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NO. 64578-1

COURT OF APPEALS STATE OF WASHINGTON
DIVISION ONE

WOODINVILLE BUSINESS CENTER NO. 1, a Washington Limited Partnership,

Respondent/Third-party Plaintiff,

v.

ALBERT L. DYKES, an individual and former General Managing Partner of Woodinville Business Center No. 1, and MARGARET RYAN-DYKES, an individual, and the marital community composed thereof,

Appellants/Third-party Defendants.

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BRIEF OF APPELLANTS

Sam B. Franklin, WSBA No. 1903
Eric L. Lewis, WSBA No. 35021
Of Attorneys for Appellants

LEE, SMART, P.S., INC.
1800 One Convention Place
701 Pike Street
Seattle, WA 98101-3929
(206) 624-7990

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I. ASSIGNMENTS OF ERROR

Assignments of Error

A. The trial court erred by finding that the jury's damages award for breach of the commission agreement was a liquidated sum, and therefore, the trial court's award of prejudgment interest was an abuse of its discretion.

B. The trial court erred by granting consideration of WBC's motion to strike the jury's consideration of the breach of fiduciary duty claim.

C. The trial court abused its discretion by ordering Mr. Dykes to disgorge $100,000 of his sales commission.

D. The trial court erred by ruling that Mr. Dykes breached his fiduciary duty to WBC.

Issues Pertaining to Assignments of Error

A. Whether the trial court committed reversible error in awarding WBC prejudgment interest where:

1. This Court reviews the trial court's conclusion of law that WBC's damages were liquidated under a *de novo* standard;

a. The Washington Supreme Court's statement of the standard of review in *Scoccolo Constr.* is limited to its facts;

b. The cases on which *Scoccolo Constr.* relies all

review a trial court's conclusion of law that plaintiff's damages are liquidated under a *de novo* standard; and

c. Application of an abuse of discretion standard of review is contrary to Washington law, and would create two different standards of review for the same rule.

2. The trial court erred when it held that the jury did not exercise discretion in reaching its verdict; and

3. The trial court's ruling is contrary to law because it mistakenly concluded that the jury's verdict was "simply a mathematical calculation."

B. Whether the trial court committed reversible error by granting WBC's motion to strike the jury's consideration of respondent's breach of fiduciary duty claim where;

1. Mr. Dykes was prejudiced by WBC's late filing of its motion to strike because;

a. Mr. Dykes did not receive actual notice of the motion to strike; and

b. Mr. Dykes was not provided sufficient time to prepare a response;

2. WBC's trial brief did not advise the trial court of the correct rule to use in its analysis of whether to grant WBC's motion to

strike;

C. Whether the trial court abused its discretion by ordering Mr. Dykes to disgorge $100,000 of his sales commission where;

1. WBC introduced inadmissible evidence in support of its argument that Mr. Dykes's breached his fiduciary duty to the partnership; and

2. The trial court abused its discretion by conflating the breach of fiduciary duty claim from *Lumpkin, Inc. v. Dykes* with the allegations of breach of fiduciary duty in this case.

D. Whether the trial court's ruling that Mr. Dykes breached his fiduciary duty to WBC constitutes reversible error where;

1. The trial court's ruling that Mr. Dykes did not timely disclose his commission to the partnership is contrary to the substantial weight of the evidence; and

2. The trial court's conclusion that Mr. Dykes breached his fiduciary duty to the partnership is contrary to Washington law.

II. STATEMENT OF THE CASE

A. Formation of WBC and description of the transaction that forms the basis of this lawsuit.

WBC was formed in or about August 1980. CP 126. The formation agreement provided that Marcol, a d/b/a of Mr. Dykes, could

receive the "normal" real estate commission for the sale of property on behalf of the partnership, but not to exceed 6 percent. CP __.[1] In January, 2008, Mr. Dykes sold a commercial property on behalf of WBC for $10,300,000. RP 540-41; 753. The closing statement was received by Mr. Lumpkin on January 24, 2008, containing Mr. Dykes request for payment of his commission of 6 percent, $618,000, as the listing agent. RP 596-97.

Mr. Dykes resigned his position as managing general partner of WBC in January 16, 2008, pursuant to the terms of the partnership vote. CP ___. On January 16, 2008, Mr. Lumpkin became the managing general partner of WBC. RP 609. On January 24, 2008, Mr. Lumpkin, as the managing general partner of WBC and on behalf of the partnership, authorized the 6 percent commission payment to Mr. Dykes. RP 596.

B. The jury heard testimony from both parties regarding what a "normal" commission should be for the sale of the property.

1. WBC's counsel asserted in opening statement that a 2 percent commission was at the high end of "normal" for a comparable transaction.

In opening argument, counsel for WBC stated that the evidence would show that the high "normal" commission for a piece of property comparable to the property sold by Mr. Dykes was 2 percent of the sale

[1] Appellant has filed a supplemental designation of clerk's papers that has not yet been received by the Court of Appeals. As soon as the clerk's papers are received by the court, appellant requests permission to file a revised brief containing all citations to the record.

price:

> So the normal for Mr. Dykes would be 2 percent. And that's high normal, actually. That's what the testimony is going to be.

RP 63.

2. WBC's expert witness testified that based on his research, a commission of 2 percent to 3 percent, split 50/50 between the listing broker and the selling broker, was "normal."

At trial, WBC presented expert testimony regarding the "normal" commission range over the 13-year period WBC's expert had been working in the industry:

> Q. So let's talk about it specifically, but what are — what are the real estate commissions in your personal experience that you've encountered for sales in the $10 million range?
>
> A. They've all been 2 to 3 percent total fee, split. Usually they're split equally, 50/50.

RP 692. WBC's expert stated his conclusion as to the appropriate commission Mr. Dykes should have received.

> Q. Having done all of that work to try to determine what the normal commission would be within the real estate industry in the Puget Sound area, do you have an opinion about what the real estate commission should have — would have been for the WBC sale if it were to constrain to the normal industry standard in the Puget Sound area?
>
> A. I would say a 3 percent fee.
>
> Q. And do you have an opinion about whether that fee would be split between the brokers?
>
> A. It would just be split evenly.

> Q. Leaving a 1 1/2 percent fee for the selling broker and a 1 1/2 percent fee for the buyer's broker; is that correct?
>
> A. In a normal instance, yes.

RP 699.

3. In closing argument, WBC argued that the "normal" commission to which Mr. Dykes was entitled was 1.5 percent.

In closing argument, counsel for WBC argued that the evidence showed that the "normal" commission Mr. Dykes should have received was 1.5 percent.

> I think what we believe that we want you to do for the partners in WBC is to find that Mr. Dykes' commission should be 1.5 percent, in which case his commission should be $154,500.

RP 673.

4. Mr. Dykes testified that a 6 percent commission paid to the listing broker was "normal."

Mr. Dykes testified that in his experience the "normal" commission for a listing agent in 1980 (the date that the partnership was formed) varied from 4 percent to 7 percent.

> Q. Now, when this offering circular was done, what was the industry standard for commercial real estate commissions?
>
> A. Oh, back then around 1980, I'd say there was — if you'd say, "Give me an exact" — there was no — there is no exact figure, but I'd put a range of anywhere between 4 and 7 percent.

RP 369. Mr. Dykes also testified about the propriety of his 6 percent

commission.

