

FILED
Court of Appeals
Division III
State of Washington
10/3/2018 2:16 PM
No. 35401-6-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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

Respondents,

v.

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.

APPEAL FROM THE SUPERIOR COURT
FOR SPOKANE COUNTY
THE HONORABLE MARYANN C. MORENO

BRIEF OF RESPONDENT

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I. INTRODUCTION

Respondent Dr. Bryan McLelland and appellant Dr. Mark Paxton each owned an undivided half interest in an oral surgery practice with three office locations when respondent sought to terminate the partnership agreement in August 2014. The practice contractually dissolved on February 28, 2015, and was judicially dissolved on March 20, 2015. While the business was winding up and the parties were negotiating how to divide the practice's assets, they continued to practice at and utilize the practice's three office locations, equipment, employees, patient files, and goodwill – although appellant evicted respondent from one location while this litigation was pending.

At trial, the court found based on expert testimony that the practice had \$1,822,388 in enterprise goodwill, and awarded the respondent, who received only one of the three practice locations, a \$414,036 equalization judgment, to ensure he received his 50% share of the practice's total goodwill. The trial court also did not abuse its discretion in awarding respondent prejudgment interest on this equalization payment, as well as his attorney fees as the prevailing party. This Court should affirm.

II. RESTATEMENT OF FACTS

A. The parties practiced oral surgery in three separate locations in and around Spokane County for 10 years.

Respondent Dr. Bryan McLelland and appellant Dr. Mark Paxton were dentists and oral maxillofacial surgeons.¹ (RP 59, 646) In March 2003, Dr. McLelland joined Dr. Paxton's oral surgery practice as an associate. (RP 61, 646; CP 3084) Dr. McLelland and another associate, Dr. Melanie Lang, through their individual professional service corporations, each purchased a one-third undivided interest in Dr. Paxton's professional service corporation pursuant to a partnership agreement ("the Agreement") executed on March 25, 2005. (RP 62, 74, 84, 646; CP 25-89, 3084)

After briefly existing as Paxton, Lang, and McLelland Oral and Maxillofacial Surgery Partnership, the three doctors changed the business from a general partnership to a professional limited liability company, Spokane OMS, PLLC, in late 2005. (RP 653; CP 32) Spokane OMS, PLLC did business as Spokane Oral & Maxillofacial Surgery ("SOMS" or "the practice"). (RP 61-62, 83-

¹ Dr. Paxton passed away during the pendency of this litigation. Respondents' motion to substitute his Estate as a party pursuant to RAP 3.2 was pending in this Court when this response brief was filed. As evidenced by appellants' opening brief, and appellants' failure to notify this Court of his passing, Dr. Paxton's death has no bearing on the legal issues before this Court. Accordingly, as did the opening brief, this brief refers to appellant as Dr. Paxton and respondent as Dr. McLelland.

84, 128, 646) The Agreement remained the governing document for the practice.

Dr. McLelland and Dr. Lang each paid Dr. Paxton \$619,835 (\$1,239,670 in total) to buy into the practice. (CP 323, 3084; RP 72-73; Ex. 47) Forty-two percent of the \$619,835 purchase price (\$261,667) paid by Dr. McLelland was allocated specifically for the practice's goodwill. (CP 323, 3084; RP 73, 267-68; Ex. 47) Accordingly, Dr. Paxton received a total of \$523,334 for the practice's goodwill from Dr. Lang and Dr. McLelland.

In addition to intangible assets, each of the doctor's professional service corporations owned a one-third undivided interest in the equipment, furniture, and office supplies, which they leased back to the practice. (Exs. 47, 48; RP 68, 83-84, 518) The Agreement provided that "[u]nless otherwise agreed by the Parties and Shareholders, however manifested or evidenced, the goodwill of the Partnership shall be owned, or considered owned, by the Shareholders, in undivided interests, based on Percentage Ownership of the Partnership." (CP 45) The Agreement also prohibited transfer to a third party of "any interest in the 'contract receivables' (oral and maxillofacial surgery contracts in progress), accounts receivable, patient records, or goodwill of the practice, the

Partnership, any of the Parties, or any of the Shareholders.” (CP 46-47)

The practice had two office locations in 2005: Spokane Valley and South Hill. (RP 63) Dr. Lang and Dr. McLelland created a separate entity, SOMFS Property Holdings, LLC, when they bought into the practice. (Ex. 53) SOMFS purchased a two-thirds interest in the Spokane Valley location, while Dr. Paxton’s personal service corporation held the remaining one-third interest. (Ex. 53; CP 321-24; RP 137, 656) Dr. Paxton and his wife also owned a 20% interest in South Stone, LLC (RP 116, 749-50; CP 322), which originally leased the South Hill location to Dr. Paxton’s personal service corporation. (RP 591-92, 657-58) After the creation of SOMS, the three doctors made the lease payments to South Stone for the South Hill location. (RP 140-41, 659-60) In 2008, the three doctors’ respective professional service corporations purchased a fractional interest in a third building, the Post Falls office. (RP 139-40, 658)

B. After buying out a third partner’s interest, Dr. McLelland and Dr. Paxton each owned a one-half undivided interest in the practice until Dr. McLelland terminated the Agreement in August 2014.

In April 2014, Dr. McLelland and Dr. Paxton each paid Dr. Lang \$265,000, including \$121,250 in goodwill, to buy out her

interest in the practice. (RP 87; Exs. 34, 124) The parties and Dr. Lang had agreed on a discounted price for her interest to accelerate her departure from the practice. (RP 87) In total, Dr. Lang received \$530,000 for her one-third interest in the firm, \$242,500 of which was for goodwill alone. As a consequence of the buy-out, Dr. McLelland and Dr. Paxton each owned an undivided one-half interest in the practice through their professional service corporations. (RP 68; CP 3085) Following the buy-out, the parties continued to operate the practice out of its three separate locations. (RP 63-64)

The Agreement by its terms could “be terminated on at least six (6) months’ notice by any of the Parties, at or after the Initial Term, however, the termination date must correspond to an anniversary hereof.” (CP 35) On August 4, 2014, Dr. McLelland provided six months’ written notice to terminate the Agreement effective February 28, 2015. (RP 174, 719; Ex. 23; CP 248) After giving the requisite notice, Dr. McLelland took no action to divide the practice’s assets or to operate his own practice separate from Dr. Paxton or SOMS. (RP 174) Rather, consistent with the Agreement, the parties began negotiating the division of the practice’s assets, including “which of the Parties will continue to

practice at each of the places of business of the Partnership.” (CP 79, 3085; see RP 173-74, 693-94)

The partnership contractually dissolved on February 28, 2015, and was judicially dissolved on March 20, 2015. (CP 90-92, 932) The superior court appointed a receiver to supervise the dissolution process, and “[p]reserv[ed] the PLLC’s business as a going concern for a reasonable period of time until the details of the division of assets and liabilities between the [S]OMS partners can be determined.” (CP 91)

Even after dissolution, the parties both continued to practice out of the three office locations and to utilize the partnership’s assets, including its equipment, employees, logo, name, website, and phone number. (RP 63-64, 171-73, 267, 360, 490; CP 3085) However, in May 2015, with no prior notice, Dr. Paxton evicted SOMS and Dr. McLelland from the South Hill office. (RP 64, 90-91, 227, 733; Exs. 10, 12, 13) Despite the Agreement’s requirement of good faith and fair dealing during the winding up process, Dr. Paxton entered into a new long-term lease for the South Hill location between his own personal service corporation and South Stone, LLC, in which he also held an interest. (RP 90-91, 599-600, 668, 733; Ex. 12)

C. The trial court divided the partnership's remaining assets, including the practice locations and goodwill.

1. The trial court found that Dr. Paxton had breached his duty of good faith and fair dealing and committed constructive fraud.

