Id.* It did not hold assets, particularly goodwill; Dr. McLelland stated assets were held individually by the individual professional service corporations. RP 83-84.

In 2014, Dr. Paxton’s and Dr. McLelland’s professional service corporations bought out the interest of Dr. Lang’s professional service corporation in the PLLC. CP 3085. They purchased from Dr. Lang undivided interests in the same PLLC “Assets” that were identified in the 2005 Acquisition Agreement. *Id.* After Dr. Lang left the practice, Drs. Paxton and McLelland, through their professional service corporations, each owned one-half of the PLLC. *Id.*

The PLLC’s members operated out of three separate office locations. *Id.* The Spokane Valley office was owned in equal shares by the professional service corporations through an LLC named “SOMFS Property Holdings Company.” Ex. P-3; RP 136-37. The PLLC leased the office space month-to-month from SOMFS Property Holdings Company. RP 311.

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<sup>2</sup> Thus, any references to the partnership in the Agreement converted to the PLLC; the “Paxton, Lang and McLelland Oral and Maxillofacial Surgery Partnership” now means “Spokane OMS, PLLC.”

Additionally, the Paxtons had a month-to-month lease with South Stone, LLC (“South Stone”), the location for the PLLC’s South Hill office. Ex. D-188; RP 140. South Stone was formed and owned prior to the business relationship of Dr. Paxton and Dr. McLelland, in 2000. RP 591. It was formed by several doctors and dentists, including Dr. Paxton and his wife. *Id.*

The PLLC’s Post Falls location was owned by another LLC, in which Dr. Paxton and Dr. McLelland owned an interest. RP 63. The PLLC leased the Post Falls location and the PLLC had a longer term lease that expires in approximately 2024. RP 451.

Dr. McLelland sent a letter to Dr. Paxton on August 4, 2014, stating he was giving the six months’ notice to dissolve the PLLC, as required by the Agreement, and that he wished to dissolve their business relationship. CP 252-56. The letter reflected Dr. McLelland’s position on how to separate the various aspects of their business practices, including profits, accounts receivable, locations, and the like. *Id.* Goodwill was not mentioned.

Each doctor’s professional service corporation that had been a member of the PLLC continued to practice independently at all three locations. RP 58, 63-64, 601. Each doctor’s professional service corporation split the rent on a 50/50 basis.

The Agreement stated that if one member sued the other while the Agreement was in effect, that member would be in default. CP 22-23. Before the six months' notice period in the Agreement expired, and while the Agreement was still in effect, Dr. McLelland sued Dr. Paxton in Spokane County Superior Court on January 29, 2015. CP 4-12. He raised a number of claims, even alleging that Dr. Paxton stole \$100,000 from the partnership and committed various breaches of fiduciary duty. *Id.*

Six months after Dr. McLelland gave his notice, the PLLC dissolved contractually on February 28, 2015. CP 932. The PLLC was judicially dissolved on March 20, 2015. CP 90-92.

In late April 2015, Mike Silvey, one of South Stone's members, the owner of the former PLLC's South Hill location, determined that all of South Stone's leases had expired, and the tenants had been on month-to-month leases. RP 598-99. At the South Stone annual shareholders meeting that same month, the members resolved to require all of the tenants to enter into new long-term leases. RP 599-600.

On June 23, 2016, Dr. McLelland's counsel sent a letter to South Stone requesting to enter into a lease on behalf of his wholly-owned professional service corporation. Because South Stone members preferred to lease to members, South Stone's new leases were made to the original members of South Stone. *Id.*, RP 593. Dr. McLelland was not a member.

RP 593. As a result, Dr. McLelland's ability to practice at the South Hill location ended.

In the ongoing litigation, Dr. Paxton moved for partial summary judgment on the theft issue, among others. CP 1229-43, 2907-12. Faced with that motion, Dr. McLelland dismissed the theft claim. CP 2912. Dr. Paxton also moved for partial summary judgment arguing that the PLLC was not a "going concern" after February 28, 2015, and further asserted that the dissolved PLLC had no goodwill value, and that any goodwill remained with the separate professional service corporations. CP 1229-35. The trial court denied summary judgment on this issue. CP 2912.

The case was tried to the Honorable Maryann Moreno over four days. RP 1-3. She concluded that Dr. McLelland had failed to prove damages on his breach of contract, fiduciary and fraud claims against Dr. Paxton. CP 3085-86. Relying solely on Lenore Romney's valuation testimony, she concluded that the PLLC had \$1,822,388.00 in goodwill value based *solely* on the locations it had been leasing. CP 3086-87. The trial court noted that this almost two million dollar goodwill value existed separately from any goodwill value inherent in the doctors' individual skill, education, and earning capacity.<sup>3</sup> She also ruled that Dr. McLelland did not

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<sup>3</sup> Among other errors in Romney's valuation methodology is her testimony that she did not value any professional goodwill because she did not believe the doctor's

violate the Agreement when he sued Dr. Paxton while the Agreement was still in effect. *Id.*

The trial court issued a letter ruling on January 17, 2017. CP 3038-43. In that letter ruling, she ordered presentment without oral argument of competing findings of fact and conclusions of law and simultaneous “briefing on the issue of attorney fees” to be made by March 3, 2017. CP 3043. Both parties submitted these simultaneous fee memos on March 1, 2017, two days before the non-oral argument hearing. CP 3051-77.

The court entered written findings and conclusions on April 13, 2017. CP 3079-90. The court found for Dr. McLelland on some claims, Dr. Paxton on some claims, and related that some of the claims were dismissed or settled. *Id.* The court awarded Dr. McLelland the Post Falls location, and Dr. Paxton the Valley location. The only monetary award Dr. McLelland received in connection with his numerous claims was for \$414,036, which was an “equalization” payment for the goodwill value placed on Dr. Paxton receiving the South Hill and Valley locations. CP 3089. Dr. Paxton received a small monetary award of \$7,587.99 for unreimbursed expenses incurred in connection with the Valley office. CP 3090. The trial court also ruled that this goodwill equalization payment was

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professional goodwill could be purchased or sold. Consequently, Romney included professional goodwill in her almost \$2 million goodwill valuation. CP 3568-73.

subject to 12% prejudgment interest from the date Dr. McLelland sent his letter notifying Dr. Paxton that he intended to dissolve the PLLC. CP 3089-90 (Finding of Fact 35, which is a conclusion of law mislabeled as a finding of fact, and Conclusion of Law 14).

Dr. McLelland submitted a fee affidavit on April 28, 2017, claiming that eight attorneys had incurred a total of \$286,102 in attorney fees. CP 3099-96. There was no segregation of fees for unsuccessful claims. *Id.*<sup>4</sup>

The trial court entered its final order on May 25, 2017. CP 3362; Appendix. The trial court granted Dr. McLelland's fee request in its entirety, without entering findings and conclusions regarding reasonableness, segregation, or any other rationale. CP 3365. The damages and attorney fee judgments were entered separately but on the same day. CP 3369, 3373. Damages were set at \$414,036.00 for the goodwill equalization payment and \$138,707.73 for pre-judgment interest for a total of \$552,743.73. CP 3373. The damages for Dr. Paxton's successful damages claim were not mentioned, no offset was provided, and no judgment was awarded in Dr. Paxton's favor. *Id.* The attorney fees and costs were awarded in full in the amount of \$339,778.30. CP 3369.

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<sup>4</sup> Dr. McLelland's counsel stated that he was "not requesting an award for certain fees and costs" totaling \$7,560.00 or about two percent of the total request. CP 3094. However, he did not state why he was not requesting them. *Id.*

Dr. Paxton moved for reconsideration under CR 59(a) on May 30, 2017. CP 3327. He argued, *inter alia*, that (1) there was no goodwill in the dissolved PLLC as a matter of law, (2) if the dissolved PLLC had goodwill value it was grossly overvalued by the court, (3) the court had failed to properly analyze and segregate the fee request, (4) Dr. McLelland had not prevailed on his claims for breach of contract, and breach of fiduciary duty, because he had not proved causation and damages, and (5) the trial court erred in concluding Dr. McLelland had not breached the partnership agreement. CP 3338-51.

Six months later, the trial court entered its order on reconsideration on December 13, 2017. CP 3501-05. The trial court concluded that Dr. McLelland was in fact required to segregate his fee request for time spent on unsuccessful claims. CP 3503. Those unsuccessful claims were listed as: “the ‘work days’ claim, theft of money claim, theft of patients claims, and the breach of fiduciary duty claim relating to the South Hill office...”. Otherwise, the court’s original rulings were upheld.

Dr. McLelland submitted a new attorney fee request that he claimed reflected the “segregation” that trial court ordered. CP 3532.<sup>5</sup> His request

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<sup>5</sup> There was a months-long delay in trial court proceedings over the issue of attorney fees. This Court suspended the briefing schedule until the trial court issued its final ruling on the matter. Upon receiving the decision, Paxton immediately filed a notice of appeal and a supplemental designation of clerk’s papers.

changed from the original \$286,102.50 to the “segregated” request of \$276,908.05, a reduction of exactly \$9,194.75. *Id.*<sup>6</sup> Dr. Paxton moved to clarify the attorney fee award and amend the judgment, and objected to the new request for attorney fees. *Id.*

On June 8, 2018, the trial court denied Dr. Paxton’s request for clarification and amendment of the judgment. *Id.* On the issue of segregation, the trial court concluded that the \$9,194.75 reduction in fees reflected proper segregation because McLelland’s counsel “filed 92 reductions in the billing.” *Id.* The trial court did not comment on the fact that the reduction represented only 3 percent of the total fees billed. The trial court agreed that McLelland had not prevailed on his breach of fiduciary duty claim, because he had failed to present evidence of damages, and claimed that this was consistent with prior rulings. *Id.* The court did not mention Dr. McLelland’s breach of contract claim, for which there were also no damages presented. The trial court ruled that an amended judgment for attorney fees and costs should be entered in the amount of \$330,383.55. *Id.*

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<sup>6</sup> The new attorney fee claim includes time spent pre-litigation, including time spent on a failed mediation, drafting the original complaint containing six claims, five of which the McLellands lost in summary judgment, were withdrawn, or failed to prove at trial. Moreover, the McLellands conceded in Church’s supporting declaration that they sought recovery of fees associated with breach of contract/breach of fiduciary duty claim, on which the trial court ruled that the Paxtons prevailed. CP 3519-67.

