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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 95921-8

(Court of Appeals Cause No. 75847-1-I)

LUCAS PRICE,

Petitioner,

v.

DANIEL PRICE,

Respondent.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Plaintiff/Appellant Lucas Price ("Lucas") is the Petitioner.

II. CITATION TO COURT OF APPEALS DECISION

Lucas seeks review of the April 30, 2018, unpublished decision (the "Decision") of the Court of Appeals, Division 1 ("Court of Appeals"), affirming (1) the trial court's order striking Lucas's jury demand and (2) the trial court's findings of fact and conclusions of law. The Decision is attached hereto as **Appendix A**, and cited herein as "Op."[1]

III. INTRODUCTION

This lawsuit arose from the self-interested actions of Defendant/Respondent Daniel Price ("Daniel") and his disloyal treatment of his brother Lucas while acting as the majority shareholder, controlling director, and chief executive of Gravity Payments, a closely held company co-founded and co-owned by the brothers. Among other things, Lucas objected to Daniel's improper use of company funds for personal expenses and outsized executive compensation. *See* RP 265:10-266:10 (6/1). Lucas also challenged Daniel's taking of a stock award that diluted Lucas's share of the company. RP 365:3-371:2 (6/1); *see* RP 253:24-254:16, 256:2-257:21 (6/1). In response, Daniel increasingly marginalized and excluded

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[1] Appellant's *Corrected* Brief is cited herein as "App. Br." And Appellant's Reply Brief is cited as "Reply Br." Respondent's Brief is cited as "Resp. Br." The Appendix to Appellant's *Corrected* Brief is cited as "App." The Report of Proceedings is cited as "RP." The Clerks Papers are cited as "CP." The Designation of Trial Exhibits is cited as "Ex."

Lucas, whom Daniel deemed a "cancer" to the company. Ex. 9.

Ultimately, Lucas filed a complaint and jury demand alleging three operative causes of action. CP 3-4, 11.[2] Two of the causes of action—breach of contract and of fiduciary duty—were legal in nature and remedy, seeking damages caused by Daniel's actions. CP 3-4. *Infra* § VI.B. The third cause of action—minority shareholder oppression—presented as a mixed legal and equitable claim because Lucas sought direct damages and asked the court to consider a compelled minority shareholder buyout.

On the eve of trial, Daniel asked the court to strike the jury, arguing (1) the breach of contract and breach of fiduciary duty claims were not operative, independent legal claims, (2) the lawsuit "primarily" sought the equitable remedy of a forced buyout because the monetary value of that remedy exceeded the other claims, (3) the equitable and legal issues could not easily be separated, and (4) the equitable issues would affect the orderly determination of legal issues. CP 11, 346, 385. Daniel's analysis was wrong on each point, mischaracterizing the facts and misapplying Washington law. CP 368; App. Br. 27-28, 35-41. In fact, the only genuine issue to be resolved under *Brown v. Safeway Stores,* 94 Wn.2d 359, 617 P.2d 704 (1980), was how to handle the equitable relief of

[2] The original complaint actually stated four causes of action, but one was dismissed by the trial court at summary judgment when all parties agreed that the "cause of action" was a remedy rather than a standalone cause of action. CP 324-26.

a minority shareholder buyout. On that issue, Lucas proposed the readily apparent answer: The jury would resolve the legal claims, and then the trial judge—informed by the jury's findings—would decide the requested buyout remedy after dismissing the jury. CP 377.

The trial court erred when it adopted Daniel's flawed reasoning and struck the jury. App. 129-33. It ignored the constitutional imperatives that the jury trial right is (1) "deserving of the highest protection" and (2) strongest in "guarantee[ing]" a jury "to determine the amount of damages in a civil case." *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711 (1989). The court also cast aside the rules stated in *Brown* that (1) "great weight should be given to the constitutional right of trial by jury and if the nature of the action is doubtful, a jury trial should be allowed" and (2) the court should "determin[e] . . . whether or not a jury trial should be granted on all *or part* of such issues." 94 Wn.2d at 368 (emphasis added).

On appeal, the Court of Appeals correctly recognized that the trial court committed a key analytical error in applying the *Brown* factors: Lucas's breach of contract and breach of fiduciary duty claims were, as Lucas argued below, direct legal claims for millions of dollars in damages. Op. 5. Having recognized the trial court's legal analysis was improper, it was incumbent on the Court of Appeals to either remand or re-weigh the

Brown factors. It did neither. Instead, the Court of Appeals superficially concluded that the trial court did not abuse its discretion by finding that the equitable claim "predominated." In doing so, the Court of Appeals apparently fell into the same trap as the trial court: It set aside a rigorous *Brown* analysis (particularly factors six and seven), and instead focused on whether the equitable remedy sought by Lucas was larger in dollar value than Lucas's damages claims. *See* Op. 5-7. The Constitution and *Brown* require more. To afford the jury trial right the "highest protection," this Court must intervene.

Additionally, over the course of the eleven-day bench trial, Lucas presented unrebutted evidence of Daniel's liability for abuse of his fiduciary position. For example. Daniel admitted during examination that he used the company to fund at least tens of thousands of dollars-worth of personal expenses. RP 200:3-7 (6/1). Those admissions—which were supported by myriad other evidence at trial (*infra* § V.A)—establish a breach of fiduciary duty and contract, for which remedy is due. *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 511-12, 728 P.2d 597 (1986). The law is also clear that Daniel's admissions entitle Lucas to an accounting of Daniel's use of company funds to discern further proper from improper expenses. *Id.* Yet, the courts have denied Lucas such relief. The Supreme Court must intervene to correct these errors too.

IV. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals err in affirming the trial court's decision to deprive Lucas of his jury trial right on his multi-million dollar legal claims where Lucas's request for equitable relief could have been determined by the court after a jury resolved the legal claims?

2. Does the Court of Appeals' application of the *Brown* factors to deny Lucas's jury trial right on these facts require this Court to clarify and restate this essential constitutional standard?

3. Does the Court of Appeals' denial of relief for admitted and unrebutted breaches of fiduciary duty and contract require reversal?

V. STATEMENT OF THE CASE

A. Daniel Admittedly Violates His Contractual and Fiduciary Duties, Leaving Lucas No Choice But to Sue

In 2004, Lucas and his brother Daniel formed a merchant services and credit card processing company called Gravity Payments. The brothers originally operated the company as partners. RP 239:9-25 (6/1). Yet, over time, that equilibrium broke down. *See* Ex 9. Daniel pushed for and attained control over day-to-day management (Ex 502; RP 243:10-244:1 (6/1)), and Lucas stepped back (RP 246:7-21 (6/1)).

On May 28, 2008, the brothers reorganized their relationship and the structure of the company through a series of interconnected agreements, including an Employment Agreement for Daniel

(“Employment Agreement”) (Ex 10) and a Shareholders Agreement between Lucas and Daniel (“Shareholders Agreement”) (App. 1), which incorporated the Employment Agreement. It is undisputed that, through these agreements, Lucas gave up a share of his ownership and day-to-day management at the company in return for a modest cash buyout and certain corporate and contractual protections. Daniel obtained managerial control and majority ownership of the company, but also assumed the duties of a controlling officer and shareholder.

The Shareholders Agreement protected Lucas’s minority shareholder rights in a number of ways. First, it limited Daniel’s right to issue himself stock compensation except in the case of extraordinary company growth. App. 29-30 ¶ 6.4.1. Before a stock award could be granted, the Shareholders Agreement required a “valuation” by an appraiser to “determine fair market value” “as of the close of each business year” to prove the extraordinary growth.

Second, by incorporating the Employment Agreement (App. 36 ¶ 7.16), the Shareholders Agreement required Daniel to use company funds “solely for authorized business expenses of Gravity.” Ex 10 ¶ 5.1. Daniel admitted that this meant that expenses were compensable only if they met IRS Guidelines. CP 1733-34.

