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No. 745441

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

KING AND MOCKOVAK EYE CENTER, INC., P.S., a Washington
professional service corporation; and CLEARLY LASIK, INC., a Nevada
corporation,

Plaintiffs/Respondents/Cross-Appellants,

v.

MICHAEL MOCKOVAK, M.D.,

Defendant/Appellant/Cross-Respondent.

MICHAEL MOCKOVAK, M.D., an individual,

Defendant/Counterclaimant/Appellant,

v.

CLEARLY LASIK, INC., a Nevada corporation, and KING AND MOCKOVAK
EYE CENTER, INC., P.S., a Washington professional service corporation,

Plaintiffs/Counterclaim Defendants/Respondents.

MICHAEL MOCKOVAK, M.D., an individual,

Defendant/Third-Party
Claimant/Appellant/Cross-Respondent,

and

MICHAEL MOCKOVAK, derivatively, on behalf of CLEARLY LASIK, INC.,
a Nevada corporation, and KING AND MOCKOVAK EYE CENTER, INC.,
P.S., a Washington professional service corporation,

Third-Party Plaintiffs/Appellants,

v.

JOSEPH KING, M.D., an individual, CHRISTIAN MONEA, an individual, and
KING LASIK, INC., P.S., a Washington professional service corporation,

Third-Party Defendants/Respondents.

JOSEPH KING, M.D., an individual,

Third-Party Defendant/Counterclaimant/Respondent/Cross-Appellant

v.

MICHAEL MOCKOVAK, an individual,

Third-Party Plaintiff/Counterclaimant Defendant/Appellant/Cross-Respondent.

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I. INTRODUCTION

This case arises out of tragic circumstances. The primary parties are former brothers-in-law who jointly owned and operated Lasik eye surgery practices in the United States and Canada. When the economic downturn led to a substantial decrease in demand for eye surgeries, the partners found themselves millions of dollars in debt. They decided to part ways, but could not agree on the terms of their separation. One of the partners decided to have the other murdered, so he could take over the practices and collect on a \$4 million key man life insurance policy. His plan was foiled by the FBI. He was arrested and ultimately convicted of attempted murder and attempted theft. The media firestorm that hit when the arrest was announced, and the loss of half the partnership's surgical team destroyed their existing practices in Washington, and forever altered the lives of all involved.

Michael Mockovak is in prison, but he has never made whole the businesses that he damaged. Nor has he ever compensated his former partner, Joseph King, for the harm he inflicted on King and his family. Instead, when the businesses sued him, Mockovak turned around and countersued his would-be murder victim and the businesses' chief executive officer, Christian Monea, for, among other things, fraud, breach of fiduciary duty, conversion, and unjust enrichment.

These claims were based on Mockovak's theory (a) that King was required to continue to operate for Mockovak's benefit the professional service corporation known as King and Mockovak Eye Center, Inc., P.S. ("KMEC"), which owned and operated the Washington practices; (b) that by opening King Lasik, Inc., P.S. ("King Lasik") after Mockovak was arrested, King and Monea committed fraud and exploited Mockovak's crimes for their own gain; and (c) that Mockovak was entitled to half the value of KMEC, King Lasik, and the Canadian practices after King singlehandedly paid down the substantial debts of all the practices.

The trial court granted Mockovak wide latitude to present his theories and claims to the jury and ask for millions of dollars in damages. The jury's wholesale rejection of his claims has not deterred Mockovak from this ongoing war against his former partner.

KMEC and Clearly Lasik, Inc. ("Clearly Lasik") sued Mockovak for breach of fiduciary duty and tortious interference with prospective advantage or business expectancy, while King asserted claims for breach of contract (based on the oral partnership agreement between King and Mockovak), unjust enrichment, and intentional injury to others under Restatement (Second) of Torts § 870. The tortious interference, unjust enrichment, and Section 870 claims were dismissed on summary judgment – those rulings are not at issue. What is at issue is the trial court's refusal

to allow King (a) to amend his pleading to add a claim for breach of fiduciary duty (based on King and Mockovak's partnership), and (b) to ask the jury for damages for Mockovak's breach of the partnership contract. The first ruling was an abuse of discretion; the second, legal error. The effect of the rulings is that Mockovak has never compensated King for the painful, exhausting, and expensive ordeal he has put King through over the last six years.

II. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied King leave to amend his pleading to add a claim for breach of fiduciary duty, and denied his motion for reconsideration.

2. The trial court erred when it ruled on Mockovak's CR 50 motion that King could not ask the jury for breach of contract damages, and denied King's motion for reconsideration.

3. The trial court erred in entering a final judgment that incorporated both the denial of King's motion for leave to amend and the ruling on Mockovak's CR 50 motion.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion in refusing to let King amend his pleading to add a breach of fiduciary duty claim when (a) the new claim arose out of the occurrences that formed the basis of the

original claims, (b) Mockovak already was facing a breach of fiduciary duty claim (brought by KMEC and King Lasik in the original complaint), (c) the motion for leave to amend was brought more than a month before the scheduled start of trial, and (d) full discovery already had been provided on the damages that King could be awarded if the claim were proved? (Assignments of Error 1 and 3.)

2. Was it error to dismiss King's breach of contract damages claims based on the statute of frauds, when the oral partnership agreement was for an indefinite period of time and was terminable at will? (Assignments of Error 2 and 3.)

IV. STATEMENT OF THE CASE

A. Statement of Facts

At the start of November 2009, Mockovak and King were partners who, through various corporations, jointly owned and operated five Lasik¹ eye surgery practices. RP 76:1-87:19, 263:19-265:23, 308:9-309:9 (G)²; Exs. 32, 43; *see* Brief of Appellant Michael Mockovak at 4 ("Mockovak

¹ Lasik stands for laser in-situ keratomileusis; it is a surgery used to correct vision in people who are near-sighted or far-sighted, or have astigmatism. *See* WebMD, LASIK Eye Surgery, <http://webmd.com/eye-health/lasik-laser-eye-surgery> (last visited Aug. 16, 2016).

² The Verbatim Report of Proceedings was not numbered sequentially and was transcribed by two different court reporters, Rawlins (designated here as "R") and Girgus (designated here as "G").

and King were business partners....”). Three of the practices were in Washington (in Renton, Vancouver, and Kennewick). RP 246:14-18 (R). The other two practices were in Canada (in Burnaby, British Columbia, and Edmonton, Alberta). RP 254:2-4, 10-12 (R).

All of the practices in Washington were owned and operated by KMEC, a Washington professional service corporation that King and Mockovak owned in equal shares. RP 246:14-18 (R). A Nevada corporation called Clearly Lasik owned a Canadian corporation, which in turn owned and operated the practice in Edmonton. RP 253:17-254:4 (R). Clearly Lasik was owned equally by King and Mockovak, as was a separate Canadian corporation that in 2009 owned and operated the practice in Burnaby. RP 254:8-18 (R); Ex. 10.³

Before 2009, Clearly Lasik also had owned and operated eye surgery practices in Wisconsin, Idaho, Oregon, and Nevada, but when the global recession hit, there was a fall-off in demand for elective eye surgeries. RP 250:3-10, 21-25 (R); RP 86:8-20 (G). The practices in the other states were closed. RP 250:21-25 (R). Despite the retrenching, at

³ There was a sixth practice, in Victoria, British Columbia, that King owned separately through a Canadian professional services corporation. RP 255:4-8 (R). Mockovak never owned any shares in the corporation that owned and operated the practice in Victoria. RP 220:13-21 (G).

the end of 2009, the partners, through Clearly Lasik and KMEC, were in debt for more than \$2.8 million. RP 134:19-24 (G); Exs. 35, 44.

The partners married sisters and lived in the same neighborhood, with their respective families, in Newcastle, Washington. RP 243:23-244:1 (R); RP 100:24-101:1 (G). Both doctors performed surgeries at the Washington clinics, but only King was licensed to practice medicine in Canada. RP 218:10-13 (G). Because Mockovak never lived up to his promise to become licensed in Canada, King performed all of the surgeries at the Canadian clinics and therefore had to spend significantly more time commuting than did Mockovak. RP 323:1-3 (R); RP 126:18-127:7 (G). Despite his greater commute time, King still performed the majority of the practices' surgeries in 2008 and 2009. RP 82:8-83:11 (G); Ex 35. By October 2009, under the partners' agreed compensation formula, the practices owed \$487,873 to Mockovak and \$907,489 to King. Ex. 35.