Although there were long passages of time between the trial court's post-trial rulings, Dr. Paxton timely sought review by this Court of each relevant ruling. CP 3360, 3507, 3782.

D. SUMMARY OF ARGUMENT

The trial court's decision to award Dr. McLelland a substantial sum for the goodwill of the dentists' joint practice upon the dissolution of their partnership is contrary to law. Unlike the situation in attributing goodwill value to a business upon the dissolution of a marriage, the two professionals here remained in practice and took whatever goodwill their joint professional practice engendered to their respective new practices in the form of retained clients. The trial court improperly inflated the value of the dissolved business through its legal error regarding "goodwill."

The trial court also erred in awarding prejudgment interest to Dr. McLelland where the claims at issue were not liquidated.

The trial court failed to properly apply the dentists' agreement where Dr. McLelland defaulted under its terms by prematurely initiating this action. Dr. McLelland breached the Agreement as a matter of law before any claim of breach by Dr. Paxton, rendering his claims for breach of contract by Dr. Paxton ineffective.

The trial court erred in making an award of fees to Dr. McLelland at all, as he was not the prevailing party. Moreover, the trial court's fee award

was excessive, contrary to the lodestar method for calculation of such a fee. The trial court also abused its discretion in failing to properly analyze and reduce Dr. McLelland's attorney fee award according to the segregation of unsuccessful claims it had ordered.

The trial court erred in failing to amend the May 24, 2017, damages judgment to reduce the damages owed to Dr. McLelland by the amount Dr. Paxton was owed.

E. ARGUMENT

(1) The Trial Court Erred in Concluding that the Dissolved PLLC Had Any Goodwill Value to Distribute as a Matter of Law

(a) Standard of Review

The trial court's pre-trial decision to deny summary judgment on the legal issue of whether the dissolved PLLC had goodwill to distribute is reviewed *de novo*. *Macias v. Saberhagen Holdings, Inc.*, 175 Wn.2d 402, 407, 282 P.3d 1069 (2012).

(b) Goodwill Is the Expectation of Continued Patronage; There Is No Goodwill Value in a Discontinued Business Such as the Doctors' PLLC

The trial court ruled as a matter of law that the dissolved PLLC had goodwill value that needed to be divided between the parties. CP 3807. It rejected Paxton's argument on summary judgment that (1) a dissolved PLLC that was organized to pool the assets of three professional service

corporations has no goodwill to distribute, and (2) the PLLC had no goodwill value separate from the goodwill of the individual professional service corporations that comprised its partners, particularly when those partners continue to do business and keep their clients.

Goodwill is intangible property and is commonly defined as the “expectation of continued public patronage.” *Matter of Marriage of Fleege*, 91 Wn.2d 324, 325, 588 P.2d 1136 (1979), *citing In re Marriage of Foster*, 42 Cal. App. 3d 577, 117 Cal. Rptr. 49 (Cal. App. 1974); *see also, Baker v. Pratt*, 176 Cal. App. 3d 370, 380, 222 Cal. Rptr. 253, 259 (Cal. App. 1986).

“Goodwill, however, cannot exist where the business is not a going concern.” *Bank of Washington v. Burgraff*, 38 Wn. App. 492, 499, 687 P.2d 236 (1984); *Fleege*, 91 Wn.2d at 328. When applied to a corporation, [or other legal entity], “going concern” means that an entity continues to transact its ordinary business. *Denver v. Denver Union Water Co.*, 246 U.S. 178, 38 S. Ct. 278, 62 L. Ed. 649 (1918). “Going concern value,” which includes goodwill, is the value of an enterprise “as an active business with future earning power, as opposed to the liquidation value of a business or its assets.” *Black's Law Dictionary* 1785 (10<sup>th</sup> ed. 1990).

Although many businesses possess this intangible known as goodwill, the concept is unique in a professional business. The concept of professional goodwill is the sole asset of the professional. If goodwill is

that aspect of a business which maintains the clientele, then the goodwill in a professional business is the skill, the expertise, and the reputation of the professional. It is these qualities which would keep patients returning to a doctor and which would make those patients refer others to him. The bottom line is that this is reflected in the doctor's income-generating ability. *In re Marriage of Zells*, 572 N.E.2d 944, 946 (Ill. 1991).

Not every business entity has goodwill. *In re Marriage of Hall*, 103 Wn.2d 236, 243, 692 P.2d 175, 179 (1984). When a party claims that there is goodwill to be distributed, the preliminary inquiry for the trial court is whether goodwill even exists. *Id.*

The PLLC did not provide medical services or treat patients. It managed and operated the practice, paid taxes, and controlled the income and finances of the doctors. CP 25-89; RP 83-84. The doctors agreed to, and were bound by, the restrictive covenant in Article 14 of the Agreement, and they agreed to conduct their practice through the PLLC. From 2005 up to February 28, 2015, membership in the PLLC was held by the doctor's professional service corporations. CP 25-89. After February 28, 2015, the PLLC was not a going concern.

The trial court erred in concluding that the dissolved PLLC had goodwill value. It is uncontroverted that the PLLC was dissolved on February 28, 2015 and neither doctor saw any patients on behalf of the

PLLC after February 27, 2015. The PLLC was no longer a going concern, as a matter of law. As a result, it could not have enterprise goodwill. *Burgraff*, 38 Wn. App. at 499.

(c) The Washington Supreme Court Has Long Held that There Is No Goodwill to Distribute in a Dissolved Professional Partnership When the Professionals Conduct Business in Separate Entities Going Forward

It has been black letter law in Washington for more than 60 years that when professionals in a partnership dissolve that partnership and continue forward in their own separate practices, there is no goodwill from the dissolved partnership to distribute. *Harstad v. Metcalf*, 56 Wn.2d 239, 242, 351 P.2d 1037 (1960), *citing Kalez v. Miller*, 20 Wn.2d 362, 147 P.2d 506 (1944); *Pollock v. Ralston*, 5 Wn.2d 36, 104 P.2d 934 (1940).

In *Harstad*, an electrical engineer and a civil engineer formed a professional partnership. *Harstad*, 56 Wn.2d at 241. When they had a falling out over business matters, Metcalf, the electrical engineer, elected to dissolve the partnership. *Id.* The partners divided the office space, employees, and other physical assets. After *Harstad*, the civil engineer, completed the partnership's ongoing projects, Metcalf filed an action for an accounting, demanding to be compensated for, *inter alia*, his "partnership interest" and "goodwill" value in the dissolved partnership. *Id.*

Our Washington Supreme Court ruled that there was no goodwill or

partnership interest value to be distributed. *Id.* at 242. It explained that no goodwill or partnership interest value exists where the partners had elected to dissolve the partnership, divide assets, and continue their own individual engineering businesses:

Each partner is continuing his own engineering business after a division of the assets of the former partnership. Accordingly, there is no good will accruing to respondent's business for which appellant is entitled to be paid. His contention to the contrary is without merit.

...Each partner is continuing his own engineering business after a division of the assets of the former partnership. Accordingly, there is no good will accruing to respondent's business for which appellant is entitled to be paid.

*Id.*

*Harstad* is indistinguishable from this case and controls the outcome here. Paxton and McLelland, two professionals, entered into the PLLC. McLelland elected to dissolve the PLLC, terminate the doctors' business relationship, and divide the assets, including the office space in the form of the three locations. They then continued their own independent medical businesses. Under *Harstad*, there was no goodwill value from the dissolved PLLC to distribute, and the trial court erred in concluding otherwise.

- (d) There Is No "Goodwill" Value to Be Allocated to an Entity Based on Office Space Leases When the Entity Dissolves and Abandons Those Leases

The trial court erroneously concluded that the PLLC had goodwill

value based on the leases of office space it controlled prior to its dissolution. CP 3087. It suggested that after the PLLC dissolved and abandoned its leases, McLelland was entitled to be paid for the “goodwill” that was somehow inherent in those locations. *Id.*

When a business entity abandons a lease, it also abandons any goodwill inhering in that business location. In *Burgraff*, the lessees abandoned their business, a restaurant, including the lease. *Burgraff*, 38 Wn. App. at 495. The lease payments were taken over by another lessee, who continued to make lease payments to the successor lessors. Before the restaurant was sold, the bank informed the former owners of its security interest in the restaurant. *Id.* at 495-96. Although the Bank agreed to permit the sale, the Bank filed suit seeking to foreclose its security interest in the restaurant. *Id.* at 496. In valuing the restaurant, the court examined the matter of goodwill and found that since the restaurant owners abandoned their restaurant and the lease, the goodwill was abandoned too. *Id.* The Court held, “[a]s the cases make plain, goodwill is inextricably included in the going business and cannot be separated from it.” *Id.* at 500.

The PLLC abandoned all of its leases in the locations, which negated as a matter of law any finding of goodwill based on those locations. The PLLC abandoned the leases, like the restaurant owners in *Burgraff*. When Dr. McLelland triggered dissolution of the PLLC, at Dr. McLelland’s

insistence, it ceased making lease payments. The lease payments were taken over by the doctors' professional services corporations.

The trial court should have found, as did the *Burgraff* court, that as a matter of law that the PLLC retained no goodwill interest in leases it abandoned.

(2) Even Assuming the Dissolved PLLC Had Goodwill, the Trial Court Abused Its Discretion in Valuing the Dissolved PLLC's Goodwill by Including the Goodwill Value of the Professional Service Corporations, Rather than Whatever Goodwill Value the PLLC Held as a Management Entity

(a) Standard of Review

The trial court's post-trial finding regarding the value of the alleged goodwill is a question of fact, reviewed for whether substantial evidence supports it. reviewed for abused of discretion. *Hall*, 103 Wn.2d at 236; *In re Marriage of Brumback*, 122 Wn. App. 1022 (2004), *review denied*, 154 Wn.2d 1003 (2005); *In re Marriage of Carrillo*, 116 Wn. App. 1020, 2003 WL 1735641 (2003).