> When I even originally structured the deal, 6 percent was below what was normally being paid at that time, and years — 27 years later, it is certainly higher. Commissions have gotten higher, not lower. So I was well aware of that self-imposed limitation, and I did quite a bit of testing of the market or — or calling people I knew, brokers, what were - was - what - what the range of typical offerings were made at. So I - I completely and absolutely kept that in mind when I determined that 6 percent was - **and I am absolutely firmly, completely, totally, convinced that 6 percent is a fair, reasonable, and - and within the industry norms figure**. And in fact, if there was no self-imposed limitations, I think it would be a little bit higher.

RP 436-37 (emphasis added).

5. Mr. Dykes's expert witness testified that a commission of five to six percent is normal for a transaction of this size and complexity.

Mr. Dykes offered Don Arsenault as an expert regarding the "normal" commission the listing broker would receive on a transaction comparable to the one at issue in this case. Mr. Arsenault, though reluctant to identify what constitutes a "normal" commission because he believed it to be price-fixing, testified that for a commercial property comparable to the one at issue in this case he would receive a commission of five to six percent.

> A. What I can say is — is what I'm willing to work for on a certain project in looking at the scope and nature of that project and the work product required. And for me, it depends whether — for me, I will charge a 5 percent or a 6 percent commission.

Q. On a project of this size?

A. Yes.

RP 718.

6. The jury was instructed to exercise its judgment to determine the "normal" commission that should have been paid to Mr. Dykes.

On the issue of Mr. Dykes's alleged breach of the partnership agreement with respect to the "normal" sales commission, the trial court instructed the jury:

> If you find that defendant WBC has proven that Albert Dykes breached its contract with it regarding the amount of commission to which he is entitled from the sale of the partnership asset, and if that breach results in a lesser commission owing Albert Dykes than that paid to him at closing of $618,000, then you should enter judgment in favor of WBC against Albert Dykes in the amount of the difference between the commission that you determined to be proper and owing under the contract between WBC and Dykes and the $618,000 he was paid at closing.

RP 840. In its verdict, the jury determined that the "normal" sales commission that Mr. Dykes, as the listing broker, should have been paid was four percent, or $206,000 less than the six percent commission he received. CP ___.

7. On the issue of prejudgment interest, the trial court held that the jury's verdict did not require the exercise of discretion, and WBC's damages were therefore liquidated.

At the hearing on November 6, 2009, the court held that the jury's

determination that the "normal" commission was 4 percent, not 6 percent, which rendered WBC's damages liquidated and therefore subject to prejudgment interest. RP 17-18 (VROP Nov. 6, 2009). The trial court stated its reasoning as follows:

> I think under the authority of *Dautel* that this action by the jury was not the type of exercise of discretion that would take their determination of a 4 percent commission and not a 6 percent commission into the realm of unliquidated damages. I think that the *Dautel* case does stand for the proposition that under those circumstances, that type of evaluation, that type of calculation by the jury, was simply a mathematical determination of what they believed to be the correct amount of the commission involved in the case. So I believe that at that point, there was little actual discretion exercised. Actually, no discretion exercised. It was simply determining: What's the correct amount, 4 percent or 6 percent? And they determined it was 4 percent. I think under the circumstances, the evidence in this case, under the — the authority of the *Dautel* case, that the amount was a liquidated sum and prejudgment interest should be calculated.

RP 17-18 (VROP Nov. 6, 2009).

C. The evidence presented at trial established that the limited and general partners of WBC contracted to pay Mr. Dykes a sales commission equal to the "normal" rate, but not to exceed 6 percent.

1. The original formation documents advised all potential investors of Mr. Dykes's sales commission.

The investment documents provided to investors clearly identified the commission to be paid to Mr. Dykes for the sale of commercial property.

> General Partners may participate in real estate commissions at time of sale or lease if performing as an agent. Lease commissions shall not exceed five percent of the term rent **and sale commission shall not exceed six percent**.

CP ___ (emphasis added). The WBC Offering Circular states in relevant part:

> COMMISSION ON SALE OF PROPERTY
>
> MARCOL may receive a real estate commission or co-broker with other brokers at the time of sale or lease of the property. **However, the partnership will not be obligated to pay a commission larger than is normal for the real estate industry in the area and the total commissions at time of sale are not to exceed 6 percent**.

CP ___ (emphasis added). These documents were provided to, and all terms agreed to, by all of the general and limited partners of WBC at the time of formation of the limited partnership. RP 843.

2. Mr. Lumpkin's testimony confirms that he was advised of the terms of Mr. Dykes's sales commission on at least three occasions before he authorized payment.

On direct examination, Mr. Lumpkin testified that he reviewed the escrow documents prior to authorizing Mr. Dykes's commission payment and determined that the amount of Mr. Dykes's commission was consistent with the partnership agreement.

> Q. Could I ask you to turn to Exhibit 21, please? When you agreed to Mr. Dykes' disbursement of $618,000, why did you do that?

> A. On the escrow documents, that was the only reference to any commissions. I had no knowledge of the UBI invoice. I had no knowledge of the buyer having an -- an outside agent. There was nothing on the face of the escrow closing statement that was at variance with the partnership **documents**.

RP 510 (emphasis added).

Evidence presented at trial demonstrated that Mr. Lumpkin was also advised of the terms of Mr. Dykes's commission under the partnership agreement in 2007 during the earlier lawsuit. CP ___.

Finally, Mr. Lumpkin admitted that he saw the amount of the commission prior to authorizing payment to Mr. Dykes:

> Q. Now, Mr. Lumpkin, when you saw that seller's closing statement dated on 6/20 — I mean, 1/24, prepared by Ms. Weis, the sale commission to Mr. Dykes of $618,000 was clearly stated, correct?
>
> A. It was.
>
> Q. And the purchase price of 10 million was clearly stated?
>
> A. It was.
>
> Q. So you were able to figure pretty quickly that's a 6 percent commission, correct?
>
> A. That's correct.

RP 615-16.

D. Over Mr. Dykes's objection, the trial court reserved to itself the findings of fact and conclusion of law on WBC's claim of breach of fiduciary duty and WBC's request for disgorgement.

1. WBC moved in its trial brief to have the breach of fiduciary duty claim tried to the court, not the jury.

WBC's claims for breach of contract and breach of fiduciary duty were originally to be tried to the jury. RP 4-5. WBC waited until its trial brief to assert its objection to a jury determination on its claim of breach of fiduciary duty. CP __. WBC argued to the court that a claim for breach of fiduciary duty is an equitable claim, and therefore only appropriate for the court, not the jury, to make findings of fact. CP __.

> For the second time the Court (not the jury), must determine whether Dykes' and UBI's conduct constitutes a breach of fiduciary duty and if so, what is the appropriate remedy.

CP __. On the first day of trial, during the discussion of preliminary matters, WBC presented argument that a claim for breach of fiduciary duty must be decided by the court, not the jury. RP 4-5.

> MR. AKERS: Your Honor, we addressed a couple of things in our trial brief regarding the fiduciary duty claim. We believe that that's an equitable matter not subject to jury determination.

RP 4-5. In response, counsel for Mr. Dykes conceded that the breach of fiduciary duty claim sought equitable relief, but objected to the jury not being permitted to make the findings of fact.

> I — it is an equitable issue, but I think it's probably an equitable issue that lends itself more properly to be determined by the jury, and let me briefly explain why. I think it's going to be dependent upon specific findings of fact.

RP 6. The trial court concluded that it would reserve the findings of fact to itself whether Mr. Dykes breached his fiduciary duties.

> I did have a chance finally last night and this morning to read your trial briefs thoroughly, and it was very helpful to do that. And the point made yesterday, I think principally by Mr. Akers, but others as well, about the equitable issues in the case, I do agree that it's a matter that is committed to the Court's ruling; that is, the equitable issues of breach of contract. And I intend to rule on those before the case is submitted to the jury, but what I would like to do is to hear the evidence, all of the evidence, of course, before I could rule on the equitable issues involving breach of fiduciary duty. Alleged breach of fiduciary duty.