For a period of several years, the brothers cooperated in relative

harmony under the new agreements: there were disagreements, but not discord. Yet, by August 2012, Daniel proclaimed that the 2008 deal was in "lame duck" status and that the brothers should discuss significant increases to Daniel's overall compensation (Ex 29), whether through increased ownership (Daniel proposed an extravagant 30 percent stock award (*id.*)) or increased cash compensation (Ex 35). In late 2012, Daniel at various times proposed and demanded compensation packages worth as much as $5 million (at a time when the net profit of the company was approximately *$2 million*). Ex 35; *see* RP 94:15-95:17 (5/31).

By 2013, any peace that had existed between the brothers was gone. Daniel's contemporaneous notes reveal that he came to view Lucas as a "cancer" to be "isolated." Ex 9. His notes showed that he viewed the 2008 agreements as "unfair" to him, but that he also believed the agreements gave him "a lot of power" and he intended to unilaterally use that power to "make the deal more fair to him." Ex 737 at 3.

Daniel did this in a few ways. First, he used the company coffers to bankroll his personal expenses. At trial, Daniel admitted to using the company credit card to fund tens of thousands of dollars of personal expenses (RP 200:3-7 (6/1)), including personal travel to see family (RP 155:8-159:14 (6/1)), personal yacht charters (RP 144:8-12 (6/1)), concerts with friends (RP 153:24-155:6 (6/1)), personal therapists (RP 157:25-

158:7 (6/1)), personal concierge health services (RP 157:1-9 (6/1)), personal bills for multiple personal attorneys (RP 148:8-149:16; 151:11-152:8 (6/1)), a home inspector (RP 146:24-148:7 (6/1)), towing charges for damages to a rental car on a personal vacation (RP 157:13-24 (6/1)), and much more.[3]

Second, Daniel triggered a massive stock award in his favor, which diluted Lucas's ownership interest and, in so doing, by the time of the trial, shifted more than $4 million in Gravity Payments equity from Lucas to Daniel. As noted above, the Shareholders Agreement requires that, as a precondition to any stock award, there must be a "valuation" of Gravity by an appraiser to "determine fair market value" (*see* App. Br. at 11). Yet, the undisputed evidence at trial established that a "valuation" did not occur before Daniel approved issuance of a stock award to himself (*id.* at 16-19). It is also undisputed that Daniel has not returned the stock even though he is now aware that he received an improper windfall.

Third, Daniel increased his compensation over Lucas's objections. RP 282:7-21 (6/9); Ex. 229. Daniel did not respond to Lucas's protests with a dialogue, nor did he decrease his compensation. He simply continued to pay himself at the same elevated level he knew was

[3] And, perhaps most tellingly, even *after* Lucas served the complaint, Daniel's pattern of billing the company for personal expenses without any reimbursement continued unabated. RP 502:13-503:1 (6/2).

objectionable. *See* RP 282:7-21 (6/9); RP 290:16-291:1 (6/9).[4]

Daniel's conduct left Lucas with no option other than to seek recourse in the courts. On March 16, 2015, Lucas served Daniel with a complaint alleging that Daniel (1) breached fiduciary duties as director, executive, and shareholder (CP 3 ¶ 16), (2) breached the contracts governing the brothers' relations (CP 4 ¶ 20), and (3) oppressed Lucas's minority shareholder interest (CP 3 ¶ 12). The complaint sought direct monetary damages for all of the claims. CP 3-4. It also sought a form of equitable relief on the shareholder oppression claim—an order directing Daniel to buy out Lucas's minority interest at fair value. CP 4 ¶ 23; *see* Ex 335 at Att. 7.[5] Lucas asked to have his complaint tried to a jury. CP 11.[6]

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[4] Fourth, and equally significant, Daniel began openly antagonizing Lucas. In 2012, Daniel voted through a punitive cash call on the shareholders over Lucas's objections even as Daniel was increasing his own executive compensation. Ex 324. In late 2013, Lucas's contemporaneous notes indicate that Daniel said Lucas would never get any greater returns from Gravity Payments, nor would he get a liquidity event for his ownership stake, so Lucas's only option was to sell his stake to Daniel for a fraction of its value. Ex 322; RP 674:23-678:7, 679:25-680:6 (6/6). Unrebutted evidence also established that Daniel excluded Lucas from key management decisions in the ensuing years, including risky ventures for Gravity Payments. For example, though he found the time to discuss the issue with dozens of business associates and casual acquaintances, including celebrity Tyra Banks (*see* Ex 126), Daniel withheld from Lucas his decision to raise the minimum salary of Gravity employees to $70,000 per year until one business day before the announcement, and he never responded to Lucas's requests for information about that major business decision. RP 291:11-292:22 (6/1); *see* Ex 127. At the same time, Daniel used company resources in his fight against Lucas (RP 806:14-17 (6/14); RP 475:14-476:16 (6/13)) and he openly (and erroneously) disparaged Lucas in public. *E.g.*, Ex 148; *compare* CP 1737 *with* RP 25:14-30:17 (5/31).

[5] Based on unrebutted expert appraisal testimony at trial, that buyout was valued at approximately $26.4 million. *See id.*

[6] Before trial, Daniel moved to summarily dismiss the breach of contract, breach of fiduciary duties, and equitable relief claims. CP 15. The trial court largely denied the motion, finding that Lucas had standing to directly allege a breach of duties and seek damages, and what relief the court granted to Daniel was insignificant. CP 325-26. The trial court dismissed Lucas's direct claim for breach of the Employment Contract, but since that contract is expressly incorporated by reference in the Shareholder's Agreement,

B. The Trial Court Erroneously and Unconstitutionally Strikes Lucas's Jury Demand

Just days before trial, Daniel moved to strike Lucas's jury demand. CP 11, 385. Lucas opposed Daniel's motion, explaining that (1) two of Lucas's three claims—breach of fiduciary duty and breach of contract—were purely legal claims, (2) the third claim—for minority shareholder oppression—sought a mixture of legal and equitable remedies, and (3) the equitable remedy for shareholder oppression—a fair market buyout of the minority interest—could efficiently be resolved by the trial court after the jury decided the damage claims. CP 368.

On the eve of trial, the trial court struck Lucas's jury demand ("Order Striking the Jury"). CP 679-81. To arrive at this unjust and unconstitutional result, the trial court made several plain legal errors. First, the trial court failed to recognize that Lucas still possessed significant breach of contract claims against Daniel because the Shareholder Agreement incorporated the duties in the Employment Agreement. App. 129-32. Second, the trial court mistakenly construed Lucas's breach of fiduciary duty claim as equitable rather than legal, contravening established precedent of this Court. *See Allard v. Pac. Nat. Bank*, 99 Wn.2d 394, 399, 663 P.2d 104 (1983); App. 129-32. Third, though it was

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the dismissal was of no substantive consequence. Finally, the court dismissed the separate claim for equitable remedies, noting that such remedies could be obtained through Lucas's other claims. CP 326.

required to do so under *Brown*, the trial court failed to consider Lucas's position that the only purely equitable element of the lawsuit—the *remedy* of a forced buyout—could be resolved after the jury decided the legal claims. *See* App. 129-32.

C. The Trial Court Denies Lucas Any Relief Even Though the Undisputed Evidence and Some of the Trial Court's Own Findings of Fact Required Judgment for Lucas

Following a bench trial, the trial court made legal conclusions white-washing Daniel's conduct, which stand in jarring juxtaposition with the unrebutted facts developed at trial[7] and some of the court's own inescapable factual findings.[8] With respect to Daniel's personal expenses charged to the company, the court inexplicably concluded "Lucas Price has not proven" his claim that Daniel "sought the Company's payment of personal expenses" "by a preponderance of the evidence." App. 57, 75, 80. That conclusion is fundamentally at odds with Washington jurisprudence

[7] The undisputed, unrebutted evidence at trial was: (1) The Shareholders Agreement is a valid, enforceable agreement between Lucas and Daniel (*see* App. Br. 11-12); (2) The Shareholders Agreement incorporates the Employment Agreement, which, in turn, requires Daniel to use company funds "solely for authorized business expenses of Gravity" (*id.*); (3) Daniel used the Gravity Payments credit card to fund tens of thousands of dollars of personal expenses (*id.* at 22-24, 48; RP 199:20-200:7 (6/1)) and otherwise did not dispute that scores of other charged expenses were personal, including, for example, expenses for international personal vacations with romantic interests (App. Br. at 22-24, 48); (4) The Shareholders Agreement requires that before a stock award may be granted to Daniel there must be a "valuation" of Gravity by an appraiser to "determine fair market value" (*id.* at 11); and (5) a "valuation" did not occur before Daniel approved issuance of a stock award to himself currently valued at over $4 million (*id.* at 16-19).