(b) The \$1,822,388 in Goodwill Value Erroneously Included the Goodwill of the Individual Doctors' Practices as a Going Concern, Which Should Not Have Been Part of the Valuation of the PLLC

The trial court abused its discretion when it concluded that the PLLC had \$1,822,388 in goodwill value exclusive of the goodwill value of each

doctor's continuing practice. CP 3087. The trial court adopted the valuation of Lenore Romney, who stated in her declaration and then at trial that the dissolved PLLC should be valued at 100% of the annual "production" at each location. CP 1424; RP 273-74, 281-84.<sup>7</sup>

The trial court's mistake hinged on allowing Romney to conflate the method of valuing goodwill when a business is ongoing – such as when a marriage dissolved and the business continues after divorce – as opposed the method of valuation when the business dissolves and is no longer a going concern. RP 273-74. Romney testified that she was valuing the goodwill of a going concern, even while she acknowledged that the PLLC was not a going concern. *Id.*

California courts first identified this distinction between valuing the dissolution of a professional practice and valuing a professional practice in a marriage dissolution setting. *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). The *Lopez* court noted that when a professional business such as a law practice dissolves, there is no goodwill to be distributed because the business discontinues. It distinguished the

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<sup>7</sup> In contrast to Romney who is not AICPA certified and who had valued only a single health care practice in her career, Paxton's experts, Charles Wilhoite and Scott Martin were both AICPA certified accountants and performed 300 and 30 health care practice valuations in their careers respectively. RP 388-95, 402-03, 513-16, 547. They testified that Romney's goodwill valuation was technically flawed. *Id.*

valuation methods in those two circumstances:

Where...the firm is being dissolved, it is understandable that a court cannot determine what, if any, of the goodwill of the firm will go to either partner. But, in a matrimonial matter, the practice of the sole practitioner husband will continue, with the same intangible value as it had during the marriage. Under principles of community property law, the wife, by virtue of her position of wife, made to that value the same contribution as does a wife to any of husband's earnings and accumulations during marriage. She is as much entitled to be recompensed for that contribution as if it were represented by the increased value of stock in a family business.

*Id.* at 107-08. The *Lopez* court acknowledged that an expert valuing a business that is being dissolved and divided has a different valuation task than an expert valuing a business for a matrimonial matter because in the divorce situation the business will continue with the same intangible value; the court is merely seeking to value the total goodwill and distribute half of that goodwill to the non-professional husband or wife. This is different from valuing goodwill, if any, in a professional business entity that ceases to exist.

The *Lopez* court explained the proper approach to determine the existence and amount of goodwill in the professional practice, which is based on the "future receipts" of the practice:

It seems to be well established in the literature of economics that the economic value of any asset depends upon the future net receipts which the asset will produce. ...But subject to this variability, the conceptual view of the economic value

of any asset is based on the future receipts which the asset will produce. Because individual assets are not used in isolation but as a part of an organized entity containing a variety of distinct assets, the economic concept of goodwill is introduced when the future receipts of the organization cannot be assigned as a contribution of a finite list of specific assets. That is, the search to assign a specific cause, in the form of a specific asset, for the expected future receipts requires the introduction of goodwill as an asset.

*Id.* at 108.<sup>8</sup>

Our Supreme Court cited *Lopez* with approval in *Marriage of Fleege*, 91 Wn.2d at 333. It also went on to explain that the goodwill in a professional practice as a going concern is not an asset that can be sold to a third party, but is inherent in the professional's own clients and reputation.

*Id.* at 330.

Our Supreme Court's *Fleege* decision reflects a widely held view that the goodwill in a professional's business is inextricably linked to the services of that particular professional, rather than linked to the other assets of the business such as trade name or capital investments. "The reputation of a professional partnership, such as partnerships of attorneys or physicians, depends upon individual skill of its members, and there is generally no goodwill to be distributed as an asset upon the dissolution of

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<sup>8</sup> The *Lyon* case, cited in the *Lopez* case, held that there is no goodwill to transfer in a professional practice dissolution because the professional takes his earning potential with him into the new practice. *Lyon v. Lyon*, 246 Cal. App. 2d 519, 524, 54 Cal. Rptr. 829 (Cal. App. 1966).

such a firm.” *Cook v. Lauten*, 117 N.E.2d 414, 416 (Ill. App. 1954); *see also*, 59A Am. Jur. 2d *Partnership* § 338 (1987) (same rule applied to partnerships of dentists).

Goodwill in a professional business must not be conflated with the post-dissolution profits earned by another professional, to which former partners have no right. *Weisbrod v. Ely*, 767 P.2d 171, 175 (Wyo. 1989). In *Weisbrod*, which involved the dissolution of a property management partnership, the Wyoming Supreme Court refused to award the outgoing partner any post-dissolution profits where the only physical assets consisted of office furniture and a truck and the partnership profits were attributable to the remaining partner’s labor. *Id.* *See also*, *Blut v. Katz*, 99 A.2d 785 (N.J. 1953) (where profits were primarily due to the surviving partners’ skill and services, no part of them was allocable to the deceased’s capital).

That future income of a professional service is not the property of a former partner is also reflected in the tax code, which categorizes the profits of a professional as personal service income rather than capital returns. “The profits of a professional, whether he works individually or jointly with other professionals in his field, are recognized as personal service income since the return attributable to capital rather than individual skill and labor is negligible.” Laura L. Crum, Comment, *Dissolution of a Law Partnership—Goodwill, Winding up Profits & Additional Compensation*, 6

J. Legal Prof. 277, 289 (1981).

Here, the trial court adopted McLelland's expert valuation of the "goodwill" in the PLLC as almost two million dollars. This figure is wildly inflated because the expert included in her valuation the future profits and income from the various locations, which is improper under Washington law. Even if the trial court insisted that the PLLC had inherent goodwill value at the time McLelland elected to dissolve it, the valuation should not have included the goodwill of the doctors' individual practices or the future profits to be earned. The trial court should have limited any goodwill to that inherent in the existence of the PLLC, as opposed to the doctor's professional service corporations.

(3) The Trial Court Erred in Awarding Prejudgment Interest Where the Claims Were Not Liquidated

Washington permits recovery of prejudgment interest if a claim is liquidated, that is, the damages are capable of computation without resort to the decisionmaker's opinion or discretion. *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968) (A "liquidated claim" is a claim "where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion."). The mere fact that the claim is disputed does not make the claim unliquidated, but if the *measure* of damages requires the exercise of

discretion, the claim is unliquidated. *Egerer v. CSR West, LLC*, 116 Wn. App. 645, 653, 67 P.3d 1128 (2003). *See, e.g., Aker Verdal A/S v. Neil F. Lampson, Inc.*, 65 Wn. App. 177, 828 P.2d 610 (1992) (claim was unliquidated where jury had to decide between two measures of damages); *Maryhill Museum of Fine Arts v. Emil's Concrete Constr. Co.*, 50 Wn. App. 895, 751 P.2d 866, *review denied*, 111 Wn.2d 1009 (1988) (claim unliquidated where court determined damages for breach of contract to reconstruct unique building was original contrast cost). *See also, Dep't of Corrs. v. Fluor Daniel, Inc.*, 160 Wn.2d 786, 161 P.3d 372 (2007) (party not entitled to prejudgment interest between time of arbitrator award and entry of judgment on it).

Where any opinion or discretion is required to determine damages, a claim is unliquidated. As noted in *Kiewitt-Grice v. State*, 77 Wn. App. 867, 872-73, 895 P.2d 6, *review denied*, 127 Wn.2d 1018 (1995), a decision requiring the determination of the reasonableness of damages is inherently one involving opinion or discretion, and prejudgment interest is unavailable. *See also, Tri-M Erectors, Inc. v. Donald M. Drake Co.*, 27 Wn. App. 529, 537, 618 P.2d 1341 (1980), *review denied*, 95 Wn.2d 1002 (1981) (“A claim is unliquidated if the principal must be arrived at by a determination of reasonableness.”).

Another basis for prejudgment interest may be that a party has the “use value” of another party’s money. *Hansen v. Rothaus*, 107 Wn.2d 468, 473, 730 P.2d 662 (1986).<sup>9</sup>

Here, Dr. McLelland’s claims were not liquidated in nature, nor did Dr. Paxton have the “use value” of money rightfully belonging to McLelland. Dr. McLelland’s goodwill “damages” were not liquidated nor was the amount of damage set forth by a “fixed standard” in the contract, without reliance on opinion or discretion. The amount was unliquidated because it required conflicting expert testimony to determine whether goodwill existed, and it further required the exercise of the trial court’s discretion to evaluate the opinions in order to reach a conclusion. CP 3087. Dr. McLelland was not entitled to prejudgment interest.

(4) Dr. McLelland Filed Suit Prematurely Here, Defaulting Under the Partnership Agreement and Negating His Subsequent Claim for Breach of Contract Against Dr. Paxton

This Court reviews a trial court's findings of fact to determine if

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<sup>9</sup> At issue in *Hansen* was whether prejudgment interest should be awarded on seven claims asserted by vessel owners against insurance brokers. With respect to each claim, the insurer stipulated to liability for certain damages. Of the claims before it, the court held the following were liquidated: the amount paid for an insurance premium, the amount a vessel owner paid a financing company for an insurance premium, the “insured agreed value” of a vessel that sank minus the amount the owner bid for salvage rights, the unpaid balance of a claim for damage to a vessel, and the amount paid for repairs to a damaged vessel. With respect to these claims, data existed by which the amount of the claim could be computed with exactness and without reliance upon opinion or discretion.

substantial evidence supports them and, if so, “whether the findings support the trial court's conclusions of law.” *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 555, 132 P.3d 789 (2006), *aff’d*, 162 Wn.2d 340, 172 P.3d 688 (2007).

In the Court's Conclusion of Law, number 11, the trial court denied Dr. Paxton’s claim that Dr. McLelland breached the Partnership Agreement by filing suit while the PLLC still existed under the partnership agreement. CP 3090.

However, the trial court’s findings of fact support only the opposite conclusion: Dr. McLelland breached the partnership agreement when he filed suit on January 29, 2015, a month before the PLLC was dissolved and partnership ended. Dr. McLelland filed this lawsuit before the PPLC was dissolved. CP 3. This violated the Agreement which provides:

Default; Dissolution and Reconstituting.

A. Default Defined. It is agreed that upon the occurrence of any of the following events, constituting defaults, this Agreement may be dissolved, either during the Initial Term, or any annual renewal period, at the option of the non-defaulting party or Parties, except for those provisions expressly intended and provided for to survive. Such events are as follows:

...