RP 30.

2. The trial court held that Mr. Dykes did not disclose material information regarding the sales commission to the partnership in a timely manner.

At the conclusion of the trial the court ruled that Mr. Dykes had breached his fiduciary duty of loyalty to the partnership.

> It seemed to the Court, given the critical nature of the commissions to be taken in this case, again, this was something that needed to be disclosed well in advance of the eleventh hour of the closing dates here. It was not disclosed, and I find that it was a material fact which was not disclosed in a timely manner.

RP 917-18 (emphasis added).

E. The court, over the objections of counsel for Mr. Dykes, heard oral argument on the issue of collateral estoppel.

1. Mr. Dykes timely objected to the court's consideration of WBC's motion for summary judgment on collateral estoppel.

On the first day of trial, appellant clearly objected to the court's consideration of the issue of collateral estoppel pleaded by WBC in its trial brief.

> MR. FRANKLIN: And I can take that up now or later, but I – and that may have a major effect on the Court's dealing with this issue. I don't think collateral estoppel is in the case. It's not been pled, for one thing. I think it has to be pled.

RP 7-8. Over appellant's objections, the court nevertheless instructed the parties it would address the issue at oral argument.

> On the issue of collateral estoppel, after we have the jury selected and empaneled, I'd like to have the attorneys address that further by way of oral argument for the Court to rule on that matter.

RP 31. During oral argument, the court recognized that WBC had failed to plead collateral estoppel, and counsel for WBC acknowledged the court's finding.

> Well, I don't think there's any question from reading your pleadings here and the agreement that you allege that you will be pursuing a breach of fiduciary duty by Mr. Dykes insofar as it relates to the commissions. What I don't see in here is that you would be asserting that he is collaterally estopped from resisting the claim of breach of fiduciary duty because of the findings and conclusions of Judge Downing in the earlier case.
>
> MR. AKERS: And that's right.

RP 89.

2. Mr. Dykes objected to the admission of any evidence regarding a prior adjudication finding that he breached his fiduciary duty to Mr. Lumpkin.

Despite WBC's acknowledgement that it had not pleaded collateral estoppel, counsel nevertheless advised the court that it would introduce evidence of the prior adjudication on Mr. Dykes's breach of fiduciary duty.

> I guess what I would suggest, Your Honor, is that you've told us that you're going to decide the breach of fiduciary duty claim. I am willing to offer and have admitted this, the findings, which are actually an exhibit. I think they're Exhibit 105 in your notebook. If you look, I think that's what it is – only to you. I don't need that to go to the jury. That fiduciary duty, I'm going to put on testimony about it in addition to what I've got here because you want that to make your decision and you should have. I think I'm also entitled to this piece of evidence in front of you, only, because you're the one that's going to do the fiduciary duty.

RP 90-91. Exhibit 105, referred to by counsel for WBC, is the court's findings of fact and conclusions of law in *Lumpkin, Inc. v. Dykes, et al.*, King County Superior Court Cause No. 05-2-33756-7.

Appellant timely objected to the admission of any evidence regarding prior findings of fact and conclusions of law from the other proceeding.

> But I don't even think this comes in as evidence because, again, the collateral estoppel cases are very clear that in order for there to be preclusive effect, that it has to be an identical issue. This is not an identical issue.

RP 92.

3. The trial court's ruling on the breach of fiduciary duty claim was based on the evidence from *Lumpkin, Inc. v. Dykes.*

The opening argument in WBC's closing referred to the court's finding in *Lumpkin, Inc. v. Dykes* that Mr. Dykes breached his fiduciary duty.

> And then the second question is: Do we have a breach? And I think we have several breaches. Number one, we have Exhibit 105 where Judge Downing specifically found a breach of Mr. Dykes to a partner. Not just to – they try and make it sound like it was just to Ned Lumpkin, but he – Judge Downing talked about partners. And you can read his own conclusions and findings.

RP 905.

The trial court's ruling that Mr. Dykes was required to disgorge $100,000 of his commission for his breach of fiduciary duty was based in large part on the trial court's consideration of the prior lawsuit.

> It's also important to realize and to take into consideration that some two or three years ago, Judge Downing, in another case involving Mr. Dykes and the partnership, found that Mr. Dykes had breached his fiduciary duty in that case. I think that's important because it points out the fact that this was not an isolated incident, and it did place Mr. Dykes on clear notice that he had been found in violation of fiduciary duty at that time relating to another transaction and it did have serious consequences. **This previous case makes in this Court's view Mr. Dykes' violation here all the more purposeful and egregious**.

RP 14-15 (VROP Nov. 6, 2009) (emphasis added).

III. SUMMARY OF ARGUMENT

The trial court erred when it held that WBC was entitled to an award of prejudgment interest on the jury's damages award because WBC's damages were not liquidated. The trial court incorrectly found that the jury had not exercised discretion, and the trial court misinterpreted Washington case law on liquidated damages.

The trial court abused its discretion by granting WBC's motion to strike the jury's consideration of WBC's claim of breach of fiduciary duty. Mr. Dykes was prejudiced by WBC's untimely filing of its motion to strike in its trial brief, and WBC failed to advise the court of the correct legal rule for determining whether a claim presents legal issues for a jury's consideration, or equitable issues for the court's determination.

The trial court abused its discretion in ordering that Mr. Dykes disgorge $100,000 of his sales commission. WBC introduced inadmissible evidence in support of its claim for breach of fiduciary duty, and the court was improperly influenced by the inadmissible evidence.

The trial court erred when it ruled that Mr. Dykes breached his fiduciary duty to WBC because the ruling was inconsistent with the substantial weight of the evidence, and was contrary to Washington partnership law.

IV. ARGUMENT

A. The trial court's ruling that WBC's damages were liquidated is inconsistent with the evidence presented at trial and is contrary to law.

The trial court's ruling that WBC's damages for the difference in the "normal" commission was a liquidated sum was in error because it was contrary to the evidence presented at trial, and was the result of an improper interpretation of the law. An award of prejudgment interest is within the trial court's discretion, and is therefore reviewed on appeal for abuse of discretion. *Scoccolo Const. v. City of Renton*, 158 Wn.2d 506, 519, 145 P.3d 371 (2006). The determination that damages are liquidated is a conclusion of law, which is subject to *de novo* review. *McConnell v. Mothers Work, Inc.*, 131 Wn. App. 525, 536, 128 P.3d 128 (2006).

The rule governing an award of prejudgment interest reads in relevant part:

> The rule in Washington is that interest prior to judgment is allowable (1) when an amount claimed is "liquidated" or (2) when the amount of an "unliquidated" claim is for an amount due upon a specific contract for the payment of money and the amount due is determinable by computation with reference to a fixed standard contained in the contract, without reliance on opinion or discretion.

Prier v. Refrigeration Eng'g Co., 74 Wn.2d 25, 32, 442 P.2d 621 (1968). A claim is "liquidated" where "the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without

reliance on opinion or discretion." *Id.* (quoting Charles T. McCormack, *Handbook on the Law of Damages* § 54, at 213 (1935)). Conversely, a claim is unliquidated where

> the exact amount of the sum to be allowed cannot be definitely fixed from the facts proved, disputed or undisputed, but must in the last analysis depend upon the opinion or discretion of the judge or jury as to whether a larger or a smaller amount should be allowed.

Prier, 74 Wn.2d at 33 (quoting McCormack, *Handbook on the Law of Damages* § 54, at 215-16).

