

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

TERSULI CONSTRUCTION)	No. 78906-6-I
SERVICES, LLC, a Washington State)	
limited liability company, and TRENT)	
GABEL, a married man,)	
)	
Respondents,)	
)	DIVISION ONE
v.)	
)	
RYAN MILETICH and RACHEL)	
MILETICH, husband and wife, and the)	UNPUBLISHED OPINION
marital community comprised thereof,)	
and ARMATA CONSTRUCTION)	
SERVICES, LLC, a Washington State)	
limited liability company,)	
)	
Appellants.)	

MANN, C.J. — Ryan Miletich and Armata Construction Services, LLC (collectively Miletich) appeal the trial court’s order granting partial summary judgment, and the final order and judgment after trial, arising from a contract dispute with his former business partner and business, Trent Gabel and Tersuli Construction Service, LLC (collectively Gabel). Miletich contends that the trial court erred in granting summary judgment on the issue of liability for Gabel’s claim of breach of fiduciary duty. Miletich further contends

that the trial court erred in its final order and judgment when it concluded that Gabel was the prevailing party, awarded Gabel his attorney fees and costs, and calculated the damages and prejudgment interest.

We remand for the trial court to enter findings of fact and conclusions of law explaining the legal basis and reasonableness of its award of attorney fees consistent with this opinion. We also remand for the trial court to remove the “offset” of \$75,000, and instead award lost profits against Miletich and Armata in the amount of \$121,374.80, and calculate prejudgment interest from this lesser amount. We otherwise affirm.

I.

In April 2009, Miletich and Gabel formed Tersuli, a licensed general contracting business focusing on insurance fire and flood restoration. Beginning in 2015, a dispute arose between Miletich and Gabel. By late April, the parties reached an agreement in principal under which Miletich would sell his 50 percent interest in Tersuli to Gabel. The parties entered a settlement agreement (Agreement) on May 18, 2016. Under the Agreement, Gabel agreed to purchase Miletich’s interest in Tersuli through two installment payments totaling the agreed purchase price of \$350,000. The first payment for \$200,000 was to be paid within two days of execution of the Agreement. The second payment of \$150,000 was due before December 31, 2016. Gabel made the first \$200,000 payment when the Agreement was signed.

As part of the Agreement, Miletich made several representations and warranties to Gabel and Tersuli concerning prior solicitation of customers and employees, including:

(a) At no time either prior to or as of the date of mutual execution of this Settlement Agreement, has Miletich, directly or indirectly, (i) initiated contact with a customer of the Company for the purpose of discussing transfer of the customer's business to Miletich (or any business in which Miletich has or will have an ownership interest ("Miletich Business")), or (ii) otherwise solicited or attempted to induce a customer of the Company to transfer his/her business to Miletich (or Miletich Business) or limit, reduce, or terminate its business relationship with the Company.

(b) At no time either prior to or as of the date of mutual execution of this Settlement Agreement, has Miletich, directly or indirectly, (i) initiated contact with any employee of the Company for the purposes of discussing employment with Miletich (or Miletich Business), or (ii), otherwise solicited or attempted to induce any employee of the Company to limit, reduce or terminate his/her employment relationship with the Company.

(c) Miletich has no actual knowledge of any material facts, circumstances, liabilities, threatened or asserted claims, conditions, or other matters, which reasonably could have a material adverse effect on the Company or its Business, except those matters which Miletich has expressly disclosed to Gabel, or which Gabel has actual knowledge of, or which Gabel reasonably could be expected to have knowledge of in the course of Gabel's participation in the business.

The Agreement also contained corresponding future nonsolicitation terms that restricted Miletich from directly or indirectly soliciting business from Tersuli's existing customers or employees for 12 months after the signing of the agreement. The Agreement did, however, allow for the release and transfer of five "projects" that Gabel would assign to Miletich so long as the customers consented and other formalities were observed. Miletich and Gabel agreed to a mutual release of claims: "provided that such release shall not apply to claims or damages arising from or related to (i) any breach of any representation, warranty, covenant or obligation of Gabel [or Miletich] . . . or (ii) the intentional misconduct, fraud, or gross negligence of Gabel [or Miletich]."