On January 28, 2015, Dr. McLelland sued Dr. Paxton for breach of contract, detrimental reliance, negligent misrepresentation, breach of the implied duty of good faith and fair dealing, and breach of fiduciary duties. (CP 4-12) Dr. McLelland later amended his complaint to include Dr. Paxton's constructive fraud in summarily evicting him from the South Hill office. (CP 2454-57)

Dr. Paxton asserted counterclaims against Dr. McLelland for interference with contractual relationships between referring providers; breach of contract for failing to reimburse Dr. Paxton for repair and maintenance expenditures after March 2014; invasion of privacy in "intentionally intercept[ing]" communications between Dr. Paxton and South Stone, LLC regarding the South Hill location; infringement of intellectual property rights in logo and trademark; breach of fiduciary duty and self-dealing in Dr. McLelland's use with patients of NuCalm, an anti-anxiety "treatment protocol"; and breach of the duty of good faith and fair dealing in failing to inform

Dr. Paxton of Dr. McLelland's ownership interest in NuCalm and American Healthcare Lending. (CP 1126-34, 3087-88)

Spokane County Superior Court Judge Maryann Moreno ("the trial court") granted Dr. McLelland's motion for partial summary judgment on his breach of contract, breach of fiduciary duties, and constructive fraud claims regarding the South Hill eviction. (CP 2902-03, 2905, 2909, 3085, 3089) The trial court ruled in favor of Dr. Paxton only on his motion for summary judgment dismissal of Dr. McLelland's breach of contract claim "for the alleged failure of Dr. Paxton to work the days specified in the Partnership Agreement." (CP 2904, 2911)

Dr. Paxton also moved for partial summary judgment on the issue of goodwill, arguing that "institutional goodwill" could not exist as a matter of law because the partnership had dissolved. (CP 1219-44, 1820-21) The trial court denied Dr. Paxton's motion, finding the existence and value of goodwill to be factual questions for trial. (CP 2904)

2. **After finding enterprise goodwill existed, the trial court awarded the South Hill and Valley locations to Dr. Paxton and the Post Falls office and an equalizing payment to Dr. McLelland.**

A four-day bench trial began on October 10, 2016. The primary issues before the court were the determination of the existence and value of goodwill and the division of the practice locations. (CP 3086) The parties reached a settlement on the second day of trial regarding the logo and name of their practice, with Dr. Paxton agreeing to pay \$20,000 for the rights to both. (RP 378-79; CP 3090) Trial continued on the remaining issues of valuing and dividing the practice locations and goodwill.

Relying on a fair market approach, Dr. McLelland's valuation expert, Lenore Romney, testified that the practice had enterprise goodwill that could be valued by practice location. (RP 269, 273, 275, 279-81) Ms. Romney calculated a total goodwill value of \$1,822,388: \$821,760 for the Valley office; \$503,470 for the South Hill office; and \$497,158 for the Post Falls office. (Ex. 44)

Dr. Paxton's expert Charles Wilhoite testified that the practice "[p]robably" had "institutional goodwill" up to February 28, 2015, but did not "feel the need to value the practice" because he "did not believe there was any material level of institutional

goodwill.” (RP 471-73, 497; *see also* Ex. 33: defense counsel acknowledging existence of enterprise goodwill in the practice)

Dr. Paxton’s second expert, Scott Martin, valued only Spokane OMS, PLLC, which holds no assets itself. (RP 550-54) Mr. Martin did not take into account the practice’s assets that “were actually owned in undivided interest by Dr. McLelland and Dr. Paxton in their professional service corporations.” (RP 550-52) Even without considering the assets owned by the parties’ professional service corporations, Mr. Martin valued the practice’s enterprise goodwill value at \$148,111 in 2013. (RP 523) Like Mr. Wilhoite, Mr. Martin failed to provide any valuation for the practice’s goodwill on or after February 28, 2015. (RP 543, 546-47)

Adopting Ms. Romney’s valuation (CP 3087), the trial court concluded that each party “is entitled to assets or cash in the amount of \$911,194” based on their undivided one-half interest in the total goodwill value of \$1,822,388. (CP 3089) The trial court awarded Dr. Paxton the South Hill and Valley locations and Dr. McLelland the Post Falls location. (CP 3089) To ensure that the total goodwill value of all three practice locations was equally distributed between the two parties, the trial court ordered Dr. Paxton to pay Dr. McLelland \$414,036 as an equalization payment,

offset by \$7,587.99 in reimbursement for repair and maintenance expenses at the Valley office. (CP 3089-90)

The trial court awarded 12% prejudgment interest on the equalization payment beginning August 4, 2014, to remedy Dr. Paxton's use of his former partner Dr. McLelland's assets "without remuneration." (CP 3089-90) The court entered its findings of fact and conclusions of law on April 13, 2017. (CP 3079-90) On May 25, 2017, the trial court entered its final order and judgment on the \$414,036 equalization payment, plus \$138,707.73 in prejudgment interest. (CP 3372-73)

3. The trial court awarded Dr. McLelland his attorney fees as the prevailing party under the Agreement.

Both parties sought fees as the prevailing party under the Agreement. (CP 3051-65, 3067-77) The trial court found Dr. McLelland to be the prevailing party on his breach of contract, breach of fiduciary duty, and constructive fraud claims on summary judgment (CP 3252), as well as on the issue of goodwill at trial, which was "the first and foremost issue in the case." (CP 3503) On May 25, 2017, the trial court awarded Dr. McLelland \$286,102.80 in attorney fees and \$53,675.50 in costs. (CP 3253, 3256-57)

On May 30, 2017, Dr. Paxton moved for reconsideration on the existence and value of goodwill, as well as the attorney fee award. (CP 3338-51) The trial court denied Dr. Paxton's motion on December 13, 2017, with the exception of his request that Dr. McLelland segregate fees incurred on successful and unsuccessful claims. (CP 3503, 3505) Because Dr. McLelland prevailed on his breach of fiduciary duty claim at summary judgment (CP 2903, 3038-39, 3252), but not in proving damages at trial (CP 3085-86, 3252, 3776), the trial court reduced Dr. McLelland's fee award by the hours spent "establishing the amount of damages for trial." (CP 3796) This reduction did "not include time spent on summary judgment," where Dr. McLelland succeeded on his breach claims. (CP 3796) The trial court incorporated its August 28, 2017 letter ruling into its June 8, 2018 order denying Dr. Paxton's motion to clarify and amend the judgment. (CP 3773)

Dr. McLelland's trial attorney submitted a 17-page declaration segregating the hours in his prior billing statements as directed by the trial court. (CP 3516-32) In total, Dr. McLelland's counsel identified 89 billing entries, for a total of \$9,194.75 in fees, involving work on unsuccessful claims. (CP 3517-32; *see* CP 3786) The trial court found this segregation satisfied its order on

reconsideration (CP 3787), denied Dr. Paxton's motion for clarification and amendment of the judgment (CP 3784-88), and entered a reduced judgment for \$276,908.05 in fees and \$53,675.50 in costs on June 8, 2018. (CP 3532, 3778-81) Dr. Paxton provides no argument challenging the trial court's cost award on appeal.