Thus, whether damages are liquidated or unliquidated depends on whether the trier of fact exercised discretion to determine their amount. *Hoglund v. Meeks*, 139 Wn. App. 854, 878, 170 P.3d 37 (2007) (trial court used the contract's formula for calculation of the damages, not discretion, so damages were liquidated); *Egerer v. CSR West, LLC*, 116 Wn. App. 645, 653-54, 67 P.3d 1128 (2003) (damages were liquidated because the measure of damages was fixed by statute, not left to the discretion of the trier of fact); *Aker Verdal A/S v. Neil F. Lampson, Inc.*, 65 Wn. App. 177, 192, 828 P.2d 610 (1992) (damages were unliquidated because court left the determination of a reasonable hourly labor rate to the jury's discretion).

1. The correct standard of review of a trial court's conclusion of law as to whether damages are liquidated or unliquidated is *de novo*, not abuse of discretion.

Before addressing the substance of appellant's argument that the

trial court erred when it concluded that plaintiff's damages were liquidated, Mr. Dykes will discuss an apparent split in the divisions of the court of appeals regarding the proper standard of review. Appellant has cited *McConnell*, 131 Wn. App. at 536 for the proposition that a trial court's ruling on whether damages are liquidated or unliquidated is a question of law reviewed *de novo*. Appellant is aware of the Court of Appeals's ruling in *Polygon NW Co. v. Am. Nat'l Fire Ins. Co.*, 143 Wn. App. 753, 790 n.13, 189 P.3d 777 (Div. I 2008), holding that both a legal conclusion that damages are liquidated, and the actual award of prejudgment interest, are reviewed for abuse of discretion. Appellant asserts that *Polygon NW Co.* incorrectly holds that abuse of discretion is the standard of review for a determination whether damages are liquidated, and that *McConnell v. Mothers Work, Inc.*, *supra*, correctly states the standard of review is *de novo*.

In *Polygon NW Co.*, the Court of Appeals's conclusion that the standard of review of a trial court's ruling as to whether damages are liquidated was based on a misinterpretation of the case S*coccolo Constr. v. City of Renton*, 158 Wn.2d 506, 519-20, 145 P.3d 371 (2006). Moreover, the line of cases on which S*coccolo Constr.* relied for its statement of the law all hold that the standard of review is *de novo*. Finally, application of an abuse of discretion standard to a trial court's ruling as to whether

damages are liquidated is contrary to Washington law, and would lead to an inconsistent standard of review of the rule from *Prier v. Refrigeration Eng'g Co.*

a. The Washington Supreme Court's ruling in *Scoccolo Constr.*, that a trial court's award of prejudgment interest is reviewed for abuse of discretion, is limited to its facts.

In *Scoccolo Constr.*, 158 Wn.2d at 519, the Washington Supreme Court stated that "[t]he award of prejudgment interest is reviewed for abuse of discretion." None of the parties in *Scoccolo Constr.* disputed the Washington Supreme Court's application of an abuse of discretion standard of review to the trial court's determination that damages were liquidated. Moreover, the case under review, *Scoccolo Constr., Inc. v. City of Renton*, 125 Wn. App. 150, 103 P.3d 1249 (2005), was published only in part, and that portion of the opinion addressing the award of prejudgment interest is not contained in the published opinion, so the full context of the Washington Supreme Court's decision on that issue is unclear. *Id.* at 165 ("A majority of the panel having determined that the remainder of the opinion lacks precedential value and will not be printed"). Finally, in support of its statement that the standard of review was "abuse of discretion," the Washington Supreme Court cited *Kiewit-Grice v. State*, 77 Wn. App. 867, 872, 895 P.2d 6 (1995). As shown in the

following analysis, under *Kiewit-Grice* and the line of cases on which it is based, a trial court's ruling on the nature of the damages is a conclusion of law subject to *de novo* review.

b. In *Kiewit-Grice*, and the line of cases on which it is based, a trial court's ruling whether damages are liquidated (or unliquidated) is a conclusion of law reviewed *de novo*.

Black's Law Dictionary defines *de novo* review as:

> An appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings.

Black's Law Dictionary 74 (Abridged 7th ed. 2000).

In contrast, review of a trial court's decision for abuse of discretion requires an inquiry into the trial court's balancing of interests, or policy considerations:

> Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.
>
> **Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interests of those affected by the order or decision and the comparative weight of the reasons for and against the**

decision one way or the other.

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (emphasis added).

The Court of Appeals decision in *Kiewit-Grice* with respect to prejudgment interest addressed two separate issues: (1) The "court's conclusion of law 5" that the damages were liquidated; and (2) the award of prejudgment interest. *Id.* at 870. In its analysis of the trial court's conclusion of law that the "jury had reached its verdict without exercising opinion or discretion and, thus, the jury award represented a liquidated sum," the Court of Appeals conducted a *de novo* review of the evidence. *Id.* at 872-74. The Court of Appeals concluded that the trial court "erred" when it held that the damages were liquidated because the damages could not be calculated until the jury exercised its discretion. *Id.* at 874. The Court of Appeals's ruling was based on its review of the evidence presented to the trial court and its subsequent independent judgment, not on the grounds that the trial court's ruling was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." The line of cases on which *Kiewit-Grice* is based also reviewed the trial court's determination whether damages were liquidated under a *de novo* standard. *See Tri-M Erectors v. Donald M. Drake Co.*, 27 Wn. App. 529, 537, 618 P.2d 1341 (1980); *Aker Verdal A/S v. Neil F. Lampson, Inc.*, 65 Wn. App.

177, 192, 828 P.2d 610 (1992).

In *Polygon NW Co.*, despite the Court of Appeals's conclusion that an abuse of discretion standard applied to the trial court's conclusion that the damages were liquidated, the Court of Appeals nevertheless reviewed the issue under a *de novo* standard. The *Polygon NW Co.* court performed an independent determination of the applicable legal authority, conducted its own legal analysis of the evidence presented to the trial court, and affirmed the trial court's ruling that plaintiff's damages were liquidated. *Id.* at 791-93. The contrast between the Court of Appeals's *de novo* and abuse of discretion standards of review is rendered especially clear in the section of the opinion addressing the trial court's award of prejudgment interest, which reads in relevant part:

> The principle is that "he who retains money which he ought to pay to another should be charged interest upon it." . . . That is, an award of prejudgment interest is in the nature of preventing the unjust enrichment of the defendant who has wrongfully delayed payment. . . .
>
> Here, both [respondents] withheld substantial payment owed to Assurance, gambling that doing so would eventually be to their economic benefit. . . . The trial court correctly concluded that it could award prejudgment interest in this action, and we affirm its decision to do so.

Id. at 793-94 (internal citations omitted).

In *Kiewit-Grice*, *Tri-M Erectors*, *Aker Verdal A/S*, and the line of cases on which these cases are based, an appellate court always reviews a

trial court's conclusion whether damages are liquidated under a *de novo* standard. Despite the Court of Appeals's statement to the contrary in *Polygon NW Co.*, it too reviewed the trial court's ruling that the plaintiff's damages were liquidated under a *de novo* standard. Therefore, the standard of review is correctly described in *McConnell*, and this court should review the trial court's conclusion of law that WBC's damages were liquidated under a *de novo* standard.

c. Adoption of an abuse of discretion standard of review for a determination whether damages are liquidated would carve out an exception to the established rule under Washington law.