(viii) Claim Against Other Parties or Shareholders. Any of the Parties or any of the Shareholders shall take any action, or fail to take any action, which results in any material claim, suit, or action being filed, or threatened or asserted in any

way against any of the other Parties or Shareholders, except fully insured malpractice claims (the deductible of which shall be paid by the Party or Shareholder who treated the patient making such malpractice claim), or which results in any material damage to or material liability of any of the other Parties or Shareholders.

CP 50-53.

Dr. McLelland's premature lawsuit constituted a default under the agreement. Moreover, Dr. Paxton was entitled to enforce his right to prohibit Dr. McLelland from practicing at any location of the practice based upon the default provisions in the Agreement.

Because the Findings of Fact expressly contradict the trial court's Conclusion of Law Number 11, it must be reversed, and this Court must direct the trial court to enter a judgment and damages on this claim in Dr. Paxton's favor.

(5) The Trial Court Erred in Awarding Fees to Dr. McLelland and Abused Its Discretion in Setting Their Amount

Dr. McLelland was not entitled to recover his fees at trial because he was not a prevailing party within the meaning of the Agreement. Even if he was the prevailing party, the trial court erred in setting the amount of his reasonable fees.

(a) Dr. McLelland Was Not Entitled to Fees at Trial

The trial court concluded that Dr. McLelland was entitled to fees as the prevailing party under the terms of the partnership agreement.

The Agreement provides for prevailing party attorney fees if any action is necessary to enforce the agreement:

If any action at law or in equity is necessary to enforce the terms of this Agreement, the prevailing Party or Parties, or Shareholder or Shareholders, shall be entitled to reasonable attorneys fees and costs, in addition to any other relief to which entitled.

CP 83.

Dr. McLelland argued below that he was the “prevailing party” on his claim for breach of contract even though he did not prove damages, citing *Miles v. F.E.R.M. Enterprises, Inc.*, 29 Wn. App. 61, 627 P.2d 564 (1981); see *Dennis I. Spencer Contractor, Inc. v. City of Aurora*, 884 P.2d 326, 327, 332 (Colo. 1994) (holding that prevailing party for purposes of awarding attorney fees is the party in whose favor the decision on liability is rendered in a violation of a contractual obligation even if no damages are awarded).<sup>10</sup>

If this Court determines that Dr. McLelland did not prevail on the goodwill issue, which the trial court indicated was the issue on which the majority of the trial was focused, then he is no longer the prevailing party and his award of fees at trial should be reversed.

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<sup>10</sup> These cases are civil rights cases in which nominal damages are presumed and neither of these cases have any application here.

(b) The Amount of Dr. McLelland's Fees Was Excessive

The trial court initially awarded Dr. McLelland the full \$286,102.80 he requested in attorney fees, plus costs. CP 3365. Although Dr. McLelland's original complaint listed seven claims, CP 7-12, and the trial court found he did not prevail on any of them except goodwill, the original fee declaration did not state that plaintiff's counsel had segregated time spent on unsuccessful claims. CP 3096. When Dr. Paxton moved for reconsideration, citing the need to segregate work on the many claims that Dr. McLelland lost, the trial court reduced the fee request to \$276,908.05. This represents a "segregation" reduction of \$9,194.75.

Fee requests under the PRA are governed by the lodestar method. *Sanders v. State*, 169 Wn.2d 827, 869, 240 P.3d 120 (2010). The lodestar method is the default principle for the calculation of a reasonable attorney fee in Washington. A fee must be *reasonable*, and the request must be adequately documented. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983); *Mahler v. Szucs*, 135 Wn.2d 398, 433-34, 957 P.2d 632 (1998). A trial court must be aggressive in the application of the lodestar methodology. *Mahler*, 135 Wn.2d at 434. ("In the past, we have expressed more than a modest concern regarding the need of litigants and courts to rigorously adhere to the lodestar methodology. Courts must

take an *active* role in assessing the reasonableness of the awards, rather than treating cost decisions as an afterthought. Trial courts should not simply accept unquestioningly fee affidavits from counsel”) (citations omitted; Court’s emphasis). Division I’s decision in *Berryman v. Metcalf*, 177 Wn. App. 644, 658, 312 P.3d 745 (2013), *review denied*, 179 Wn.2d 1026 (2014) evidences the same desire for an independent and comprehensive application of the lodestar methodology by trial courts. (“... the findings must do more than give lip service to the word ‘reasonable.’ The findings must show how the court resolved disputed issues of fact and the conclusions must explain the court’s analysis.”).

The process for calculating a reasonable attorney award is straightforward, as described by the *Mahler* court. An attorney fee request must be documented by contemporaneous time records. 135 Wn.2d at 434. While the documentation for fees need not be exhaustive, it must still be sufficient to enable a court to know the number of hours worked, the type of work performed, and the attorney performing the work. *Bowers*, 100 Wn.2d at 597. The burden of documenting the fee award rests entirely with the party seeking an award of attorney fees, in this case, Dr. McLelland. *Mahler*, 135 Wn.2d at 433-34; *Berryman*, 312 P.3d at 753.

A court must determine the reasonable number of hours. *Mahler*, 135 Wn.2d at 434. A court must consider the reasonable hourly rates of the

attorneys actually billed to the clients. *Id.* at 434. The lodestar is then derived by multiplying the reasonable hourly rates of the billing lawyers times the reasonable hours spent to achieve the result for the client. *See generally*, Philip A. Talmadge, Thomas M. Fitzpatrick, *The Lodestar Method for Calculating a Reasonable Attorney Fee in Washington*, 52 *Gonz. L. Rev.* 1 (2016/17).<sup>11</sup>

Here, Dr. McLelland’s fee request fails to meet the requirements of the lodestar method. The documentation of work performed is imprecise.<sup>12</sup> Moreover, Dr. McLelland failed to undertake the necessary segregation of recoverable time from unrecoverable time, leading to a \$9,000 “segregation” that is patently insufficient.

Dr. McLelland may not recover time spent on unsuccessful matters,

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<sup>11</sup> Ultimately, the lodestar fee must reflect the time it should take competent counsel to perform the necessary work upon which the client’s successful result is predicated. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 151, 859 P.2d 1210 (1993).

<sup>12</sup> The time entries for Dr. McLelland’s counsel are not helpful – they are very general and often amount to block-billing. “Block billing is the time-keeping method by which each lawyer and legal assistant enters the total daily time spent working on a case, rather than itemizing the time expended on specific tasks.” *Welch v. Met. Life Ins. Co.*, 480 F.3d 942, 945 n.2 (9th Cir. 2007) (internal quotation marks omitted). “[B]lock billing makes it more difficult to determine how much time was spent on particular activities.” *Id.* at 948. Additionally, “block billing hides accountability and may increase time by 10% to 30% by lumping together tasks.” *Yeager v. Bowlin*, 2010 WL 1689225 at \*1 (E.D. Cal. 2010) (citing the State Bar of California Committee on Mandatory Fee Arbitration, Arbitration Advisory 03–01 (2003)) (internal quotation marks omitted). Accordingly, “the usage of block billing is fundamentally inconsistent with the lodestar method.” *Willis v. City of Fresno*, 2014 WL 3563310 (E.D. Cal. 2014), *on remand*, 2017 WL 5713374 (E.D. Cal. 2017).

and he must confine his request to attorney time spent on matters on which he prevailed. *Pham v. City of Seattle*, 159 Wn.2d 527, 538-39, 151 P.3d 976 (2007) (upholding the excising of time spent on unsuccessful activities). Time that is duplicative or wasteful should not be included in a fee request. *Mahler*, 135 Wn.2d at 434. This Court *must* exclude wasteful or duplicative time. *Id.* at 434 (“Necessarily, this decision requires the court to exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims.”); *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987); *Berryman*, 177 Wn. App. at 661-62.

The obligation to excise such time initially falls on the party seeking fees, here, Dr. McLelland. It is inappropriate to merely lay claim to all of the hours spent on a case and ask a busy court to sort out what is recoverable from what is not. *Berryman*, 177 Wn. App. at 657 (burden of demonstrating a fee is reasonable is on the fee applicant).

The trial court lauded Dr. McLelland’s counsel for segregating the fee request and reducing “92 entries.” CP 3772-77. In fact, the trial court repeated this phrase twice in its order denying Paxton’s motion to clarify and amend the judgment. *Id.* The trial court suggested that this number reflected appropriate segregation with respect to all of the work done over three years in this matter.

However, the number of altered entries is not an accurate measure of whether proper segregation occurred. Dr. McLelland's "segregated" fee request, reduced a \$286,102.80 fee request to a \$276,908.05 fee request. Dr. McLelland would have this Court believe that only 3% of his settlement, mediation, investigation, complaint drafting, discovery, pretrial motions practice, and trial proceedings, was spent on the issues of (1) breach of fiduciary duty, (2) the claims for "work days" and theft of \$100,000 and patients, (3) the claims for right to the logo and name of the practice, (4) detrimental reliance, (5) negligent misrepresentation, (6) implied duty of good faith and fair dealing, and (7) injunctive relief. These were all of the claims raised in his complaint upon which he did not prevail, as the trial court found. CP 3079-90, 3498-99.

Even if the trial court felt that most of the trial centered on the issue of goodwill, the attorney fee entries going back to 2014, before the lawsuit was filed, and clearly encompass far more than the goodwill issue. It is evident from even a cursory review that the trial court did not scrutinize these "92 entries" that McLelland's counsel trumpeted in his declaration.

For example, in his amended fee request, lead counsel Michael Church repeatedly declared that he segregated only time spent on the issues of "work days, theft of patients, theft of money, and damages for breach of fiduciary duties." CP 3532. However, in its order, the trial court ordered

that he request *only* fees in connection with the “goodwill claim, the NuCalm claim, and American Health claim.” CP 3505.

Thus, on its face, the “segregated” fee request does not eliminate fees incurred for unsuccessful claims, even though the trial court specifically concluded that segregation was possible and the claims were not intertwined.

It is obviously frustrating for overworked courts when counsel does not do its job in appropriately segregating fee requests. However, it is the trial court’s duty to closely examine these requests and not leave it to this Court to do that work.

Dr. McLelland’s “segregated” fee request is manifestly unreasonable and facially inadequate, based on the record and what the trial court ordered in terms of segregation. The request should have been rejected or seriously reduced by the trial court to reflect proper segregation. The trial court abused its discretion in approving it without additional scrutiny or reduction.