A rift developed between King and Mockovak and the two decided in 2009 to part ways. RP 104:5-7, 105:5-8 (G). They could not agree, however, on a division of their assets and debts, and each of them wanted the Renton practice. RP 105:18-106:3 (G). Their dispute was scheduled to be resolved by arbitration in December 2009. RP 125:5-6 (G).

But on November 7, 2009, following months of secretive planning, Mockovak attempted to hire an assassin to murder King, in an effort to gain sole control of the practices and the proceeds of a \$4 million key man insurance policy on King's life. RP 113:16-18, 106:4-6 (G); Ex. 19. Shortly after he tendered payment for the murder, Mockovak was arrested by the FBI and charged with (i) solicitation to commit first degree murder; (ii) attempted first-degree murder; (iii) conspiracy to commit theft in the first degree; and (iv) attempted first-degree theft of the life insurance policy. Ex. 19. Just months before the attempted murder, King had asked Mockovak to change the beneficiary of the life insurance policy to King's wife, but Mockovak never signed the form changing the beneficiary. RP 106:21-109:19 (G); Ex. 42.

Upon his release from jail on bail, Mockovak immediately withdrew \$100,000 from the practices' United States bank account. RP 399:21-400:3 (R); CP 71-72; Ex. 53. He did so without permission from King or Monea (KMEC and Clearly Lasik's chief executive officer). RP 401:2-8 (R). His withdrawal overdrew the account, leaving the practices unable to pay their staff and vendors. RP 400:9-401:11 (R).

KMEC and Clearly Lasik filed this lawsuit against Mockovak, asserting damages claims for breach of fiduciary duty and tortious interference with prospective advantage or business expectancy. CP 01-

09. They also sought injunctive relief to prevent Mockovak from (a) withdrawing additional funds from the practices, (b) selling or attempting to sell corporate assets, (c) entering any KMEC or Clearly Lasik office, (d) having any contact with any KMEC or Clearly Lasik employee, customer, or financial institution, or (e) interfering or attempting to interfere in the corporate activities of KMEC or Clearly Lasik. *Id.*

The trial court entered a Temporary Restraining Order (“TRO”) that enjoined Mockovak from “withdrawing or encumbering any of KMEC’s or Clearly Lasik’s corporate funds” and also barred him from “selling, attempting to sell, offering as collateral or otherwise encumbering or hypothecating any interest that he may have in KMEC or Clearly Lasik, absent agreement or further Court Order.” Ex. 14. The scheduled preliminary injunction hearing never took place because the parties stipulated to extend the TRO and stay the civil proceedings. RP 212:18-213:7 (G); Ex. 15.

Mockovak’s crimes destroyed KMEC. After his arrest on November 12, 2009, Mockovak never performed surgery again. RP 250:20-23 (G). On January 26, 2010, the Washington State Medical Quality Assurance Commission suspended his medical license for, among other things, acts of moral turpitude. Ex. 20. Two years later, his license

was permanently revoked, as were his licenses to practice medicine in California, Oregon, Nevada, and Illinois. RP 203:6-204:1 (G); Ex. 21.

On February 3, 2011, a jury found Mockovak guilty of attempted murder and attempted theft. CP 3108-12. He was sentenced to a term of 20 years in prison. CP 3117; Ex. 18. Under the terms of the Judgment and Sentence, Mockovak was prohibited *for life* from having contact with King and his family, Monea, and the “CLI Offices.”⁴ Ex. 18. This Court affirmed Mockovak’s convictions and the Washington Supreme Court denied review. *State v. Mockovak*, 174 Wn. App. 1076 (unpublished), *rev. denied*, 178 Wn.2d 1022 (2013).

Mockovak’s crimes destroyed his partnership with King. RP 116:5-9 (G). Overnight, their practices lost one of two surgeons. RP 116:7-20 (G). The “murder-for-hire” plot became an international story. RP 116:25-118:6 (G); Exs. 28-31. Mockovak’s name and picture appeared in newspapers and on television shows in the United States and Canada. RP 119:19-120:5 (G); Exs. 30, 31. Under these circumstances, King could not continue to operate KMEC – a corporation that had

⁴ “CLI” refers to Clearly Lasik. King and Mockovak commonly used the term “Clearly Lasik” to refer to all of their practices. RP 248:5-18 (R).

“Mockovak” in its title and pictures of and references to Mockovak in all of its advertising materials. RP 118:10-120:2 (G); Exs. 26, 27.

On November 23, 2009, King formed King Lasik. RP 120:9-11, 124:22-24 (G); Ex. 12. King owns 100 percent of the shares of King Lasik. RP 125:17-24 (G). Mockovak never owned any of the shares of King Lasik, nor has he ever performed surgery or worked for King Lasik. RP 250:20-251:6 (G).

Through King Lasik, King generated surgical income, which he used to service the debts of KMEC and Clearly Lasik. CP 7506. By the time of trial in this case, King had paid down \$1.4 million in debts owed by the companies when Mockovak was arrested. RP 134:19-135:15 (G).

B. Statement of Pre-Trial Proceedings

On July 29, 2011, Mockovak launched an aggressive litigation campaign, filing counterclaims against KMEC and Clearly Lasik, and third-party claims against King and Monea for fraud. CP 912-13. Individually and “in his capacity as a shareholder on behalf of” Clearly Lasik and KMEC, he also asserted third-party claims against King, Monea, and King Lasik for: (i) breach of fiduciary duty, (ii) conversion, (iii) unjust enrichment, and (iv) conspiracy. CP 913-16.

Mockovak’s theory was that the corporate structures he and King set up should now be disregarded. CP 1610-12, 1620-21, 1772-74. He

contended that King Lasik was merely an extension of KMEC. CP 1624-25. And he argued that Clearly Lasik owned all of the practices and that he and King therefore had 50/50 ownership interests in all of the practices. CP 1610-12.

As a third-party defendant, King counterclaimed against Mockovak for breach of contract and intentional injury to others under Restatement (Second) of Torts § 870. CP 944-48, 2416-17. King was joined by King Lasik in counterclaiming for unjust enrichment. CP 2416. Both sides filed jury demands. CP 7776-81.

Because a physician who loses his medical license is not eligible to hold shares in a Washington professional services corporation, *see* RCW 18.100.100, KMEC and King moved for a partial summary judgment seeking a determination that Mockovak's shares in KMEC were cancelled. CP 1427-32. Clearly Lasik, King Lasik, and Monea joined the motion, arguing with King and KMEC that under the Washington Supreme Court's ruling in *Sound Infiniti, Inc. v. Snyder*, 169 Wn.2d 199, 237 P.3d 241 (2010), Mockovak's damages claims were barred and his exclusive remedy was the appraisal proceeding provided by statute. CP 1427-32.

Mockovak opposed the motion, arguing (among other things) that even though the shares were certificated in his name, Clearly Lasik, and not Mockovak and King, owned the shares in KMEC. CP 1610-12, 1620-

21. The trial court ruled there was a genuine issue of material fact as to the ownership of KMEC, but dismissed Mockovak's derivative claims on behalf of KMEC reasoning that either Mockovak did not own the shares of KMEC or his shares had been cancelled. CP 2074-80.

Several months later, and based on additional evidence, KMEC and King renewed their partial summary judgment motion. CP 3059-80. Mockovak opposed it. CP 3391-412. He argued that "[t]he jury will need to decide what the two men own, how the business should be valued, and any amounts owed to Mockovak apart from his share of the business itself. Mockovak does not seek to continue to own the Clearly Lasik businesses with King. Because a jury must decide these questions, the Court should deny King's motion for summary judgment." CP 3392.