The holding of *Polygon NW Co.* – that an appellate court reviews the trial court's decision whether a party's damages are liquidated for abuse of discretion – is contrary to Washington law. It is settled law that a trial court's legal conclusions are reviewed *de novo*. *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 833-34, 161 P.3d 1016 (2007) (for a pure question of law a *de novo* standard of review should be applied); *In re Estate of Jones*, 152 Wn.2d 1, 8-9, 93 P.3d 147 (2004) ("An appellate court reviews conclusions of law and questions of statutory interpretation *de novo*, as these are questions of law"). It is also settled law that a trial court's conclusion that a party's damages are liquidated is a conclusion of law. *Cummings v. Nordmark*, 73 Wn.2d 322, 324, 438 P.2d 605 (1968)

(assignment of error to a conclusion of law that the amount due was liquidated and subject to interest); *Starczewski v. Unigard Ins. Group*, 61 Wn. App. 267, 272 n.2, 810 P.2d 58 (1991) ("The trial court's conclusion of law 2 states: 'The sums due to plaintiffs were not liquidated'"); *Molander v. Raugust-Mathwig, Inc.*, 44 Wn. App. 53, 69, 722 P.2d 103 (1986) ("In conclusion of law 6.2, the court noted this balance was a liquidated amount").

Assuming arguendo that the standard of review set forth in *Polygon NW Co.* is correct, i.e. whether a party's damages are liquidated is reviewed for abuse of discretion, it would be inconsistent with the standard of review for the second prong of the test for an award of prejudgment interest. Recall that under the rule stated in *Prier v. Refrigeration Eng'g Co.*, a trial court may award prejudgment interest where the damages are: (1) Liquidated; or

> (2) when the amount of an "unliquidated" claim is for an amount due upon a specific contract for the payment of money and the amount due is determinable by computation with reference to a fixed standard contained in the contract, without reliance on opinion or discretion.

Id. at 32.

In Washington, a trial court's interpretation of a contract is a question of law reviewed *de novo*. *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 52, 164 P.3d 454 (2007); *Yeats v. Estate of Yeats*, 90 Wn.2d

201, 204, 580 P.2d 617 (1978) ("Absent disputed facts, the construction or legal effect of a contract is determined by the court as a matter of law"). Thus, under the second prong of the test from *Prier*, where a trial court determines that a party's damages are unliquidated but can be calculated by reference to specific provisions in the contract, the appellate court would review the trial court's interpretation of the contract under a *de novo* standard. In contrast, under the rule set forth in *Polygon NW Co.*, the first prong of the test from *Prier* would be subject to an abuse of discretion standard of review. That the two prongs of the test under which prejudgment interest may be awarded would be subject to different standards of review under the holding of *Polygon NW, Inc.* strongly suggests that the Court of Appeals's ruling that a trial court's conclusion of law that a party's damages are liquidated is reviewed for abuse of discretion was incorrectly decided and the proper standard of review is *de novo*.

In sum, the rule from *Polygon NW Co.*, that a trial court's ruling as to whether damages are liquidated is reviewed for abuse of discretion, was based on a misinterpretation of the Washington Supreme Court's analysis in *Scoccolo Constr*. Moreover, the long line of cases that have addressed this issue have performed a *de novo* review of the trial court's ruling whether the damages are liquidated. Finally, application of an abuse of

discretion standard to a trial court's conclusion as to whether damages are liquidated is contrary to Washington law, and would lead to an inconsistent standard of review of the rule from *Prier v. Refrigeration Eng'g Co.* Therefore, the correct standard of review of the trial court's ruling that WBC's damages were liquidated is *de novo*.

2. The trial court erred when it held that the jury did not exercise any discretion in reaching its verdict.

The trial court's conclusion that the jury verdict did not require discretion was based on the assumption that the jury had only to decide whether a four percent commission, or a six percent commission, was "normal." The trial court stated:

> The jury exercised its discretion to weigh evidence of what a, quote, normal commission would have been, and they accepted evidence that a normal commission would have been 4 percent, not 6 percent. ...
>
> ... So I believe that at that point, there was little actual discretion exercised. **Actually, no discretion exercised. It was simply determining: What's the correct amount, 4 percent or 6 percent? And they determined it was 4 percent.** I think under the circumstances, the evidence in this case, under the -- the authority of the *Dautel* case, that the amount was a liquidated sum and prejudgment interest should be calculated.

RP 17-18 (VROP Nov. 6, 2009) (emphasis added).

The trial court's citation of *Dautel* further supports the conclusion that it believed the jury was presented with a simple choice between two

possible values for a "normal" commission. In *Dautel*, the issue was whether the employee/plaintiff was entitled to a sales commission of 10 percent, or 20 percent. *Dautel v. Heritage Home Center, Inc.*, 89 Wn. App. 148, 151, 948 P.2d 397 (1997). At trial, the defendant stipulated to a 10 percent commission, so the only remaining question was whether plaintiff was owed an additional 10 percent commission. *Id.* In the bench trial, the trial court concluded that the correct commission was 20 percent (presumably based on the terms of the employment agreement though the opinion does not say), and because the determination of plaintiff's damages did not require any discretion, the unpaid commission was a liquidated amount and subject to prejudgment interest. *Id.* at 155.

The dispute over the commission in *Dautel* was an either/or proposition: the plaintiff was owed a commission of either 10 percent, or 20 percent. Thus, at any time prior to trial the plaintiff's damages could have been readily calculated by assuming them to be either zero, or equal to the 10 percent commission previously stipulated to by the defendants. In the case at bar, the trial court incorrectly assumed that Mr. Dykes's commission was simply an either/or proposition; *i.e.*, the "normal" commission was either four percent or six percent. Unlike *Dautel*, however, and contrary to the trial court's analysis of the evidence presented at trial, here the jury was presented with testimony that the

"normal" commission could be as low as 1.5 percent, or as high as 6 percent.

WBC's opening statement stated that the evidence would show that at most, the "normal" commission Mr. Dykes should have received was 2 percent of the sale price. RP 63. WBC later presented expert testimony that the "normal" commission on a $10,000,000 real estate transaction was between 2 percent and 3 percent, split equally between the listing broker and the selling agent. RP 692; 697-98; 699. Finally, in its closing argument WBC asserted that the jury should find that the "normal" commission was 1.5 percent of the sale price.

Mr. Dykes testified at trial that in his experience, the "normal" commission paid on a transaction of this nature was between 4 percent and 7 percent, and that it could go as high as 12 percent. RP 369-70. Mr. Dykes further testified that the 6 percent commission he received was completely reasonable. RP 436-37. Finally, Mr. Dykes's expert witness testified that the normal commission on a comparable transaction was 5 percent to 6 percent. RP 718.

After hearing all of the evidence, the jury concluded that the "normal" commission was 4 percent, not 1.5 percent as WBC argued, nor 6 percent as Mr. Dykes argued. CP ___. **At no time did either party argue that the "normal" sales commission to a listing agent for a**

comparable commercial property was four percent. The jury's verdict clearly demonstrates that the jurors did not accept either party's valuation of the "normal" commission, but instead exercised its discretion in reaching its verdict. This outcome is identical to the facts of *St. Hilaire v. Food Servs. of Am., Inc.*, 82 Wn. App. 343, 353, 917 P.2d 1114 (1996).