[8] The trial court found: (1) the report used to justify the stock award was a "calculation" not a "valuation" (App. 64); (2) "The Shareholders Agreement required a 'valuation' as a basis for a stock award" (*id.*), and (3) the "final appraisal reframed its opinion as a calculation and as framed, it may not have met the requirements of the Shareholders Agreement" (App. 77).

on a fiduciary's use of company resources for personal advantage and with Daniel's admissions. With respect to Lucas's challenge to the stock award, the court erroneously failed to consider that Daniel's retention of the stock award was a breach of contract. App. 84. The court also erroneously concluded that return of the stock award was "a matter for [the company] to address with its shareholders," ignoring that the Shareholders Agreement is a contract between Lucas and Daniel. App. 77; *see* App. 81.

D. The Decision Affirms the Trial Court's Order Striking the Jury and Its Findings of Fact and Conclusions of Law

On April 30, 2018, the Court of Appeals issued the Decision, affirming the Order Striking the Jury even while faulting the trial court's legal analysis under *Brown* as erroneous. The Court of Appeals correctly concluded that Lucas's breach of fiduciary duty claim was a direct, legal claim for damages under *Allard* (Op. 5) and impliedly recognized the *remedy* of a forced buyout was the only purely equitable element to which Lucas would not traditionally have been entitled to a jury (Op. 5-7). Even so, the Court of Appeals fell into the same erroneously simplistic analysis as the trial court, concluding that the trial court did not abuse its discretion when it concluded that Lucas's lawsuit was "primarily" about that single form of relief. Op. 5-7. As explained further below, that is not the analysis that the seven-factor *Brown* test requires. *Infra* § VI.B. To the extent the Court of Appeals' analysis fairly applies existing *Brown* jurisprudence, the

Brown test must be restated to protect the jury trial right under the Washington Constitution. This Court should reject an interpretation of *Brown* that allows a trial court the discretion to deprive a plaintiff a jury trial on seven-figure damages legal claims simply because the plaintiff also seeks an eight-figure equitable *remedy* that can be resolved after a jury trial. *Infra* § VI.C.

The Decision also affirmed—without significant analysis—the trial court's legal conclusions that that Lucas had not proven facts at trial entitling him to relief under Washington's law governing corporate fiduciaries. Op. 11-17. As explained further below, this affirmance too cannot be justified under Washington law. *Infra* § VI.D.

VI. ARGUMENT WHY REVIEW SHOULD BE GRANTED

A. Standard for Discretionary Review

This Court will accept review of a decision of the Court of Appeals if the decision (1) "conflict[s] with a decision of the Supreme Court," (2) "conflict[s] with a published decision of the Court of Appeals," (3) presents "a significant question of law under the Constitution of the State of Washington," or (4) "involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b).

B. The Decision Violates Lucas Price's Right to a Jury Trial under this Court's Precedent in *Brown*, Warranting Review under RAP 13.4(b)(1)

The Decision deprives Lucas of his constitutional right to a jury—

particularly in its failure to engage in the analysis required by the sixth and seventh *Brown* factors. The Court of Appeals, like the trial court before it, collapsed the seven-factor *Brown* test into a single, simplistic question—whether the trial court has discretion to decide whether an action is "primarily" equitable in nature. Op. 5-7. This apparently led the Court of Appeals to follow the trial court's rudimentary comparison of the total monetary value of the legal remedies versus the equitable remedy. *Id.*

Yet, this is plainly not the required analysis in Washington.[9] Instead, *Brown* requires engagement with seven factors, the seventh of which provides that the trial court should "ascertain the real issues in dispute before making the determination as to whether or not a jury trial should be granted on all *or part* of such issues." *Brown*, 94 Wn.2d at 368 (emphasis added). Particularly when this seventh factor is combined with the sixth—which states that any doubt should be resolved in favor of a jury (*id.*)—*Brown* calls on Washington courts to closely consider whether it is possible to empanel a jury, even on "part" of the action. If the answer is yes, *Brown* directs the trial court to seat a jury.

Here, implementing a proper *Brown* analysis, the Order Striking

[9] Hypothetically, Washington law could allow such broad, unreviewable discretion. Indeed, a few states grant the trial court such discretion. *See State ex rel. Cherry v. Burns*, 258 Neb. 216, 223, 602 N.W.2d 477 (1999). *Brown* starkly diverges from that approach. *See* Eric J. Hamilton, *Federalism and the State Civil Jury Rights*, 65 Stan. L. Rev. 851 (2013).

the Jury was plainly erroneous. First, the Washington Constitution reserves to the jury the responsibility of determining facts such as whether a defendant's conduct caused damages, and if so, the extent of those damages. *Sofie*, 112 Wn.2d at 646.[10]

Second, Lucas's causes of action—as developed through discovery and prosecuted at trial—are plainly legal in nature. It is "well settled" that issues of contract construction, breach of contract, and damages, if any, that flow from a breach of contract are legal issues to be decided by a jury. *S.P.C.S., Inc. v. Lockheed Shipbuilding & Const. Co.*, 29 Wn. App. 930, 934, 631 P.2d 999 (1981). This is true even if other equitable relief—such as a request for accounting—is sought. *Id.* at 934-35. Lucas presented evidence that Daniel violated the Shareholders Agreement by (1) taking corporate money for personal expenses (*supra* § V.A), (2) setting his compensation at excessive levels without consulting Lucas, Gravity's only other shareholder and director, and in disregard of the company's financial needs *(see* RP 282:7-21; 290:16-291:1 (6/9); Ex 804), and (3) by engineering unwarranted stock compensation to himself (*supra* § V.A; *see* Ex 335). A jury should have decided whether Daniel breached these

[10] Thus, even if the *cause of action* is typically equitable, the requested *remedy* determines whether the action requires a jury. *Auburn Mech., Inc. v. Lydig Const., Inc.*, 89 Wn. App. 893, 903-04, 951 P.2d 311 (1998); *see Dep't of Nat. Res. State of Wash. v. Littlejohn Logging, Inc.*, 60 Wn. App. 671, 674, 806 P.2d 779 (1991) (reversing as abuse of discretion order striking jury where plaintiff sought damages, even if the cause of action could be characterized as equitable).

obligations and any resultant damages. *S.P.C.S.*, 29 Wn. App. at 934.

Likewise, Lucas's breach of fiduciary duty claim—which, on summary judgment, the trial court affirmed was a *direct*, personal claim (CP 324)—is legal and should be decided by a jury. *Kelly v. Foster*, 62 Wn. App. 150, 154, 813 P.2d 598 (1991). Where, as here, "the beneficiaries seek recovery for themselves personally, the action is considered legal in nature." *Allard*, 99 Wn.2d at 400.[11]

In light of the foregoing, as Lucas explained to the trial court, it was clearly possible to resolve "part"—indeed, virtually all—of the lawsuit with a jury. Lucas proposed that the action be tried to a jury and the trial court reserve for subsequent determination the one purely equitable remedy—a minority shareholder buyout. CP 386. Close scrutiny of the report of proceedings reveals that such an approach would have protected Lucas's constitutional rights and led to no confusion or inefficiencies. Virtually every fact presented during the bench trial was independently proper and necessary to resolve Lucas's breach of contract and breach of fiduciary duty claims (even if also relevant to the shareholder oppression claim). This is not surprising since the test for minority shareholder oppression in Washington is closely tied to the test

[11] By contrast, where the party seeks relief on behalf of another (for example, derivative claims), "the action is considered equitable in nature." *Id.*

for breach of fiduciary duties. *See Nakata v. Blue Bird, Inc.*, 146 Wn. App. 267, 279, 191 P.3d 900 (2008). To protect Lucas's rights under *Brown* and the Washington Constitution, the Court should have allowed trial of all—or virtually all—of the action to a jury. Its failure to do so was error.