The trial court granted King and KMEC's motion in part, ruling that Mockovak had owned the KMEC shares and that the shares were cancelled as a matter of law. CP 4678-81. But it refused to hold that Mockovak's damages claims were barred. *Id.*

Mockovak moved for summary judgment on all of KMEC and Clearly Lasik's claims and all of King and King Lasik's claims. CP 2596-619. The trial court granted the motion in part, dismissing with prejudice (a) KMEC and Clearly Lasik's claim for tortious interference with prospective advantage or business expectancy, (b) King's claim for

intentional injury to others under Restatement (Second) of Torts § 870, and (c) King and King Lasik's claim for unjust enrichment. CP 4675. It denied the motion with respect to KMEC and Clearly Lasik's claim for breach of fiduciary duty and King's claim for breach of the partnership contract. *Id.*

After the trial court dismissed his Section 870 claim, King moved for leave to amend his pleading to add a claim for breach of fiduciary duty, based on his partnership with Mockovak. CP 4454-59. The trial court denied the motion and denied King's motion for reconsideration, ruling without explanation that the proposed amendment would be prejudicial to Mockovak, even though the facts that supported the claim had been in the case from the beginning, as had a claim for breach of fiduciary duty (asserted by KMEC and Clearly Lasik), and even though the prospective damages were the same as had been sought under King's Section 870 claim. CP 4454-59, 5736-38, 6182-84. In discovery, King already had been deposed and produced thousands of pages of documents evidencing the injuries he had sustained both personally and with respect to the businesses. CP 4458, 5937-41.

King filed a motion to exclude Mockovak's attendance at trial. CP 7625-40. Mockovak had been confined in maximum security, and was subject to a sentencing order that he not have contact with King, King's

family, or Monea. CP 7641-56; Ex. 18. The King County Prosecutor's Office and State Department of Corrections urged the trial court to exclude Mockovak's attendance at trial, based on economic and safety considerations. CP 7762-72. The trial court, however, granted Mockovak's cross motion and allowed him to attend trial un-handcuffed, dressed in civilian clothes, and sitting just a few feet from King. CP 7773-75.

One week before trial, Mockovak filed a motion to bifurcate the valuation of his cancelled KMEC shares from the rest of the trial. CP 5919-22. Without dropping his damages claims, Mockovak reversed his position, arguing that the court and not the jury must decide the fair value of his KMEC shares. *Id.* The trial court denied the motion, CP 6195-97, and the case proceeded to trial on November 16, 2015.

C. Statement of Trial Proceedings

All of Mockovak's individual claims (fraud, conversion, unjust enrichment, and conspiracy), and his derivative claims on behalf of Clearly Lasik (breach of fiduciary duty, conversion, unjust enrichment, and conspiracy), were tried to the jury, as were KMEC and Clearly Lasik's claim for breach of fiduciary duty and King's claim for breach of contract. CP 7156-60.

Before trial, the parties stipulated to the facts of Mockovak's crimes. Ex. 19. During trial, both parties called witnesses and introduced exhibits. RP 73, 157, 241, 341-42, 443, 534 (G); RP 257, 369, 470, 565, 666 (R). Mockovak objected only to one exhibit and prevailed on his arguments for limiting the scope of testimony from King and his wife. RP 108:4-11, 343:1-348:8 (G). Both parties called experts who opined on the value of Mockovak's cancelled KMEC shares, the value of the other practices, and other damages. RP 475:1-563:20, 584:19-662:24 (R); RP 444:13-453:17, 539:15-565:22, 566:16-575:10 (G).

Near the close of KMEC and Clearly Lasik's case, and King's and King Lasik's case (the counterclaims and third-party claims of King and King Lasik were tried along with KMEC and Clearly Lasik's claims), and again after the close of their cases, Mockovak moved to dismiss King's breach of contract claim. CP 6252-72; RP 150:11-151:16, 454:21-466:5 (G). Mockovak argued that the oral partnership agreement between himself and King violated the statute of frauds because it could not be completed within one year. *Id.* Although King opposed the motion, CP 6280-87, the trial court ultimately granted it in part (refusing to allow King to pursue breach of contract damages) and denied it in part (allowing the jury to decide whether King had proved the existence and termination

of a partnership), CP 7083-85, and denied King's motion for reconsideration, CP 7080-82.

At the conclusion of the three-week trial, the court instructed the jury, and the parties presented closing arguments. RP 770:3-11 (R); CP 7117-55. Mockovak has asserted no error with respect to any of the instructions, and he raised no objection to King's closing argument either during or after the argument, but before the case went to the jury. RP 770:18-805:2, 835:21-843:1 (R). After deliberating for two days, the jury rendered its verdict. RP 656:5-662:10 (G); CP 7156-60.

The jury found that Mockovak had breached his fiduciary duty, but awarded no damages to KMEC or Clearly Lasik. CP 7157. It found that King and Mockovak had had a partnership, and that Mockovak's actions made it not reasonably practicable to continue to carry on the partnership or that Mockovak had engaged in wrongful conduct that adversely and materially affected the partnership business. *Id.* Accepting the testimony of King's expert, the jury valued Mockovak's shares in KMEC in the amount of *negative* \$233,584.00. RP 503:17-504:10 (R); CP 7158. The jury rejected all of Mockovak's claims. CP 7158-60. The trial court entered a final judgment, CP 7165-203, and an amended final judgment, CP 7422-26.

Mockovak filed a notice of appeal before the trial court denied his motion for a new trial. CP 7359-401, 7405-08. King timely filed a notice of cross appeal. CP 7427-34, 7435-503.

V. SUMMARY OF ARGUMENT

The overarching theme of Mockovak's appeal is that he did not receive a fair trial because of juror bias. Mockovak argues that he was unfairly prejudiced because King made references, during trial and in closing argument, to Mockovak's murder plot. But that plot was an essential – and stipulated – fact. It was that attempted murder, and the resulting arrest and conviction, that ended Mockovak's surgical career and partnership with King. The widespread publicity destroyed their practices. King had good reason to open a new practice under a new name. In this regard, Mockovak's crimes were an integral part of the story. There was nothing improper about telling that story to the jury.

Nevertheless, Mockovak accuses King of trying to play on the jurors' emotions. He ignores his own attempts to elicit juror sympathy. Among other things, his counsel showed a picture of his daughter, Marie Claire, during opening statements, while asserting that Mockovak was only trying to recover "what is fair ... as an inheritance for his daughter," the daughter who "just last month ... turned 10," and who has "spent half her life with her father in prison." RP 206:2-13 (R). Then, during trial,

Mockovak testified about getting to see Marie Claire for the “first time” in “years” and that he “miss[es] her every day.” RP 471:19-472:19 (G); CP 7017. He told the jury he was asking for his “share” of the businesses that he “co-owned at the end of 2009” because this was the “only way” he could “take care of” his daughter (despite the hundreds of thousands of dollars he has spent on this and other litigations). RP 507:12-17 (G).

He does not mention that his references to his daughter led the trial court to enter an order forbidding him from making further references to her and barring his counsel from showing more pictures of her during closing or arguing that Mockovak was pursuing his claims for her benefit. CP 7092-94. Nor does he mention the trial court’s expression of concern that Mockovak was “trying to slip in things that are irrelevant and prejudicial to gain emotional sympathy from the jury.” RP 576:21-24 (R).

In the end, the jury produced a verdict that awarded no damages to KMEC or Clearly Lasik, despite finding that Mockovak had breached his fiduciary duty to them. And it found that Mockovak had not proved his claims. Under these circumstances, and because Mockovak does not even try to argue that the record lacked substantial evidence to support the jury’s verdict, the Court should reject Mockovak’s appeal in its entirety.

On the other hand, the Court should reverse the trial court’s refusal to let King pursue his claim for damages for breach of the partnership

agreement and its denial of King's motion for leave to amend his pleading. The case should be remanded to the trial court for the limited purpose of letting King add a claim for breach of fiduciary duty and then go to trial to seek an award of damages on one or both of his claims of breach.

VI. ARGUMENT

A. **The Trial Court Erred by Dismissing King's Breach of Contract Damages Claims on Statute of Frauds Grounds.**

Whether a contract or covenant complies with the statute of frauds is a legal conclusion that this Court reviews de novo. *See, e.g., Dickson v. Kates*, 132 Wn. App. 724, 733, 133 P.3d 498 (2006).