In *St. Hilaire*, the question was whether the damages awarded by the jury were liquidated, and therefore subject to prejudgment interest. *Id.* At trial, the plaintiff and defendant each presented expert testimony regarding the amount of the plaintiff's damages. *Id.* at 354. Each party's expert disagreed with the other party's valuation of damages. *Id.* The jury's damages award was in an amount in between the two parties' positions on damages. *Id.* The Court of Appeals stated that the jury's compromise verdict was additional proof that it had exercised discretion to determine the measure of damages because it had rejected the amounts proposed by each party and come up with its own value. *Id.* The *St. Hilaire* court concluded that because the jury had exercised discretion, the damages were unliquidated. *Id.*

Here, the parties presented conflicting evidence to the jury regarding the correct "normal" commission. After hearing all of the evidence, the jury rejected the "normal" commission suggested by each party, and made its own determination of the correct value. The evidence

overwhelmingly shows that the jury's verdict was an act of discretion, contrary to the findings of the trial court. Thus, the trial court's interpretation and reliance on *Dautel* was in error, and under the analysis of *St. Hilaire*, WBC's damages were unliquidated because until the jury exercised its discretion to determine the correct "normal" commission, calculation of the exact sum owed could not be accomplished.

3. The trial court's ruling is contrary to law because it mistakenly concluded that the jury's verdict on damages was "simply a mathematical calculation."

The trial court stated that WBC's damages were liquidated because:

> The jury exercised its discretion to weigh evidence of what a, quote, normal commission would have been, and they accepted evidence that a normal commission would have been 4 percent, not 6 percent. **Once the jury made that decision, there was no further discretion or option utilized to arrive at the amount. It was simply a mathematical calculation at that point that they took the 4 percent commission from the 6 percent commission and ended up with $206,000 precisely**.

RP 17-18 (emphasis added).

The trial court's analysis is contrary to law because it misapprehends the "act of discretion" that renders damages unliquidated. First, as was discussed in section 1, *supra*, the jury's verdict was not simply a selection of the "normal" commission value suggested by one of the parties. More importantly, the trial court's ruling was reversible error

because it incorrectly assumed that *Dautel* stands for the proposition that damages are liquidated if, **after** the trier of fact exercises discretion to determine the measure of damages, the amount of the damages may be readily calculated. Two cases clearly illustrate the error in the trial court's interpretation and application of the rule.

In *Aker Verdal A/S*, 65 Wn. App. 177, 191-92, 828 P.2d 610 (1992), the issue was what was the proper labor rate to be charged for the time plaintiff expended to repair a crane provided by the defendant that had collapsed. Plaintiff presented expert testimony regarding its out-of-pocket labor costs and it was left to the discretion of the jury to determine the "reasonable" hourly rate. *Id.* at 192. Of course, once the jury exercised its discretion to decide the correct hourly rate, determination of the plaintiff's damages was simply a "mathematical calculation" accomplished by multiplying the hourly labor rate by the total number of hours worked. Nevertheless, the court held that plaintiff's damages were unliquidated because the jury had exercised discretion. *Id.* at 192.

Similarly, in *Douglas NW, Inc. v. Bill O'Brien & Sons Constr., Inc.*, 64 Wn. App. 661, 690-92, 828 P.2d 565 (1992), the issue was whether the amounts awarded to the defendant on its counterclaims constituted liquidated, or unliquidated sums. The defendant was awarded $20,525.58 in damages on its counterclaim for the cost of having

equipment on standby during construction delays caused by the general contractor, Douglas NW, Inc. *Id.* at 691. Douglas NW, Inc. argued in its appeal that this sum was unliquidated **even though the trial court had awarded O'Brien, Inc. the precise amount it had stated in its claim**. *Id.* The Court of Appeals noted that expert testimony had been presented to the court during the bench trial "concerning the proper computation method for deriving hourly equipment rates." *Id.* The Court of Appeals concluded that because the trial court relied on opinion testimony to determine O'Brien, Inc.'s damages, the sum was unliquidated. *Id.*

In both *Aker Verdal A/S* and *Douglas NW, Inc.*, the courts held that the damages were unliquidated where calculation of the damages could only occur after the exercise of discretion by the finder of fact. That a party's damages could be readily calculated after the finder of fact exercised its discretion was immaterial to the court's ruling. In the case at bar, the trial court erred in holding that it was the physical calculation of the damages that required discretion. Were the trial court's legal analysis applied to the facts of *Aker Verdal A/S* and *Douglas NW, Inc.*, it would result in a complete reversal of the holding in each case. The correct rule is therefore that where calculation of the damages cannot be accomplished without the discretionary findings of the trier of fact, the damages are unliquidated.

In sum, the trial court's ruling that WBC's damages for its claim of breach of contract on the "normal" commission paid to Mr. Dykes were liquidated was contrary to the testimony at trial, the evidence of the jury's exercise of discretion in its determination of WBC's damages, and based on the trial court's incorrect application of the rule from *Dautel v. Heritage Home Center, Inc.* This court should therefore perform a *de novo* review of the evidence presented at trial, and the applicable case law, and hold that WBC's damages for Mr. Dykes's breach of the sales commission provision of the partnership agreement were unliquidated.

B. The trial court's consideration of WBC's motion to strike the jury's review of its breach-of-fiduciary-duty claim prejudiced Mr. Dykes, and the court's granting of the motion was an abuse of discretion.

WBC waited until the last possible moment to object to the jury's consideration of its breach-of-fiduciary-duty claim. CP __. WBC's motion to strike the jury's consideration of that claim, improperly inserted into its trial brief, was not only untimely pursuant to CR 6(d) but also failed to advise the trial court of the proper factors to be considered before denying Mr. Dykes his constitutional right to a jury trial on the issue.

1. Mr. Dykes was prejudiced by WBC's untimely filing of its motion to strike.

WBC's failure to timely file its motion to strike the jury's consideration of the breach of fiduciary duty claim prejudiced Mr. Dykes's

ability to respond to the issue. Pursuant to CR 6(d), a motion must be filed, and notice given to the parties, no fewer than five days before the hearing. *See also* King County Local Court Rule 7(b)(4)(A) (motion must be filed **no fewer than 6 court days** before the hearing). Where a party fails to timely file a motion pursuant to CR 6(d) and the motion is considered, reversal requires that the non-moving party show prejudice. *Loveless v. Yantis*, 82 Wn.2d 754, 759-60, 513 P.2d 1023 (1973). To establish prejudice, the non-moving party must show that it did not receive actual notice, or did not have sufficient time to prepare a response. *Id.*

a. Mr. Dykes did not receive actual notice of WBC's motion to strike the jury's consideration of the claim of breach of fiduciary duty.

WBC's trial brief was filed the same day as the hearing, September 15, 2009. CP ___; RP 4-5. To have any meaning at all, actual notice must require more than a party receiving a copy of the motion the morning of the hearing. Under any reasonable standard, WBC's untimely filing of its motion to strike in its trial brief did not constitute actual notice to Mr. Dykes.

b. Mr. Dykes did not have sufficient time to review the brief prior to the hearing.

Even if WBC could establish that the trial brief provided actual notice, it must concede that counsel for Mr. Dykes did not have sufficient

time to review the trial brief and prepare a response given that the brief was filed on the morning of the first day of trial. In addition, WBC's late filing of the motion to strike cause further prejudice to Mr. Dykes because the trial court was not been provided sufficient time to familiarize itself with the issues contained in the brief.

> **And I might advise everyone that I just received the case over the lunch hour and have just had a chance really to scan the trial briefs**. I intend to read them with greater care as we get into the trial. I just wanted to let you know where the Court stands right now with respect to preparing for the case. It's going to take a little longer to really get familiar with the issues. But let me ask, as to that view by Mr. Akers about the fiduciary duty claim, I will ask the other attorneys about their views with respect to that.

RP 5-6 (emphasis added).