Dr. Paxton appeals the May 25, 2017 final order and judgments, the December 13, 2017 order on reconsideration, and the June 8, 2018 order denying defendants' motion to clarify and amend the judgment and amended judgment on attorney fees. (CP 3360-61, 3507-08, 3782-83)

III. ARGUMENT

A. **The trial court properly denied summary judgment because the existence of goodwill is a factual issue.**

The value of a business "typically includes the value of its intangible assets, also known as 'goodwill.'" *Dixon v. Crawford, McGilliard, Peterson & Yelish*, 163 Wn. App. 912, 919, ¶ 13, 262 P.3d 108 (2011), *rev. denied*, 173 Wn.2d 1015 (2012). Goodwill is a "benefit or advantage" that an establishment acquires through (among many factors) continuing public patronage, "constant or habitual customers on account of its local position," and "reputation for skill or affluence." *Suther v. Suther*, 28 Wn. App. 838, 843-44,

627 P.2d 110, *rev. denied*, 95 Wn.2d 1029 (1981) (quoting *Marriage of Lukens*, 16 Wn. App. 481, 483-84, 558 P.2d 279 (1976), *rev. denied*, 88 Wn.2d 1011 (1977)). A trial court analyzes goodwill first by determining whether it exists and, if so, its value “according to acceptable accounting methods.” *Marriage of Zeigler*, 69 Wn. App. 602, 607, 849 P.2d 695 (1993); *Marriage of Hall*, 103 Wn.2d 236, 243, 692 P.2d 175 (1984) (trial court must “first determine if goodwill exists in a particular practice”).

The trial court properly denied Dr. Paxton’s motion for summary judgment because the “existence of goodwill is a question of fact.” *Marriage of Knight*, 75 Wn. App. 721, 726, 880 P.2d 71 (1994), *rev. denied*, 126 Wn.2d 1011 (1995); *see also Berg v. Settle*, 70 Wn.2d 864, 867, 425 P.2d 635 (1967) (recognizing that “the presence or absence of good will was a question of fact for the trial court”; “issue then is whether good will existed in this particular case”) (citing *Evans v. Gunnip*, 36 Del. Ch. 589, 135 A.2d 128 (1957)); *Marriage of Kaplan*, 23 Wn. App. 503, 505, 597 P.2d 439 (1979) (“Whether a particular attorney has goodwill and the value of his goodwill are questions of fact”); *Zeigler*, 69 Wn. App. at 607-08 (affirming trial court’s conclusion that business had no goodwill

where trial court “clearly considered the relevant factors” and “its conclusion is reasonable under the facts presented”).

In denying Dr. Paxton’s motion for summary judgment, the trial court did not “rule[] as a matter of law that the dissolved PLLC had goodwill value.” (App. Br. 14) Rather, the trial court properly reserved its determination on the existence of goodwill for trial. (CP 2904: “The crux of the issue is whether or not at the time of dissolution goodwill existed, and if so, its value. At trial, the court will determine if goodwill existed, place a value on it, and divide it in accordance with the Agreement.”) All of Dr. Paxton’s attempts to turn goodwill into a legal issue reviewed de novo (App. Br. 14) fail:

- 1. A practice can have a goodwill value separate from the goodwill of the parties’ individual professional service corporations.**

The “concept” of professional goodwill is not the “sole asset of the professional.” (App. Br. 15) Rather, courts generally recognize two types of goodwill: “enterprise goodwill (also called commercial or professional goodwill) and personal goodwill (also

called professional goodwill).”² *May v. May*, 214 W. Va. 394, 399, 589 S.E.2d 536, 541 (2003) (surveying cases). Enterprise goodwill is “a distinct *asset* of a professional practice, not just a *factor* contributing to the value or earning capacity of the practice.” *Hall*, 103 Wn.2d at 241 (emphasis in original). Enterprise goodwill “represents the expectation of continued patronage based on such intangibles as location, trade name, reputation, organization and established clients.” *Zeigler*, 69 Wn. App. at 607. While the “[d]iscontinuance of the business or profession may greatly diminish the value of the goodwill[,] . . . it does not destroy its existence.” *Hall*, 103 Wn.2d at 241.

An individual’s professional goodwill, while “personal in nature and not a readily marketable commodity,” *Lukens*, 16 Wn. App. at 484, is nevertheless distinguishable from a practicing

² This distinction arises most frequently in dissolution cases. However, Washington, unlike many jurisdictions, “make[s] no distinction between personal and enterprise goodwill”; both “personal and enterprise goodwill in a professional practice constitute marital property” subject to division. *May*, 214 W. Va. at 401 & n.13 (emphasis omitted) (citing *Marriage of Hall*, 103 Wn.2d 236, 692 P.2d 175 (1984)). Accordingly, our courts have used the term “professional goodwill” to describe both enterprise and personal goodwill. Compare *Lukens*, 16 Wn. App. at 484 (distinguishing “professional goodwill” from the goodwill of “commercial ventures”; “professional goodwill” is associated with “the practice of an attorney, physician, or other professional person” and is “personal in nature”) with *Knight*, 75 Wn. App. at 725-26 (evidence supported trial court’s finding that wife’s store had “[p]rofessional goodwill”). See also *Hall*, 103 Wn.2d at 241 (goodwill is “a property or asset which usually supplements the earning capacity of another asset, a business or profession”).

professional's earning capacity, *Dixon*, 163 Wn. App. at 918-19, ¶ 13; it is not "the sole asset of the professional." (App. Br. 15) Rather, it can be "an intangible asset *of a business.*" *Knight*, 75 Wn. App. at 726 (emphasis added). For instance, although both a practicing professional and salaried professional have earning capacities, "only the practicing professional has a business or practice to which the goodwill can attach." *Hall*, 103 Wn.2d at 241. Where goodwill has attached to a practice, it "may continue in existence in the form of established patients or clients, referrals, trade name, location, and associations which now attach to former partners or buyers of the practice" even after the professional, and his or her earning capacity, "either retires or dies." *Hall*, 103 Wn.2d at 241. Whether such personal goodwill has attached to a business is clearly an issue of fact.

In his efforts to paint the existence of goodwill as a legal issue, Dr. Paxton seemingly contends that there is an exception to this factual inquiry where "professionals in a partnership dissolve that partnership and continue forward in their own separate practices." (App. Br. 17) Dr. Paxton relies on *Harstad v. Metcalf*, 56 Wn.2d 239, 351 P.2d 1037 (1960), to claim that, under such

circumstances, there is “no goodwill value from the dissolved PLLC to distribute.” (App. Br. 18)

Harstad is hardly “black letter law” (App. Br. 17) and does not, in fact, draw such a bright-line rule. Indeed, Dr. Paxton fails to cite, much less discuss, *Berg v. Settle*, 70 Wn.2d 864, 425 P.2d 635 (1967), in which the Court held seven years after *Harstad* that the existence of goodwill in *Harstad* had been a factual determination. *Berg*, 70 Wn.2d at 868 (“[o]n these facts it was determined that there was no good will to be distributed” in *Harstad*) (emphasis added).

In *Berg*, the Court found that Dr. Settle’s medical practice had “a substantial element of good will” when Dr. Berg initially purchased a 45% interest in the practice. 70 Wn.2d at 868. The business “flourished and grew” before Dr. Berg left the practice. *Berg*, 70 Wn.2d at 868. After he left, Dr. Settle “continued to use the partnership assets and x-ray equipment in the same place of business and he conducted the same business in the same hospitals as before. No attempt was made to divide the physical assets. All of them continued to be used profitably.” *Berg*, 70 Wn.2d at 868-69.