C. The Availability of a Jury Trial to a Plaintiff Stating Legal Claims is a Constitutional Question of Significant Importance to the Public, Justifying Review under RAP 13.4(b)(3) and (4)

In Washington, "[t]he right of trial by jury shall remain inviolate." WASH. CONST. art. I, § 21. A plaintiff's right to a jury trial "'must be protected from all assaults to its essential guaranties,'" because "[a]t its core" the Washington Constitution "guarantees litigants the right to have a jury resolve questions of disputed material facts." *Davis v. Cox*, 183 Wn.2d 269, 288–89, 351 P.3d 862 (2015) (quoting *Sofie*, 112 Wn.2d at 656). As explained above, the Decision is unconstitutional under *Brown*. That said, to the extent *Brown* can be construed to allow a trial court discretion to deny a jury trial where a plaintiff states multiple legal claims seeking multi-million dollar damages—because the plaintiff *also* asked for a higher-dollar equitable remedy—this Court must restate the law to protect an essential constitutional guarantee from undue encroachment.

The federal courts have long interpreted the United States Constitution's Seventh Amendment jury trial right—which informs Washington's constitutional guarantee[12]—to guarantee that a litigant is

[12] *Sitton v. State Farm Mut. Auto. Ins. Co.*, 116 Wn. App. 245, 259, 63 P.3d 198 (2003) (citing *Sofie*, 112 Wn.2d at 647).

entitled to have all factual issues raised by the legal aspects of a case tried to a jury. Those determinations are then treated as binding on the trial court in its subsequent determination of any equitable issues. *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 82 S. Ct. 894 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 79 S. Ct. 948 (1959); *see* 9 Fed. Prac. & Proc. Civ. § 2302.1 (3d ed.); Hamilton, *supra* at 863.[13] More than twenty states have followed the federal courts in adopting a similarly protective view of the jury trial right under comparable constitutional provisions. Hamilton, *supra* at 873-75.[14]

That said, wholesale revision of the *Brown* test is not necessary to protect a litigant's right to a jury trial in Washington. As described above, factors six and seven of the *Brown* test, if properly elucidated and enforced, would provide ample protection to litigants like Lucas.[15]

D. The Decision's Refusal to Afford a Remedy for Daniel's Admitted Breaches of Fiduciary Duty and Contract Justifies Review under RAP 13.4(b)(1) and (2).

Further, the Court of Appeals' superficial affirmance of the trial

[13] Under federal law since *Dairy Queen*, "the right to a trial by jury exists as to any issue that is an element of a claim cognizable at law, even if that legal claim appears to be less significant than the equitable elements of the case." 9 Fed. Prac. & Proc. Civ. § 2302.1 (3d ed.) (emphasis added); *see Angelopoulos v. Keystone Orthopedic Specialists, S.C.*, 12-CV-5836, 2017 WL 2215038, at *4 (N.D. Ill. May 19, 2017) (plaintiff was entitled to jury trial on legal aspects of its claim even though its alternative request for relief was equitable in nature).

[14] To date, Washington has not adopted the federal approach. Yet, given this Court's recent interpretation of the Washington Constitution to provide broad defense of a litigant's right to have a jury decide all disputed issues of fact (*Davis*, 183 Wn.2d at 288–89), a move to a standard akin to the federal rule may be necessary and overdue.

[15] Such enforcement of *Brown* would bring Washington closer in line with its stated constitutional interpretation and also with a broad subset of states that afford litigants the right to a jury on a claim-by-claim basis. Hamilton, *supra* at 890-900.

court's legal conclusions on liability cannot be reconciled with established precedent. First, as explained above, Daniel was forced to admit that he used corporate resources (which he has not repaid) for his personal benefit. *Supra* § V.A. There can be no doubt that, given these admissions, his takings receive no deference (under the business judgment rule or otherwise) and the trial court applied an incorrect legal standard to bar relief on Lucas's breach of fiduciary duty claim. *See* App. Br. 50-52. Daniel's admissions mandate reversal and entry of judgment as to liability for Lucas. *See id.* Similarly, there can be no debate that Daniel's actions breached the Shareholders Agreement, which mandates that company funds be used "solely for authorized business expenses of Gravity." *Supra* § V.A; *see* App. Br. 52-54.

Second, the evidence presented at trial proved that Daniel was in breach of contract and his fiduciary duty by taking and keeping the four million dollar stock award. *Supra* § V.A. Once Daniel was aware that the stock award was improper, he was obliged to correct the mistake to avoid being in breach. App. Br. 43-44; Reply Br. 15-16.[16] Similarly, as a fiduciary, Daniel must act for Lucas's benefit on matters within the scope of their relationship: Many forms of conduct permissible for those acting

[16] *See* 27 Williston on Contracts § 70:13 (4th ed.) ("It is unjust to permit either party to a transaction, where both are laboring under the same mistake, to take advantage of the other when the truth is known.").

at arm's length are forbidden to Daniel with regard to Lucas. *See Kane v. Klos*, 50 Wn.2d 778, 784, 314 P.2d 672 (1957). Putting a finer point on it, Daniel is required to put Lucas's interests *above his own*. *Safeco Ins. Co. of Am. v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499 (1992). Daniel has not conformed to those duties. The record is plain that Daniel is currently holding stock to which he is not entitled. The trial court and Court of Appeals' rejection of well-established law on the nature of Daniel's duties is perplexing and erroneous, and warrants review and correction.

VII. CONCLUSION

For the reasons stated above, this Court should grant Lucas's Petition for Review.

DATED this 30th day of May, 2018.

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DECLARATION OF SERVICE

On May 30, 2018, I caused to be served a true and correct copy of the foregoing document upon counsel of record, at the address stated below, via the method of service indicated:

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

DATED this 30th day of May, 2018, at Seattle, Washington.

By: s/ Gregory J. Hollon
Gregory J. Hollon, WSBA No. 26311

Appendix A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

LUCAS PRICE, an individual, Appellant, v. DANIEL PRICE, an individual, Respondent.	)	No. 75847-1-I UNPUBLISHED OPINION FILED: April 30, 2018

VERELLEN, J. — Lucas Price, a minority shareholder, director, and founder of Gravity Payments, Inc., appeals a judgment rejecting his claims against the majority shareholder, Daniel Price.

Lucas challenges the court's decision to strike his jury demand. Because the trial court properly applied the factors from Brown v. Safeway Stores, Inc.,[1] the trial court did not abuse its discretion when it determined the action was primarily equitable and struck Lucas's jury demand.

Following the bench trial, the trial court found Lucas failed to prove his claims of (1) minority shareholder oppression, (2) breach of fiduciary duty, and (3) breach of the shareholders agreement. Because the evidence is sufficient to

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[1] 94 Wn.2d 359, 617 P.2d 704 (1980).

support the court's findings and those findings support the court's conclusions, the trial court did not err.

Lucas also challenges the award of attorney fees and costs to Daniel, the postjudgment interest rate, and various trial management decisions. The trial court did not abuse its discretion in any of these areas.

Therefore, we affirm.

FACTS

In 2004, brothers Lucas and Daniel formed Price & Price, LLC, a credit card processing services company. Shortly after they formed the company, Daniel and Lucas divided ownership 50/50.