In 2002, King and Mockovak entered into an oral partnership agreement to build an ophthalmological practice together: performing surgeries, contributing to the practice financially and through the performance of administrative functions, and sharing in the debts and profits, equally. RP 76:1-87:19, 263:19-265:23, 308:9-309:9 (G). They opened surgical clinics in Washington state and Canada, and later agreed to expand their practice by opening clinics in Wisconsin, Idaho, Oregon, and Nevada. RP 250:1-20 (R); RP 84:2-11 (G). To make this possible, Clearly Lasik and KMEC leased space, bought equipment, and paid clinic operating costs, sometimes using funds provided by bank loans and lines of credit that the partners personally guaranteed. RP 77:8-23, 81:14-21

(G). When King and Mockovak closed several of the non-Washington clinics, there were outstanding debts. RP 87:22-88:5 (G). At the time of Mockovak's arrest, the partners owed creditors approximately \$1.4 million, plus additional sums for unpaid bank loans and lease liabilities. RP 134:19-135:6 (G).

The partners also had contractual obligations to perform warranty surgeries. A patient who had eye surgery at a KMEC or Clearly Lasik clinic could buy a warranty, which obligated the practice to perform follow-up eye surgery or surgeries, if needed. RP 128:1-19 (G). When Mockovak was arrested and lost his license to practice medicine, the full burden to perform surgeries (including warranty surgeries) fell on King.

Mockovak breached the parties' partnership contract by (a) attempting to murder his partner, which rendered him unable to continue performing surgeries (including warranty surgeries) and administrative functions on the partnership's behalf, and (b) failing to pay his share of the partnership's debts after he was arrested. For these breaches, King put on evidence that he had sustained business-related damages of \$153,324 (for his payment of Mockovak's share of partnership debts, including warranty refunds) and warranty surgery-related damages of \$288,146 (for the cost of performing warranty surgeries on Mockovak's patients after his arrest). RP 131:7-21 (G); RP 485:7-487:9 (R). But the jury was not allowed to

consider these damages claims because the trial court erroneously granted Mockovak's CR 50 motion. CP 7083-85.

Before the close of King's case, Mockovak moved for dismissal of King's breach of contract claim, arguing that it was barred by the statute of frauds, RCW 19.36.010. CP 6252-72. The trial court denied the CR 50 motion as premature. CP 6296-98. When Mockovak renewed the motion at the close of King's case, the court granted the motion in part. CP 7083-85. It barred King from asking the jury for breach of contract damages, even though the jury was permitted to find, and did find, that Mockovak's crimes made it not reasonably practicable to carry on the business or that Mockovak had engaged in wrongful conduct that adversely and materially affected the partnership business. CP 7084-85, 7080-82, 7157. Mockovak now appeals the trial court's decision to allow King to pursue, in part, his breach of contract claim, and King cross appeals the barring of his claim for contract damages. While the trial court did not err by allowing the breach of contract claim to be presented to the jury, it was legal error to bar King from asking for damages resulting from the breach that the jury properly found.

1. The Oral Partnership Agreement Did Not Violate the Statute of Frauds Because It Was for an Indefinite Length of Time and Was Terminable at Will.

A partnership is an association of two or more persons to carry on as co-owners a business for profit. RCW 25.05.055(1). A “partnership at will” is a “partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking.” RCW 25.05.005(8). The evidence at trial showed that beginning in 2002, and continuing through the date of arrest, King and Mockovak agreed to open and jointly operate Lasik practices, in partnership, throughout the United States and Canada. As there was no evidence that King and Mockovak’s partnership was for a defined period of time or had an expiration date, it was a partnership at will.

The provision of the statute of frauds invalidating an oral agreement that by its terms is not to be performed within one year, has no application to an oral partnership that is for an indefinite length of time and terminable at will. *Malnar v. Carlson*, 128 Wn.2d 521, 534, 910 P.2d 455 (1996); *Davis v. Alexander*, 25 Wn.2d 458, 466, 171 P.2d 167 (1946). In such cases, Washington courts recognize that “if, by its terms, performance is possible within one year, however unlikely that may be, the agreement is not within the statute of frauds; and it is also legally immaterial that the actual period of performance exceeded one year.”

Malnar, 128 Wn.2d at 534, 910 P.2d 455 (citing John D. Calamari & Joseph M. Perillo, *Contracts* § 19-18 (3d ed. 1987)). Because King and Mockovak had an oral agreement for a partnership that was for an indefinite period of time and terminable at will, it was not within the statute of frauds.

Mockovak's argument to the contrary is based on his mischaracterization of the agreement at issue as being one for the payment of multi-year leases and the performance of warranty surgeries in the indefinite future. Br. at 38-42. According to Mockovak, because these alleged contract terms were not to be performed in one year, the entire partnership agreement was void. But this is a mischaracterization of the parties' agreement and of King's testimony at trial. As explained above, the original agreement was to develop a joint ophthalmological practice, *i.e.*, to perform Lasik surgeries at various locations and share in the profits and losses. There were later, ancillary agreements to stand behind corporate debts and perform warranty surgeries, but even if those debts stemmed from a multi-year obligation or the warranties were for patient lifetimes, the partnership agreement itself, with its sharing of partnership obligations, *still was for an indefinite term.*

Because the partnership could have ended at any time (through arbitration or otherwise), everything could have been completed within a

year.⁵ Thus, the trial court erred in holding that the statute of frauds precluded King from seeking breach of contract damages from Mockovak.

2. The Trial Court’s Refusal to Dismiss King’s Breach of Contract Claim Was Not Error and Did Not Harm Mockovak.

If an agreement “originally complies with the Statute of Frauds, that validity ‘passes through’ to subsequent modifications of the agreement” even if the subsequent modifications do not meet the statutory requirements. 25 Wash. Practice, *Contract Law and Practice* § 3:15, Westlaw (database updated Nov. 2015). Thus, for example, oral modifications to a written contract are considered valid and enforceable, and a writing evidencing the modification is not required. *See id.* Mockovak cites no decision where a contract modification that allegedly did not satisfy the statute of frauds rendered the original agreement void and unenforceable.

In this case, the original agreement between King and Mockovak to go into business together as partners did not violate the statute of frauds because it was for an indefinite term. When that agreement was subsequently modified to add provisions about being jointly responsible

⁵ Whether the underlying debts to creditors, including lease and warranty obligations, would have lasted for more than a year is irrelevant because they would no longer have belonged to the partnership. Moreover, those obligations were in writing. RP 79:16-81:17 (G); Ex. 33.

for corporate debts that King and Mockovak eventually agreed to take on (including leases and warranty surgeries), those modifications did not need to be in writing. Thus, the trial court did not err in letting at least part of King's breach of contract claim go to the jury.

Finally, even if there had been any error associated with letting the jury decide that King and Mockovak had been partners and that Mockovak's actions ended the partnership, the error would have been harmless. The jury did not award any damages for breach. And had King not pursued a breach of contract claim based on the partnership agreement, he still could have referred to their arrangement as a partnership, based on his own view of their relationship – a view that Mockovak shared, as evidenced by his admissions at trial, RP 263:19-265:23 (G), and the first sentence in his Statement of the Case: "Before November 12, 2009, Mockovak and King were business partners ...," Br. at 4.

No credence should be given to Mockovak's argument that it was reversible error to allow King's breach of contract claim to go forward. With or without that claim, King could have referred to their relationship as a partnership, and argued that Mockovak's actions were a betrayal of the partnership. Moreover, Mockovak did not move for summary judgment on King's contract claim; instead, he brought a CR 50 motion after almost all of the evidence about the partnership, including the

testimony and exhibits, already had been admitted.⁶ Under these circumstances, any error in letting King's breach of contract claim go to the jury was harmless. *See Blaney v. Int'l Ass'n of Machinists & Aerospace Workers*, 151 Wn.2d 203, 87 P.3d 757 (2004) (acknowledging an error is harmless when it is not prejudicial to the substantial rights of the parties and does not affect the final outcome of the case).