On appeal, Dr. Settle challenged the trial court’s inclusion of goodwill in valuing the business upon Dr. Berg’s dissociation. In affirming the trial court’s decision, the Court in *Berg* found

“illuminating” *Evans v. Gunnip*, 36 Del. Ch. 589, 135 A.2d 128 (1957). In *Evans*, Gunnip merged the partnership assets into a new firm the day after Evans withdrew from the partnership. The trial court subsequently awarded Evans “an amount which included a good will element.” *Berg*, 70 Wn.2d at 867 (discussing *Evans*).

As Dr. Paxton argues here, Gunnip “contended that the good will was that of the individual partners and therefore not an asset of the partnership.” *Berg*, 70 Wn.2d at 867 (discussing *Evans*). However, the *Berg* Court agreed with *Evans* “that the presence or absence of good will was a question of fact for the trial court and that there was sufficient evidence to support a finding that good will existed.” *Berg*, 70 Wn.2d at 867 (discussing *Evans*). Relying on *Evans*, the *Berg* Court distinguished *Harstad* to affirm the trial court’s finding of “a good will element *under these circumstances* was not erroneous.” 70 Wn.2d at 867-68 (emphasis added). *Berg* makes clear that the determination of whether a professional’s personal goodwill has attached or transferred to a partnership, or remains solely in the professional’s “own separate practices” (App. Br. 17), is a factual inquiry.

2. A dissolved entity has goodwill to distribute where its “going concern” value is preserved during the winding up of the practice.

The trial court was not precluded as a matter of law from finding enterprise goodwill (App. Br. 14-17) after the date of dissolution because the practice preserved its “going concern” value while winding up the partnership. A “going concern” is a solvent, operating business enterprise. *See Chatterton v. Bus. Valuation Research, Inc.*, 90 Wn. App. 150, 154 n.1, 951 P.2d 353 (1998); *Cardiff v. Johnson*, 126 Wash. 454, 460, 218 Pac. 269, 222 Pac. 902 (1923). Even if the practice itself was not an “active business with future earning power” (App. Br. 15, quoted source omitted) at the time of trial, the parties had preserved the practice’s “going concern” value at the time of dissolution.

A limited liability company “continues after dissolution . . . for the purpose of winding up its activities.” Former RCW 25.15.295(1)³; RCW 25.15.297(1). In winding up, the company may “preserve the limited liability company’s business or property as a

³ The current Washington Limited Liability Company Act, RCW ch. 25.15, became effective on January 1, 2016. RCW 25.15.903. Because this lawsuit commenced on January 28, 2015, former RCW 25.15.295 governs the practice’s “winding up” process. However, the relevant portions of former RCW 25.15.295 are identical to those of RCW 25.15.297, the current “winding up” statute.

going concern for a reasonable time.” Former RCW 25.15.295(2)(a); RCW 25.15.297(2)(a). On March 20, 2015, when the trial court judicially dissolved the practice, the court also appointed a receiver “to supervise the dissolution process.” (CP 91) The receiver’s authority included “[p]reserving the PLLC’s business as a going concern for a reasonable period of time until the details of the division of assets and liabilities between the [S]OMS partners can be determined and the [S]OMS partners can commence practicing as separate entities.” (CP 91, emphasis added)

In particular, the trial court granted the receiver “authority to make decisions regarding separation of the parties’ interests and the *ongoing operations of the PLLC*, which shall be in the best interest of the PLLC and to preserve its assets.” (CP 92, emphasis added) By the time of trial, the “details of the division of assets and liabilities” (CP 91) had not yet been determined. Accordingly, the practice’s value as a going concern was preserved and the trial court was not, as a matter of law, precluded from finding that the practice had enterprise goodwill simply because the practice had dissolved. (App. Br. 17) The trial court properly denied summary judgment.

3. Whether an entity has “abandoned” its goodwill by abandoning a lease is a factual question.

Finally, *Bank of Washington v. Burgraff*, 38 Wn. App. 492, 687 P.2d 236 (1984) does not remotely stand for the proposition that no enterprise goodwill can exist as a matter of law where a business entity has “abandoned” its lease. (App. Br. 19) On the contrary, *Burgraff* reiterates that both the existence and value of goodwill – including whether goodwill has been “abandoned” – are factual questions.

In *Burgraff*, a bank sought to foreclose its security interest in a restaurant, claiming that it had an interest in the \$57,000 proceeds from the restaurant sale prior and superior to the Burgraffs’ security interest. 38 Wn. App. at 496. At trial, the court found that the value of the restaurant’s physical assets was \$6,000, and that “there were few, if any, supplies and inventory, and that there was no value to the liquor license.” 38 Wn. App. at 495-96. The bank “had no lease rights” because “the business has been abandoned by its debtor,” the restaurant’s liquor license “had been picked up and put in the ‘Discontinued’ category because of abandonment of the premises; there was no going business.” *Burgraff*, 38 Wn. App. at 496, 499-500. Accordingly, the trial court

held that the bank had a prior security interest only with respect to the restaurant's \$6,000 in equipment. *Burgraff*, 38 Wn. App. at 497.

The bank argued on appeal that it had a security interest in the business' goodwill and, because the restaurant sold "for \$57,000 and the equipment was valued at only \$6,000, the goodwill of the business had a value of up to \$51,000." *Burgraff*, 38 Wn. App. at 498-99. On appeal, the Court noted that "goodwill, the valuation of which is a question properly submitted to the trier of fact, is an intangible and valuable asset that can exist independently from leasehold rights." *Burgraff*, 38 Wn. App. at 499 (internal citation omitted). However, the Court ultimately agreed with the trial court that the bank had no interest in the goodwill "[o]n this record," because evidence "support[ed] the trial court's finding that there was no going business at the time of the sale and that the Bank had no interest in the lease, whereas *Burgraff* did." *Burgraff*, 38 Wn. App. at 500 (emphasis added). As such, "there was no goodwill upon which the Bank could realize its interests." *Burgraff*, 38 Wn. App. at 500.

Far from holding that any business entity that "abandons a lease" "negate[s] as a matter of law any finding of goodwill based on those locations" (App. Br. 19), the Court in *Burgraff* recognized that

whether or not an entity “abandons” its interest in goodwill is a *factual* issue for the trial court to determine, and will not be disturbed if supported by substantial evidence. Nor did Dr. McLelland or SOMS “abandon” any leases here; the parties continued to practice out of all three practice locations even after dissolution, until Dr. Paxton, by his own admission, evicted both SOMS and Dr. McLelland from the South Hill location. (RP 733) To deny Dr. McLelland the goodwill value of a practice location from which he was evicted would impermissibly reward Dr. Paxton for breaching his fiduciary duties. The trial court did not err in refusing to grant summary judgment on this basis.

B. Substantial evidence supports the trial court’s finding that the practice had enterprise goodwill.

This Court reviews for substantial evidence the trial court’s factual findings that enterprise goodwill existed. *Dixon*, 163 Wn. App. at 921, ¶ 19 (factual findings “supported by substantial evidence will not be reversed on appeal”); *Knight*, 75 Wn. App. at 726 (“[s]ubstantial evidence supports the trial court’s finding that [the store] had goodwill”). Substantial evidence is that which is “sufficient to persuade a fair-minded person of the truth of a premise.” *Dixon*, 163 Wn. App. at 921, ¶ 19.