In 2008, Lucas and Daniel restructured the company into Gravity Payments, Inc., a closely-held corporation. They executed a series of agreements, including employment agreements for each brother and a shareholders agreement. As part of the restructuring, Gravity redeemed 20,000 shares from Lucas, reducing his ownership interest to 40 percent.

Lucas filed this lawsuit in 2015 and brought four claims: (1) minority shareholder oppression, (2) breach of fiduciary duty, (3) breach of Daniel's employment agreement and the shareholders agreement, and (4) general equitable relief.

On January 22, 2016, Lucas filed a jury demand. On February 22, 2016, the court dismissed Lucas's cause of action for general equitable relief and his

claim for breach of the employment agreement. On May 26, 2016, the court struck Lucas's jury demand.

At the start of the bench trial, the court denied Lucas's motion to exclude Daniel's calendar. During trial, the court limited Lucas's cumulative cross-examination of Daniel's forensic accounting expert.

The trial court ultimately found Lucas failed to prove any of his remaining claims and dismissed the action with prejudice. The court also awarded $1,324,941.61 in fees and costs to Daniel. And the court imposed a postjudgment interest rate of 12 percent on the fee award.

Lucas appeals.

ANALYSIS

I. Jury Demand

Lucas contends the trial court abused its discretion when it struck his jury demand.

We review a trial court's decision to strike a jury demand for abuse of discretion.[2] In a civil case, there is a right to a jury trial when the action is purely legal in nature but not when it is purely equitable.[3] "The overall nature of the action is determined by considering all the issues raised by all of the pleadings."[4] In making this determination, the trial court should consider:

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[2] Dep't of Nat. Res. v. Littlejohn Logging, Inc., 60 Wn. App. 671, 673, 806 P.2d 779 (1991) (citing Brown, 94 Wn.2d at 368).

[3] Brown, 94 Wn.2d at 365.

[4] Id.

> "(1) who seeks the equitable relief; (2) is the person seeking the equitable relief also demanding trial of the issues to the jury; (3) are the main issues primarily legal or equitable in their nature; (4) do the equitable issues present complexities in the trial which will affect the orderly determination of such issues by a jury; (5) are the equitable and legal issues easily separable; (6) in the exercise of such discretion, great weight should be given to the constitutional right of trial by jury and if the nature of the action is doubtful, a jury trial should be allowed; (7) the trial court should go beyond the pleadings to ascertain the real issues in dispute before making the determination as to whether or not a jury trial should be granted on all or part of such issues."[5]

Here, the court identified, "Lucas is the party seeking equitable relief and is the party demanding a jury."[6]

At the time of trial, Lucas had three claims: (1) minority shareholder oppression, (2) breach of fiduciary duty, and (3) breach of contract under the shareholders agreement. Lucas sought an accounting, court-ordered buyout, any other "equitable remedies as the Court deems just and appropriate," damages, and attorney fees.[7]

The trial court concluded, "Lucas primar[ily] seeks an equitable remedy in this action, though monetary damages are sought as well. Lucas's claim for minority oppression is equitable in nature. His claim for breach of fiduciary duty involves many of the same issues as the oppression claim and is primarily equitable in nature."[8]

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[5] Id. at 368 (quoting Scavenius v. Manchester Port Dist., 2 Wn. App. 126, 129-30, 467 P.2d 372 (1970)).

[6] Clerk's Papers (CP) at 860 (Conclusion of Law 14).

[7] CP at 4.

[8] CP at 860 (Conclusion of Law 15).

During oral argument before this court, Lucas focused on Allard v. Pacific National Bank to argue his claim for breach of fiduciary duty is legal in nature.[9] In Allard, our Supreme Court considered whether the beneficiaries of a trust had a right to a jury trial in a suit for breach of fiduciary duty against the trustee.[10] The court recognized "[w]here the beneficiaries seek recovery for themselves personally, the action is considered legal in nature."[11] Here, as to Lucas's claim that Daniel breached his fiduciary duty when he improperly charged personal expenses to the company, Lucas sought recovery based on his share of ownership.[12]

But the centerpiece of the lawsuit was Lucas's minority oppression claim and request for a court-ordered buyout. An accounting and a court-ordered buyout are equitable remedies.[13] And a claim of minority shareholder oppression

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[9] 99 Wn.2d 394, 663 P.2d 104 (1983).

[10] Id. at 395.

[11] Id. at 400.

[12] See Appellant's Br. at 51 ("Lucas is a 32.5 percent shareholder in Gravity. Thus, for every dollar Daniel spent of Gravity's money for his own personal expenses, approximately one-third was direct damage to Lucas.").

[13] See Jackson v. Gardner, 197 Wash. 276, 283-84, 84 P.2d 992 (1938) ("Manifestly the right of the parties could not be determined except by taking an accounting between them, and, as the transactions appeared by the pleadings to be extensive and varied, it necessarily involved a long and complicated accounting. It has long been the rule that these conditions alone justified the assumption of jurisdiction by a court of equity."); Peabody v. Pioneer Sand & Gravel Co., 164 Wash. 26, 39, 2 P.2d 714 (1931); Garey v. City of Pasco, 89 Wash. 382, 383-84, 154 P. 433 (1916) ("an action for an accounting, properly maintainable as such, is one of equitable cognizance"); Auburn Mech., Inc. v. Lydig Constr., Inc., 89 Wn. App. 893, 902, 951 P.2d 311 (1998) (a coercive order is within the court's equitable power).

under RCW 23B.14.300 is an equitable claim.[14] "When both law and equity issues exist in a lawsuit, a trial court has wide discretion in granting or denying a jury trial."[15] Notably, in Whatcom County v. Reynolds,[16] this court determined "[a]ctions involving fiduciary relationships that seek accountings and imposition of constructive trusts are invariably equitable."[17] Here, as recognized by the trial court, "[h]is claim for breach of fiduciary duty involves many of the same issues as the oppression claim and is primarily equitable in nature."[18]

Although money damages are a legal remedy and breach of contract is a legal claim,[19] the trial court recognized, "[t]he equitable issues present complexities that would affect the orderly determination of any legal issues by the jury.[20] And the court acknowledged, "[b]oth the claims and the relief are so interrelated that they cannot easily be separated between the court and a jury."[21]

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[14] See Scott v. Trans-Sys., 148 Wn.2d 701, 716-17, 64 P.3d 1 (2003) ("Dissolution suits under Washington's dissolution statute are fundamentally equitable in nature.").

[15] Batten v. Abrams, 28 Wn. App. 737, 743, 626 P.2d 984 (1981).

[16] 27 Wn. App. 880, 620 P.2d 544 (1980).

[17] Id. at 882.

[18] CP at 860.

[19] S.P.C.S., Inc. v. Lockheed Shipbuilding and Constr. Co, 29 Wn. App. 930, 934, 631 P.2d 999 (1981) ("The court has been called upon to construe a contract, determine if a breach has occurred, and determine what damages, if any, flow therefrom. It is well settled that these are legal issues."); Auburn Mech., 89 Wn. App. at 901 ("Money damages is exactly the remedy juries traditionally determine."); but see S.P.C.S., Inc., 29 Wn. App. at 934 ("even if the action is one for money damages, it may be primarily equitable in nature").

[20] CP at 860 (Conclusion of Law 17).

[21] Id. (Conclusion of Law 16).

The record adequately supports the trial court's determination that Lucas primarily sought equitable remedies not easily separated between the court and a jury.

Lucas also claims the trial court's decision to strike the jury demand was improperly influenced by scheduling concerns. Shortly before trial, Lucas's counsel e-mailed the court to express concern about the number of days reserved for the trial. The court responded by attaching the order granting the motion to strike the jury and stating, "Thus, there is now an additional day for trial."[22] Contrary to Lucas's argument, the email exchange does not imply the trial court struck Lucas's jury demand in order to accommodate scheduling concerns.

Because the trial court properly applied the Brown factors consistent with the record and our case law, we conclude the trial court did not abuse its discretion when it struck Lucas's jury demand.