B. The Trial Court Abused Its Discretion When It Refused to Let King Amend His Pleading to Add a Breach of Fiduciary Duty Claim.

This Court reviews for abuse of discretion a trial court's decision to deny a party's motion for leave to amend its pleading. *See Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 165, 736 P.2d 249 (1987) (citing *Del Guzzi Constr. Co. v. Global Nw., Ltd.*, 105 Wn.2d 878, 888, 719 P.2d 120 (1986)).

Partners owe each other and the partnership fiduciary duties of loyalty and care. RCW 25.05.165(1); *Nord v. Shoreline Sav. Ass'n*, 116 Wn.2d 477, 805 P.2d 800 (1991). Breach of fiduciary duty sounds in tort, *see Dombrosky v. Farmers Insurance Co. of Washington*, 84 Wn. App.

⁶ Mockovak cites a number of instances in the record where he allegedly was prejudiced by King's use of the betrayal and partnership theme. Br. at 43. But nearly all of the cited instances occurred long before Mockovak brought his CR 50 motion. *See, e.g.*, RP 174:10-13, 186:16-19, 188:14-23, 300:12-14 (R).

245, 262, 928 P.2d 1127 (1996), and intentional torts support damages awards for emotional distress, *see Cagle v. Burns & Roe, Inc.*, 106 Wn.2d 911, 915-17, 726 P.2d 434 (1986).

Had King been permitted to add a claim for breach of fiduciary duty, King would have been entitled to seek damages for the emotional distress and other personal injuries caused by those breaches. The trial court's ruling deprived him of that opportunity even though a purpose of the rule governing the amending of pleadings, CR 15, is to "facilitate a proper decision on the merits." *See Herron*, 108 Wn.2d at 165, 736 P.2d 249 (quoting *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983)).

King's life was turned upside down when Mockovak was arrested. Overnight, the full burden of the surgical schedule fell on King, as did the entire responsibility for the practices' debts and contractual obligations. The resulting stress, both from the increase in workload and worry, and the deep sense of betrayal of the bonds of partnership (and of friendship and family), caused substantial physical and emotional injury to King.

The record shows (based on offers of proof) that since learning of the murder plot, King has suffered from sleep deprivation, developed chest pains and gastrointestinal problems, and lost a substantial amount of weight, and his marital relationship has suffered. CP 7504-15. He has had

to watch his children suffer through recurring nightmares and emotional problems. CP 7512. He has lost friends and contact with family members (his former sister-in-law and niece, *i.e.*, Mockovak's wife and daughter). CP 7513. He has lived with fear and worry for his family's safety, to the extent that he moved their home to Canada. CP 7507, 7513-14.

Under CR 15(a), leave to amend "should be freely given 'except where prejudice to the opposing party would result.'" *Id.* (quoting *Caruso*, 100 Wn.2d at 349, 670 P.2d 240); *see Sanwick v. Puget Sound Title Ins. Co.*, 70 Wn.2d 438, 445, 423 P.2d 624 (1967) (recognizing there should be liberal application of CR 15(a)'s mandate that "leave . . . shall be freely given when justice so requires"). There was no prejudice here and failure to allow the amendment deprived King of justice for the wrongs done by Mockovak.

1. Amendment Would Not Have Produced Unfair Surprise.

Unfair surprise is one of the factors a trial court may consider when determining whether an amendment would prejudice the opposing party. *Herron*, 108 Wn.2d at 165-66, 736 P.2d 249. There would have been no unfair surprise had King been permitted to add a claim for breach of fiduciary duty. First, the claim arose out of the occurrences already described in KMEC and Clearly Lasik's original complaint and in King's

earlier pleadings. *See* CP 01-09, 2419-28. Second, Mockovak already was facing a breach of fiduciary duty claim (brought by KMEC and Clearly Lasik) and a claim for breach of his partnership contract with King. Third, because King had pursued a Section 870 claim, Mockovak had deposed King with respect to his claim for personal injury, including emotional distress, and had received thousands of pages of documents supporting King's damages claims for personal injuries and business injuries.

2. Amendments Are Properly Allowed at Any Stage, Absent Prejudice to the Opposing Party.

Under Washington law, "timeliness alone, without more, is generally an improper reason to deny a motion to amend." *Quality Rock Prods., Inc. v. Thurston County*, 126 Wn. App. 250, 273, 108 P.3d 805 (2005); *see also Caruso*, 100 Wn.2d at 349, 670 P.2d 240 (observing that "delay, excusable or not, in and of itself is not sufficient reason to deny" a motion for leave to amend). Amendments are properly allowed at any stage of the case, when there exists no prejudice to the opposing party. *Hendricks v. Hendricks*, 35 Wn.2d 139, 148, 211 P.2d 715 (1949).

King filed his motion for leave to amend soon after the trial court granted Mockovak's summary judgment motion on King's Section 870 claim, and more than a month before trial. Filing a motion for leave to

amend several weeks in advance of trial is not prejudicial, especially when the claim arises out of occurrences that have been part of the case from the very beginning. *See Caruso*, 100 Wn.2d at 350, 670 P.2d 240 (upholding addition of a defamation claim after acknowledging that “courts have allowed amendments to complaints made 5 or 6 years after the filing of the original complaint” and observing that the original complaint contained a paragraph giving petitioner notice of a possible defamation issue).

Under these circumstances, and in light of the magnitude of the personal injuries Mockovak caused by his outrageous misconduct, the trial court abused its discretion when it refused to allow King to amend his pleading, depriving King of any personal remedy. Had the court allowed King’s pleading to be amended, it is likely the jury would have (a) found in King’s favor on his breach of fiduciary duty claim (as it did for KMEC and Clearly Lasik), and (b) awarded damages to King in light of the substantial resulting injuries.

C. The Trial Court Committed No Abuse of Discretion When It Denied Mockovak’s Motion to Bifurcate.

A trial court’s decision to bifurcate a trial is reviewed for abuse of discretion. *Johnson v. Recreational Equip., Inc.*, 159 Wn. App. 939, 957, 247 P.3d 18 (2011). “A discretionary decision or order of the trial court

‘will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’” *Angelo v. Angelo*, 142 Wn. App. 622, 639, 175 P.3d 1096 (2008) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). The appellant bears the burden of proving an abuse of discretion was committed. *See Hernandez v. Stender*, 182 Wn. App. 52, 58, 358 P.3d 1169 (2014).

1. The Trial Court Was Not Required to Decide One Issue Separately from the Other Issues in the Case.

Contrary to his earlier demand to have a jury decide “all claims and issues” in the case, CP 7779-81, Mockovak one week before trial filed a bifurcation motion demanding that the Court and not the jury should determine the fair value of his cancelled KMEC shares, while the “remaining issues” would be tried to the jury, CP 5919-22. The remaining issues included Mockovak’s claims for constructive trust, conversion, unjust enrichment, breach of fiduciary duty, conspiracy, and fraud, as well as King’s breach of contract claim and KMEC and Clearly Lasik’s breach of fiduciary duty claim, and all the issues associated with the parties’ claims. CP 894-918, 2413-18.

When issues or claims may be bifurcated for trial is governed by CR 42(b), which provides that “in furtherance of convenience or to avoid

prejudice, or when separate trials will be conducive to expedition and economy,” a trial court “*may* order a separate trial of any claim, cross claim, counterclaim, or third party claim, or of any separate issue or any number of claims, cross claims, counterclaims, third party claims, or issues, always preserving inviolate the right of trial by jury.” CR 42(b) (emphasis added).

Rule 42(b) is not “a rule that calls for or properly lends itself to a liberal or indiscriminate application.” *Brown v. Gen. Motors Corp.*, 67 Wn.2d 278, 282, 407 P.2d 461 (1965). Rather, it is a rule that “should be carefully and cautiously applied and be utilized only in a case and at a juncture where informed judgment impels the court to conclude that application of the rule will manifestly promote convenience and/or actually avoid prejudice.” *Id.* This is particularly true “where the issues of liability and damages are generally interwoven and the evidence bearing upon the respective issues is comingled and overlapping.” *Id.*

Mockovak did not argue below, and does not contend here, that bifurcation would have furthered convenience or been conducive to expedition and economy. He can make no such argument because one of the fundamental issues in dispute was whether, as King contended, KMEC was essentially destroyed in late 2009, or whether, as Mockovak contended, KMEC was still a going concern as of January 2011. This

factual issue was critical to both the valuation of KMEC shares *and* Mockovak's claims for conversion, unjust enrichment, and constructive trust (as well as the parties' cross claims for breach of fiduciary duty). The parties' experts testified at trial as to their opposing views on this question,⁷ and had the court granted the bifurcation motion, this testimony would have had to be presented twice.