Substantial evidence plainly supports the trial court's finding of the existence of enterprise goodwill in this case. First, the parties have, in the past, specifically valued, purchased, and sold interests in the practice's goodwill. In 2005, Dr. McLelland purchased a one-third undivided interest in "existing patient files and records," "presently existing accounts receivable," and "goodwill of the practice." (CP 322-23; RP 265-68; Ex. 49) Of the \$619,835 total buy-in price, Dr. McLelland paid \$83,333 for patient files and records, \$100,000 for accounts receivable, and \$261,667 – over 40% of the total purchase price – specifically for goodwill. (CP 323; RP 73, 267) Similarly, when Dr. Lang left the practice, Dr. McLelland and Dr. Paxton both purchased a "significant" percentage of goodwill from her, paying a total of \$242,500 for goodwill alone – over 45% of the buy-out price. (RP 87; Ex. 34 at 2-3)

Indeed, the Agreement itself contemplates the existence of enterprise goodwill by explicitly providing that "the *goodwill of the Partnership* shall be owned, or considered owned, by the Shareholders, in undivided interests, based on Percentage Ownership of the Partnership." (CP 45, emphasis added) The Agreement further prohibits either partner from transferring to a third party intangible assets, including the "*goodwill of the*

practice, the Partnership, any of the Parties, or any of the Shareholders.” (CP 47, emphasis added)

Additionally, as Dr. Paxton’s own expert admitted, location, practice name, and covenants not to compete are all practice intangibles that suggest the existence of enterprise goodwill. (RP 477-78) Those intangibles existed here and continued beyond the date of dissolution: “the locations are still being used”; the name that the practice calls itself “is still . . . a presence”; “the website is still active”; “the phone numbers are still in use”; “many of the same, if not the same, staff are still working at the offices”; and “the systems and the procedures that the parties used before [dissolution] are still being used.” (RP 267) At the time of trial, the practice still received patients and referrals directed to SOMS, as opposed to the individual practitioners or their professional service corporations. (RP 218, 650) Both parties also continued practicing at all three locations (until Dr. Paxton evicted Dr. McLelland from South Hill), operating in “generally” the same way as they always had under the Agreement. (RP 259)

Accordingly, the trial court did not abuse its discretion in finding that enterprise goodwill existed in relation to the practice locations, which were “the most valuable asset[s] of the practice

after the practitioners themselves.” (CP 3087) Dr. Paxton’s own expert admitted that favorable locations can “add to the value of a business.” (RP 450) And the Agreement’s termination clause contemplated that the parties would continue to utilize and benefit from the assets of the practice – particularly, the locations – even after dissolution. Upon termination of the Agreement, “and the necessary division of the jointly owned Practice Interests,” the parties “will then determine which of the Parties will continue to practice at each of the places of business of the Partnership.” (CP 79) The trial court’s finding that “each location was important enough to be recognized within the Partnership Agreement as an asset of the business that would continue on even if the partnership terminated” (CP 3087) is clearly supported by the record.

C. The trial court properly valued the practice’s goodwill.

1. The trial court did not abuse its discretion in adopting the methodology of Dr. McLelland’s valuation expert.

Like the existence of goodwill, the trial court’s valuation of goodwill is a question of fact that will not be reversed if supported by substantial evidence. *Marriage of Luckey*, 73 Wn. App. 201, 206, 868 P.2d 189 (1994); *Suther*, 28 Wn. App. at 844 (affirming trial court’s valuation where “based on competent evidence”).

While our Supreme Court has recognized five particular accounting methods in valuing goodwill,⁴ these methods “are not the exclusive formulas available to trial courts in analyzing the evidence presented,” *Hall*, 103 Wn.2d at 245, and “one or more methods may be used” to value goodwill. *Luckey*, 73 Wn. App. at 206. The trial court’s primary concern is “to achieve a just and fair evaluation of the existence and value” of the goodwill. *Hall*, 103 Wn.2d at 245.

Contrary to Dr. Paxton’s claims (App. Br. 21-24), “[t]here is no suggestion in the cases that certain valuation methods apply only for the purpose of marital dissolution whereas other methods apply for partnership dissociation.” *Dixon*, 163 Wn. App. at 921-22, ¶ 21. In *Dixon*, an equity partner sought a buyout of his interest in a law firm. The firm had no written partnership agreement, and “no agreement excluding claims for goodwill among the partners.” 163 Wn. App. at 923, ¶ 24. The trial court used a “capitalization of excess earnings” method to value the goodwill as the “difference between the firm’s earnings and the remaining partners’ collective ‘replacement values.’” 163 Wn. App. at 916, ¶ 7.

⁴ These methods are straight capitalization, capitalization of excess earnings, the IRS variation of capitalized excess earnings, the market value method, and the buy/sell agreement method. *Hall*, 103 Wn.2d at 243-45.

The Court of Appeals affirmed, holding that the partner left the firm's goodwill, including that which he contributed, with the firm when he dissociated: "Goodwill is a recognized asset *of a professional practice*" that "attache[s] to [a] practice" and "may continue in existence in the form of established patients or clients, referrals, trade name, location and associations which now attach to former partners or buyers of the practice." *Dixon*, 163 Wn. App. at 922, ¶ 21, 923, ¶ 24 (emphasis added) (quoting *Hall*, 103 Wn.2d at 241). Because the trial court's valuation "provides an accurate reflection of the goodwill value of the firm as a whole," the trial court properly "valued the firm's goodwill to determine [the partner's] share." *Dixon*, 163 Wn. App. at 923, ¶ 24.

As in *Dixon*, here the parties had no agreement to exclude claims for goodwill. Accordingly, the Agreement expressly provided that "the goodwill of the Partnership shall be owned, or considered owned, by the Shareholders, in undivided interests based on Percentage Ownership of the Partnership." (CP 45) Nor was respondent expert's method of valuing the practice "technically flawed." (App. Br. 21 n.7) The parties here preserved the practice's "going concern" value while winding up the partnership. (CP 91-92; Arg. § A.2, *supra*) Not only did Ms. Romney value the practice's

goodwill based on a “fair market value on a going concern basis” (RP 273; Ex. 44 at 2), but there is “no definitive formula for ascertaining the value of goodwill,” *Dixon*, 163 Wn. App. at 923, ¶ 26, and even “opinion evidence is admissible.” *Lukens*, 16 Wn. App. at 486. Accordingly, the trial court was well within its discretion to adopt Ms. Romney’s valuation of the practice’s goodwill.

Appellant does not cite, much less discuss *Dixon*, instead relying on a California case, *Marriage of Lopez*, 38 Cal. App. 3d 93, 113 Cal. Rptr. 58 (1974), and *Marriage of Fleege*, 91 Wn.2d 324, 588 P.2d 1136 (1979), both decided more than 30 years before *Dixon*. (App. Br. 21-24) The Court in *Dixon*, 163 Wn. App. at 921, ¶ 21, unequivocally rejects Dr. Paxton’s argument that there is a “distinction between valuing the dissolution of a professional practice and valuing a professional practice in a marriage dissolution setting.” (App. Br. 21) Nor does *Fleege* hold otherwise. *Fleege* addresses only whether, in dissolution cases, a professional spouse’s goodwill “constitutes a community asset and should be considered by the court in distributing the community property.” 91 Wn.2d at 330.