II. Shareholder Oppression, Breach of Fiduciary Duty, and Breach of Contract

Lucas assigns error to the court's findings that he failed to prove his claims of shareholder oppression, breach of contract, and breach of fiduciary duty.

Review of a trial court's findings of fact and conclusions of law is "limited to determining whether the trial court's findings are supported by substantial evidence in the record and, if so, whether the conclusions of law are supported by those findings of fact."[23]

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[22] CP at 1719.

[23] Scott, 148 Wn.2d at 708.

The business judgment rule applies to all of Lucas's claims.[24] Generally, "[c]ourts are reluctant to interfere with the internal management of corporations" and "refuse to substitute their judgment for that of the directors."[25] Specifically, the business judgment rule "immunizes management from liability in a corporate transaction undertaken within the corporation's power and management's authority where a reasonable basis exists to indicate that the transaction was made in good faith."[26] Corporate officers do not have immunity when they act "in bad faith and with a corrupt motive."[27]

Washington's corporation dissolution statute, RCW 23B.14.300(2)(b), permits equitable relief if "[t]he directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent."

Washington courts have established two tests to define oppressive conduct. "The first, called the 'reasonable expectations' test, defines oppression as a violation by the majority of the reasonable expectations of the minority."[28] "It is the minority shareholder's burden to show oppressive conduct before the burden shifts to the majority shareholders to establish legitimate business justifications for the

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[24] See Para-Medical Leasing, Inc. v. Hangen, 48 Wn. App. 389, 396, 739 P.2d 717 (1987) (the business judgment rule applies when "considering the actions of a corporate officer").

[25] Nursing Home Bldg. Corp. v. DeHart, 13 Wn. App. 489, 498, 535 P.2d 137 (1975).

[26] Interlake Porsche & Audi, Inc. v. Bucholz, 45 Wn. App. 502, 509, 728 P.2d 597 (1986).

[27] Id.

[28] Scott, 148 Wn.2d at 711.

conduct."[29] "'Reasonable expectations' are those spoken and unspoken understandings on which the founders of a venture rely when commencing the venture."[30]

"Application of the reasonable expectations test is most appropriate in situations where the complaining shareholder was one of the original participants in the venture—one who would have committed capital and resources."[31]

The second oppression test is defined as

> "burdensome, harsh and wrongful conduct; a lack of probity and fair dealing in the affairs of the company to the prejudice of some of its members; or a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely."[32]

This test is applied when application of the reasonable expectations test is not straightforward. In Scott v. Trans-System, Inc., our Supreme Court determined the reasonable expectations test should not be applied when "there is no indication in the record as to what the reasonable expectations of the parties were or whether [the complaining shareholder] invested any of his own money to facilitate the incorporation and development of [the company]."[33]

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[29] McCormick v. Dunn & Black, P.S., 140 Wn. App. 873, 889, 167 P.3d 610 (2007) (citing id. at 709).

[30] Scott, 148 Wn.2d at 711.

[31] Id.

[32] Id. (quoting Roblee v. Roblee, 68 Wn. App. 69, 76, 841 P.2d 1289 (1992)).

[33] Id. at 712.

"These two tests are not mutually exclusive and one or both may be used in the same case, depending on the facts."[34] "Under both tests, the complaining shareholder has the burden of proof, by a preponderance of the evidence, to establish the requisite jurisdictional facts and the equitable grounds for dissolution."[35]

As a threshold matter, the court properly applied the reasonable expectations test because Lucas and Daniel co-founded Gravity and there is evidence in the record as to their reasonable expectations.[36]

To support his claim that Daniel breached his fiduciary duty, Lucas must show "(1) that a shareholder breached his fiduciary duty to the corporation, and (2) that the breach was a proximate cause of the losses sustained."[37] A claim of minority shareholder oppression is closely related to a claim that the majority shareholder breached his or her fiduciary duty.[38]

"Once the breach of fiduciary duty has been established, the plaintiff must prove the damage resulting from the breach."[39] "Damages must be supported by competent evidence in the record; however, evidence of damages is sufficient if it

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[34] Id. at 711.

[35] Id. at 712.

[36] See CP at 920 ("Where, as here, the dispute is between corporate founders, the 'reasonable expectations' test applies.") (Conclusion of Law 8).

[37] McCormick, 140 Wn. App. at 894 (citing Interlake Porsche, 45 Wn. App. at 509).

[38] Scott, 148 Wn.2d at 711.

[39] Interlake Porsche, 45 Wn. App. at 510.

affords a reasonable basis for estimating the loss and does not subject the trier of fact to mere speculation or conjecture."[40]

To show breach of contract, Lucas must prove duty, breach, causation, and damages.[41] "There is in every contract an implied duty of good faith and fair dealing."[42] Here, section 6.1.1 of the shareholders agreement also imposes an obligation of good faith and fair dealing to the board's decisions related to Daniel's salary and bonuses. The court correctly concluded this section was "not intended to impose a separate duty . . . because the duty to exercise good faith and fair dealing is inherent in every contract."[43]

We apply the shareholder oppression reasonable expectations test, breach of fiduciary duty standard, and breach of contract theory to the three central disputes in this litigation.

A. 2012 Stock Award

Under section 6.4.1 of the shareholders agreement, "Daniel Price shall receive an annual stock award" based on the "Year Closing Value."[44] The "Year Closing Value" is determined by "a *valuation* of the Corporation . . . by a qualified appraiser."[45] Sufficient evidence supports the finding that "[t]he Shareholders

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[40] Id. (citation omitted).

[41] Baldwin v. Silver, 165 Wn. App. 463, 473, 269 P.3d 284 (2011).

[42] Badgett v. Sec. State Bank, 116 Wn.2d 563, 569, 807 P.2d 356 (1991).

[43] CP at 931 (Conclusion of Law 34).

[44] Ex. 11 at 29-30.

[45] Ex. 11 at 30 (emphasis added).

Agreement provided for an annual stock award to Daniel Price based on the growth of the company."[46]

In late 2012, Daniel asked Clothier and Head, Gravity's accounting firm, to perform a valuation for 2011 and 2012 to determine the amount of Daniel's stock grant for those years. Mark Mitchell performed the appraisal.

Daniel repeatedly told Mitchell that he wanted the appraisal to be independent. When Mitchell requested "written projections or estimates of future growth," Daniel refused to provide such documentation because he wanted the report to be completed "without the inside information, so that the report can stand on its own more."[47] The record supports the finding that Daniel "intended that Mitchell would do the work independently and without manipulation from shareholders."[48]

At trial, Lucas's primary challenge to the stock award was that Daniel improperly manipulated the appraisal by "put[ting] his thumb on the scale in order to make the 2011 appraisal lower and the 2012 appraisal higher so that there would be as big of a difference as possible between the two so that he could get a larger stock award."[49]

After Lucas expressed his concern, Daniel facilitated a meeting between Lucas and Mitchell to discuss Mitchell's draft appraisal. At the meeting, Lucas

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[46] CP at 909 (Finding of Fact 26).

[47] RP (June 8, 2016) at 192.

[48] CP at 909 (Finding of Fact 27).

[49] RP (June 1, 2016) at 365.

proposed a different growth rate than the one contained in the draft. Daniel testified at trial that he did not believe it was appropriate for either himself or Lucas to present growth rates. Daniel reiterated he was "looking for the appraiser to reach his own independent judgment about what the applicable growth rate should be."[50] Sufficient evidence supports the court finding that Daniel refused to provide growth projections and "insist[ed] that the appraisal must be independent."[51]

Based on the draft appraisal, the board approved a 2012 stock award to Daniel in March 2013. Mitchell characterized the draft appraisal as a "valuation." After the board relied on the appraisal and unanimously approved the stock award, Mitchell reframed the appraisal as a "calculation." Daniel testified that Mitchell did not tell him about the language changes and that he did not learn about the changes until trial.