(6) Dr. Paxton Is Entitled to Fees at Trial and on Appeal

RAP 18.1(a) provides for fees if provided for by applicable law.

The Agreement included a prevailing party attorney fee provision, which the trial court invoked to award fees to Dr. McLelland. CP 83.

If Dr. Paxton prevails on his contention that the trial court erred on

the goodwill issue in particular, which the trial court concluded was the main issue at trial, then he is the prevailing party by the terms of the Agreement and was entitled to recover his fees at trial and on appeal.

F. CONCLUSION

The trial court applied the incorrect methodology for addressing the value of the goodwill of a business where it treated the practice of the two oral surgeons here as ongoing. The Court also erred in awarding prejudgment interest and attorney fees to Dr. McLelland, and in abused its discretion in failing to segregate fees for Dr. McLelland's many unsuccessful claims.

This Court should reverse the trial court's judgment and remand for a new trial on damages. Costs on appeal, including reasonable attorney fees, should be awarded to Dr. Paxton.

DATED this 2<sup>d</sup> day of August, 2018.

Respectfully submitted,



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# APPENDIX

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CN: 201502003261  
**SN: 338**  
PC: 4

**FILED**  
**MAY 25 2017**  
Timothy W. Fitzgerald  
SPOKANE COUNTY CLERK

**SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE**

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, )

NO. 15-2-00326-1

Plaintiffs, )

**FINAL ORDER**

vs. )

MARK C. PAXTON, D.D.S. and DIANE S. )  
PAXTON, husband and wife, and the marital )  
community thereof, and MARK C. PAXTON, )  
D.D.S., P.S., a Washington professional )  
services corporation, )

Defendants. )

**I. BASIS**

This matter came before the court for bench trial beginning October 10, 2016, before the Honorable Judge Maryann Moreno. Plaintiffs appeared at trial through their attorneys of record Michael H. Church and Darren M. Digiacinto of Stamper Rubens, P.S. Defendants appeared at trial and through their attorneys of record, David Kulisch and Jenaé Ball of Randall Danskin, P.S.

FINAL ORDER: 1

  
STAMPER RUBENS, P.S.  
ATTORNEYS AT LAW  
720 WEST BOONE, SUITE 200  
SPOKANE, WA 99201  
TELEFAX (509) 326-4891  
TELEPHONE (509) 326-4800

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**II. FINDINGS**

The Court entered its letter Ruling on January 17, 2012, and its Findings of Fact and Conclusions of Law on April 13, 2017, which are incorporated herein by this reference.

**III. ORDER**

On the basis of the Findings of Fact and Conclusions of Law filed on April 13, 2017:

IT IS HEREBY ORDERED that entity Goodwill existed as of February 28, 2015, and is subject to division pursuant to the parties' undivided one-half interests in the same. Each doctor or his respective entity is entitled to assets or cash in the amount of \$911,194.00, which is based on their undivided one-half interest in the total goodwill value of \$1,822,388.00.

IT IS FURTHER ORDERED that the practice locations are divided as follows:

- A. The South Hill location shall be allocated to Dr. Paxton.
- B. The Valley location shall be allocated to Dr. Paxton.
- C. The Post Falls location shall be allocated to Dr. McLelland.

IT IS FURTHER ORDERED that Dr. Paxton shall pay Dr. McLelland an equalization payment in the amount of \$414,036.00 in order to ensure that the total value of goodwill at the three practice locations is distributed equally between the two doctors. The Court will enter judgment in favor of Dr. McLelland in the amount of \$414,036.00.

IT IS FURTHER ORDERED that since no current valuation of the jointly owned equipment, furniture, and supplies exists at this time, the parties are to attempt to equitably divide these assets. If the parties cannot agree, the Receiver in this case, Tim Cronin, is



1 empowered to obtain, inventory, and value these assets and divide the assets. Any fees for  
2 appraisal shall be shared equally.  
3

4 IT IS FURTHER ORDERED that the parties shall cancel the phone number to the Valley  
5 location (509-926-7106) and shall each pay one-half of any amounts still due and owing for that  
6 phone line.  
7

8 IT IS FURTHER ORDERED that this Court already granted summary judgment in favor  
9 of the Plaintiffs on their claims of breach of contract, breach of fiduciary duty, and constructive  
10 fraud related to the South Hill eviction. No damages are awarded for Dr. Paxton's breach.  
11

12 IT IS FURTHER ORDERED that Defendants' claim related to NuCalm is denied.  
13

14 IT IS FURTHER ORDERED that Defendants' claim related to American Healthcare  
15 Lending is denied.  
16

17 IT IS FURTHER ORDERED that Defendants' claim for reimbursement for certain  
18 expenses including the painting of the Valley office, replacement of the ice machine at the  
19 Valley office, replacement of the suction machine at the Valley office is granted, and Dr.  
20 McLelland will pay Dr. Paxton \$7,587.99.  
21

22 IT IS FURTHER ORDERED that Defendants' claim for breach of contract related to Dr.  
23 McLelland's purchase of the Sullivan Road building is denied.  
24

25 IT IS FURTHER ORDERED that Defendants' claims for breach of fiduciary duty related  
26 to Dr. McLelland's purchase of the Sullivan Road building is denied.  
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1 IT IS FURTHER ORDERED that Defendants' claim for prior breach related to the date  
2 Plaintiffs' filed their Complaint is denied.

3  
4 IT IS FURTHER ORDERED that judgment shall be entered for Plaintiffs in the amount  
5 of the equalization payment of \$414,036.00. Prejudgment interest at 12% is awarded from  
6 August 4, 2014, to the date of judgment. Post judgment interest shall accrue at 12%.

7  
8 IT IS FURTHER ORDERED that Plaintiffs, as prevailing party, are awarded reasonable  
9 attorney fees in the amount of \$286,102.80 and costs in the amount of \$53,675.50 and Plaintiffs  
10 shall be awarded judgment for the same. Post judgment interest shall accrue at 12%.

11  
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14 5-24-17  
15 DATE

  
16 JUDGE MARYANN C. MORENO

17 Presented By:

18 STAMPER RUBENS, P.S.

19  
20 By:   
21 MICHAEL H. CHURCH, WSBA # 24957  
22 HAILEY L. LANDRUS WSBA #39432  
23 Attorneys for Plaintiffs

24 *Approved as to form:*

25 RANDALL | DANSKIN

26  
27  
28 By: \_\_\_\_\_  
29 DAVID A. KULISCH, WSBA #18313  
30 JENAÉ M. BALL, WSBA # 36613  
31 Attorneys for Defendants

CN: 201502003261

SN: 339

PC: 2

FILED

MAY 25 2017

Timothy W. Fitzgerald  
SPOKANE COUNTY CLERK

**SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE**

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, )

NO. 15-2-00326-1

JUDGMENT SUMMARY

Plaintiffs, )

vs. )

MARK C. PAXTON, D.D.S. and DIANE S. )  
PAXTON, husband and wife, and the marital )  
community thereof, and MARK C. PAXTON, )  
D.D.S., P.S., a Washington professional )  
services corporation, )

Defendants. )

JUDGMENT CREDITORS: BRYAN W. McLELLAND, D.D.S. and KRISTA McLELLAND  
and BRYAN W. McLELLAND, D.D.S., P.S.

JUDGMENT DEBTORS: MARK C. PAXTON, D.D.S. and DIANE S. PAXTON and  
MARK C. PAXTON D.D.S., P.S.

PRINCIPAL JUDGMENT AMOUNT: .....\$339,778.30

TOTAL JUDGMENT AMOUNT: .....\$339,778.30

17904366-4

LF [Signature]

JUDGMENT SUMMARY: 1



STAMPER RUBENS, P.S.  
ATTORNEYS AT LAW

720 WEST BOONE, SUITE 200  
SPOKANE, WA 99201  
TELEFAX (509) 326-4891  
TELEPHONE (509) 326-4800

1 DONE IN OPEN COURT THIS 24 day of May, 2017.

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4  
5 HONORABLE MARYANN C. MORENO

6 Presented By:

7 STAMPER RUBENS, P.S.

8  
9  
10 By: 

11 MICHAEL H. CHURCH, WSBA #24957

12 HAILEY L. LANDRUS, WSBA #39432

13 Attorneys for Plaintiffs

14 Approved as to form:

15 RANDALL DANKIN

16  
17  
18  
19 By: \_\_\_\_\_

20 DAVID A. KULISCH, WSBA #18313

21 JENAÉ M. BALL, WSBA #36613

22 Attorneys for Defendants

23 H:\Clients\McLelland\Pleadings\41 Judgment for Award & Judgment Fees and Costs\Judgment Summary for Attorney Costs & Fees 4-20-17.docx

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31 JUDGMENT SUMMARY: 2



STAMPER RUBENS, P.S.  
ATTORNEYS AT LAW

720 WEST BOONE, SUITE 200  
SPOKANE, WA 99201  
TELEFAX (509) 326-4891  
TELEPHONE (509) 326-4800

CN: 201502003261

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FILED

MAY 25 2017

Timothy W. Fitzgerald  
SPOKANE COUNTY CLERK

**SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE**

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, )  
Plaintiffs, )

NO. 15-2-00326-1

JUDGMENT

vs.

MARK C. PAXTON, D.D.S. and DIANE S. )  
PAXTON, husband and wife, and the marital )  
community thereof, and MARK C. PAXTON, )  
D.D.S., P.S., a Washington professional )  
services corporation, )  
Defendants. )

THIS MATTER came before the Court on the presentation by Bryan W. McLelland, D.D.S. and Krista McLelland and Bryan W. McLelland, D.D.S., P.S., Plaintiffs, of a judgment for money due by Mark C. Paxton, D.D.S. and Diane S. Paxton and Mark C. Paxton, D.D.S., P.S. The judgment was presented pursuant to the Court's Findings of Fact Conclusions of Law filed on April 14, 2017, Additionally, it is based upon the Affidavit of Michael H. Church filed contemporaneously herewith and incorporated herein by reference.