As the Supreme Court recognized in *Hall* five years later, the “confusing and unfair criteria” *Fleege* presents “are based on [its]

failure to distinguish between professional goodwill and personal earning capacity of the professional.” *Hall*, 103 Wn.2d at 240-41. *Hall* clarified that goodwill “is a distinct *asset* of a professional practice, not just a *factor* contributing to the value or earning capacity of the practice.” 103 Wn.2d at 241 (emphasis in original). *Dixon* again reiterated this principle nearly three decades later, affirming the trial court’s “accurate reflection of the goodwill value *of the firm as a whole*” in affirming a judgment for the value of enterprise goodwill upon one partner’s withdrawal from a professional practice. 163 Wn. App. at 923, ¶ 24 (emphasis added).

2. Substantial evidence supports the trial court’s goodwill valuation.

The trial court was well within its discretion to adopt Ms. Romney’s valuation, which was supported by substantial evidence. In reaching her conclusions, Ms. Romney relied on “valuation indications” from a 1999 practice prospectus for Dr. Paxton’s then-solo practice, the actual goodwill values used in the 2005 McLelland and Lang buy-in and the 2014 Lang buy-out, and the 2014 Goodwill Registry – “an industry source” to compare valuations of specific types of medical practices. (RP 275, 277; Ex. 44 at 10-12) Using the 2005 buy-in prices, Romney determined that 8.1% of the practice’s total net production was allocated to patient files and 25.3% of net

production to goodwill. (RP 280-81; Ex. 44 at 3) These two components combined equaled the total intangible value of the practice. (RP 281; Ex. 44 at 3)

Because her objective was to determine the goodwill value by practice location, Ms. Romney multiplied the combined percentage of intangibles by the net production of each office to determine the total value of goodwill flowing from each location. (RP 281; Ex. 44) Using this formula, Ms. Romney valued the goodwill of the Spokane Valley location at \$821,760, the South Hill location at \$503,470, and the Post Falls location at \$497,158. (Ex. 44 at 3, 6) The total goodwill value was \$1,822,388. (Ex. 44 at 3)

Ms. Romney's goodwill values are entirely consistent with the historical value the parties have placed on the practice's goodwill. In 2005, Dr. McLelland paid \$261,667 for one-third of the practice's goodwill, which increased as the practice became more reputable and lucrative in the following decade. (CP 323; RP 73, 284, 286) In 2014, the parties again recognized that enterprise goodwill existed when they bought out Dr. Lang's one-third interest in the practice. (RP 87; Ex. 34 at 2-3) Additionally, while the parties agreed to pay Dr. Lang a total of \$242,500 for goodwill, the

trial court heard evidence that that price “undervalued” the practice. (RP 153-54)

Because the parties each owned a one-half, undivided interest in the practice’s \$1,822,388 in goodwill, the trial court properly determined that “[e]ach doctor or his respective entity is entitled to assets or cash in the amount of \$911,194.” (CP 3089) Because he received the two practice locations with the highest goodwill values, Dr. Paxton received goodwill valued at \$1,325,230. (CP 3089; Ex. 44 at 3) In contrast, Dr. McLelland received only the Post Falls location, worth \$497,158. (CP 3089; Ex. 44 at 3) Accordingly, the trial court did not abuse its discretion in ordering Dr. Paxton to make an equalization payment to Dr. McLelland in the amount of \$414,036. (CP 3089)

While Dr. Paxton’s experts may have disagreed with Ms. Romney’s valuation and methods (App. Br. 21 & n.7), the trial court clearly found Ms. Romney’s valuation most credible. This Court will “not reweigh or rebalance competing testimony and inferences even if [it] may have resolved the factual dispute differently.” *Bale v. Allison*, 173 Wn. App. 435, 458, ¶ 36, 294 P.3d 789 (2013). Indeed, neither of Dr. Paxton’s experts offered the trial court any differing goodwill value, instead relying on their contention that

goodwill could not exist as a matter of law because the practice was no longer a “going concern.” (RP 417, 543, 546-47) Because his legal argument that the practice did not have a “going concern value” fails (Arg. § A.2, *supra*), Dr. Paxton cannot now complain that the trial court adopted the only valuation of goodwill presented at trial.

D. The trial court did not abuse its discretion in awarding prejudgment interest.

The trial court properly awarded prejudgment interest on Dr. McLelland’s equalization payment. (App. Br. 25-27) This Court reviews an award of prejudgment interest for abuse of discretion. *Simpson v. Thorslund*, 151 Wn. App. 276, 288, ¶ 22, 211 P.3d 469 (2009). Generally, a judgment bears interest “from the date of entry at the maximum rate permitted under the usury statute,” RCW 19.52.020. *Green v. McAllister*, 103 Wn. App. 452, 470, 14 P.3d 795 (2000); *see also* RCW 4.56.110(5). “[P]rejudgment interest is allowed when the purpose of the lawsuit is to disgorge a fixed amount of funds rightfully belonging to the plaintiff.” *Green*, 103 Wn. App. at 470; *Simpson*, 151 Wn. App. at 288, ¶ 22 (“plaintiff should be compensated for the ‘use value’ of the money representing his damages for the period of time from his loss to the date of judgment”) (quoted source omitted).

In most cases, the funds must be liquidated, meaning “the amount can be calculated precisely without resorting to opinion or discretion.” *Green*, 103 Wn. App. at 470. In *Green*, however, this Court held that the “liquidated funds rule” is “inapplicable in partnership cases” because “[p]artnership affairs are governed by the partnership act, not the court’s equitable discretion.” *Green*, 103 Wn. App. at 471. (App. Br. 27) Noting that “[d]isallowing interest would allow the dominant partners to dissolve the partnership, dispute the value of the departed partner’s interest, and use the disputed partnership property interest-free until entry of a judgment,” this Court affirmed the award of prejudgment interest on an equitable accounting judgment in *Green*, 103 Wn. App. at 471, even though the trial court had to determine the precise amount due.

Division One reaffirmed this principle in *Dixon*, rejecting the argument of the remaining partners in a legal partnership that prejudgment interest from the date of dissociation “is contrary to Washington cases disfavoring prejudgment interest to a discretionary judgment amount.” 163 Wn. App. at 925, ¶ 31. Because RCW 25.05.250(2) provides that interest “must be paid from the date of dissociation to the date of payment” and directs the trial court to “determine the buyout price of the dissociated

partner's interest . . . and accrued interest, and enter judgment for any additional payment or refund," the Court affirmed a prejudgment interest award of \$99,140 on a \$232,143 partnership interest (including goodwill) of the withdrawing partner in *Dixon*, 163 Wn. App. at 925, ¶¶ 32, 34. Because prejudgment interest is important "to compensate the dissociating partner for the use of his interest in the firm," the trial court in *Dixon* properly included prejudgment interest in the award. 163 Wn. App. at 925, ¶ 33 (quoted source omitted). These same principles apply here. See RCW 25.15.436 (partnership may be converted into a limited liability company), .451 (the converted organization "is for all purposes the same entity that existed before").