During one of two telephone conversations, Daniel did tell Mitchell that his "goal" for the company was "35 to 40 percent growth in 2013."[52] But Daniel did not discuss his goals for 2011 or 2012, the applicable years for Mitchell's appraisal. The record supports the findings that Daniel did not provide projected growth rates for 2011 or 2012 and that "[t]here is no evidence that anything Daniel Price said to Mitchell . . was incorrect or intended to manipulate the appraisal."[53]

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[50] RP (June 8, 2016) at 202-03.

[51] CP at 909 (Finding of Fact 27).

[52] RP (June 8, 2016) at 194-95.

[53] CP at 910 (Finding of Fact 29).

Further, Mitchell based the appraisal on a discounted cash flow analysis and a separate market comparable analysis. Lucas's complaint of manipulation due to Daniel allegedly providing projected growth rates applies only to the discounted cash flow analysis. Sufficient evidence supports the court's finding that "Lucas Price's claim that Daniel Price manipulated the valuation reports by influencing the growth rates used in those reports relates only to the discounted cash flow analysis. Lucas Price did not contest the market comparable analysis."[54]

The record supports the court's findings, and these findings support the court's conclusions that the 2012 stock grant did not constitute shareholder oppression, breach of fiduciary duty, or breach of contract.[55]

B. Personal Expenses

A fiduciary is "liable only for those expenditures of corporate funds that were shown to have been for his personal benefit."[56] "[W]here a transaction

[54] CP at 912 (Finding of Fact 38).

[55] Lucas claims that although Daniel "represented to the court that he was going to call a meeting to review the improper stock award[,] . . . Daniel has done nothing." Appellant's Br. at 47. But the announcement by defense counsel of Daniel's intent to call a board meeting to address what to do about the form change from a "valuation" to a "calculation" was not the subject of any finding by the trial court, was not reduced to writing as urged by the court, and does not meaningfully impact any issue on appeal. This appeal is limited to whether sufficient evidence supports the court's findings and whether those findings support the court's conclusions and not whether conduct after the trial is of any significance.

[56] Interlake Porsche, 45 Wn. App. 512.

involves self-dealing or evidence of personal benefit is shown, then the burden shifts to the fiduciary to show good faith."[57]

During trial, the parties disputed the standard for determining an "authorized business expense." Lucas's forensic accounting expert, William Partin, applied IRS documentation guidelines and "totaled the charges lacking proper documentation."[58] Partin found a total of $627,965.08 lacking sufficient documentation.

The shareholders agreement does not discuss payment of personal expenses with corporate assets. But Daniel's employment agreement provides, "Employee shall use any credit card or other authorization to incur costs or expenses in the name of Gravity solely for authorized business expenses of Gravity," and the employment agreement is incorporated into the shareholders agreement by reference.[59] The employment agreement does not define "authorized business expenses."

Daniel testified, "The rules I that follow are from the shareholders agreement. I'll state it somewhat imperfectly, because I don't have it in front of me, that the company expenses should be in line with the IRS guidelines."[60] But Daniel also testified he did not intend to "refer . . . to IRS documentation

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[57] Id.

[58] CP at 768.

[59] Ex. 10 at 3.

[60] CP at 1734.

standards."[61] Sufficient evidence supports the finding that "[t]here is no evidence that the company conditioned reimbursement on presentation of such IRS documentation."[62]

Daniel testified that well over 90 percent of the expenses were business related. Daniel also testified some of the company credit card expenses were not reimbursed. Sufficient evidence supports the finding that "[t]here was evidence that Daniel Price used the company credit card for expenses that were not subsequently reimbursed."[63]

Daniel's forensic accounting expert, Lorraine Barrick, compared specific expenses with Daniel's calendar to determine whether expenses were personal or business. Barrick testified that the expenses reports showed "the kinds of things that can be incurred by the CEO of a company."[64] The court found "Daniel Price's expert . . . testified that she reviewed . . . Daniel's calendar and was able to determine that many of the disputed expenses were related to a proper business purpose."[65]

Daniel and his expert's testimony provide sufficient evidence to support the court's findings, and these findings support the court's conclusions that Lucas

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[61] RP (June 1, 2016) at 206.

[62] CP at 905 (Finding of Fact 12).

[63] Id. (Finding of Fact 11).

[64] RP (June 14, 2016) at 652.

[65] CP at 906 (Finding of Fact 12).

failed to show Daniel's credit card expenses constituted shareholder oppression or breach of fiduciary duty.

The court also determined "the breach of contract claim does not include the . . . reimbursement issues" because "[t]he agreement does not address reimbursement, and the duty [of good faith and fair dealing] cannot be used to create any obligation."[66] Even if the contract does apply to the reimbursement claim, sufficient evidence supports the court's finding that Lucas failed to prove Daniel improperly used corporate assets to pay personal expenses.

C. Daniel's 2013 and 2014 Bonuses

According to section 6.4.3 of the shareholders agreement, "[t]he Corporation (through the Board) is authorized to pay Daniel Price such salary and bonus as it may determine under 6.1.1."[67] Section 6.1.1 grants Daniel the authority to set his compensation if the Board cannot reach consensus.[68] Sufficient evidence supports the court finding that "Daniel Price had the authority

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[66] CP at 930 (Conclusion of Law 32).

[67] Ex. 11 at 30.

[68] Id. at 27 ("The Board, as so constituted, shall decide all management issues as follows: If the Board achieves consensus, their consensus decision shall be the decision of the Board. If they are unable to reach consensus, then the representative of the Founder or his estate, who . . . hold more Shares than the other Founder or his estate . . . shall decide and control the management decision of the Board."); see also RCW 23B.07.320(1)(f) ("An agreement among the shareholders of a corporation. . . is effective . . . even though it is inconsistent with . . . this title in that it . . . [t]ransfers to one or more shareholders . . . all or part of the authority to exercise the corporate powers.).

under the Shareholders Agreement to set his bonus compensation without board consensus."[69]

In March 2013, Daniel and Lucas agreed on a 2012 cash bonus of $800,000 for Daniel in addition to his $300,000 salary. Lucas testified he agreed because Daniel threatened to withhold Lucas's questions for Mitchell about the Clothier and Head valuation. Daniel testified, "I don't think that's true," and presented evidence that he forwarded Lucas's questions to Mitchell shortly after the meeting.[70] And Daniel's lawyer, Jonathan Michaels, who was at the March 20 meeting, testified that the meeting was civil; "[t]here was no table pounding or name calling or threats or anything of that sort."[71] Sufficient evidence supports the court finding that the March 2013 board meeting was "civil and cordial and there were no threats."[72]

In 2013 and 2014, Daniel and Lucas could no longer agree as to Daniel's bonus. In late 2012, Lucas proposed setting Daniel's 2013 bonus at $200,000, despite Gravity's significant year over year growth. Shortly thereafter, communication between Lucas and Daniel began to break down. Lucas argues Daniel did not establish a lack of consensus, but there was adequate evidence of an impasse to support Daniel's invocation of section 6.1.1 of the shareholders agreement.

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[69] CP at 915 (Finding of Fact 48).

[70] RP (June 9, 2016) at 382.

[71] RP (June 13, 2016) at 493.

[72] CP at 908-09 (Finding of Fact 25).

In early 2014, Lucas and Daniel agreed to hire an executive compensation consultant to advise on the bonus dispute. Daniel selected Towers Watson.

Daniel testified that he did not have "any material role" in gathering information for Towers Watson.[73] He also testified that he instructed Emery Wager, a Gravity employee, "[t]o communicate everything to Lucas, to not hold anything back, and to make sure he was fully informed, answer his questions, and try to fulfill any requests that he could."[74] And Daniel testified that he wanted the report to be "independent and credible" and he tried to avoid influencing their work.[75] The record supports the finding that "Daniel Price intended that Towers Watson's report would be independent and he had very little involvement in their work."[76]

In the report dated April 17, 2015, Towers Watson determined the appropriate bonus range for Daniel was between $75,000 and $500,000, with the appropriate total compensation between $675,000 and $2.8 million. In the report, the total compensation was comprised of salary, bonus, and long term compensation.