Based on Plaintiff's Memorandum in Support of Plaintiffs' Request for an Award of

JUDGMENT: 1



STAMPER RUBENS, P.S.  
ATTORNEYS AT LAW

720 WEST BOONE, SUITE 200  
SPOKANE, WA 99201  
TELEFAX (509) 326-4891  
TELEPHONE (509) 326-4800

1 Attorney Fees and Costs and the Summary Statement of Attorneys Fees and Costs, the Court  
2 enters Judgment, against Defendants jointly and severally in favor of Plaintiffs as follows:  
3

- 4 1. Principal amount - \$339,778.30;  
5  
6 2. A total judgment amount of \$339,778.30 is awarded in favor of Plaintiffs against  
7 Defendants, jointly and severally, MARK C. PAXTON, D.D.S. and DIANE S.  
8 PAXTON, and MARK C. PAXTON, D.D.S., P.S.

9 DONE IN OPEN COURT THIS 24 day of May, 2017.

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12 \_\_\_\_\_  
13 HONORABLE MARYANN C. MORENO

14 Presented By:

15 STAMPER RUBENS, P.S.

16  
17  
18 By: 

19 MICHAEL H. CHURCH, WSBA #24957  
20 HAILEY L. LANDRUS, WSBA #39432  
21 Attorneys for Plaintiffs

22 RANDALL | DANSKIN

23  
24  
25 By: \_\_\_\_\_

26 DAVID A. KULISCH, WSBA #18313  
27 JENAÉ M. BALL, WSBA # 36613  
28 Attorneys for Defendants  
29  
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CN: 201502003261

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FILED

MAY 25 2017

Timothy W. Fitzgerald  
SPOKANE COUNTY CLERK

**SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE**

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,

Plaintiffs,

vs.

MARK C. PAXTON, D.D.S. and DIANE S.  
PAXTON, husband and wife, and the marital  
community thereof, and MARK C. PAXTON,  
D.D.S., P.S., a Washington professional  
services corporation,

Defendants.

NO. 15-2-00326-1

JUDGMENT SUMMARY

JUDGMENT CREDITORS: BRYAN W. McLELLAND, D.D.S. and KRISTA McLELLAND  
and BRYAN W. McLELLAND, D.D.S., P.S.

JUDGMENT DEBTORS: MARK C. PAXTON, D.D.S. and DIANE S. PAXTON and  
MARK C. PAXTON D.D.S., P.S.

PRINCIPAL JUDGMENT AMOUNT: .....\$414,036.00

Pre Judgment interest at the rate of 12% per Annum (from 8/4/2014 – 5/19/17):.....\$138,743.73

Judgment Amount Shall Bear Interest at Judgment Rate per Annum: 12%

17904367-2

JUDGMENT SUMMARY: 1



STAMPER RUBENS, P.S.  
ATTORNEYS AT LAW

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SPOKANE, WA 99201  
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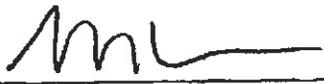
Attorney Fees, Costs, and Other Recovery Amounts Shall Bear Interest at Judgment Rate per Annum, the amount of which will be filed separately herein: 12%

Attorney for Judgment Creditors: MICHAEL H. CHURCH and HAILEY L. LANDRUS

Attorney for Judgment Debtors: DAVID A. KULISCH and JENAÉ M. BALL

**TOTAL JUDGMENT: \$552,743.73**

DONE IN OPEN COURT THIS 24 day of May, 2017.

  
\_\_\_\_\_  
HONORABLE MARYANN C. MORENO

Presented By:  
STAMPER RUBENS, P.S.

By:   
\_\_\_\_\_  
MICHAEL H. CHURCH, WSBA #24957  
HAILEY L. LANDRUS, WSBA#39432  
Attorneys for Plaintiffs

RANDALL | DANSKIN

By: \_\_\_\_\_  
DAVID A. KULISCH, WSBA #18313  
JENAÉ M. BALL, WSBA # 36613  
Attorneys for Defendants

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CN: 201502003261

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FILED

MAY 25 2017

Timothy W. Fitzgerald  
SPOKANE COUNTY CLERK

**SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE**

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, )

NO. 15-2-00326-1

JUDGMENT

Plaintiffs, )

vs. )

MARK C. PAXTON, D.D.S. and DIANE S. )  
PAXTON, husband and wife, and the marital )  
community thereof, and MARK C. PAXTON, )  
D.D.S., P.S., a Washington professional )  
services corporation, )

Defendants. )

THIS MATTER came before the Court on the presentation by Bryan W. McLelland, D.D.S. and Krista McLelland and Bryan W. McLelland, D.D.S., P.S., Plaintiffs, of a judgment for money due by Mark C. Paxton, D.D.S. and Diane S. Paxton and Mark C. Paxton, D.D.S., P.S. The judgment was presented pursuant to Judge Maryann C. Moreno's Findings of Fact and Conclusions of Law filed on April 13, 2017, attached as Exhibit "A" and incorporated herein by this reference.

JUDGMENT: 1



STAMPER RUBENS, P.S.  
ATTORNEYS AT LAW

720 WEST BOONE, SUITE 200  
SPOKANE, WA 99201  
TELEFAX (509) 326-4891  
TELEPHONE (509) 326-4800

1 Based on Judge Moreno's Findings of Fact and Conclusions of Law, the Court enters  
2 Judgment, against Defendants jointly and severally in favor of Plaintiffs as follows:

- 3 1. Principal Amount - \$414,036.00;  
4  
5 2. Pre-judgment interest in the amount of \$138,707.73;  
6  
7 3. Post-judgment interest shall accrue at 12% per annum;  
8  
9 4. A Judgment for Attorney Fees, Costs, and Other Recovery Amounts will be filed  
10 separately; and  
11 5. A total judgment amount of \$552,743.73 is awarded in favor of Plaintiffs against  
12 Defendants, jointly and severally, MARK C. PAXTON, D.D.S. and DIANE S.  
13 PAXTON, and MARK C. PAXTON, D.D.S., P.S.

14 DONE IN OPEN COURT THIS ~~24~~ day of May, 2017.

15  
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17   
18 HONORABLE MARYANN C. MORENO

19 Presented By:

20 STAMPER RUBENS, P.S.

21  
22 By:   
23

24 MICHAEL H. CHURCH, WSBA #24957  
25 HAILEY L. LANDRUS, WSBA #39432  
26 Attorneys for Plaintiffs

27 RANDALL | DANSKIN

28  
29 By: \_\_\_\_\_

30 DAVID A. KULISCH, WSBA #18313  
31 JENAÉ M. BALL, WSBA # 36638  
Attorneys for Defendants



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# **Exhibit A**

FILED

APR 13 2017

Timothy W. Fitzgerald  
SPOKANE COUNTY CLERK

**SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE**

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, )

NO. 15-2-00326-1

Plaintiffs, )

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

vs. )

MARK C. PAXTON, D.D.S. and DIANE S. )  
PAXTON, husband and wife, and the marital )  
community thereof, and MARK C. PAXTON, )  
D.D.S., P.S., a Washington professional )  
services corporation, )

Defendants. )

The above-referenced case came on for bench trial beginning October 10, 2016, before the Honorable Maryann Moreno. Plaintiffs appeared at trial through their attorneys of record Michael H. Church and Darren M. Digiacinto of Stamper Rubens, P.S. Defendants appeared at trial and through their attorneys of record, David Kulisch and Jenaé Ball of Randall Danskin, P.S.

The following issues were presented at trial for adjudication<sup>1</sup>:

1. Whether there is goodwill, and if so, its value?
2. Whether the Valley location should be allocated to Dr. Paxton or Dr. McLelland?
3. Whether the Post Falls location should be allocated to Dr. Paxton or Dr. McLelland?

<sup>1</sup> The ownership of the logo, name, tradename, and website were resolved between the parties and thus were not presented for determination by this Court.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW: 1**

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4. What value, if any, should be allocated to the South Hill location and owed to Bryan W. McLelland, D.D.S., P.S. ("Dr. McLelland") by Mark C. Paxton, D.D.S., P.S. ("Dr. Paxton")?

5. Whether Dr. McLelland has established damages for the breach of contract, breach of fiduciary duties, and constructive fraud for which this Court has already determined Dr. Paxton was liable on summary judgment?

6. Whether Dr. McLelland owes Dr. Paxton reimbursement for equipment repairs, and, if so, in what amount?

7. Whether Dr. McLelland breached the fiduciary duties he owed to Dr. Paxton and Spokane OMS, PLLC?

8. Whether Dr. Paxton is liable to Dr. McLelland for Dr. McLelland's remaining claims, and if so, what damages should be awarded to Dr. McLelland?

9. Whether Dr. McLelland is liable to Dr. Paxton for Dr. Paxton's remaining claims, and if so, what damages should be awarded to Dr. Paxton?

The following witnesses were called and testified at the trial:

A. Plaintiffs' witnesses:

1. Dr. Bryan McLelland
2. Shelby Henke
3. Lenore D. Romney, CPA, CFE, CVA (Expert)

B. Defendants' witnesses:

1. Charles Wilhoite – Willamette Associates (Expert)
2. Scott Martin
3. Mike Silvey
4. Renee Bancroft
5. Dr. Mark Paxton

The following exhibits were admitted into evidence and considered by the Court:

A. Plaintiffs' Exhibits:

- P-1 Practice Prospectus for Mark C. Paxton, DDS
- P-3 Acquisition Agreement between Dr. Mark Paxton, DDS and Dr. Bryan McLelland, DDS dated March 1, 2005

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- P-4 Partnership Agreement
- P-6 Email to McLelland from Paxton, 7/9/08
- P-9 String of emails titled "South Hill Rent Deposits Effective May 1<sup>st</sup>"
- P-10 String of emails between Kim Anderson, Terri Crawley and Dr. Paxton dated May 6, 2015
- P-11 (ID Only) String of emails between Kim Anderson, Dr. McLelland & Jessica Wood dated May 6, 2015
- P-12 String of emails titled "New South Hill Lease" dated between May 11, 2015 and May 23, 2015
- P-13 String of emails titled "Eviction of Spokane OMS From Property Owned by South Stone, LLC at 2807 W. Stone" dated May 11, 2015
- P-19 (ID Only) Letter to Jenaé Ball and Kit Querna from Michael Church
- P-20 (ID Only) Article Written by Robert F. Reilly titled "*What Lawyers Need to Know about Distinguishing Personal Goodwill from Entity Goodwill in the Closely Held Company Valuation*"
- P-21 (ID Only) Order Denying Plaintiffs' Motion for Summary Judgment and Granting Defendants' Motion for Summary Judgment
- P-22 (ID Only) Document of Publication
- P-23 Letter to Jenaé Ball and Kit Querna from Michael Church (redacted), August 4, 2014
- P-33 Email string between Kit Querna and Charles Wilhoite dated November 19, 2015
- P-34 Acquisition Agreement
- P-41 Spokane Oral & Maxillofacial Surgery web site home page
- P-44 Expert Lenore Romney Report
- P-45 Exhibits re: Work Hours (Bates Nos. 1 thru 33, 1431 thru 1468, 1546 thru 1561, and 1562 thru 1615)
- P-47 Bill of Sale, 2005
- P-48 Equipment Lease, 2005
- P-49 Sale of Patient Records and Accounts Receivable, 2005