Dr. Paxton does not even cite, let alone attempt to distinguish this case from, *Green* and *Dixon*. Here, too, the trial court properly found prejudgment interest "appropriate in a partnership dissolution where one partner uses a former partner's assets without remuneration." (CP 3089)

Dr. Paxton enjoyed the benefit of the practice's goodwill at both the South Hill and Valley locations, which his own expert conceded would likely generate more revenue than a single office location. (RP 422-23, 476) The South Hill location alone generated

approximately \$1.5 million per year in revenue, of which \$500,000 is attributable to goodwill. (Ex. 44 at 3) The Spokane Valley location, which Dr. Paxton also retained, with a goodwill value of \$821,760, generated even more income; in 2014, the location net \$2,461,310 in revenue. (Ex. 44 at 3) Dr. McLelland, meanwhile, has the benefit of the \$497,158 in goodwill at only the Post Falls location, which earned net proceeds of \$1,489,073 in 2014. (Ex. 44 at 3)

The trial court was well within its discretion to award prejudgment interest on the equalization payment – effectively the “buyout price” of Dr. McLelland’s goodwill interest in the practice. *See Dixon*, 163 Wn. App. at 925, ¶¶ 32-33; RCW 25.05.250(2). Prejudgment interest was thus appropriate to compensate Dr. McLelland for the otherwise-disproportionate goodwill value that Dr. Paxton enjoyed but for the equalization payment. The trial court did not abuse its discretion.

E. The trial court properly denied reconsideration on an issue that Dr. Paxton belatedly raised and failed to support with evidence.

The trial court properly declined to consider Dr. Paxton’s claim that Dr. McLelland defaulted under the Agreement by “prematurely” filing his complaint in this action on January 28, 2015, one month before the date of contractual dissolution on

February 28, 2015. (App. Br. 27-29) Not only does the provision cited by Dr. Paxton not apply, but he untimely raised this issue.

The Agreement provides that the partnership “may be dissolved . . . at the option of the non-defaulting Party” “upon the occurrence” of a default “during the Initial Term, or any annual renewal period,” such as when “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” “against any of the other . . . Shareholders.” (CP 50-52) This provision clearly concerns only third-party actions against a shareholder caused by another shareholder’s actions. Dr. McLelland did not engage in any action or omission that resulted in a lawsuit against him or Dr. Paxton. Therefore, Dr. McLelland did not default under the Agreement.

Regardless, Dr. Paxton failed to plead this claim or present any evidence supporting it at any time in the two years leading up to, or even during, trial. Dr. Paxton did not assert the “premature filing” as an affirmative defense or a counterclaim in his answer (CP 1114-33); nor did he raise it as grounds for relief in either of his motions for summary judgment. (CP 1219-44, 1808-21) Instead, Dr. Paxton prevented Dr. McLelland from defending against this

claim at trial by raising it for the first time at the end of the defense's closing argument, admitting this was something "we've never talked about in this case." (RP 805) Indeed, Dr. Paxton did not substantively raise and argue this issue until reconsideration.

The trial court has broad discretion in deciding a motion for reconsideration, and this Court will not reverse the trial court's ruling absent a manifest abuse of discretion. *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, ¶ 11, 122 P.3d 729 (2005), *rev. denied*, 157 Wn.2d 1022 (2006). Furthermore, the trial court is not required to consider arguments "based on new legal theories with new and different citations to the record" on reconsideration; CR 59 "does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision." *Wilcox*, 130 Wn. App. at 241, ¶ 12.

In any event, as the trial court recognized in denying reconsideration on this basis, Dr. Paxton himself did not present any evidence at trial in support of this belated claim. (CP 3498-99) On appeal, Dr. Paxton also fails to identify how this claimed "premature" filing injured or otherwise prejudiced him. After over two years of litigation, the trial court was well within its discretion to reject Dr. Paxton's claims that he suffered damages in retaining

counsel and defending against this lawsuit (CP 3298) during the one month that he claimed it was “premature” to sue under the Agreement.

Even if Dr. Paxton was “entitled” to “enforce his right to prohibit Dr. McLelland from practicing at any location of the practice” in the event of a default (CP 3299), the trial court did not award Dr. McLelland any damages for the South Hill eviction. (CP 3085-86) Nor did the claimed “premature suit” “deprive[] Dr. Paxton from the right to continue to negotiate in good faith to reach a settlement.” (CP 3299) The parties engaged in settlement negotiations for 18 months leading up to trial, including after Dr. McLelland filed suit. (*See, e.g.*, RP 132; CP 101-25, 1247, 1385)

Dr. Paxton could, and should, have raised this issue before “entry of an adverse decision.” The trial court did not err in refusing to grant reconsideration where “the premature filing issue was not argued or supported by any evidence put forward at trial.” (CP 3090, 3498-99) *See Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, ¶ 17, 225 P.3d 266 (2009) (where trial court finds insufficient evidence “to persuade it that something occurred, an appellate court is simply not permitted to reweigh the evidence and come to a contrary finding”), *rev. denied*, 168 Wn.2d 1041

(2010); *Thompson v. Henderson*, 22 Wn. App. 373, 376, 591 P.2d 784 (1979) (where trial court “determines that a [party] has failed to meet the high burden of proof, it becomes doubly hard for an appellate court to rule in the [party’s] favor”).

F. The trial court did not abuse its discretion in awarding Dr. McLelland reasonable attorney fees.

1. Dr. McLelland was entitled to fees under the Agreement as the prevailing party on summary judgment and at trial.

A contract may “specifically provide” that attorney fees and costs “incurred to enforce the provisions of such contract” shall be awarded to the prevailing party. RCW 4.84.330. The Agreement here specifically provides that the prevailing party in “any action at law or in equity . . . to enforce the terms of this agreement” “shall be entitled to reasonable attorney fees and costs.” (CP 83) Generally, a prevailing party is “one who receives an affirmative judgment in his or her favor.” *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997). Where neither party wholly prevails, the “substantially prevailing party” may recover fees. *Riss*, 131 Wn.2d at 633. Whether a party substantially prevailed “depends upon the extent of the relief afforded the parties.” *Riss*, 131 Wn.2d at 633.

Dr. McLelland sued Dr. Paxton for breach of contract, detrimental reliance, negligent misrepresentation, breach of the

implied duty of good faith and fair dealing, and breach of fiduciary duties constituting constructive fraud. (CP 2454-57) Dr. Paxton counterclaimed for interference with contractual relationships, breach of contract, invasion of privacy, intellectual property infringement, breach of fiduciary duty and self-dealing, and breach of the duty of good faith and fair dealing. (CP 1126-33)

Dr. McLelland is the substantially prevailing party because he prevailed on the “main issues of breach and goodwill.” (CP 3090) The trial court granted Dr. McLelland’s motion for partial summary judgment on his breach of contract, breach of fiduciary duties, and constructive fraud claims – decisions Dr. Paxton does not challenge on appeal. (CP 2902-03, 2905, 2909, 3038-39, 3085, 3089) Dr. McLelland also successfully defended against Dr. Paxton’s motion for summary judgment on the issue of goodwill – the “main issue” at trial, on which Dr. McLelland prevailed and received an affirmative \$414,036 judgment plus \$138,707 in prejudgment interest. (CP 2905, 2911, 3373)

In contrast, the trial court rejected the vast majority of Dr. Paxton’s counterclaims (CP 3087-88, 3090), ruling in his favor only in dismissing on summary judgment Dr. McLelland’s breach of contract claim for Dr. Paxton’s alleged failure “to work the days

specified in the Partnership Agreement” (CP 2904-05, 2911) and in awarding Dr. Paxton \$7,587 for his reimbursement claim at trial. (CP 3090) The trial court denied Dr. Paxton’s American Healthcare claim (which he conceded at trial was barred by the statute of limitations (RP 55)), as well as his “claim related to NuCalm.” (CP 3090) Even if this Court were to reverse the trial court and find that goodwill does not exist (App. Br. 30), Dr. McLelland remains the substantially prevailing party entitled to fees because the trial court indisputably afforded Dr. McLelland far more relief than Dr. Paxton, both prior to and at trial.