Prior to signing the Agreement, on May 4, 2016, Miletich formed his new company, Armata. Miletich licensed Armata on May 31, 2016—two weeks after the

May 18, 2016, Agreement. Miletich formed Armata in anticipation of the buyout of his interest in Tersuli, and of him running his own insurance restoration company.

On December 7, 2016, Gabel sent a written demand to Miletich claiming that Miletich had breached the terms of the Agreement. The letter outlined several examples including Miletich's solicitation of customers and employees both prior to and after the Agreement. The letter stated that due to the material breach of the Agreement and breach of fiduciary duty, Gabel was relieved of further obligations under the Agreement, including payment of the second \$150,000 installment.

After Miletich failed to respond, on February 16, 2017, Gabel filed a complaint in superior court asserting claims for breach of contract, breach of fiduciary duty, breach of duty of good faith and fair dealing, breach of the employee duty of loyalty, tortious interference with business expectancy, slander, and fraud in the inducement. Miletich answered and asserted counterclaims for breach of contract/quantum meruit, conversion/constructive trust, and violation of the Washington State Securities Act, ch. 21.20 RCW.

On February 15, 2018, the trial court ruled on the parties' cross motions for summary judgment. The court granted summary judgment for Gabel on the issue of liability for the claims of breach of fiduciary duty and tortious interference. The court also dismissed Miletich's claims for quantum meruit and conversion/constructive trust. The court denied summary judgment on the parties' remaining claims.

On June 6, 2018, after a four-day bench trial, the trial court entered findings of fact and conclusions of law. The court's findings included: (1) Miletich's last day as an owner and employee of Tersuli was April 29, 2016; (2) the Agreement was executed

and effective May 18, 2016; (3) the unit purchase agreement was also executed May 18, 2016, with a retroactive effective date of January 1, 2016; (4) the second installment of \$150,000 was due and payable on December 31, 2016 “provided Miletich complied with and did not breach the terms of the Agreement or otherwise engage in unlawful conduct that excused payment;” (5) Gabel did not pay the second payment because of Miletich’s unlawful conduct; and (6) Miletich represented and warranted several things regarding his pre-settlement conduct with both customers and employees “as well as his actual knowledge of any material facts or circumstances that could have an adverse effect on Tersuli and/or the Agreement.”

With respect to Miletich’s representations and warranties, the trial court found:

In the weeks and months before executing the Agreement, Miletich undertook extensive and continuing efforts to funnel certain business relationships away from Tersuli to Armata that included the jobs known as: . . . [“Unreleased Jobs”]. For example, Miletich engaged in a pattern of phone calls, emails, and face to face meetings to facilitate the transfer of the Unreleased Jobs from Tersuli to Armata during the weeks leading up to execution of the Agreement. Miletich intentionally deleted certain Unreleased Jobs from the Tersuli Job Sheet prior to his separation and execution of the Agreement to conceal certain Unreleased Jobs from Gabel. Miletich intentionally omitted certain Unreleased Jobs from the Tersuli Job Sheet and instructed Tersuli employee Dave Tabacheck to do the same. Gabel had no knowledge of Miletich’s conduct in this respect.

Finally, based on the expert testimony of Paul Torelli, Ph.D., the court found the pretax actual or potential revenue associated with the Unreleased Jobs totaled \$586,193.42. And applying a profit margin of 33.5 percent, the court found the lost profit to Gabel from the Unreleased Jobs was \$196,374.80.

The trial court’s conclusions of law included:

- The Agreement was valid and enforceable;

- Miletich owed Tersuli an employee duty of loyalty through his last day of employment and breached that duty by engaging in self-dealing, deceit, and misrepresentations;
- Miletich owed fiduciary duties through April 29, 2016 and, consistent with the ruling on summary judgment, breached his fiduciary duties by engaging in self-dealing, deceit, and misrepresentations;
- Miletich materially breached his representations, warranties, and nonsolicitation restrictions in the Agreement regarding solicitation of employee Josh Jacobson;
- Miletich did not breach the Agreement with respect to solicitation of customers as the Unreleased Jobs were not customers, but were valid business expectancies;
- Miletich owed and breached a duty of good faith and fair dealing by omitting and concealing that he was working on the Unreleased Jobs;
- Gabel was not in breach of the Agreement by not tendering the second installment of \$150,000 on December 31, 2016, due to Miletich's breach of the Agreement and other unlawful conduct;
- Tersuli sustained its burden of proof for claims of breach of contract related to employee solicitation, breach of duty of good faith and fair dealing, breach of employee duty of loyalty;
- Miletich failed to sustain his burden of proof on his claims for violations of the Washington State Securities Act;
- Miletich sustained his burden of proof that Gabel failed to send out a timely joint announcement, but Miletich failed to establish any damages;