Eventually, Daniel unilaterally set his bonuses for 2013 and 2014 at $800,000. His salary remained $300,000, for a combined total compensation of $1.1 million each year. Sufficient evidence supports the findings that (1) "Daniel

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[73] RP (June 9, 2016) at 255.

[74] Id. at 256.

[75] Id. at 257.

[76] CP at 913 (Finding of Fact 42).

Price's compensation for 2013 and 2014 is within Towers Watson's range of reasonable compensation for the CEO of Gravity Payments" and (2) "[t]he Towers Watson report corroborated the reasonableness of Daniel Price's compensation."[77] Even though Lucas provided some evidence questioning the Towers Watson analysis, other evidence supported it.

We conclude the record supports the court's findings, and these findings support the court's conclusions that the 2013 and 2014 bonuses did not constitute shareholder oppression, breach of fiduciary duty, or breach of contract.

III. Limitation of Cross-Examination

Lucas argues the trial court abused its discretion when it terminated his cross-examination of Lorraine Barrick, Daniel's forensic accounting expert.

"The scope of cross-examination is within the discretion of the trial court."[78] "Similarly, the admissibility of cumulative evidence lies within the trial court's discretion."[79]

On cross-examination, Lucas attempted to elicit testimony from Barrick about specific days when Daniel charged "business" expenses to Gravity and his calendar did not show a corresponding entry. Daniel objected that the testimony was cumulative, and the court agreed because the expense reports and Daniel's calendar were "already before the court."[80]

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[77] CP at 915-16 (Findings of Fact 48 and 50).

[78] Thornton v. Annest, 19 Wn. App. 174, 180, 574 P.2d 1199 (1978).

[79] Christensen v. Munsen, 123 Wn.2d 234, 241, 867 P.2d 626 (1994).

[80] RP (June 14, 2016) at 728.

Lucas argues the limits on his cross-examination excluded evidence establishing his claim that Daniel misused corporate assets. But the testimony he was attempting to elicit did not provide the court with any new information.

We conclude the trial court did not abuse its discretion when it terminated Lucas's cross-examination of Daniel's expert witness.

IV. Denial of Lucas's Motion to Exclude

Lucas argues the trial court abused its discretion when it denied his motion to exclude Daniel's calendar.

In order to exclude evidence for a discovery violation, the court must consider (1) "'whether a lesser sanction would probably have sufficed,'" (2) "whether . . . the disobedient party's refusal to obey a discovery order was willful or deliberate," and (3) whether the violation "substantially prejudiced the opponent's ability to prepare for trial."[81]

On May 19, 2016, Lucas deposed Barrick. She testified to reviewing Daniel's entire calendar, from 2008 to present, to prepare her report. Barrick brought the calendar and her other files to the deposition. On May 25, 2016, Lucas moved to exclude Daniel's calendar because Daniel did not provide his calendar until Barrick's deposition even though it was responsive to several earlier

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[81] Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997) (quoting Snedigar v. Hodderson, 53 Wn. App. 476, 487, 768 P.2d 1 (1989), rev'd in part, 114 Wn.2d 153, 786 P.2d 781 (1990)).

discovery requests. On May 31, 2016, the court denied Lucas's motion to exclude.

Lucas does not establish the late disclosure substantially prejudiced his ability to prepare for trial. He argues he was prejudiced because his experts were unable "to develop a comprehensive responsive analysis of the calendar,"[82] but makes no showing that his theory of the case required such an analysis. The theory underlying Lucas's claim that Daniel misused corporate assets was that Daniel failed to document his expenses per IRS guidelines.

We conclude the trial court did not abuse its discretion when it denied Lucas's motion to exclude Daniel's calendar.

V. Attorney Fees and Costs

Lucas contends the trial court abused its discretion when it awarded attorney fees and costs to Daniel.

We review a trial court's determination of reasonableness of attorney fees for abuse of discretion.[83] The party requesting the fee must provide reasonable documentation of the work performed.[84] And the court must conduct an independent "evaluation of the reasonableness of the fees" and cannot simply rely on the billing records and pleadings of the prevailing party.[85] "Meaningful findings

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[82] Appellant's Br. at 59.

[83] Berryman v. Metcalf, 177 Wn. App. 644, 656-57, 312 P.3d 745, 753 (2013).

[84] 224 Westlake, LLC v. Engstrom Props., LLC, 169 Wn. App. 700, 734, 281 P.3d 693, 712 (2012).

[85] Berryman, 177 Wn. App. at 677-78.

and conclusions must be entered to explain an award of attorney fees."[86] "The findings must show how the court resolved disputed issues of fact and the conclusions must explain the court's analysis."[87]

Lucas generally challenges the trial court fees and costs order because the court "entered [Daniel's] proposed fee award without *any* changes."[88] Although the court approved the amount requested by Daniel, this does not mean the court did not conduct an independent evaluation of the reasonableness of the fees. The court took care to enter 50 findings of facts to justify its reasonable fee calculation.[89] The court entered sufficiently meaningful findings of fact and conclusions of law to explain the award.

Lucas's other challenges to costs paid by Gravity, duplicative fees for multiple attorneys, and fees for time unrelated to litigation are not compelling.

We conclude the court did not abuse its discretion when it awarded attorney fees and costs to Daniel.

VI. Postjudgment Interest

Lucas also argues the trial court erred when it applied a 12 percent postjudgment interest rate to Daniel's judgment.

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[86] Id.

[87] Id. at 658.

[88] Appellant's Br. at 62.

[89] See Choung Van Pham v. Seattle City Light, 159 Wn.2d 527, 540, 151 P.3d 976 (2007) ("In this case, the trial judge took care to enter 35 findings of fact justifying his reasonable fee calculation.").

Postjudgment interest is mandatory under RCW 4.56.110.[90] As a result, a trial court's award of postjudgment interest is a matter of law that we review de novo.[91] Under RCW 4.56.110, the appropriate interest rate amount depends on the foundation of the particular judgment. "Judgments founded on written contracts . . . shall bear interest at the rate specified in the contracts."[92] If the contract does not provide a rate, "judgments shall bear interest . . . at the maximum rate permitted under RCW 19.52.020."[93] The highest permissible interest rate is 12 percent per annum.[94]

Here, the judgment of attorney fees and costs to Daniel is founded on a contract, specifically, the shareholders agreement.[95] And because the shareholders agreement does not identify a specific interest rate, the court properly applied the statutory maximum rate.

We conclude the trial court did not abuse its discretion in setting the postjudgment interest rate at 12 percent.

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[90] TJ Landco, LCC v. Harley C. Douglass, Inc., 186 Wn. App. 249, 256, 346 P.3d 777 (2015).

[91] Id.

[92] RCW 4.56.110(1).

[93] RCW 4.56.110(4); see also TJ Landco, 186 Wn. App. at 260 ("[T]here was no contractual interest rate that governed the award. The trial court correctly applied the 'default' 12 percent interest provided by RCW 4.56.110(4) and RCW 19.52.020(1).").

[94] RCW 19.52.020(1)(a).

[95] See Ex. 11 at 36 ("In the event of any litigation concerning or arising from this Agreement, the substantially prevailing Party shall be entitled to recover from the losing Party or Parties his reasonable attorneys' and paralegal fees and expenses of litigation incurred at trial and appellate levels.").

VII. Fees on Appeal

Lucas seeks fees on appeal under section 7.14 of the shareholders agreement. Because section 7.14 only provides for an award to the substantially prevailing party and Lucas is not the substantially prevailing party, we deny his request for fees.

Daniel also seeks fees on appeal under section 7.14 of the shareholders agreement and RAP 18.1. Because Daniel is the substantially prevailing party, we grant his request upon his timely compliance with the requirements of RAP 18.1.

Therefore, we affirm.

WE CONCUR:

Spearman, J.

Cox, J.

MCNAUL EBEL NAWROT & HELGREN PLLC

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