2. The trial court did not abuse its discretion in entering the amended fee award segregating unsuccessful damage claims.

The trial court is given “broad discretion” in determining the reasonableness of an attorney fee award. *Ethridge v. Hwang*, 105 Wn. App. 447, 460, 20 P.3d 958 (2001). This Court will uphold a fee award unless it finds the trial court manifestly abused its discretion. *Ewing v. Glogowski*, 198 Wn. App. 515, 521, ¶ 13, 394 P.3d 418 (2017). A trial court abuses its discretion only when it exercises its discretion on untenable grounds or for untenable reasons. *Ewing*, 198 Wn. App. at 521, ¶ 13. Although “the size of the amount in dispute in relation to the fees requested” is a “vital

consideration” in assessing the reasonableness of a fee request, an appellate court “will not overturn a large attorney fee award in civil litigation merely because the amount at stake in the case is small.” *Ewing*, 198 Wn. App. at 524, ¶ 23 (quoting *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 150, 859 P.2d 1210 (1993) and *Berryman v. Metcalf*, 177 Wn. App. 644, 660, ¶¶ 35-36, 312 P.3d 745 (2013), *rev. denied*, 179 Wn.2d 1026 (2014)).

To determine reasonable attorney fees, the trial court “begins with a calculation of the ‘lodestar,’ which is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.” *Miller v. Kenny*, 180 Wn. App. 772, 820, ¶ 121, 325 P.3d 278 (2014). A trial court may require a party “to segregate its attorney fees between successful and unsuccessful claims”; where the claims are unrelated, “the court should award only the fees attributable to the recovery.” *Bloor v. Fritz*, 143 Wn. App. 718, 747, ¶ 72, 180 P.3d 805 (2008). Dr. Paxton does not challenge counsel’s hourly rate. Rather, he challenges only the number of hours Dr. McLelland’s counsel expended.

When the trial court entered its original fee award on May 25, 2017 (CP 3254-55), the parties had been engaged in litigation, including extensive negotiations, mediation, and a four-day trial,

for over two years. (*See, e.g.*, CP 22, 105-17, 146) The trial court did not abuse its discretion in entering the initial \$286,102 judgment, let alone the amended June 8, 2018 judgment that reduced the fee award by amounts incurred on unsuccessful damage claims.

Dr. McLelland's attorney fee declarations were not "vague" and "imprecise." (App. Br. 33 & n.12; CP 3775) To assist the court in determining the hours reasonably expended, attorneys must only "provide reasonable documentation of the work performed." *Miller*, 180 Wn. App. at 822, ¶ 127 (quoting *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983)). This documentation "need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work." *Miller*, 180 Wn. App. at 822, ¶ 127 (quoting *Bowers*, 100 Wn.2d at 597). As the trial court correctly found, Dr. McLelland's counsel submitted 158 pages of

highly-detailed billing entries⁵ that “list the task completed, the time it took to complete the task, and the name of the particular attorney who did the work.” (CP 3091-3249, 3775)

Additionally, after the trial court granted Dr. Paxton’s request for segregation, Dr. McLelland submitted a 17-page declaration meticulously identifying, entry by entry, exactly which hours in his prior billing statements were related to unsuccessful claims. (CP 3516-32) Dr. McLelland’s counsel also provided a second supplemental declaration further explaining his “careful analysis . . . utilized to arrive at the time [the] attorneys spent on the four claims at issue for the reduction.” (CP 3653-54) Dr. Paxton fails to identify how plaintiff counsel’s billing entries and declarations are too “general” and “not helpful” to the trial court (App. Br. 33 n.12), when the trial court itself found the

⁵ For example, on February 6, 2015, counsel billed 2.4 hours to “Draft Motion to Dissolve PLLC and for Judicial Supervision of Winding Up/Appointment of Receiver; Draft Memorandum in support of same; Draft Declaration of Bryan McLelland in support of same.” (CP 3117) On March 16, 2015, counsel billed 1.2 hours to “Review emails from client regarding Paxton’s advertisements, advertisement for associate, website, x-rays, and Joint Commission/AAADC; Correspondence to Defendant’s attorneys regarding same.” (CP 3123) In yet another entry, from May 31, 2016, counsel billed 0.80 hours for “Review Joint Trial Management Report from Kulisch; Work on case strategy regarding trial; Review Motions in Limine; Email Tuija regarding estimated time; Review Kulisch’s three emails.” (CP 3205) These entries clearly “itemize[e] the time expended on specific tasks” and are not impermissible “block-billing.” (App. Br. 33 n.12, quoted source omitted)

documentation “satisfies the Court’s prior order requiring segregation.” (CP 3775)

In total, Dr. McLelland’s counsel identified \$9,194.75 in fees relating to his work on unsuccessful claims. (CP 3532) Although Dr. Paxton complains that the trial court reduced the fee award by “only 3%” of the total amount incurred in the course of litigation (App. Br. 35), the goodwill claim on which Dr. McLelland unequivocally prevailed was the “first and foremost issue in the case.” (CP 3503) The trial court “does not need to deduct hours here and there just to prove to the appellate court that it has taken an active role in assessing the reasonableness of a fee request.” *Miller*, 180 Wn. App. at 823, ¶ 130.

Crucially, “[a]s the judge presiding over the trial in this matter,” the trial court here was “aware that much of the trial time was spent on determining the existence of good will and any value attributed to it.” (CP 3775) *Miller*, 180 Wn. App. at 822, ¶ 129 (trial court in the best position to determine reasonableness of a fee request particularly where “[t]he same judge presided over almost every pretrial event as well as the trial and posttrial proceedings”). The trial court did not abuse its discretion in finding “the amount

requested by McLelland is sufficiently specific to allow a calculation pursuant to lodestar” (CP 3775) and entering the amended fee award.

G. This Court should deny Dr. Paxton’s fee request and award Dr. McLelland his fees on appeal.

This Court may award reasonable attorney fees on appeal if provided for by applicable law. RAP 18.1(a). The Agreement provides that the prevailing party in “any action at law or in equity . . . to enforce the terms of this Agreement” “shall be entitled to reasonable attorney fees and costs.” (CP 83) *See* RCW 4.84.330 (prevailing party entitled to attorney fees where a contract “specifically provides” for such a fee award). Because Dr. McLelland prevailed below, and the trial court’s orders and judgments are all supported by substantial evidence, this Court should deny Dr. Paxton’s fee request and award Dr. McLelland his attorney fees as the prevailing party on appeal.

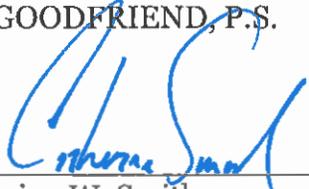
IV. CONCLUSION

This Court should affirm the trial court in its entirety and award respondent his fees on appeal.

Dated this 3rd day of October, 2018.

SMITH GOODFRIEND, P.S.

STAMPER RUBENS, P.S.

By:  _____

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DECLARATION OF SERVICE

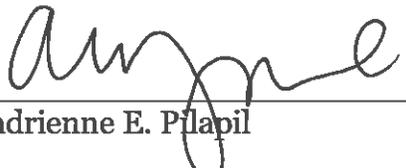
The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 3, 2018, I arranged for service of the foregoing Brief of Respondent, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 3rd day of October, 2018.



Andrienne E. Pilapil

SMITH GOODFRIEND, PS

October 03, 2018 - 2:16 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
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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