WBC's decision to wait until it filed its trial brief to spring its motion to strike the jury's consideration of the breach-of-fiduciary-duty claim on Mr. Dykes is precisely the sort of tactical surprise that CR 6(d) was intended to prevent. WBC's filing of the motion in its trial brief was not actual notice to Mr. Dykes, and counsel for Mr. Dykes was not provided sufficient time to prepare a response. The court therefore erred by considering the motion to strike the jury's consideration of WBC's breach of fiduciary duty claim.

2. WBC's trial brief did not properly advise the trial court of the factors necessary to its ruling, and the trial court's grant of the motion was an abuse of its discretion.

The trial court's discretionary ruling that WBC's claim for breach of fiduciary duty was primarily equitable and therefore not proper for the jury's consideration was based on an improper legal analysis and was therefore an abuse of its discretion. A trial court's determination whether a claim presents primarily legal issues and may be considered by a jury, or primarily equitable issues to be considered by the court, is within the discretion of the court and will not be overturned unless the decision was an abuse of discretion. *Brown v. Safeway Stores*, 94 Wn.2d 359, 368, 617 P.2d 704 (1980). Where a trial court's discretionary ruling is based on an incorrect legal analysis, it is an abuse of the court's discretion. *State v. Tobin*, 161 Wn.2d 517, 523, 166 P.3d 1167 (2007); *State v. Kinneman*, 155 Wn.2d 272, 289, 119 P.3d 350 (2005) (*citing City of Kennewick v. Day*, 142 Wn.2d 1, 8, 11 P.3d 304 (2000)).

WBC's motion to strike contained in its trial brief correctly stated that a court "is vested with wide discretion to allow a jury on some, none, or all of the issues." CP __. WBC's motion, however, failed to identify the factors set forth in, among other cases, *Brown v. Safeway Stores*, that the court must necessarily consider before it may exercise its discretion.

The complete rule is:

> In determining whether a case is primarily equitable in nature or is an action at law, the trial court is accorded wide discretion, the exercise of which will not be disturbed except for clear abuse. This discretion should be exercised with reference to a variety of factors **including, but not necessarily limited to,** the following factors set forth in *Scavenius v. Manchester Port Dist.*, 2 Wn. App. 126, 129-30, 467 P.2d 372 (1970):
>
> (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.

Brown, 94 Wn.2d at 368.

At the hearing on September 16, 2009, the trial court stated its ruling on WBC's motion as follows:

> I did have a chance finally last night and this morning to read your trial briefs thoroughly, and it was very helpful to do that. And the point made yesterday, I think principally by Mr. Akers, but others as well, about the equitable issues in the case, I do agree that it's a matter that is committed to the Court's ruling; that is, the equitable issues of breach of contract. And I intend to rule on those before the case is submitted to the jury, but what I would like to do is to hear the evidence, all of the evidence, of course, before I could rule on the equitable issues involving breach of fiduciary duty. Alleged breach of fiduciary duty.

RP 30. The trial court's oral ruling fails to identify a single factor from *Brown* that the court considered, much less provide a legal analysis of the grounds for the trial court's decision. Because the trial court's analysis was plainly based on an incorrect legal analysis, it was an abuse of its discretion.

In sum, WBC failed to timely file its motion to strike the jury's consideration of its breach of fiduciary duty claim under CR 6(d), instead incorporating its argument into its trial brief. WBC's motion clearly prejudiced Mr. Dykes because notification of a hearing on the day of the hearing is not actual notice, and counsel for Mr. Dykes had no opportunity to review WBC's motion, much less prepare a response. Further, WBC's briefing failed to identify the factors that were critical to the trial court's analysis of the legal issue. The trial court's ruling was therefore an abuse of its discretion.

C. The trial court abused its discretion in its order that Mr. Dykes disgorge $100,000 of his commission for breaching his fiduciary duty to the partnership.

The trial court was improperly influenced by the evidence that Mr. Dykes had previously breached his fiduciary duty to Mr. Lumpkin in *Lumpkin, Inc. v. Dykes*. A trial court has discretion to order that a defendant disgorge some or all of his profits for a breach of his fiduciary duty to a partnership. *Cotton v. Kronenberg*, 111 Wn. App. 258, 275, 44

P.3d 878 (2002). A trial court's order that some or all of a defendant's fee be disgorged will only be overturned upon a showing that the trial court abused its discretion. Here, the trial court abused its discretion by allowing WBC to present evidence that Mr. Dykes was held to have breached his fiduciary duty to Mr. Lumpkin in a prior, unrelated lawsuit, and by allowing that evidence to improperly influence its ruling that Mr. Dykes be required to disgorge $100,000 of his sales commission for his breach of fiduciary duty to WBC.

1. WBC introduced inadmissible evidence of the trial court's ruling in *Lumpkin, Inc. v. Dykes* in support of its claim for collateral estoppel.

During oral argument, WBC quickly conceded that it had never pleaded a claim for collateral estoppel and that the issue was not properly before the court. It therefore appears that WBC's claim of collateral estoppel was a Trojan horse intended to introduce otherwise inadmissible evidence to the trial court regarding the court's prior ruling in *Lumpkin, Inc. v. Dykes*. That WBC's tactic was successful cannot be disputed, for although the trial court recognized that WBC had never pleaded collateral estoppel (a point WBC readily conceded) the trial court nevertheless allowed WBC to argue that the court's ruling in *Lumpkin, Inc. v. Dykes* was evidence that the dispute over Mr. Dykes's sales commission was also a breach of his fiduciary duty to WBC.

2. The court abused its discretion by conflating the breach of fiduciary duty claim in *Lumpkin, Inc. v. Dykes* with the breach of fiduciary duty claim at issue in this case.

In *Lumpkin, Inc. v. Dykes*, Mr. Dykes was held to have breached his fiduciary duty to Mr. Lumpkin by failing to disclose relevant information related to a bid for a construction project. RP 84. In the case at bar, WBC asserted that Mr. Dykes breached his fiduciary duty to the partnership by failing to timely disclose his commission for the sale of the WBC property.

It cannot be disputed that evidence of the prior breach of fiduciary duty strongly influenced the trial court's opinion in this case. *See* RP 14-15 (VROP Nov. 6, 2009). The improper influence the prior ruling in *Lumpkin, Inc. v. Dykes* had on the trial court's decision regarding disgorgement makes the trial court's ruling based on "untenable grounds", "manifestly unreasonable," and "arbitrarily exercised." The trial court's order that Mr. Dykes disgorge $100,000 of his sales commission should therefore be reversed because the court's ruling was an abuse of its discretion.

D. The trial court's finding that Mr. Dykes breached his fiduciary duty to WBC ignores the weight of the evidence, and is contrary to partnership law.

The trial court's finding that Mr. Dykes breached his fiduciary duty

of loyalty to WBC is not supported by the evidence, and the evidence introduced at trial does not support the court's conclusion of law. For those issues tried to the court:

> The standard of review for a trial court's findings of fact and conclusions of law is a two-step process. First, we must determine if the trial court's findings of fact were supported by substantial evidence in the record. If so, we must next decide whether those findings of fact support the trial court's conclusions of law.

Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999).

> Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 819, 828 P.2d 549 (1992).

1. The trial court's finding of fact that Mr. Dykes did not timely disclose his commission to WBC is contrary to the substantial weight of the evidence.

The trial court's ruling that Mr. Dykes breached his fiduciary duty to the partnership by failing to timely disclose the terms of his commission is contradicted by undisputed evidence presented at trial. This evidence shows that: (1) All of the partners received the partnership-formation documents containing a disclosure of the amount and terms of Mr. Dykes's commission as a listing agent; and (2) that Mr. Lumpkin

concedes that he was made aware of Mr. Dykes's commission on at least three separate occasions prior to his authorization of the payment as the managing general partner.