For damages, the court concluded that as a result of Miletich's conduct, Gabel was entitled to damages as follows:

- Lost profits against Miletich and Armata in the amount of \$196,374.80.
- Lost profits are subject to off-set in the amount of \$225,000. The \$150,000 still owing on the contract, and the \$75,000 the work would have cost Gabel in terms of hiring an additional employee to perform such work.

- Prejudgment interest at a rate of 12 percent per annum from the effective date of the Agreement on the lost profits.
- Post-judgment interest at the rate of 12 percent per annum from the date judgment is entered.

Finally, the court concluded that “[p]laintiffs, as the prevailing party, are entitled to recover reasonable attorneys’ fees and costs incurred in this lawsuit in an amount to be determined by the Court at a later date upon Motion by Plaintiff.”

Gabel moved for attorney fees based on its status as the prevailing party under the contract, Miletich’s breach of duty good faith and fair dealing, and breach of fiduciary duty. The trial court awarded Gabel \$150,000 in attorney fees and \$10,491.91 in costs.¹ On August 6, 2018, the trial court entered the judgment as follows:

1. Judgment is entered in favor of [Gabel] and against [Miletich], jointly and severally, in the principal judgment amount of \$196,374.80.
2. Pre-judgment interest is awarded on the principal judgment amount at the statutory rate 12% per annum from May 18, 2016, which equates to \$51,906.24 as of July 31, 2018.
3. Reasonable attorneys’ fees and costs in the amount of \$170,432.91 are awarded to [Gabel] as follows: (1) \$150,000 in reasonable and necessary fees per 7/5/18 Order; (2) \$9,941.00 in reasonable and necessary fees per 2/13/18 Order; and (3) \$10,491.91 in costs per 7/5/18 Order.²
4. Defendant Miletich is entitled to an offset of: (1) \$150,000 for the second installment payment under the May 18, 2016 Settlement Agreement; (2) prejudgment interest on the \$150,000 second installment payment at the statutory rate of 12% per annum from January 1, 2017, which equates to \$28,408.32 as of July 31, 2018; and (3) \$75,000 for the estimated expense of an additional Tersuli employee.
5. After applying the above-referenced offset, the total net judgment amount entered in [Gabel’s] favor is \$165,305.63.

¹ Miletich also unsuccessfully moved for attorney fees.

² The earlier attorney fee awards are not at issue on appeal.

Miletich appeals.

II.

Miletich first argues that the trial court erred in awarding attorney fees to Gabel. Miletich contends that because his net recovery was more than Gabel's he was the true prevailing party. We disagree.

The prevailing party is the one who receives judgment in that party's favor. Blair v. Washington State Univ., 108 Wn.2d 558, 571, 740 P.2d 1379 (1987). Whether a party is a prevailing party is a mixed question of law and fact and is reviewed pursuant to an error of law standard. Dave Johnson Ins., Inc. v. Wright, 167 Wn. App. 758, 782, 275 P.3d 339 (2012). The prevailing party is the one that receives an affirmative judgment in its favor. Wright, 167 Wn. App. at 782-83. If neither party wholly prevails, determining the substantially prevailing party depends on the extent of the relief accorded. Wright, 167 Wn. App. at 783.

Miletich contends that he was the prevailing party, because the principal judgment for Gabel was \$196,374.80, and Miletich was entitled to an "offset" of \$225,000 total. In making this argument, Miletich argues that Gabel materially breached the agreement by failing to tender the purchase price, and Gabel had no excuse for nonpayment. Miletich argues that since he was entitled to a net affirmative judgment of \$47,903.74, he was the prevailing party.

The trial court, however, made an express and unchallenged finding,³ that:

³ Unchallenged findings of fact are verities on appeal. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 819, 828 P.2d 549 (1992).