Moreover, there would also have had to have been duplication of testimony by King and Monea, for their testimony provided support and context for their expert's opinion that KMEC was not a going concern after the end of 2009. The expert and lay testimony was relevant to interwoven issues of liability and damages for all the claims at issue, and explains the trial court's comment at the conclusion of the trial: "By the

⁷ King's expert testified that the fair value of the cancelled KMEC shares should be determined based on KMEC's liquidation value, given that KMEC could not continue after Mockovak's arrest and the resulting deluge of adverse publicity, and the company's lack of income due to discontinuation of its surgical practice. RP 494:14-507:7 (R). Contrary to Mockovak's arguments, King did not ask the jury to award him nothing "for the simple reason that [he] stood convicted of attempted murder," Br. at 17; rather, King's expert explained how he valued the KMEC shares in light of well-accepted valuation principles and determined that they had a negative value, RP 494:14:-507:7 (R). Mockovak's expert, on the other hand, testified that the fair value of the shares should be determined by treating KMEC as a going concern because King Lasik was just a continuation of KMEC. RP 607:19-25 (R); RP 564:12-25 (G). The concept of King Lasik as a mere continuation of KMEC was integral to Mockovak's conversion, unjust enrichment, and constructive trust claims. RP 825:16-826:2, 832:19-833:11 (R); CP 894-918.

way, I have no idea how that could be a separate bifurcated phase now when I have seen all of the evidence.” RP 683:5-7 (R).

2. This Was Not an Action Brought Under RCW 23B.13.300; Rather, the Issue of Fair Value Was Raised Only as One of Many Issues and Claims in Dispute.

Completely ignoring CR 42(b), his own jury demand, and his previous argument that the “jury will have to decide ... how the business should be valued,” CP 3392,⁸ Mockovak argues that the trial court erred by not taking the issue of the fair value of his cancelled KMEC shares away from the jury and deciding it in a separate appraisal proceeding. Br. at 11-16. Mockovak focuses his argument on RCW 23B.13.300 and ignores that he had not initiated a dissenter’s rights action. Rather, the issue of the fair value of his cancelled shares in KMEC arose only because he lost his battle against the cancellation of those shares. And it arose in the context of a lawsuit that involved several legal and equitable claims brought by both sides.

Under Washington law, when an action presents both legal and equitable issues, the trial court has wide discretion to allow a jury to

⁸ Mockovak also takes out of context King’s statement that this “is not a jury issue.” Br. at 16. King was arguing that Mockovak’s claims for “money loaned, surgical services performed,” etc., should be dismissed instead of being sent as separate claims to the jury because, under *Sound Infiniti*, they would be addressed as part of the determination of the fair value of Mockovak’s cancelled KMEC shares. See CP 3075-76.

decide some, none, or all issues presented. *Brown v. Safeway Stores, Inc.*, 94 Wn.2d 359, 367, 617 P.2d 704 (1980). Here, the court decided to allow the jury to decide all issues presented. This was in keeping with Mockovak's own demand that the jury decide "all claims and issues" in the case. CP 7779-81. Further, even if Mockovak were right in arguing that a fair value determination in a dissenter's rights *action* is to be made by a judge instead of a jury (although no Washington decision so holds),⁹ he has cited no authority for the proposition that when a fair value determination is only one of many issues presented in a case, that issue must be decided by the court separately from, and before, all the other issues and claims going to the jury.¹⁰ The Court should reject this

⁹ Mockovak cites *EagleView Technologies, Inc. v. Pikover*, 192 Wn. App. 299, 365 P.3d 1264 (2015), and *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 331 P.3d 40 (2014), for the proposition that "the court" makes the valuation decision in a dissenter's rights action, Br. at 15, without acknowledging that in both cases, it was not a question of whether a judge or jury could make the decision, but whether the decision could be made by an expert witness. See *SentinelC3*, 181 Wn.2d at 142, 331 P.3d 40 ("Respondents are correct that the court, rather than any expert witness, makes the ultimate valuation decision in a dissenter's rights action."); *EagleView*, 192 Wn. App. at 308, 365 P.3d 1264 (citing *SentinelC3* for the proposition that it is the court, and not an expert witness, that makes the ultimate valuation decision).

¹⁰ Mockovak argues that his claim of error is based on "interpretation" of RCW 23B.13.300, and therefore the standard of review should be de novo. Br. at 11. Cf. *EagleView*, 192 Wn. App. at 306-07, 365 P.3d 1264 (making a similar argument). But the real issue is not the statutory interpretation question, but rather, whether the trial court erred (...continued)

proposition, as it is contrary to both CR 1, which mandates administration and construction of the court rules “to secure the just, speedy, and inexpensive determination of every action,” and CR 42(b), which vests the trial court with broad discretion.

D. The Trial Court Properly Refused to Dismiss Jurors for Cause After They Indicated They Could Impartially Follow the Law.

This Court reviews for abuse of discretion a trial court’s decision whether to dismiss a juror “for cause.” *Hough v. Stockbridge*, 152 Wn. App. 328, 340, 216 P.3d 1077 (2009). When a “for cause” challenge is based on alleged bias, the trial court must determine “whether a juror with preconceived ideas can set them aside’ and decide the case on an impartial basis.” *State v. Grenning*, 142 Wn. App. 518, 540, 174 P.3d 706 (2008) (quoting *State v. Noltie*, 116 Wn.2d 831, 839, 809 P.2d 190 (1991)), *aff’d*, 169 Wn.2d 47 (2010). The trial court “is in the best position to address this question because it has the ability to evaluate factors outside the written record such as a juror’s demeanor and conduct.” *Id.* at 540, 174 P.3d 706.

(...continued)

when it denied Mockovak’s motion for bifurcation – and that question is reviewed for abuse of discretion. The Court should reject Mockovak’s attempt to have it apply the wrong standard of review.

After disclosing Mockovak's conviction for attempted murder during *voir dire*, Mockovak's counsel asked the jury pool:

If the crime in this case is attempted murder of the other business person in this business dispute, would you have difficulty being fair in resolving the business dispute in favor of the person who sits in prison?

RP 122:16-20 (R). Many of the potential jurors raised their cards, and Mockovak challenged all of them for cause. RP 124:20-125:7 (R).

Mockovak assigns error to the trial court's refusal to grant his challenge, but fails to inform the Court of the inquiry that followed his challenge:

MR. GOODNIGHT [King's counsel]: Now, if Judge Chun instructs you that in this case there is evidence of serious intentional criminal misconduct against Dr. King, but he also instructs you that as officers of the court, it is your duty to follow the law in a fair and impartial way, doesn't mean that you don't hold someone accountable. It means that you follow the law. Would you be able to follow the instructions of the court? Raise your cards if you agree?

THE COURT: For the record, it looks like virtually everyone is holding up their cards, but I am not sure.

MR. GOODNIGHT: I will ask the reverse question for that reason, Your Honor. Is there anyone who says "I don't think that I could follow the judge's instructions under circumstances where one of the parties to a civil dispute was suing for money has committed a crime as serious as attempted murder in the first degree. I cannot follow the judge's instructions"? Anyone who says that they can't follow the instructions of the court? Now, is there a --

THE COURT: For the record, I don't think that any one raised their card.

RP 131:4-132:4 (R).

King's counsel also specifically asked Juror 3 questions about his ability to follow the law:

I mean, it is a fact of the case that Mr. Mockovak is convicted of attempted murder in the first degree, and some other crimes. Do you believe that you can hear all of the evidence in the case, which will come through exhibits and witnesses and consider the instructions given by Judge Chun and follow the law including the fact of the conviction?