- 1 P-52 Agreement Concerning Sale of Additional Assets of OMS
- 2 Practice, 2005
- 3 P-53 Building Management Agreement, 2005
- 4 P-54 Building Lease, 2005
- 5 P-59 SOMS QuickBooks reports—Balance Sheet 12/31/14 and Profit
- 6 & Loss 12/31/14—printed 1/22/16
- 7 P-60 SOMS QuickBooks report—Accounts Payable printed 1/22/16
- 8 P-61 SOMS QuickBooks report—Fixed Assets printed 1/22/16
- 9 P-64 Collection and production information from Dr. McLelland (Page
- 10 1 only)
- 11 P-67 (ID Only) The Health Care Group Goodwill Registry—Year 2014
- 12 P-69 Inventory worksheets (undated)
- 13
- 14 P-70 (ID Only) Email dated May 19, 2015, between Dr. Paxton and Shelby Henke with
- 15 the subject of “Surgical Equipment, Crash Carts and Emergency
- 16 Medications, etc., etc....Other Patient Safety Issues”
- 17 B. Defendants’ Exhibits:
- 18 D-102 (ID Only) U.S. Return of Partnership Form 1065 for Paxton, Lang, and McLelland
- 19 Oral and Maxillofacial Surgery Partnership for 2005
- 20 D-103 Spokane Oral & Maxillofacial Surgery: Corporation Rules and Bylaws
- 21 dated 02/01/2005
- 22 D-104 Email from Mark Paxton to Dan at Cain and Waters regarding the
- 23 buyout dated 02/03/2005
- 24 D-105 Email exchange between Mark Paxton and John Richards at US Bank
- 25 regarding sale and joint acquisition dated 02/03/2005
- 26 D-112 U.S. Return of Partnership Income Form 1065 for Spokane OMS, PLLC
- 27 for 2011
- 28 D-114 U.S. Return of Partnership Income Form 1065 for Spokane OMS, PLLC
- 29 for 2012
- 30 D-116 U.S. Return of Partnership Income Form 1065 for Spokane OMS, PLLC
- 31 for 2013

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- D-119 U.S. Return of Partnership Income Form 1065 for Spokane OMS, PLLC for 2014
- D-124 Acquisition Agreement between Melanie Lang, D.D.S., M.D., P.S. and Bryan McLelland, D.D.S., P.S. dated 06/02/2014
- D-126 Letter to Jenaé Ball and Michael Church from Scott Martin with Valuation of Spokane OMS, PLLC dated 06/11/2014
- D-127 (ID Only) Email from Stacie Sung to Bryan McLelland dated 06/16/2014
- D-128 (ID Only) Email from Katherine Hoeksema to Bryan McLelland dated 06/16/2014
- D-129 (ID Only) Email from Bryan McLelland to Katherine Hoeksema via Terri Crawley dated 06/16/2014
- D-131 ACI Coating LLC Invoice #9381159 dated 07/25/2014
- D-136 Emails between Patty Gibson and Bryan McLelland regarding Valley vacuum/suction dated 12/23/2014 to 12/26/2014 (Page 1 only)
- D-139 Emails between Patty Gibson and Bryan McLelland regarding ice machine dated 01/15/2015 to 01/19/2015
- D-142 Email from Michael Church to Lenore Romney dated 02/11/2015
- D-144 (ID Only) Letter from Michael Church to David Kulisch and Jenaé Ball dated 03/18/2015
- D-145 South Stone, LLC Annual Shareholders Meeting Minutes dated 04/22/2015
- D-157 (ID Only) Letter from Jenaé Ball to Michael Church with patient referral dated 07/02/2015
- D-158 (ID Only) Letter from David Kulisch to Michael Church regarding referral books/pads dated 08/04/2015
- D-162 (ID Only) Letter from David Kulisch to Michael Church dated 12/21/2015
- D-174 (ID Only) March 29, 2006 – No objection by Bryan D. Anderson to Dr. Paxton selling part of their interest in the South Hill to Dr. McLelland and Dr. Lang
- D-175 (ID Only) March 29, 2006 – No objection by Carolyn Wirf to Dr. Paxton selling part of their interest in the South Hill to Dr. McLelland and Dr. Lang

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- D-176 (ID Only) March 29, 2006 – No objection by Bradley G. Shern to Dr. Paxton selling part of their interest in the South Hill to Dr. McLelland and Dr. Lang
  - D-177 (ID Only) March 29, 2006 – No objection by Robert Walker to Dr. Paxton selling part of their interest in the South Hill to Dr. McLelland and Dr. Lang
  - D-178 March 29, 2006 – No objection by Mike Silvey to Dr. Paxton selling part of their interest in the South Hill to Dr. McLelland and Dr. Lang
  - D-181 String of emails between Patty Gibson and Shelby Henke regarding Valley Suction machine dated July 5, 2016 and photo attached
  - D-182 July 26, 2016, Invoice for suction machine
  - D-185 May 10, 2016, photographs of 507 N. Sullivan Road, Spokane Valley
  - D-187 Spokane Restaurant Equipment Billing Statement, Copy of Check
  - D-188 (ID Only) Commercial lease between South Stone, LLC and Mark and Diane Paxton dated August 1, 2000
  - D-189 Email from Edward Daude to Mark Paxton dated 2/5/14
  - D-190 Exhibit "Q" Supplemental Report, Exhibit "R"
  - D-191 The Health Care Group Goodwill Registry—Year 2014

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### I. FINDINGS OF FACT

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Having reviewed the testimony of the witnesses before this Court and having reviewed the evidence as identified herein, the Court makes the following Findings of Fact:

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1. In March 2003, Dr. Bryan McLelland joined the oral surgery practice of Dr. Mark Paxton as an associate.

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2. In 2005, Dr. McLelland and another associate, Dr. Melanie Lang, each bought one-third of the practice.

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3. Dr. McLelland purchased an undivided interest in the practice's assets, including equipment, furniture, fixtures, patient files, accounts receivable, supplies, and goodwill.

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4. The total purchase price of the assets was \$619,835. Of that amount, \$261,667 was allocated to goodwill.

5. To affect this purchase, Dr. McLelland's professional services corporation entered into a Partnership Agreement with Dr. Paxton's professional services corporation and the professional services corporation of Dr. Lang. The Partnership Agreement acknowledged that

1 Defendant Paxton, Dr. Lang, and Dr. McLelland were shareholders of the respective professional  
2 services corporations. It also designated the three individuals as "Shareholders" for purposes of  
3 the Partnership Agreement.

4 6. The Partnership Agreement stated that the goodwill of the Partnership shall be  
5 owned, or considered owned, in undivided interests by the Shareholders.

6 7. As of March 1, 2005, the parties agreed to form a partnership, utilizing the OMS  
7 name and operated out of an office on the South Hill and an office in Spokane Valley.

8 8. Sometime in 2008, the practice opened another location in Post Falls, Idaho.

9 9. In April 2014, Dr. Lang sold her interest in the partnership to Dr. McLelland and  
10 Dr. Paxton in equal shares. Consequently, Dr. McLelland and Dr. Paxton became equal partners  
11 in the practice with each owning an undivided one-half interest in the assets of the Practice.

12 10. Shortly after Dr. McLelland and Dr. Paxton became equal partners in the practice,  
13 ongoing differences between them led Dr. McLelland to give notice of his intent to terminate the  
14 partnership on August 4, 2014. The partnership was judicially dissolved in February 2015;  
15 however, the parties continued to practice out of the same three locations, having divided up the  
16 staff and files by agreement. Meanwhile, the parties continued to negotiate issues, such as who  
17 would practice where.

18 11. The Partnership Agreement addresses termination of the practice as follows: "Upon  
19 the termination of this Agreement, and the necessary division of the jointly-owned Practice  
20 Interests, the Parties agree to negotiate, in good faith, so to divide such jointly owned Practice  
21 Interests. Further, the Parties will then determine which of the Parties will continue to practice at  
22 each of the places of business of the Partnership."

#### 23 Breach of Contract and Fiduciary Duty by Paxton

24 12. Prior to trial, the parties presented competing motions for summary judgment. The  
25 Court ruled on Plaintiffs' Motion for Partial Summary Judgment, granting Plaintiffs' motion for a  
26 determination that Dr. Paxton breached the Partnership Agreement, breached his fiduciary duties  
27 (citing RCW 25.05.165), and committed constructive fraud by evicting Dr. McLelland from the  
28 South Hill location in June 2015. The Court issued a letter ruling on June 9, 2016 and entered an  
29 Order on June 17, 2016.

30 13. One of the issues before the Court at trial was to determine damages resulting from  
31 Dr. Paxton's actions in evicting Dr. McLelland. Dr. McLelland claimed that he suffered the loss

of clientele and the lost revenues and referrals associated with the loss of the ability to practice in that location. Dr. McLelland did not present any evidence reflective of his losses for 2015.

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14. Based on the lack of evidence presented, the Court is not able to calculate damages with reasonable certainty on the claims of breach of contract, breach of fiduciary duty, or constructive fraud. For this reason, the Court denies damages for breach by Dr. Paxton.

Asset Division/Goodwill

15. Much of the trial was spent discussing the issue of goodwill of the practice. When Dr. McLelland joined the practice as a partner in 2005, he purchased an undivided interest in the assets of Paxton's practice. Those assets included furniture, fixtures, equipment, patient files, accounts receivables, supplies, and goodwill. The total buy-in was \$619,835.00; the goodwill portion was valued at \$261,667.00. The agreement was between the parties' professional corporations. In 2014 when the parties purchased Dr. Lang's interests in SOMS, Dr. McLelland paid \$265,000.00, of which \$121,250.00 was for goodwill. The Partnership Agreement allocates the goodwill of the practice to the parties in undivided interests. The parties agreed to form a partnership utilizing the SOMS name and conducting business at the Valley and South Hill locations. Upon termination of the partnership, the parties were to negotiate in good faith and determine which of the parties will continue to practice at each of the places of business of the partnership.