The second installment payment of \$150,000 was due and payable on December 31, 2016, provided Miletich complied with and did not breach the terms of the Agreement or otherwise engage in unlawful conduct that excused payment of the second installment payment. Gabel did not pay the second instalment payment of \$150,000 because of Miletich's unlawful conduct.

Based on this unchallenged finding, the trial court concluded that "Gabel was not in breach of the Agreement by not tendering the second installment of \$150,000 on December 31, 2016 due to Miletich's breach of the Agreement and other unlawful conduct described above." Thus, while the second installment payment was still due, Gabel was not in breach of the Agreement for not paying on December 31, 2016.

In contrast, based on its unchallenged findings, the trial court specifically concluded that Gabel prevailed on his claims of breach of contract, breach of the duty of good faith and fair dealing, breach of the employee duty of loyalty, and breach of fiduciary duty. Miletich only prevailed on one breach of contract claim—that Gabel did not send out joint announcement letters—but he failed to establish any damages as a result.

Based on the record before us and the trial court's unchallenged findings, there was no basis for the trial court to conclude that Miletich was the prevailing party. The court confirmed this in its oral decision: "I don't think [Miletich] under any circumstance is the prevailing party. This court specifically found [Miletich] breached the contract. So [he] is not the prevailing party, under a breach of contract." The Agreement provided that the prevailing party was entitled to attorney fees and costs. Because Gabel was the prevailing party, the trial court did not err in awarding him attorney fees and costs.

III.

Miletich next assigns error to the trial court's decision granting summary judgment for Gabel on the issue of liability on Gabel's claims for breach of fiduciary duty. We disagree.

We review a superior court's summary judgment decisions de novo. Int'l Marine Underwriters v. ABCD Marine, LLC, 179 Wn.2d 274, 281, 313 P.3d 395 (2013).

"Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). The moving party has the initial burden to demonstrate there is no genuine dispute as to any material fact. Reasonable inferences from the evidence must be resolved against the moving party. Folsom, 135 Wn.2d at 663. If the moving party meets its initial burden, then the burden shifts to the nonmoving party to set forth facts showing that there is a genuine issue of material fact. Hash v. Children's Orthopedic Hosp. & Med. Ctr., 110 Wn.2d 912, 915, 757 P.2d 507 (1988).

A breach of a fiduciary duty imposes liability in tort. Miller v. U.S. Bank of Washington, N.A., 72 Wn. App. 416, 426, 865 P.2d 536 (1994), as corrected (Feb. 22, 1994). In order to prevail, the plaintiff must establish "(1) the existence of a duty owed [to them]; (2) a breach of that duty; (3) a resulting injury; and (4) that the claimed breach was the proximate cause of the injury." Miller, 72 Wn. App. at 426 (quoting Hansen v. Friend, 118 Wn.2d 476, 479, 824 P.2d 483 (1992)). When it is established that a duty is

owed to the plaintiff, the court then determines whether the facts qualify as that defined duty, and whether there was a breach. Miller, 72 Wn. App. at 426.

“The role of members in a member-managed LLC is analogous to that of partners in a general partnership, and partners are held accountable to each other and the partnership as fiduciaries.” Bishop of Victoria Corp. Sole v. Corp. Bus. Park, LLC, 138 Wn. App. 443, 456, 158 P.3d 1183 (2007).

A partner owes a fiduciary duty of loyalty and care to both the partnership and to other partners. A partner owes a duty of loyalty to avoid secret profits, self-dealing, and conflicts of interest. A partner must avoid self-dealing by refraining from dealing with the partnership on behalf of a party having an interest adverse to the partnership. And a partner must avoid conflicts of interest in refraining from competing with the partnership.

Bishop of Victoria Corp., 138 Wn. App. at 456-57; RCW 25.05.165.

In his motion for summary judgment, Gabel established that under the May 18, 2016 Agreement, Miletich represented and warranted that prior to execution of the Agreement he had not solicited or attempted to solicit Tersuli’s customers or employees. Gabel demonstrated that Miletich had solicited both current customers and one employee.