RP 148:10-17 (R). When Juror 3 responded, "I can follow the law, but I have a bias," RP 148:18 (R), he was excused for cause without objection from King. RP 149:1-10 (R). Mockovak's counsel then asked the remaining juror pool if anyone agreed with Juror 3. RP 150:22-151:1-17 (R). No other potential juror agreed with Juror 3. RP 151:15-17 (R).

The trial court also asked the juror pool the following questions:

THE COURT: Would you please raise your cards for me, if based on everything that you have heard thus far, you simply feel that you cannot be fair and impartial in this case? Now I will ask it another -- nobody has raised their card. I am ask it another way. You are required to be fair and impartial. Based what you have heard, including about the conviction, do you feel that you simply cannot be fair and impartial in this case? If so, please raise your card. All right. Next question. No one raised their cards.

RP 149:19-150:5 (R).

Thus, the jurors were asked a number of questions designed to determine whether they could try the issues impartially and without prejudice to Mockovak. Based on the responses to those questions, and the trial court's observations of the jurors as they gave those responses, the trial court ultimately denied Mockovak's challenge. Accordingly, this Court should deny Mockovak's request for a new trial based on alleged juror bias.

E. The Trial Court Properly Rejected Mockovak's Proposed Additional Jury Instructions.

A trial court's decision whether to give a particular instruction to the jury is reviewed "only for abuse of discretion." *Stiley v. Block*, 130 Wn.2d 486, 498, 925 P.2d 194 (1996); *Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wn. App. 35, 44, 244 P.3d 32 (2010), *aff'd*, 174 Wn.2d 851 (2012). "Refusal to give a particular instruction is an abuse of discretion only if the decision was 'manifestly unreasonable, or [the court's] discretion was exercised on untenable grounds, or for untenable reasons.'" *Anfinson*, 159 Wn. App. at 44-45, 244 P.3d 32 (quoting *Boeing v. Harker-Lott*, 93 Wn. App. 181, 186, 968 P.2d 14 (1998)). The abuse of discretion standard also applies to questions about the specific wording of proffered instructions. *Bodin v. City of Stanwood*, 130 Wn.2d 726, 732, 927 P.2d 240 (1996).

Mockovak argues incorrectly that the Court reviews de novo a trial court's failure to give an instruction "that correctly states the law." Br. at 26. His argument is based on a misreading of *Griffin v. W. RS, Inc.*, 143 Wn.2d 81, 18 P.3d 558 (2001). The *Griffin* court said that jury instructions are reviewed de novo to determine if they correctly state the law, 143 Wn.2d at 87, 18 P.3d 55, but it said nothing about the standard of review applicable to a trial court's refusal to give an instruction, *see Terrell v. Hamilton*, 190 Wn. App. 489, 498, 358 P.3d 453 (2015) (rejecting the same argument, stating: "Whether a jury instruction reflects an accurate statement of the law is reviewed de novo. But a trial court's decision ... whether to give a particular instruction is reviewed for an abuse of discretion." (citation omitted)).

Jury instructions are sufficient if they are supported by the evidence, permit each party to argue its theory of the case, do not mislead the jury, and, when read as a whole, properly inform the jury of the applicable law. *Fergen v. Sestero*, 182 Wn.2d 794, 803, 346 P.3d 708 (2015). "No more is required." *Anfinson*, 159 Wn. App. at 44, 244 P.3d 32. Thus, "[i]f a party's theory of the case can be argued under the instructions given as a whole, then a trial court's refusal to give a requested instruction is not reversible error." *Id.* at 45, 244 P.3d 32; *accord Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 120, 323

P.3d 1036 (2014) (refusing to overturn jury verdict when jury instructions, as a whole, accurately stated the law, allowed both sides to argue their theory of the case, and were not misleading).

At issue here are two jury instructions that the trial court refused to give. One related to Mockovak's crimes. Mockovak asked that the jury be instructed:

The Court has ruled and the parties have stipulated that Dr. Mockovak's crimes are facts for purpose[s] of this civil trial. Because Dr. Mockovak may not challenge those facts for purposes of this civil trial, you should disregard any argument or testimony regarding the criminal events to which he has not been permitted to respond that are not contained in the parties' stipulation, which is Trial Exhibit 19.

CP 7589.

Mockovak argues that the trial court should have given this instruction because he "was not permitted to challenge his [criminal] convictions" during the trial and was "prejudiced" by having to answer questions "designed to put [him] in an embarrassing position" with respect to aspects of his crimes. Br. at 22-23. This argument is not well-taken for at least three reasons.

First, Mockovak *did* challenge his criminal convictions when he told the jury that he was accepting "for the purposes of this trial there was an attempted murder of Dr. King that took place that was ruled by a court of law to have been something that I committed," RP 249:11-14 (G), but

that he was “disputing the conviction outside of [the] four walls” of the courtroom, RP 250:5-6 (G). He reiterated his “walls of this courtroom” concept several times. *See* RP 199:22-25, 249:10-14, 249:19-24, 250:12-17 (G). The trial court recognized that with this testimony, Mockovak was suggesting that he was not guilty of the crimes he had committed. RP 282:7-285:14 (G).¹¹

Second, had the questioning of Mockovak been so improper that a curative instruction was warranted, one would expect that many objections would have been raised. But, in fact, only one objection was raised during the whole examination of Mockovak. After the matter was discussed at sidebar, the objection was sustained and the trial court struck the question. RP 277:24-278:5 (G). The absence of any other objections refutes the argument that the proposed instruction was necessary.

Third, the last sentence of the proposed instruction is confusing and misleading, particularly in light of the fact that Mockovak did challenge his conviction. The jury would not have known what the

¹¹ The trial court also recognized that Mockovak was trying to use the court’s orders to avoid answering whether he agreed that his attempt to steal the proceeds of the \$4 million life insurance policy on King’s life was a breach of his fiduciary duty, a question the court said was not “inappropriate,” and to which Mockovak’s counsel had not objected. RP 284:23-285:10 (G). The trial court rejected the proposed instruction at least in part because Mockovak was trying to play both sides of the fence. *See id.*

“criminal events” were to which a response had “not been permitted....”

For all of these reasons, the trial court committed no abuse of discretion when it refused to give the requested instruction.

The same conclusion applies to the second instruction at issue.

Mockovak’s proposed instruction no. 5 read as follows:

Mockovak has been convicted of crimes which will be accepted as fact for purposes of this trial. The Washington Constitution’s Declaration of Rights provides that “[n]o conviction shall work a corruption of the blood nor a forfeiture of the estate.” Mockovak seeks to recover damages and the value of his share of the Clearly Lasik® business, which are part of his “estate.” You may consider whether Mockovak’s conviction had any effect on the value of his “estate,” but you may not, under the Washington Constitution’s Declaration of Rights, conclude that he “forfeited” his estate by virtue of his conviction.

CP 5633; Br. at 26-28.

This instruction suffered from several flaws. The first sentence was ambiguous and confusing. Mockovak *was* convicted of crimes – that is an undisputable fact, not something that was accepted as fact just “for purposes of this trial.” The parties’ stipulation went to the facts underlying the conviction, not the conviction itself. Ex. 19. The third sentence was misleading in suggesting that “damages” were part of Mockovak’s “estate.” A cause of action may have been part of the estate, but whether Mockovak was entitled to damages was disputed. Further, the last sentence was more a matter of argument than a statement of applicable

law, as the trial court observed. RP 677:25-678:5 (R) (refusing to give the instruction because it was “odd,” “irregular,” “could cause confusion for the jury,” and was in “the realm of argument”). The trial court had no obligation to give an argumentative or misleading instruction. *See, e.g., Watson v. Hockett*, 107 Wn.2d 158, 163, 727 P.2d 669 (1986) (modern jury instruction practice is aimed at “avoid[ing] slanted or argumentative instructions”); *State v. Rehak*, 67 Wn. App. 157, 165, 834 P.2d 651 (1992) (trial court is not obliged to give misleading instructions). In any event, the absence of the instruction did not stop Mockovak from referring to the constitutional provision during *voir dire* and in closing. *See* RP 119:4-120:11, 135:4-8, 811:25-812:8 (R).