The partnership-formation documents, offered as an exhibit at trial, stated that Mr. Dykes was entitled to the "normal" commission for his role in the sale of any WBC property, but not to exceed 6 percent. CP __. Undisputed evidence presented at trial, and conceded by WBC, showed that all of the general and limited partners were provided with the formation documents and that these documents specified the terms of the partnership. RP 843. Mr. Lumpkin testified that he was aware of the terms of the partnership agreement. RP 510. Mr. Lumpkin further admits that when he saw the amount of Mr. Dykes's commission, $618,000, he had no objection because it was consistent with the terms of the partnership documents. RP 510. The evidence in the record shows that Mr. Lumpkin was also advised of the terms of Mr. Dykes's commission in 2007 during the previous litigation between Mr. Dykes and Mr. Lumpkin. CP ___. Finally, Mr. Lumpkin concedes that he was aware of the terms of Mr. Dykes's sales commission at the time he authorized, or in his words "concurred" with, the payment. RP 615-16.

Undisputed evidence and testimony at trial refutes the argument that Mr. Dykes failed to timely disclose the terms of his commission to the

partnership. In fact, the evidence shows that precisely the opposite was true; Mr. Dykes revealed the terms of his commission more than 20 years before he was paid. The evidence also showed that Mr. Lumpkin, the only other general partner in the partnership at the time Mr. Dykes received his commission, was made aware of the terms on at least three separate occasions before the commission was paid. Moreover, Mr. Lumpkin testified that he saw no reason to object to the payment of the 6% commission to Mr. Dykes because it was consistent with the terms of the partnership agreement. The trial court's ruling that Mr. Dykes did not timely disclose the terms of his commission to the partnership is therefore contrary to the substantial weight of the evidence and the court's ruling that Mr. Dykes breached his fiduciary duty to WBC is properly reversed.

2. The trial court's conclusion that Mr. Dykes breached his fiduciary duty to WBC is contrary to law.

Limited partnerships are governed by statute, RCW 25.05 *et seq.*, and by the common law to the extent they are not displaced by the partnership agreement. *Diamond Parking v. Frontier Bldg. P'ship*, 72 Wn. App. 314, 317-18, 864 P.2d 954 (1993) ("[a] partnership agreement is the law of the partnership").

> The agreement, whatever its form, is the heart of the partnership. One of the salient characteristics of partnership law is the extent to which partners may write their own ticket.

> Relations among them are governed by common law and statute, but almost invariably can be overridden by the parties themselves.

Horne v. Aune, 130 Wn. App. 183, 201, 121 P.3d 1227 (2005) (*citing Seattle-First Nat'l Bank v. Marshall*, 31 Wn. App. 339, 347, 641 P.2d 1194 (1982)). A partner's fiduciary duties to the partnership are as follows:

> (1) The only fiduciary duties a partner owes to the partnership and the other partners are the duty of loyalty and the duty of care set forth in subsections (2) and (3) of this section.
>
> (2) A partner's duty of loyalty to the partnership and the other partners is limited to the following:
>
> (a) To account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;
>
> (b) To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and
>
> (c) To refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.
>
> . . . .
>
> (4) A partner shall discharge the duties to the partnership and the other partners under this chapter or under the partnership agreement and exercise any rights consistently with the obligation of good faith and fair dealing.
>
> (5) A partner does not violate a duty or obligation under this

> chapter or under the partnership agreement merely because the partner's conduct furthers the partner's own interest.

RCW 25.05.165.

Washington recognizes the contractual nature of RCW 25.05 *et seq.* ("RUPA"). In *J&J Celcom. v. AT&T Wireless Servs., Inc.*, 162 Wn.2d 102, 169 P.3d 823 (2007), the Washington Supreme Court addressed a certified question from the United States Court of Appeals for the Ninth Circuit regarding a fiduciary's duty of loyalty. Writing in a separate concurrence, Justice Madsen addressed in detail each of the three duties of loyalty described in RCW 25.05.165(a)-(c). *Id.* at 108-15. In describing the scope of a partner's fiduciary duties to a partnership under RUPA, Justice Madsen wrote:

> RUPA represents a major overhaul in the nature of the fiduciary duties imposed on partners. There are two general views of the partnership relation: one emphasizes the fiduciary nature of the relationship and the other emphasizes the contractual nature of the relationship. **The common law and the UPA are based on the fiduciary view, the fundamental principle of which is that partners must subordinate their own interests to the collective interest, absent consent of all the partners**. Thus, under the common law and the UPA, the duty of loyalty prevented a partner from benefiting, directly or indirectly, from the partnership, more than any of the other partners. The broad approach from the *Restatement of Agency*, incorporated into partnership law, was that the duty of loyalty required a partner to act solely for the benefit of the partnership in all matters connected to the partnership. **This required partners to disgorge any profits made without consent of the other partners, the rule applied in *Bassan*.**

> **RUPA represents a major shift away from the fiduciary view and toward the "libertarian" or "contractarian" view, by (a) expressly limiting fiduciary duties, (b) sanctioning a partner's pursuit of self-interest, and (c) allowing partners to waive most fiduciary duties by contract.** RUPA was intended to bring the law of partnership into the "modern age," to make partnerships more rational, efficient, and stable business entities.

J&J Celcom., 162 Wn.2d at 109-10 (emphasis added).

In sum, undisputed evidence admitted at trial shows that all partners were timely advised, and consented to, Mr. Dykes's 6 percent sales commission. Moreover, RUPA, and the case law interpreting its provisions, unequivocally state that the terms of a partnership agreement dictate the duties owed by the partners. No evidence was offered at trial that the partnership agreement required that Mr. Dykes obtain a vote authorizing his commission, and it cannot be disputed that the partnership agreement advised the partners that Mr. Dykes could take a 6 percent commission, as he did. The trial court's conclusion that Mr. Dykes breached his fiduciary duties to the partnership was therefore contradicted by the evidence presented at trial, and contrary to the law.

V. CONCLUSION

Appellant respectfully requests that this Court reverse the trial court's finding that WBC's damages for breach of the partnership agreement were liquidated, and therefore subject to an award of

prejudgment interest. Appellant further requests that this Court reverse the trial court's grant of WBC's motion to strike the jury's consideration of WBC's breach of fiduciary duty claim. In the alternative, appellant requests that the court reverse the trial court's finding that Mr. Dykes breached his fiduciary duty to the partnership by failing to timely disclose his commission. Finally, appellant requests that the court reverse the trial court's order that Mr. Dykes disgorge $100,000 of his commission.

RESPECTFULLY submitted this 17th day of May, 2010.

LEE SMART, P.S., INC.

By:

Sam B. Franklin, WSBA No. 1903
Eric L. Lewis, WSBA No. 35021
Of Attorneys for Appellant
Albert L. Dykes

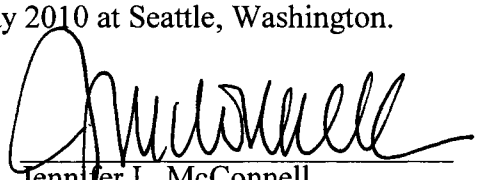
CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on May 17, 2010, I caused service of the foregoing on each and every attorney of record herein:

VIA LEGAL MESSENGER

Mr. George W. Akers
Montgomery Purdue Blankinship & Austin, PLLC
5800 Bank of America Tower
701 Fifth Avenue
Seattle, WA 98104-7096

DATED this 17th day of May 2010 at Seattle, Washington.



Jennifer L. McConnell
Legal Assistant

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