Miletich does not dispute Gabel’s allegations, but instead first argues that he did not owe a fiduciary duty to Tersuli because the effective date of the Agreement was backdated to January 1, 2016. Miletich is correct that the parties backdated the effective date of the transfer of Miletich’s rights and interests under the Unit Purchase Agreement to January 1, 2016, for tax purposes. However, the representation and warranty provision of the Agreement state that Miletich’s “representations and warranties shall be true and correct as of the date of mutual execution of the”

Agreement. The trial court's unchallenged findings determined that the Agreement itself was executed and effective on May 18, 2016. Miletich's claim that he owed no fiduciary duty after January 1, 2016, and prior to May 18, 2016, fails.

Alternatively, Miletich argues the releases in the Agreement had the effect of releasing any liability for pre-Agreement breaches of fiduciary duty. Miletich ignores that the plain language of the release states that "such release shall not apply to (i) any breach of any representation, warranty, covenant or obligation of Miletich under this Settlement Agreement . . . or (ii) claims or damages arising from the intentional misconduct, fraud, or gross negligence of Miletich." Miletich's pre-Agreement breached of fiduciary duty fell outside the scope of the releases in the Agreement.

The trial court did not err in granting summary judgment on liability for Gabel's claim of breach of fiduciary duty.

IV.

Miletich next argues that the trial court erred in its award of attorney fees. To make this argument, he contends that the court erred in failing to enter sufficient written findings of fact and conclusions of law in support of its fee award. We agree.⁴

A trial court has broad discretion to determine the amount of attorney fees to be awarded, so long as the award is reasonable. State Farm Mut. Auto. Ins. Co. v. Johnson, 72 Wn. App. 580, 595, 871 P.2d 1066 (1994). The trial court must, however, "supply findings of fact and conclusions of law sufficient to permit a reviewing court to determine why the trial court awarded the amount in question." SentinelC3, Inc. v.

⁴ Gabel does not respond to Miletich's argument that the trial court failed to enter sufficient findings and conclusions in support of the attorney fee award.

Hunt, 181 Wn.2d 127, 144, 331 P.3d 40 (2014). The trial court must explain the basis for its award as well as provide sufficient explanation to allow for a meaningful review. State Farm, 72 Wn. App. at 595 (remanding for findings on application of lodestar analysis); Smith v. Behr Process Corp., 113 Wn. App. 306, 342-43, 54 P.3d 665 (2002) (remanding for clarification and basis for applying lodestar multiplier).

In Crest, Inc. v. Costco Wholesale Corp., 128 Wn. App. 760, 115 P.3d 349 (2005), for example, the parties disputed whether the attorneys' hourly charge was reasonable. The trial court limited the hourly award to the rate customarily charged by attorneys in Whatcom County without explaining its reason for doing so. Crest, 128 Wn. App. at 773-74. We remanded, explaining:

While fee decisions are entrusted to the discretion of the trial court, this court will exercise its supervisory role to ensure that discretion is based on articulable grounds. Here, the trial court failed to provide a written basis for the limitation sufficient for this court to accomplish a considered review.

Crest, 128 Wn. App. at 774.

In addition to articulating the calculation of reasonable attorney fees, the trial court must also delineate the basis for the fee award—particularly where, as here, the court concludes that there was a breach of both the contract and common law duties. See Boguch v. Landover Corp., 153 Wn. App. 595, 615-621, 224 P.3d 795 (2009) (remanding attorney fee award where prevailing party failed to segregate its time between breach of contract claims and tort claims). The trial court recognized this burden:

THE COURT: In addition, pursuant to the terms of the contract, you may bring a motion for attorney's fees. Now the Court is going to consider the nature of the breach, then—again, the result of the breach—

[RESPONDENT]: I understand where you are coming from, Your Honor.

THE COURT: Because we have to acknowledge that the specific breach that this Court found, did not result in significant harm to Mr. Gabel.

[RESPONDENT]: I understand where you are coming from that, Your Honor[.] Also, we had made a separate—and whether it is alternative or part and parcel the same—argument that there is fees awardable for breach of the fiduciary duty under Washington common law

THE COURT: The common law—I will look at the argument that you set forth in terms of any common law claims for attorney’s fees. Again, the common law issues are obviously separate from the contract issues, and that’s why I wanted to make sure that my findings indicated what I specifically found to be the breach. And I wanted to make sure that we were very clear that while there was a breach, in fact, that in result Mr. Gabel was not harmed by the specific breach that this court found, because there was no—so we have to address that.