The refusal to give the instructions did not prevent Mockovak from presenting all of his claims and arguing his theory of the case to the jury. For this reason and all of the reasons discussed above, the trial court committed no reversible error when it rejected the proposed instructions.

F. The Trial Court Properly Denied Mockovak’s Motion for a New Trial Based on Alleged Jury Nullification.

1. There Was No Misconduct, nor Was There Any Timely Objection to the Alleged Misconduct.

After trial, Mockovak brought a motion under CR 59(a)(2) arguing, among other things, that he was entitled to a new trial because King’s counsel committed misconduct by inviting the jury to nullify the

trial court's instructions. CP 7205-09. The trial court denied the motion. CP 7405-07. This Court reviews the denial for an abuse of discretion, *see Aluminum Co. of Am. v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 537, 998 P.2d 856 (2000), recognizing that "[t]he trial court is in the best position to most effectively determine if counsel's misconduct prejudiced a party's right to a fair trial," *Miller v. Kenny*, 180 Wn. App. 772, 815, 325 P.3d 278 (2014).

When, as here, the request for a new trial is based on alleged prejudicial misconduct, the party seeking the new trial has to prove that the conduct complained of actually constituted misconduct (and not mere aggressive advocacy) and that the misconduct was prejudicial in the context of the entire record. *Aluminum Co.*, 140 Wn.2d at 539, 998 P.2d 856; *accord Miller*, 180 Wn. App. at 814, 325 P.3d 278. The party complaining must have properly objected to the misconduct at trial and the misconduct must not have been cured by court instructions. *Aluminum Co.*, 140 Wn.2d at 539, 998 P.2d 856.

Misconduct alleged to have occurred during closing argument must have "materially affect[ed] the substantial rights of the moving party," and must have been objected to at the time. *Sommer v. Dep't of Soc. & Health Servs.*, 104 Wn. App. 160, 170-71, 15 P.3d 664 (2001) (citation omitted). "[A]bsent an objection to counsel's remarks, the issue of

misconduct cannot be raised for the first time in a motion for a new trial unless the misconduct is so flagrant that no instruction could have cured the prejudicial effect.” *Id.* at 170-71, 15 P.3d 664 ¹²

Here, as in *Sommer* and *Miller*, no contemporaneous objections were made. And here, as in *Sommer* and *Miller*, nothing occurred during closing that remotely approached the “flagrant” misconduct standard. *See id.* (finding no flagrant misconduct after counsel for defendant verbally attacked opposing counsel during closing); *Miller*, 180 Wn. App. at 815-17, 325 P.3d 278 (concluding that argument did not invite jury to decide case on basis of jurors’ self-interest).

In this case, if the entire closing argument is read and the cited excerpts placed in context, it is apparent that King’s counsel was engaged in nothing more than zealous advocacy, and frequently was merely countering Mockovak’s themes. For example, while Mockovak argues that counsel “told the jury to require Mockovak to pay debts of the business (RP 795:3-5 (R)),” Br. at 34, that is not what was said. Rather,

¹² The trial court’s instructions informed the jury that statements made by lawyers are not evidence, CP 7120, and required the jury to disregard any testimony that the trial court had directed them to disregard, CP 7119-20. During the trial, the court had specifically instructed the jury that emotional distress damages were not a part of the case. RP 164:21-165:2 (G). “Jurors are presumed to follow the court’s instructions.” *Terrell*, 190 Wn. App. at 504, 358 P.3d 453.

the rhetorical statement about what “would be fair” was made in response to Mockovak’s opening statement and trial testimony suggesting that all *he* wanted out of the case was what was “fair.” Similarly, while Mockovak complains about the request for the jury to put an end to the litigation “ordeal” and provide “closure” to King, Br. at 34, he ignores that this was relevant to King’s request for the jury to determine that Mockovak had made it not reasonably practicable to carry on the partnership, *see* CP 7157. Also, there is nothing wrong with pointing out that Mockovak’s claims of fraud, conspiracy, conversion, and unjust enrichment had been hanging over King’s head for several years and it was time for those claims to be resolved.

Finally, Mockovak mischaracterizes the so-called “grand finale” to King’s closing argument. Br. at 34-35. He argues that counsel “in effect told the jury to ignore the court’s instructions and decide the case based on ‘matters of the heart.’” Br. at 34. But, in fact, counsel actually told the jury exactly the opposite, acknowledging that the legal system “can’t deal with matters of the heart,” but it “can do justice.” RP 803:18-804:3 (R). And he asked the jury to “render a verdict that is just.” RP 804:8-10 (R). Counsel did not tell the jurors to ignore the evidence. He asked only for a verdict that is just.

2. The Alleged Misconduct Had No Prejudicial Effect.

Counsel for King did not invite jury nullification, but even if they had, there is absolutely no evidence that the jury actually was nullified. “Nullification is a juror’s knowing and deliberate rejection of the evidence or refusal to apply the law because the result dictated by law is contrary to the juror’s sense of justice, morality, or fairness.” *State v. Nicholas*, 185 Wn. App. 298, 301, 341 P.3d 1013 (2014). For example, in a criminal case, “[j]ury nullification occurs in a trial when a jury acquits a defendant, even though the members of the jury believe the defendant to be guilty of the charges.” *Id.* at 301, 341 P.3d 1013.

Here, the jury did not award KMEC, Clearly Lasik, or King any damages. Had jury nullification occurred as Mockovak contends, there would have been a different outcome. The mere fact that the jury concluded Mockovak breached his fiduciary duty to KMEC and Clearly Lasik, and rendered the partnership impracticable to carry on, is not indicative of nullification. It would have been surprising had the jury *not* reached this conclusion given Mockovak’s incarceration and the stipulated evidence of his misconduct. Finally, the fact that Mockovak failed to prevail on his fraud, conspiracy, constructive trust, conversion, unjust enrichment, and breach of fiduciary duty claims is not indicative of nullification – Mockovak does not contend that there is not substantial

evidence supporting the jury's verdict. Thus, there is no basis to conclude that the jury committed a knowing and deliberate rejection of the evidence or refusal to apply the law.

G. Mockovak Failed to Prove He Was Entitled to \$200,000.

Mockovak's final argument on appeal is that he is contractually entitled to a \$200,000 "share" of the \$400,000 payment made by LASIK MD for waiver of a non-compete promise. Br. at 44-46. Mockovak treats this as a contract interpretation issue, wholly ignoring that he never brought a claim for breach of contract. CP 894-918. This Court should decline to review a claim not raised below. *See* RAP 2.5(a).

Mockovak did assert a claim of entitlement under alternative theories of conversion, unjust enrichment, and constructive trust. *See, e.g.*, CP 915, 719, 7134, 7146. When the jury rejected these theories, he brought a CR 59 motion arguing that the trial court should "vacate the jury's verdict denying Dr. Mockovak's unjust enrichment claim of \$200,000 for his share of the non-compete waiver." CP 7209 (capital letters modified to lowercase). The trial court's denial of that motion is reviewed for abuse of discretion. *See Lian v. Stalick*, 106 Wn. App. 811, 824, 25 P.3d 467 (2001).

There was no abuse of discretion. The \$400,000 payment was for waiver of a promise not to compete within a 75-kilometer radius of

Victoria, British Columbia. Exs. 130, 131. At the time the waiver was accepted and the payment made, Mockovak was in prison so competition was not an issue. Exs. 18, 19, 131. Moreover, he had never been licensed to work or practice medicine in Canada and King was and always had been the sole owner of the Canadian corporation that owned and operated the eye surgery practice in Victoria. RP 218:10-13 (G); RP 255:4-8 (R). Given this evidence, it is understandable that the jury rejected Mockovak's claims that King had committed conversion or been unjustly enriched.

VII. CONCLUSION

This Court should affirm the judgment insofar as it reflects the denial of all of Mockovak's claims. This Court should also reverse the judgment in part, and remand the matter to the trial court for the limited purpose of allowing King to add a breach of fiduciary duty claim and pursue an award of damages based on that claim and on his claim for breach of contract.

Respectfully submitted this 19th day of August, 2016.



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