16. Dr. McLelland offered the testimony of his expert, Lenore Romney. Lenore Romney valued the goodwill for each of the three locations using the fair market approach, summarizing net production by location and then using the multiple of 33.4%. Using this method, Dr. Paxton is required to pay an equalizing payment to Dr. McLelland in the amount of \$414,036.00.

17. Ms. Romney testified that, in this practice, goodwill includes an assembled work force, in-place systems and procedures, locations of the practice, referral sources, continued patronage, and patient recommendations. Dr. Paxton had those features in 2005, and they were then transferred originally in a one-third undivided interest and now one-half undivided interest. As of February 2015, the practice still had a website, phone number, same staff, and locations. The termination language of the agreement contemplated that the parties would continue to utilize the assets of the partnership, including the locations. Thus, all the features Ms. Romney references as comprising goodwill of this practice continue to be utilized by parties at the various locations. Ms. Romney's valuation focused on the intangible value by office.

18. Goodwill is essentially "the monetary value of a reputation. It is the expectation of continued public patronage. It is a way of recognizing earnings not strictly attributable to the value

1 of the work performed. It is distinguishable from the skill, education, and earning capacity of a  
2 practicing professional." Valuation of goodwill is a question of fact. There is no definitive formula  
3 for ascertaining the value of goodwill. (See *Dixon v. Crawford, McGilliard, Peterson & Yellish*,  
4 163 Wash. App. 912, 918-19, 262 P. 3d 108 (2011).)

5 19. The Court finds from the testimony and records that location is the most valuable  
6 asset of the practice after the practitioners themselves. Consequently, location in this particular  
7 case has value and comprises a large portion of entity goodwill. The parties understood this  
8 concept and agreed that each location was important enough to be recognized within the  
9 Partnership Agreement as an asset of the business that would continue on even if the partnership  
10 terminated.

11 20. Entity goodwill exists. The Court adopts Ms. Romney's valuations. The value of  
12 the goodwill for all three Practice locations as of February 28, 2015, was \$1,822,388. Dr.  
13 McLelland and Dr. Paxton each own an undivided one-half interest in the practice goodwill. Equal  
14 distribution would allocate assets and/or cash to each in the amount of \$911,194.00.

15 21. The value of the goodwill broken down by practice location and for purposes of  
16 distributing the undivided interests of the parties as of February 28, 2015 is as follows: Spokane  
17 Valley - \$821,760.00; Post Falls - \$497,158.00; and South Hill - \$503,470.00.

18 Allocation of Practice Locations

19 22. The South Hill and Valley locations shall be awarded to Dr. Paxton. The Post Falls  
20 location shall be awarded to Dr. McLelland. This is based upon the request of Dr. McLelland  
21 which was not objected to by Dr. Paxton.

22 Breach of Contract by Dr. McLelland

23 23. Dr. Paxton alleged but the Court does not find that Dr. McLelland breached the  
24 Partnership Agreement by purchasing and developing the Sullivan Road building in Spokane  
25 Valley in 2014.

26 24. Dr. McLelland purchased a building on Sullivan Road in Spokane Valley in 2014.

27 25. There was no evidence offered at trial that before the breakup of the relationship  
28 that Dr. McLelland saw any patients there, advertised the location, or conducted any business at  
29 this location.

30 26. Dr. McLelland did not hide his purchase of the Sullivan Road building from Dr.  
31 Paxton. Office staff and Dr. Paxton knew of the building purchase.

27. Because Dr. McLelland's purchase of the Sullivan building was clearly not on behalf of the partnership, it did not require Dr. Paxton's consent.

28. Therefore, in accordance with the language of the Agreement, because the purchase of the Sullivan building did not require consent by Dr. Paxton, no breach is found.

#### Reimbursement for Repairs

29. Dr. Paxton and Dr. McLelland had an oral agreement that they were to divide the cost of equipment repairs. Dr. Paxton paid \$15,175.99 to paint the Valley location, replace the ice machine, and replace the suction machine. He is entitled to reimbursement for half by Dr. McLelland.

#### NuCalm and American Healthcare Lending

30. Dr. Paxton alleged but the Court does not find that Dr. McLelland breached fiduciary duties regarding his treatment of patients with NuCalm. Dr. Paxton produced no evidence in support of his claim at trial. Dr. McLelland testified that the product is safe and effective and that no patient complained about the use of NuCalm.

31. Dr. Paxton claimed but produced no evidence that Dr. McLelland breached fiduciary duties by failing to disclose his ownership interest in American Healthcare Lending. The company was used by the partnership and provides financial assistance for oral surgery patients. Dr. McLelland testified that Dr. Paxton was fully aware of Dr. McLelland's connection. Dr. Paxton put forth no evidence to support this claim.

32. In light of the lack of evidence to support Dr. Paxton's claims, the Court finds in favor of Dr. McLelland.

#### Attorneys Fees and Costs

33. Page 54 of the Partnership Agreement, Paragraph "D" provides for an award of attorney fees and costs to the prevailing party if an action at law or in equity is necessary to enforce the terms of the Agreement. This action sought to determine whether goodwill existed, its value, if any, and to divide up the practice locations, among other issues. In addition, breach of a fiduciary or contractual partnership duty is a recognized ground in equity for an award of attorney fees. Where neither party wholly prevails, the party who substantially prevails is the prevailing party. This determination turns on the extent of relief awarded the parties which is in this case favors the Plaintiff. Plaintiff prevailed on the issues of goodwill, breach of contract, NuCalm and American Healthcare Lending. Defendant prevailed on minor issues of reimbursement. Plaintiff's claims for "work days" and "theft" were dismissed prior to trial. Plaintiff substantially prevailed in this matter.

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34. Plaintiffs are the prevailing party and are entitled to reasonable attorney fees in the amount of \$\_\_\_\_\_ and costs in the amount of \$\_\_\_\_\_. TO BE DETERMINED.

35. Prejudgment interest is appropriate in a partnership dissolution where one partner uses a former partner's assets without remuneration.

## IL CONCLUSIONS OF LAW

Having found the facts listed herein and having reviewed the applicable law, the Court makes the following Conclusions of Law:

1. Entity goodwill existed as of February 28, 2015 and is subject to division pursuant to the parties' undivided interests in the same. Each doctor or his respective entity is entitled to assets or cash in the amount of \$911,194.00, which is based on their undivided one-half interest in the total goodwill value of \$1,822,388.00.

2. The Court divides the practice locations as follows:

A. The South Hill location shall be allocated to Dr. Paxton.

B. The Valley location shall be allocated to Dr. Paxton.

C. The Post Falls location shall be allocated to Dr. McLelland.

D. Dr. Paxton shall pay Dr. McLelland an equalization payment in the amount of \$414,036.00 in order to ensure that the total value of goodwill at the three Practice locations is distributed equally between the two doctors. The Court will enter judgment in favor of Dr. McLelland in the amount of \$414,036.00.

3. As no current valuation of the jointly owned equipment, furniture, and supplies exists at this time, the Court defers to the parties to equitably divide these assets. If the parties cannot agree, the Receiver in this case, Tim Cronin, is empowered to obtain, inventory, and value these assets and divide as appropriate. Fees for appraisal shall be shared equally.

4. The parties shall cancel the phone number to the Valley location (509-926-7106) and shall each pay one-half of any amounts still due and owing.

5. This Court already granted summary judgment in favor of the Plaintiffs on their claims of breach of contract, breach of fiduciary duty, and constructive fraud related to the South Hill eviction. No damages are awarded for Dr. Paxton's breach.

6. Defendants' claim related to NuCalm is denied.

7. Defendants' claim related to American Healthcare Lending is denied.

8. Defendants' claim for reimbursement for certain expenses including the painting of the Valley office, replacement of the ice machine at the Valley office, replacement of the suction machine at the Valley office is granted, and Dr. McLelland will pay Dr. Paxton \$7,587.99.

9. Defendants' claim for breach of contract related to Dr. McLelland's purchase of the Sullivan Road building is denied.

10. Defendants' claims for breach of fiduciary duty related to Dr. McLelland's purchase of the Sullivan Road building is denied.

11. Defendants' claim for prior breach related to the date Plaintiffs' filed their Complaint is denied.

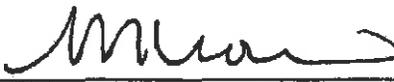
12. The parties have settled all claims regarding the "logo" and name of the practice.

13. Plaintiff's claims for "work days" and "theft" were dismissed prior to trial. The court makes no findings with regard to amount of discovery, time or expense involved prior to dismissal of these claims.

14. Judgment shall be entered for Plaintiffs in the amount of the equalization payment of \$414,036.00. Prejudgment interest at 12% is awarded from August 4, 2014, to the date of Judgment.

15. The Partnership Agreement provides for attorney's fees to the prevailing party. Plaintiffs, as prevailing party on the main issues of breach and goodwill, are awarded reasonable attorney fees in the amount of \$ \_\_\_\_\_ and costs in the amount of \$ \_\_\_\_\_. TO BE DETERMINED.

DATED this 13 day of April, 2017.

  
\_\_\_\_\_  
JUDGE MARYANN C. MORENO

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Brief of Appellants* in Court of Appeals, Division III Cause No. 35401-6-III to the following:

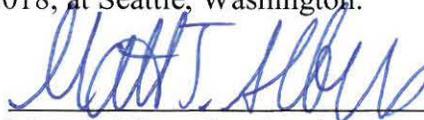
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Original Efiled with:  
Court of Appeals, Division III  
Clerk's Office  
500 N Cedar Street  
Spokane, WA 99201

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: August 2, 2018, at Seattle, Washington.



\_\_\_\_\_  
Matt J. Albers, Paralegal  
Talmadge/Fitzpatrick/Tribe

**TALMADGE/FITZPATRICK/TRIBE**

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**Appellate Court Case Number:** 35401-6  
**Appellate Court Case Title:** Bryan W. McLelland, DDS, et ux, et al v Mark C. Paxton, DDS, et ux  
**Superior Court Case Number:** 15-2-00326-1

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