(Emphasis added).

In its findings and conclusion after trial, the trial court concluded that Tersuli breached both the Agreement as well as common law duties. On the Agreement, the court concluded that Tersuli breached the representations, warranties and nonsolicitation restriction regarding solicitation of employees—but that there were no damages. The court found that Tersuli did not breach the representations, warranties, and nonsolicitation restriction with respect to the solicitation of customers because the Unsolicited Jobs were not “customers.” Outside the Agreement, the trial court found that Tersuli breached his fiduciary duties, duty of good faith and fair dealing, and employee duty of loyalty.

In its order granting attorney fees, the trial court concluded only that the hourly rates charged by Gabel’s counsel were reasonable and commensurate with the Seattle market for similarly-sized law firms, practices, and experience, and that the time spent

was reasonable and necessary. The trial court failed, however, to explain the basis for its award of fees and delineate between claims for breach of the Agreement and/or breach of one the common law duties.⁵ Finally, the court failed to explain the rationale supporting its reduction in attorney fees between the request for \$186,690.00 and its award of \$150,000.

Without findings of fact and conclusions of law that explain the legal basis and reasonableness of the attorney fees, we are unable to accomplish a considered review. Crest, 128 Wn. App. at 774. Remand is necessary.

V.

Gabel's motion for attorney fees and costs argued that fees were appropriate under the Agreement, for Miletich's breach of fiduciary duty, and for Miletich's breach of his duty of good faith and fair dealing. While the order awarding attorney fees fails to explain the basis for the award, Miletich argues that the trial court erred if it granted fees based on any of the theories argued by Gabel.⁶ We address each in turn.

A.

Miletich first argues that the trial court erred if it awarded attorney fees based on a breach of fiduciary duty, because a breach of fiduciary duty will not support an award of fees. We disagree.

⁵ For example, as pointed out by Miletich, the trial court granted summary judgment on the issue of liability for breach of fiduciary duty. The only issue remaining for trial on the breach of fiduciary duty claim was damages. Thus, if the fee award was based only on the breach of fiduciary duty, the findings need to segregate time spent on other claims.

⁶ Miletich also argues that the trial court erred if it based its fee award on tortious interference with a business expectation. Because Gabel did not argue below that tortious interference with business expectancies supported an award of attorney fees, Gabel waives any such claim. RAP 2.5.

In Washington, attorney fees are generally not awarded as part of the cost of litigation unless authorized by contract, statute, or a recognized ground in equity. Hsu Ying Li v. Tang, 87 Wn.2d 796, 797, 557 P.2d 342 (1976). Tang concerned the award of costs and attorney fees to one partner after successfully seeking an accounting and dissolution of a two-person partnership. Tang, 87 Wn.2d at 797. The Supreme Court acknowledged that recognized grounds in equity for awarding attorney fees included the losing party's bad faith, and the "common fund exception." Tang, 87 Wn.2d at 798. But, because there was no evidence of bad faith conduct, the court concluded that the bad faith exception was not applicable. The court further concluded that because the prevailing partner had only preserved partnership funds for himself—and not for others—the common fund exception did not apply. Tang, 87 Wn.2d at 798. The court continued, however, and exercised its equitable powers to award attorney fees to the prevailing partner based on the respondent's breach of fiduciary duty. Tang, 87 Wn.2d at 799-800.

Miletich correctly points out that subsequent cases have interpreted Tang as basing the fee award on the prevailing partner having preserved an identifiable fund in the form of a partnership assets. See ASARCO Inc. v. Air Quality Coalition, 92 Wn.2d 685, 716, 601 P.2d 501 (1979); Perez v. Pappas, 98 Wn.2d 835, 845, 659 P.2d 475 (1983). Miletich asserts further, however, that the identifiable fund must benefit multiple parties, not just one partner in order for the breach of fiduciary duty exception to apply. We disagree. Tang involved one partner protecting partnership assets for himself. If the prevailing partner had protected an identifiable fund for the benefit of multiple parties, the court would not have needed to reject application of the common fund

exception. The court only turned to the breach of fiduciary duty exception because the protected assets only benefited the prevailing party. Tang, 87 Wn.2d 798-800.

As the court recognized in Green v. McAllister, 103 Wn. App. 452, 468, 14 P.3d 795 (2000), where a breach of fiduciary duty is established, the trial court has the discretion to award fees. While an award of attorney fees is not mandatory for breach of fiduciary duty, “[e]specially when the plaintiff is suing to recover for himself alone,” an award remains within the trial court’s discretion. Green, 103 Wn. App. at 468.

Here, like Tang, there is an identifiable fund—lost profits from the Unreleased Jobs—that Gabel preserved. On remand, the trial court has the discretion to award or deny fees based on breach of fiduciary duty.

B.

Miletich next contends that the trial court erred if it awarded attorney fees based on a breach of the Agreement. Based on the trial court’s existing findings, we agree.

Under the Agreement, the prevailing party is entitled to attorney fees “if any arbitration proceeding or litigation is commenced to enforce this Settlement Agreement because of an alleged dispute, breach, default, or misrepresentation in connection with any of the provisions of this Settlement Agreement.” (Emphasis added). Thus, in order for attorney fees to be available under the agreement, Gabel must have prevailed in demonstrating a dispute, breach, default, or misrepresentation connected to a “provision” of the Agreement. Boguch, 153 Wn. App. at 615.

Prevailing on a breach of contract claim requires that the contract imposes a duty, the duty is breached, and “the breach proximately cause[d] damage to the

claimant.” NW Indep. Forest Mfrs. V. Dep’t of Labor & Indus., 78 Wn. App 707, 712, 899 P.2d 6 (1995).

Miletich correctly points out that the trial court specifically concluded that he did not breach the representations, warranties, and nonsolicitation restrictions in the Agreement regarding solicitation of customers because the Unreleased Jobs were not customers. Miletich also correctly points out that while the trial court found that he breached the agreement with respect to his solicitation of Tersuli employee Josh Jacobsen, the court did not find that Gabel was damaged by Miletich’s action. While the written findings and conclusions are silent as to any damage attributable to this breach, the trial court’s oral ruling appear to reflect a finding of no damage:

THE COURT: . . . And I wanted to make sure that we were very clear that while there was a breach, in fact, that in result Mr. Gabel was not harmed by the specific breach that this court found, because there was no—so we have to address that.

On remand, if the trial court awards attorney fees based on the Agreement, it must explain the basis for concluding that Gabel prevailed in demonstrating that a provision of the Agreement was breached and that Gabel was damaged as a result of that breach.

C.

Miletich next asserts that the trial court erred if it awarded attorney fees based on a breach of the duty of good faith and fair dealing. This is so, he contends, because the trial court failed to find that the Agreement gave Miletich any discretionary authority to determine a contract term. Based on the trial court’s existing findings, we agree.⁷

⁷ Gabel does not respond to this argument.

“Under Washington law, ‘[t]here is in every contract an implied duty of good faith and fair dealing’ that ‘obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.’” Rekhter v. State, Dep’t of Soc. & Health Servs., 180 Wn.2d 102, 112-113, 323 P.3d 1036 (2014) (quoting Badgett v. Sec. State Bank, 116 Wn.2d 563, 569, 807 P.2d 356 (1991)). The duty of good faith and fair dealing “cannot add or contradict express contract terms and does not impose a free-floating obligation of good faith on the parties.” Rekhter, 180 Wn.2d at 113. “In particular, the duty of good faith and fair dealing arises ‘when the contract gives one party discretionary authority to determine a contract term.’” Rekhter, 180 Wn.2d at 113 (quoting Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc., 86 Wn. App. 732, 738, 935 P.2d 628 (1997)).

In Rekhter, for example, DSHS contracted with individual care providers to perform necessary services. The providers agreed in the contract to assist with personal care services and household tasks included in the client’s “service plan.” The contracts incorporated by reference the service plans for the particular clients, although the contracts were signed before the service plans were created. After the contracts were signed, DSHS executed the service plans which determined the work to perform and ultimate compensation. Rekhter, 180 Wn.2d at 108-09. DSHS subsequently adopted a process that ultimately required live in providers to “perform necessary services without compensation.” Rekhter, 180 Wn.2d at 109.

Our Supreme Court concluded that DSHS violated the duty of good faith and fair dealing found in the providers’ contracts because DSHS held unilateral “discretion to set a future contract term.” Rekhter, 180 Wn.2d at 113. The court further explained:

when a party has discretion over a future contract term, it has an implied duty of good faith and fair dealing in setting and performing that contractual term. Here, the contract provided that service providers would be paid for the hours authorized in the service plan pursuant to the CARE process. DSHS was the party responsible for determining the hours that would be authorized because it designed the CARE process that produced that determination. When DSHS exercised discretion to create the systems that produced the service plans and reduce the hours those plans authorized for live-in providers, its actions were governed by an implied covenant of good faith.

Rekhter, 180 Wn.2d at 115.

Here, unlike Rekhter, the trial court's findings do not indicate that the Agreement provided Miletich with "discretionary authority to determine a contract term." Rekhter, 180 Wn.2d at 113. Without such discretion, there is no legal basis to conclude that Miletich breached the duty of good faith and fair dealing.

VI.

Miletich next argues that the trial court erred in calculating the loss in net profit on which to base its award of prejudgment interest. He contends the court erred by failing to subtract the \$75,000 in employee overhead that would have been necessary for Gabel to recover the calculated loss in net profit. We agree.

We review an award of prejudgment interest for abuse of discretion. TJ Landco, LLC v. Harley C. Douglass, Inc., 186 Wn. App. 249, 255, 346 P.3d 777 (2015).

Prejudgment interest is awarded on the principle that a defendant who retains money which he owed to another should be charged interest upon it. Hansen v. Rothaus, 107 Wn.2d 468, 473, 730 P.2d 662 (1986). "The plaintiff should be compensated for the use value of the money representing his damages for the period of time from his loss to the date of judgment." Hansen, 107 Wn.2d at 473. The Court has found "no basis to

distinguish liquidated damages in negligence actions from those in contract actions. The policy basis for awarding prejudgment interest on liquidated damages applies regardless of the characterization of the claim.” Hansen, 107 Wn.2d at 475.

The trial court found that the pretax actual, or potential revenue that the Unreleased Jobs would have earned for Gabel, was \$586,193.42. Based on expert testimony, the court found that an appropriate profit margin would be 33.5 percent, which would equate to a loss profit to Gabel of \$196,374.80. The same expert opined, however, that in order to earn the potential revenue for the Unreleased Jobs, Gabel would have needed to incur \$75,000 in additional employee expenses. In other words, in order for Gabel to earn a net profit of \$196,374.80, it would have cost him \$75,000 in overhead. The trial court applied the \$75,000 as an “offset” to the total damage award. This was an error. The \$75,000 was not an “offset” but was instead overhead and should have been subtracted from the calculated net profit of \$196,374.80 to produce an actual net profit of \$121,374.80. Prejudgment interest, consequently, should have been calculated based on a loss profit of \$121,374.80.

We remand for the trial court to remove the “offset” of \$75,000, and instead award lost profits against Miletich and Armata in the amount of \$121,374.80, and calculate prejudgment interest from this lesser amount.⁸

⁸ Miletich argues that the trial court erred by awarding prejudgment interest at a rate of 12 percent. This is so, he avers, because the interest rate for tortious conduct is controlled by RCW 4.56.110(3)(b). Miletich ignores that absent a written agreement, the statutory rate for prejudgment interest is 12 percent under RCW 19.52.010. The trial court did not err in awarding prejudgment interest at a rate of 12 percent.

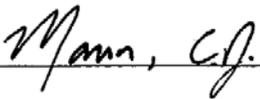
VII.

Both parties request attorney fees on appeal. Because both parties prevail in part, we decline to award attorney fees on appeal.

We remand for the trial court to enter findings of fact and conclusions of law explaining the legal basis and reasonableness of its award of attorney fees consistent with this opinion.

We also remand for the trial court to remove the "offset" of \$75,000, and instead award lost profits against Miletich and Armata in the amount of \$121,374.80, and calculate prejudgment interest from this lesser amount.

We otherwise affirm.



WE CONCUR:



