72334-1

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No. 72334-1

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

NIKOLAY BELIKOV, a married individual,

Respondent,

v.

MARYANN HUHS and ROY E. HUHS, JR., and the marital community thereof,

Appellants.

BRIEF OF APPELLANT

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ORIGINAL

TABLE OF CONTENTS

Page

INTRODUCTION 1

ASSIGNMENTS OF ERROR 2

Assignments of Error 2

Issues Pertaining to Assignments of Error 3

STATEMENT OF THE CASE 5

A. Parties. 5

B. Formation of R-Amtech 5

C. Ownership of R-Amtech. 7

D. The Tetris Sale. 12

E. Belikov's Real Estate Gift to the Huhses. 13

F. Proceedings 14

Jury Demand 14

RPC 1.8(c) 16

Judgment with Respect to R-Amtech 17

ARGUMENT 17

1. The trial court erred by striking the jury demand, and denying defendants a trial by jury. 18

A. As this Action's Issues Sound Almost Exclusively in Law, All Issues Should have been Tried to a Jury. 19

B. *Scavenius* Factors 22

i. Point 3: Belikov's Claims are Overwhelmingly Legal 23

ii. Point 4: The minimal equitable issues did not present complexities in the trial which affected the orderly determination by a jury 28

iii. Point 5: The equitable and legal issues are not easily separable. 29

Page

iv. Point 6: Great weight should be given to the constitutional right of trial by jury, and the trial court should go beyond the pleadings to ascertain the real issues.....29

2. The trial court erred in not applying the applicable statute of limitations to Belikov's claims against the Huhses regarding ownership of R-Amtech. 30

3. The trial court erred by ruling Belikov is the owner of R-Amtech.....37

A. Legal Ownership.....37

B. Equitable Ownership 38

4. The trial court erred by finding that Al Huhs violated RPC 1.8(c).....41

A. The Declaration of Gift is Not a Conveyance Instrument.....43

B. Al Huhs did Not Unduly Influence or Solicit a Gift from Belikov.....44

5. The trial court erred by ruling that a lawyer may be civilly liable to a client based on the lawyer's violation of RPC 1.8(c).....47

6. The trial court erred in not applying the applicable statute of limitations to Belikov's claim that Al Huhs violated RPC 1.8(c). 49

7. The trial court erred in awarding $900,000 in attorneys' fees to Belikov. 50

A. Award of Fees was Improper.....51

B. The Trial Court's Calculation of Fees was Improper.....52

8. The trial court erred in releasing the Huhses' Lis Pendens. 54

9. Request for remand to new trial judge.....55

CONCLUSION 57

TABLE OF AUTHORITIES

Page(s)

CASES

Adcox v. Children's Orthopedic Hosp.,
123 Wn.2d 15, 864 P.2d 921 (1993).....36

Allard v. Pac. Nat. Bank,
99 Wn.2d 394, 663 P.2d 104 (1983).....27

Allen v. State,
118 Wn. 2d 753, 826 P.2d 200 (1992).....32

Auburn Mechanical, Inc. v. Lydig Const., Inc.,
89 Wn. App. 893, 951 P.2d 311 (1998).....20, 21, 24

Bays v. Haven,
55 Wn. App. 26 324, 328, 777 P.2d 562 (1989).....39

Beacon Theatres, Inc. v. Westover,
359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959).....18

Burns v. McClinton,
135 Wn. App. 285, 143 P.3d 630 (2006).....50

Burnside v. Simpson,
123 Wn.2d 93, 864 P.2d 937 (1994).....36, 37

Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.,
129 Wn. App. 810, 120 P.3d 605 (2005).....36

Central Heat, Inc. v. Daily Olympian, Inc.,
74 Wn.2d 126, 443 P.2d 544 (1968).....34

City of Bothell v. King Cnty.,
45 Wn. App. 4, 723 P.2d 547 (1986).....34

Coggle v. Snow,
56 Wn. App. 499, 784 P.2d 554 (1990).....19

Page(s)

Dole Food Co. v. Patrickson,
538 U.S. 468, 12 S.Ct. 1655 (2003) 38

Ferguson v. Jeanes,
27 Wn. App. 558, 619 P.2d 369 (1980) 45

Fred Hutchinson Cancer Research Ctr. v. Holman,
107 Wn.2d 693, 732 P.2d 974 (1987) 51

Gander v. Yeager,
167 Wn. App. 638, 282 P.3d 1100 (2012) 51

Gerimonte v. Case,
42 Wn. App. 611, 712 P.2d 876 (1986) 50

Gillingham v. Phelps,
11 Wn.2d 492, 119 P.2d 914 (1941) 21

GMAC v. Everett Chevrolet, Inc.,
179 Wn. App. 126, 317 P.3d 1074 (2014) 56

Goodman v. Goodman,
128 Wn.2d 366, 907 P.2d 290 (1995) 34

Graves v. P.J. Taggares Co.,
94 Wn.2d 298, 616 P.2d 1223 (1980) 18

Green v. A.P.C.,
136 Wn.2d 87, 960 P.2d 912 (1998) 31, 32

Green v. McAllister,
103 Wn. App. 452, 14 P.3d 795 (2000) 51

Hardy v. Hardy,
910 N.E.2d 851 (Ind. Ct.App. 2009) 37

Hegwine v. Longview Fibre Co., Inc.,
132 Wn.App. 546, 132 P.3d 789 (2006) 36, 41

Hill v. Dep't of Labor & Indus.,
90 Wn.2d 276, 580 P.2d 636 (1978) 33

Page(s)

Hsu Ying Li v. Tang,
87 Wn.2d 796, 557 P.2d 342 (1976).....51

In Interest of Perry,
31 Wn. App. 268, 641 P.2d 178 (1982).....46

In re Estate of Jones,
170 Wn. App. 594, 287 P.3d 610 (2012).....46

In re Estate of Knowles,
135 Wn. App. 351, 143 P.3d 864 (2006).....45

In re Estates of Hibbard,
118 Wn. 2d 737, 826 P.2d 690 (1992).....31

In re Rapid Settlements, Ltd. v. Symetra Life Ins. Co.,
166 Wn. App. 683, 271 P.3d 925 (2012).....39

Keever & Assocs. v. Randall,
129 Wn. App. 733, 119 P.3d 926 (2005).....37

Kelly v. Foster,
62 Wn. App. 150, 813 P.2d 598 (1991).....21, 51

Kucera v. State, Dept. of Transp.,
140 Wn. 2d 200, 995 P.2d 63 (2000).....21

L.K Operating LLC v. Collection Group,
168 Wn. App. 862, 279 P. 3d 448 (2013).....16

LK Operating, LLC v. Collection Group, LLC,
181 Wn.2d 48, 331 P.3d 1147 (2014).....48

Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now (C.L.E.A.N.),
119 Wn. App. 665, 82 P.3d 1199 (2004).....52, 53

Lowe v. Rowe,
173 Wn. App. 253, 294 P.3d 6 (2012).....46

Martin v. Dematic,
315 P.3d 1126 (Div. 1 2013).....31

Page(s)

Olympic Healthcare Svces. II LLC v. Dep't of Social & Health Svces.,
175 Wn. App. 174, 304 P.3d 491 (2013) 56

Oman v. Yates,
70 Wn.2d 181, 422 P.2d 489 (1967) 44

Peters v. Skalman,
27 Wn. App. 247, 617 P.2d 448 46

Reed v. Reeves,
160 Wash. 282, 294 P. 995 (1931) 20

Reichelt v. Johns-Manville Corp.,
107 Wn.2d 761, 733 P.2d 530 (1987) 31

S.P.C.S., Inc. v. Lockheed Shipbuilding & Const. Co.,
29 Wn. App. 930, 631 P.2d 999 (1981) 19, 20, 21, 29

Scavenius v. Manchester Port Dist.,
2 Wn. App. 126, 467 P.2d 372 (1970) 3, 19, 22

Sherbeck v. Lyman's Estate,
15 Wn. App. 866, 552 P.2d 1076 (1976) 31, 32, 35

Sing v. John L. Scott, Inc.,
83 Wn. App. 55, 920 P.2d 589 (1996) *rev'd on other grounds*, 134 Wn.2d 24, 948 P.2d 816 (1997) 53

Smith v. Behr Process Corp.
113 Wn. App. 306, 54 P.3d 665 (2002) 53

Sofie v. Fibreboard Corp.,
112 Wn.2d 636, 771 P.2d 711 (1989) 20

State ex rel. Bannister v. Goldman,
265 S.W.3d 280 (Mo.App. E.D 2008) 55

State ex rel. Carroll v. Junker,
79 Wn. 2d 12, 482 P.2d 775 (1971) 19

Page(s)

State ex rel. Lemley v. Reno,
436 S.W.3d 232 (Mo.App. E.D. 2013) 55

State ex rel. Ross v. Superior Court,
132 Wn. 102, 231 P. 453 (1924) 19

Stiley v. Block,
130 Wn.2d 486, 925 P.2d 194 (1996) 46

Travis v. Washington Horse Breeders Ass'n, Inc.,
111 Wn.2d 396, 759 P.2d 418 (1988) 53

Trumbull v. Jefferson County,
60 Wash. 479, 111 P. 569 (1910) 55

Valley/50th Ave., L.L.C. v. Stewart,
159 Wn.2d 736, 153 P.3d 186 (2007) 45

Vanderpol v. Schotzko,
136 Wn. App. 504, 150 P.3d 120 (2007) 18

Watkins v. Siler Logging Co.,
9 Wn.2d 703, 116 P.2d 315 (1941) 18, 20

STATUTES

15 USC § 78m 40

IRC 6038 9

RCW 4.16.040(1) 34

RCW 4.16.80(2) 34

RCW 4.16.080(3) 34

RCW 4.28.320 54

RCW 23B.07.230 39

Page(s)

Securities & Exchange Act 40

Uniform Fraudulent Transfer Act 15

OTHER AUTHORITIES

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Wash. Const. art. I, § 21 18

INTRODUCTION

This appeal primarily addresses legal ownership of defendant R-Amtech International, Inc. ("R-Amtech," pronounced "RAM-teck"). The trial court ruled that plaintiff Nikolay E. Belikov ("Belikov"), for his own economic and other reasons, did not want to own R-Amtech. The evidence showed that the parties therefore abandoned the original plan that Belikov own the company. Ownership was purchased by, and shares issued to, defendant Maryann Huhs in 1998, a circumstance that was never altered. The evidence demonstrated that Belikov treated Maryann Huhs as R-Amtech's owner, and avoided Russian and U.S. taxes and Russian registration requirements by not being an owner. Nonetheless, the trial court ruled Belikov legally owns R-Amtech, and awarded to R-Amtech $3,112,329.00 in damages, and to Belikov $00,000.00 in attorneys' fees, for a total of $4,031,646.25 against Roy E. Huhs, Jr. ("Al Huhs," a lawyer) and Maryann Huhs (collectively, "the Huhses").

Belikov was on inquiry notice since 1998, many years longer than the statute of limitations allows, that Maryann Huhs owned R-Amtech's stock and was acting as R-Amtech's sole owner, enjoying the benefits and shouldering the burdens of such ownership. The trial court erred by determining that the discovery rule protects Belikov from a statute of limitations defense in such circumstances.

In 2007, Belikov gifted real estate in Cle Elum, Washington (the "Suncadia Property") to the Huhses and their sons. The trial court erred by rescinding this gift based on Al Huhs's alleged violation of RPC 1.8(c), including by declining to apply the statute of limitations.

The trial court improperly vacated Belikov's jury demand over the Huhses' objections, and denied the Huhses a trial by jury.

The trial court erred by awarding attorneys' fees to Belikov, and by improperly vacating a *lis pendens* the Huhses recorded on the Suncadia Property pending this appeal.

ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred by granting Belikov's motion to strike Belikov's jury demand, and denying the Huhses a trial by jury.[1]

2. The trial court erred by not applying the statute of limitations to Belikov's claims against the Huhses regarding ownership of R-Amtech.[2]

3. The trial court erred by ruling Belikov owns R-Amtech.[3]

4. The trial court erred by ruling Al Huhs violated RPC 1.8(c).[4]

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[1] CP 815-17.
[2] CP 1858.
[3] CP 1853.

5. The trial court erred by ruling a lawyer may be civilly liable to a client based on the lawyer's violation of RPC 1.8(c).[5]

6. The trial court erred by ruling a client's gift to a lawyer in violation of RPC 1.8(c) is void *ab initio*, as opposed to voidable, and therefore not subject to the statute of limitations. Thus, the trial court erred in ruling Belikov's RPC 1.8(c) claim is not time barred.[6]

7. The trial court erred by awarding to Belikov non-statutory attorneys' fees and costs.[7]

8. The trial court erred by releasing the Huhses' *lis pendens* pending this appeal.[8]

Issues Pertaining to Assignments of Error

1. The trial court vacated Belikov's jury demand over the Huhses' objections, denying them a trial by jury. Given that (1) this case's issues are overwhelmingly questions of law; (2) the trial court's verdict was based overwhelmingly on legal concepts; (3) Belikov presented few, if any, viable theories in equity; and (4) the factors set forth in *Scavenius v. Manchester Port Dist.*[9] weigh heavily in favor of a jury trial, was the denial of a jury trial improper? (Assignment of Error 1)

2. Belikov, by his own testimony, (1) was at all times since its inception chairman of R-Amtech's board of directors; (2) attended board meetings regularly through 2005; (3) sent and received communications over many years wherein Maryann Huhs was

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[4] CP 1859-60.
[5] CP 1859-60.
[6] CP 1860.
[7] CP 1259-61, Order Granting Plaintiff's Motion for Award of Attorneys' Fees; CP 1275-78, Judgment for Plaintiff for Reasonable Attorneys' Fees and Costs.
[8] CP 1796-99, Order Releasing Lis Pendens Pursuant to RCW 4.28.320.
[9] 2 Wn. App. 126, 129-130, 467 P.2d 372, 374 (1970).

stated to be R-Amtech's sole owner; (4) had tens of millions of dollars in investment and financial expectations in R-Amtech; and yet (5) never once discussed his purported ownership of R-Amtech with either Maryann Huhs or his and R-Amtech's lawyer, John Huhs. Under these circumstances, was Belikov on inquiry notice that he did not own R-Amtech, and that Maryann Huhs was acting as R-Amtech's sole owner, many years longer than the statute of limitations allows, even considering the discovery rule? (Assignments of Error 2 and 3)

3. The trial court concluded that "it is clear [Belikov] had his own reasons for not wanting record ownership of R-Amtech" from the time of its formation in January 1996, and that he made an "unwise attempt to avoid record ownership." Based on these desires, intentions and directions of Belikov, full ownership of R-Amtech was vested in Maryann Huhs in 1998, a fact that always was well known and never challenged by Belikov. Under these circumstances, did the trial court err by ruling that Belikov owns R-Amtech? (Assignment of Error 3)

4. In 2007, Belikov gifted the Suncadia Property to the Huhses. Al Huhs, an attorney, did not draft any document on Belikov's behalf effecting the gift, and did not influence Belikov into making it (indeed, Al Huhs did not know about the gift until months after Belikov agreed to make it). Did the trial court err by ruling that Al Huhs violated RPC 1.8(c), and by rescinding the Suncadia Property gift? (Assignments of Error 4 and 5)

5. RPC 1.8(a), under certain circumstances, can serve as the basis for a court to refuse to enforce a contract governing a lawyer-client business transaction when the client is denied a pre-contract opportunity to consult with separate counsel. This concept is based on public policy considerations. However, RPC 1.8(c), proscribing a lawyer from drafting an instrument on behalf of a client giving the lawyer a substantial gift from a client, cannot be, and has never been held by any court based on the ABA Model Rules to be, a basis to rescind a client-to-lawyer gift. Did the trial court err by applying principles governing lawyer-client business transactions under RPC 1.8(a) to allegations under RPC 1.8(c), and ruling that (1) RPC 1.8(c) can be the basis to rescind a client-to-lawyer gift without any suggestion of solicitation or undue influence; (2) Al Huhs drafted an instrument on Belikov's behalf

that had the legal effect of giving Al Huhs a real estate gift from Belikov as proscribed by RPC 1.8(c); and (3) Belikov's action to rescind his 2007 gift to the Huhses is not time barred? (Assignments of Error 4, 5 and 6)

6. The trial court awarded Belikov $900,000 in attorneys' fees. Belikov had petitioned for an award of $1,142,424.15 in attorneys' fees, which he claimed were the totality of fees incurred in the prosecution of his "breach of fiduciary duty, fraud and conversion claims." Did the trial court err by awarding non-statutory fees to Belikov; and by awarding that amount? (Assignment of Error 7)

7. After trial and entry of judgment, the Huhses filed a *lis pendens* on the Suncadia Property, asserting that ownership of it remained in dispute pending appeal. Did the trial court err in releasing that *lis pendens*? (Assignment of Error 8)

STATEMENT OF THE CASE

A. Parties.

Belikov is a Russian citizen residing in Costa Rica.[10] RP 5/22 87:3-4. The Huhses, a married couple, are residents of Washington. RP 5/20 112:19-20; 113:9-16. R-Amtech is a Washington corporation. TR 3.

B. Formation of R-Amtech.

Nonparty ZAO-Elorg ("Elorg"), a Russian company of which Belikov was a principal, acquired ownership of the intellectual property ("IP") of the videogame "Tetris" after a complex ownership transition involving numerous Soviet government and private entities in the 1980s. RP 5/27 12:17-20:10; 5/27 23:18-24:3. Belikov never owned the Tetris IP

[10] The trial court did not make any award in favor of plaintiff Techno-TM ZAO ("TM-ZAO"). CP 1836, fn 1.

individually. RP 5/21 113:12-17. R-Amtech was formed on January 22, 1996 to license, sell, and distribute Tetris and other Russian technologies. RP 5/12 104:17-106:6. In 1996, Elorg executed license agreements assigning to R-Amtech the worldwide marketing rights to the Tetris IP.[11] TR 152; RP 5/20 129:24-130:7. The licensing agreements provided that R-Amtech would retain 60% of revenue derived from the marketing of Tetris, and pay Elorg the remaining 40%. TR 151, 152.

Revenues from Tetris were divided between R-Amtech and Elorg for years without protest from Belikov. RP 5/20 133:2-5; 145:25-146:7; 153:21-155:14. Other than an early loan and Maryann Huhs's purchase of stock, all of R-Amtech's capitalization was derived from its 60% share of receipts from income generated by its Tetris licensing agreements. RP 5/20 126:6-17. Belikov dismissed the documented Elorg/R-Amtech Tetris license agreements as "artificial," asserting that the contracts were nonbinding or meaningless. RP 5/21 116:20-119:3. He testified that all revenues from the marketing of Tetris, including R-Amtech's 60%, "are my money." RP 5/27 44:25-45:12. He further testified that his lawyer,

[11] Several years later, ZAO-Elorg was substituted by nonparty Elorg Company, LLC, a Delaware limited liability company ("Elorg-LLC"), of which Belikov also was the principal. Because this is not relevant to the substance of this appeal, both entities are collectively referred to herein as "Elorg."

John Huhs, arranged the program.[12] RP 5/27 117: 13-15. Thus, Belikov argued, and the trial court agreed, that R-Amtech's 60% constituted Belikov's personal capitalization of R-Amtech. CP 1842-43.

Maryann Huhs, as R-Amtech's owner and primary employee, administered much of the Tetris licensing; arranged for payment of costs (including R-Amtech salaries, brand maintenance, infringement activities, costs associated with the activities of subsidiary companies, and extensive worldwide copyright maintenance fees); paid Elorg its share of the profits; and paid herself dividends as R-Amtech's owner.[13] RP 5/27 140:1-141:22. Tetris was sold in January 2005, resulting in a $14.4 million payout to Belikov – tax-free because he was not an owner of R-Amtech – and $600,000 to R-Amtech and Maryann Huhs, who paid taxes. RP 6/5 115:12-22; 128:20-23.

C. Ownership of R-Amtech.

By his own admission, Belikov was at all times represented by attorney John Huhs with respect to R-Amtech, as well as Belikov's interests in, and contemplated ownership of, R-Amtech, and R-Amtech's business. RP 5/21 105:23-106:6; 5/27 44:20-22. John Huhs originally sat

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[12] Belikov testified: "Well, it was John Huhs's idea. He said something should be on paper, because the decision on how much money should be transferred, that was my decision. Because it was my money."

[13] The business and financial structure of Tetris's marketing was very complex involving several different entities, a point the trial court recognized. CP 1838-39. That structure is not pertinent to this appeal, and therefore is not presented herein.

on R-Amtech's board of directors. TR 530; CP 289-90. Again, by his own admission, Belikov never saw a need to discuss his allegedly intended ownership of R-Amtech with his attorney John Huhs and, in fact, never did discuss such purported ownership with him despite his "complete trust and faith" in him through 2003. RP 5/27 40:6-9; 44:20-46:11; 47:3-19.

Belikov testified he "appointed … president" of R-Amtech Maryann Huhs. RP 5/21 108:10-13. By this action, he claims Maryann Huhs duped him over some 15 years about his being R-Amtech's owner. However, by his own admission, Belikov never once discussed his purported ownership of R-Amtech with Maryann Huhs. RP 5/27 47:20-48:1; 5/28 2:10-16.

Originally, it was contemplated that Belikov, Maryann Huhs, several Russian nationals, and others providing business and professional expertise would jointly own R-Amtech's stock. RP 5/22 13:11-21; 6/5 72:12-75:23. This ownership structure was not implemented, as the Russians, including Belikov, declined stock ownership citing concern about U.S. and Russian taxation, disclosure and government registration concerns. 6/5 72:12-75:23. Extensive documentation confirms this point,[14] and the trial court concluded in its findings that "Mr. Belikov did

[14] Specifically, email correspondence from and by Belikov's attorneys, R-Amtech, and R-Amtech's accountant; and R-Amtech board of director meeting minutes demonstrate

not want his ownership to trigger the requirement that R-Amtech file IRS Form 5472 ...," which would have resulted in Belikov incurring Russian and U.S. tax obligations.[15] CP 1844. The trial court further ruled:

> Certainly Mr. Belikov could and should have been more assertive. It is clear he had his own reasons for not wanting record ownership of R-Amtech. But it is equally clear that at all times he intended to be, believed he was the managing owner of R-Amtech." CP 1852.
>
> Nonetheless, Mr. Belikov's unwise attempt to avoid record ownership did not serve to vest ownership in Maryann Huhs. Significantly, no one apparently ever informed Mr. Belikov of any potential legal detriments of not maintaining record ownership, presumably because none could have been foreseen during this time period. CP 1085.

Belikov never asserted any claim of ownership of R-Amtech until he filed this action in July 2012. RP 6/5 20:2-13. No evidence or testimony suggests there was an understanding that Maryann Huhs would own R-Amtech's stock as a "straw person" for Belikov to enable him to avoid U.S. and Russian taxes, as well as registration with Russian authorities (Maryann Huhs testified there was no such understanding). RP 6/5 76:19-25. Again, Belikov testified he never discussed it with her. In 1998, Maryann Huhs purchased and received all of R-Amtech's stock, and offered as evidence a stock certificate in her name. RP 6/5 75:22-23;

Belikov's refusal to own stock despite numerous proposals. Belikov's personal portfolio documentation does not mention that he "owns" R-Amtech. TR 99, 531, 540, 629, 630.

[15] *See* IRC 6038.

CP 124-26. Belikov has no stock certificate or knowledge that one was issued to him. RP 5/22 13:22-14:4.

The Huhses testified Belikov was chairman of R-Amtech's board of directors[16] from 1996 through 2005, when he resigned. RP 5/21 49:16-18; 6/4 26:5-8; 6/5 80:20-23. Belikov testified he is and always has been chairman of R-Amtech's board, and that he attended no meetings after 2005 because he did not know they were taking place, and apparently saw no reason to call any himself. RP 5/28 40:7-14.

Belikov presented evidence that he "should" have been issued R-Amtech stock, pointing to a January 26, 1996 board consent to action that directed such issuance (TR 529); and an entry in R-Amtech's financial records showing a "$20,000" entry for "Capital stock – **b** Common stock." TR 160. The consent to action predates numerous communications demonstrating stock never was issued to Belikov – at his own direction. TR 540, 629, 630; RP 5/19 28:24-29:6; 5/19 62:9-12; 5/27 6:16-8:1; 6/4 102:19-103:7; 6/5 108:7-15. Belikov never exercised an additional option to purchase shares. RP 5/28 10:17-20; 30:19-32:6. By 2003, he had abandoned attempts to obtain stock. RP 6/5 107:25-108:6.

Per his expert, Lorraine Barrick, Belikov claimed the $20,000 capital stock entry in R-Amtech tax returns is evidence Belikov

[16] The chairman of the board has no executive authority; is limited to presiding over board of director meetings; and need not be a shareholder. RP 6/4 172:9-16.

"purchased" stock. RP 6/2 38:1-22. Barrick explained that a $26,000 entry represents Belikov's acquisition of 25,000 shares for $1.00/share, $6,000 of which was converted to a loan. RP 6/2 36:2-39:19. But R-Amtech's accountant, Gregg Jordshaugen, testified the $20,000 entry was a "placeholder" not reflective of any stock purchase, inserted while the parties were exploring ownership issues. RP 6/4 92:3-23. As an oversight, Mr. Jordshaugen left in R-Amtech's accounting the placeholder for years after discussions regarding Belikov owning stock were abandoned. RP 6/2 92:3-23.

Belikov claimed below that he holds "beneficial ownership," purportedly in equity, of R-Amtech by asserting "he" funded R-Amtech through Tetris royalties (which R-Amtech retained through its licensing agreements with Elorg, that Belikov claimed were "artificial") RP 5/21 117:13-15; and that R-Amtech did "no work" for the Tetris royalties, and therefore is not entitled to them. RP 6/2 65:11-22. However, R-Amtech, largely through Maryann Huhs's efforts, did significant work toward the successful management of Tetris. RP 6/5 100:5-103:9.

The trial court barred testimony from the Huhses' expert witness, Sergey S. Sokolov, as irrelevant. CP 950-51. Sokolov, a Russian law expert, would have testified that Belikov could not legally become a direct, indirect, "beneficial" or any other variety of owner of any U.S.

company unless he first obtained authorization from the Central Bank of Russia, and complied with Russia's registration and capital currency requirements for income he derived from it. CP 635-652. Belikov disclaimed any knowledge of whether he did so, testifying that this was the responsibility of his lawyer, John Huhs.[17] RP 5/28 17:20-18:11.

D. The Tetris Sale.

On January 21, 2005, non-party Tetris Holdings, LLC purchased Elorg (including the Tetris IP Elorg owned) from Belikov, and a subsidiary, Games International, LLC ("Games"), from R-Amtech which held the licensing rights to Tetris. Elorg, R-Amtech, Games, Belikov and Maryann Huhs were separate signatories to the sale agreement. TR 648.

In that contract, Belikov relinquished to Tetris Holdings, LLC his interest in Elorg. TR 648. Elorg warranted it had good and exclusive title to the Tetris IP, and that it had no ownership interest, or obligation to make any investment or capital contribution, in R-Amtech. TR 648. Elorg also released R-Amtech from any and all liabilities and obligations under the Tetris licensing agreements. TR 648. This demonstrates the distinction between Belikov and Elorg as participants in the program

[17] The trial court noted there was no evidence Belikov was aware he had any Russian taxation or registration requirements. CP 1845. However, this was not a subject of trial testimony, as the trial court had barred Sokolov in an order in limine. CP 950-51.

whereby R-Amtech marketed Tetris, and that R-Amtech's 60% was not Belikov's money representing his personal capitalization of the company.

E. Belikov's Real Estate Gift to the Huhses.

Belikov agreed to gift the Suncadia Property to Maryann Huhs months before Al Huhs knew about it. Specifically, Belikov testified that Maryann Huhs "sprung" the concept of the gift on him unexpectedly during a meeting with his financial advisor, and that he agreed to it out of embarrassment, in December 2006. RP 6/2 143:16-144:7. He testified that he first discussed the gift with Al Huhs only in February 2007. RP 6/2 146:2-147:11. The trial court ruled:

> Maryann Huhs first raised the issue of the Suncadia home in late 2006 in a meeting with Mr. Belikov and Mr. Ferguson. Although not germane to the court's final analysis, the court concludes that Mr. Belikov reluctantly agreed to the gift because he was embarrassed to seem ignorant or ungenerous in front of Mr. Ferguson.[18]

Belikov was required to consult with his own financial advisors at Morgan Stanley Smith Barney ("MSSB"); and arrange and document the transfer of funds from his own trust through them, as part of effecting the gift. RP 5/20 25:15-28:23.

On March 1, 2007, Al Huhs prepared, and Belikov executed, a "declaration of gift" regarding the Suncadia Property that Belikov ***earlier*** had gifted to the Huhses and their sons by way of funding for the purchase

[18] CP 1859.

of the property.[19] TR 91. The declaration of gift states that Belikov had earlier instructed his financial advisors to transfer from his trust to Victory Real Estate Holdings, LLC ("Victory") $1.5 million to effect the purchase. It does not itself make any such transfer.

Belikov arranged funding with his MSSB advisors. RP 5/20 25:15-28:23. After funding was effected and Victory purchased the Suncadia Property in June 2007, Belikov transferred ownership of Victory to the Huhses by divesting its ownership from his trust – a process Al Huhs was not involved in. RP 6/3 136:22-137:13.[20] When asked whether he could have changed his mind about the gift after he told Maryann Huhs he would give it, and before funding, Belikov testified "[t]heoretically, yes." RP 6/2 153:25-154:7.

F. Proceedings

Jury Demand

Belikov filed this lawsuit on July 16, 2012, originally alleging nineteen causes of action, and later amended his complaint to allege 21 causes of action. CP 1800-34. Seven causes of action were on behalf

[19] The declaration of gift also addresses his gift of a real estate parcel in Costa Rica which is not a subject of this appeal.

[20] Belikov testified that he told his MSSB advisors to make the transfer, and that the transfer was for himself, but that he lied to his advisors in telling them this. RP 5/27 63:1-64:3.

of plaintiff TM-ZAO,[21] six of which are at law (breach of contract; fraud and fraudulent concealment; negligent misrepresentation and concealment; tortious interference with contract; conversion and violation of Uniform Fraudulent Transfer Act). The second, promissory estoppel, while sounding in equity, is specifically designated in the amended complaint as an "Alternative Cause of Action." CP 1819.

Belikov's 14 causes of action also are predominantly at law (breach of fiduciary duty; fraud; negligent misrepresentation; conversion; breach of contract; negligence; violation of Uniform Fraudulent Transfer Act; corporate waste). CP 1823-33. Two sound in equity (promissory estoppel; and unjust enrichment) and four (resulting trust; constructive trust; preliminary and permanent injunction; declaratory judgment), while involving equitable concepts, are remedies requested for wrongdoing Belikov alleged primarily in law. CP 1823-33. The trial court essentially agreed, granting little or no relief in the form of equitable remedies. CP 1835-65.

On June 18, 2013, Belikov filed his jury demand, which did not seek to limit the jury's role, demanding only that "this cause be tried before a jury of twelve." CP 249-250. Relying on Belikov's demand as

[21] These claims were based on allegations that Maryann Huhs misrepresented and concealed facts regarding licensing and royalty payments, and wrongfully converted funds. None were the subject of an award by the trial court. CP 1836.

contemplated by CR 38(d), the Huhses did not file a separate demand for a jury.

RPC 1.8(c)

Citing this Court's opinion in *L.K Operating LLC v. Collection Group*,[22] the trial court ruled that a lawyer's preparation of documents that provide a substantial gift from a client to the lawyer *ipso facto* renders the gift void *ab initio*:

> There is no doubt that Mr. Huhs violated RPC 1.8(c) in preparing these documents including the missing document. He was intimately involved in drafting documents that provided a substantial gift–a home valued at $1.5 million dollars to him and his wife. A transaction in violation of RPC 1.8 is void as against public policy and is subject to rescission.[23]

After the trial court entered its verdict memorandum, but before it entered judgment, the Washington Supreme Court affirmed this Court's ruling in *L.K Operating*, but provided instruction as to the circumstances in which a lawyer may be barred from enforcing a lawyer-client business transaction that violates RPC 1.8(a). On August 11, 2014, the Huhses moved for reconsideration of the trial court's conclusion based on the Supreme Court's ruling. CP 1166-1239. The trial court denied that motion without requiring a response from Belikov. CP 1257-58.

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[22] 168 Wn. App. 862, 279 P. 3d 448 (2013).
[23] CP 1859-60.

Judgment with Respect to R-Amtech

The trial court awarded ownership of R-Amtech to Belikov (CP 1853) as described above, and awarded to R-Amtech $3,112,329.00 against the Huhses in damages. CP 1162. These money damages were based on transfers from R-Amtech to the Huhses. The trial court awarded Belikov $900,000 in attorneys' fees, citing its breach of fiduciary duty conclusions. CP 1275-78.

ARGUMENT

This case is primarily about ownership of R-Amtech. Indeed, it could be said that it is exclusively about ownership of R-Amtech (save the RPC issue). The trial court found that Belikov, and not Maryann Huhs, owns R-Amtech, and then made monetary awards in favor of R-Amtech against the Huhses. If Maryann Huhs owns R-Amtech, and Belikov does not, then the Huhses' asserted liability to R-Amtech, and the monetary awards, are moot. With respect to ownership of R-Amtech, if the trial court erred by failing to apply a statute of limitations; denying a jury trial; awarding Belikov ownership of R-Amtech in equity; and/or finding that substantial evidence demonstrates Belikov owns R-Amtech in law, then all R-Amtech related aspects of this action must be reversed and/or remanded.

1. The trial court erred by striking the jury demand, and denying defendants a trial by jury.

The trial court erred by denying the Huhses a jury trial. The trial court's reasoning, that "the primary claims are equitable," is demonstrably inaccurate based on Belikov's allegations; the nature of the remedies Belikov sought and was awarded; jurisprudence regarding claims in equity; and judicial test factors the trial court disregarded or misapplied in determining this action is primarily in equity.

"The right to a jury trial is fundamental."[24] The Washington Constitution provides that "[t]he right of trial by jury shall remain inviolate."[25] "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."[26]

The Huhses properly relied on Belikov's jury demand in not filing their own. One party's jury demand provides all parties with a right to a jury trial.[27] "A demand for trial by jury … may not be withdrawn without the consent of the parties."[28]

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[24] *Vanderpol v. Schotzko*, 136 Wn. App. 504, 510, 150 P.3d 120 (2007).
[25] Wash. Const. art. I, § 21; CR 38(a). *Watkins v. Siler Logging Co.*, 9 Wn.2d 703, 710, 116 P.2d 315 (1941)(The right to a jury trial has been "jealously guarded by the courts.").
[26] *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501, 79 S.Ct. 948, 952, 3 L.Ed.2d 988 (1959).
[27] *See Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 305, 616 P.2d 1223 (1980).
[28] CR 38(d) and CR 39(a).

A. As this Action's Issues Sound Almost Exclusively in Law, All Issues Should have been Tried to a Jury.

On the eve of trial, Belikov moved the trial court to strike his own jury demand, attempting in his motion to characterize his causes of action as predominantly in equity. CP 797-805. This was done by pointing to the equitable remedies he had pleaded as causes of action. CP 797-805.

"[I]n cases involving both legal and equitable issues the trial court has been vested with wide discretion to allow a jury on some, none, or all issues."[29] The standard of review of a trial court's denial of a jury trial generally is abuse of discretion.[30] Under that standard, a trial court order should be reversed if it is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons."[31] Nonetheless, the standard requires "decision-making founded upon principle and reason."[32]

Here, the trial court did not explain its rationale in striking the jury demand, other than to state its conclusion that the case is mostly equitable in nature. Nothing in the record suggests the trial court considered the *Scavenious* factors at all. This itself is abuse of discretion, and forces this

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[29] *S.P.C.S., Inc. v. Lockheed Shipbuilding & Const. Co.*, 29 Wn. App. 930, 934, 631 P.2d 999 (1981) (reversing trial court's decision to strike the jury demand where the "main issues [we]re legal"). *See also Scavenius v. Manchester Port Dist.*, 2 Wn. App. 126, 129-30, 467 P.2d 372 (1970).
[30] *S.P.C.S.*, 29 Wn. App. at 934.
[31] *State ex rel. Carroll v. Junker*, 79 Wn. 2d 12, 26, 482 P.2d 775, 784 (1971).
[32] *Coggle v. Snow*, 56 Wn. App. 499, 505, 784 P.2d 554, 558 (1990). *See also State ex rel. Ross v. Superior Court*, 132 Wn. 102, 107, 231 P. 453 (1924)("It must, like discretion in other matters, be based on reason.").

Court to review the record *de novo* for lack of any means of analyzing the trial court's conclusion. In any event, abuse of discretion is demonstrated by the record.

Preliminarily, "Washington follows the historical test in determining whether claims sound in equity or at law. Thus, we look to see whether the claims in question were within the exclusive jurisdiction of the equity courts when the state constitution was adopted in 1889 to determine whether claims sound in equity or in law."[33] Significantly, "[a]ny doubt should be resolved in favor of a jury trial, in deference to the constitutional nature of the right."[34] "Beneficial ownership of a corporation," the purportedly equitable liability theory related to this action's primary issue, certainly did not exist as an equitable doctrine in 1889, even if Belikov could demonstrate it exists today.

Belikov's own amended complaint states that it "asserts fraud, breach of fiduciary duty, conversion and other claims." CP 1800. The majority of his 21 causes of action are legal, and therefore properly submitted to a jury.[35] Many of his "causes of action," such as resulting

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[33] *Auburn Mechanical, Inc. v. Lydig Const., Inc.*, 89 Wn. App. 893, 897-98, 951 P.2d 311 (1998), *citing Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 645, 771 P.2d 711 (1989) and other authority.
[34] *S.P.C.S.*, 29 Wn. App. at 934.
[35] *See, e.g., Sofie v. Fibreboard Corp.*, 112 Wn.2d at 649-50 (recognizing right to jury trial for tort claims, including negligence); *Reed v. Reeves*, 160 Wash. 282, 286, 294 P. 995 (1931) (holding that a fraud claim for monetary damages is a legal claim to which the right to a jury trial attaches); *Watkins v. Siler Logging Co.*, 9 Wn.2d 703, 714, 116 P.2d

trust, constructive trust, and injunctive relief, are in fact requested remedies for the legal claims of breach of fiduciary duty, fraud and conversion, and are not themselves causes of action. Such claims should be tried to a jury.[36]

Notably, "equity will not act if there is a complete and adequate remedy at law."[37] Summarizing this state's jurisprudence, *Washington Practice*[38] explains the circumstances wherein remedies available at law are inadequate so as to allow concurrent claims in equity:

> The remedy at law has, with reasonable consistency, been found inadequate (1) where the injury complained of by its nature could not be compensated in money damages, or damages could not be ascertained with any degree of certainty; (2) where the remedy at law would not be an efficient one because the injury is of a continuing nature or recourse to damage actions at law would result in a multiplicity of actions; (3) where, because of the statute of frauds, or for other reason, an action or defense at law may be defeated; (4) where, because of the circumstances, the injury or threatened injury would be irreparable; or (5) where the alternative is self-help. [citations omitted]

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315 (1941) (trial court committed reversible error by denying jury trial because action was based on alleged conversion and was "strictly a suit at law"); *Kelly v. Foster*, 62 Wn. App. 150, 154, 813 P.2d 598 (1991) (holding that plaintiffs' claims for breach of fiduciary duty were legal in nature and not equitable); *Auburn Mechanical*, 89 Wn. App. at 903-04 (recognizing that unjust enrichment claims are legal in nature).

[36] *See, e.g., Gillingham v. Phelps*, 11 Wn.2d 492, 119 P.2d 914 (1941) (argument on appeal that trial court erred by allowing jury to decide lawsuit seeking to impose a constructive trust was "without substantial merit"; jury verdict affirmed).

[37] *S.P.C.S.*, 29 Wn. App. at 934. *See also, e.g., Kucera v. State, Dept. of Transp.*, 140 Wn. 2d 200, 210-11, 995 P.2d 63 (2000) (property owners failed to show the right to injunctive relief where money damages were available).

[38] 15 Wash. Prac., Civil Procedure § 44:10 (2d ed.).

None of these apply here. Money damages were calculated to the penny and awarded in accordance with Belikov's requests for relief. The injuries complained of are not continuing and would not result in multiple actions; are not irreparable; are not subject to the statute of frauds or other defense leading to unjust results (the claims at law were adjudicated based on the weight of evidence); and are not subject to self-help.

Belikov's allegations regarding R-Amtech fundamentally address (1) his acquired ownership of the corporation by purchase of stock and "his" capitalization of it through R-Amtech's contract with Elorg; and (2) the Huhses' alleged misdirection of R-Amtech's assets and payments. Plainly, Belikov would have an adequate remedy at law in the form of monetary damages and a determination, as a matter of law, that he owns R-Amtech, as is made clear by the trial court's conclusions themselves, which make such awards overwhelmingly at law. Those monetary and ownership awards obviate and prove superfluous any equitable claims.

B. *Scavenius* Factors

Factors a trial court should consider in determining whether an action that includes claims in equity should be tried to a jury were established in 1970 in *Scavenius v. Manchester Port Dist.*[39]

> (1) who seeks the equitable relief; (2) is the person seeking the equitable relief also demanding trial of the issues to the

[39] 2 Wn. App. 126, 129-130, 467 P.2d 372, 374 (1970).

> 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.

Analysis of these factors points so strongly in favor of a jury trial that it is clear the trial court abused its discretion under applicable standards in striking Belikov's jury demand. Belikov seeks both equitable remedies and to rescind his own jury demand, but points 1 and 2 are of less concern given that his claims for equitable relief are tangential and derive from the same alleged facts and circumstances as his claims at law. By demanding a jury, Belikov conceded equity is not the thrust of his theories of liability.

i. Point 3: Belikov's Claims are Overwhelmingly Legal

That the issues are "primarily legal" in "their nature is readily apparent" by (1) the character of Belikov's claims, and the remedies he seeks; (2) the sheer number of claims at law versus those in equity pursued by Belikov; (3) the fact that few, if any at all, of the equitable claims Belikov alleges could have substantive merit; and (4) the fact that the trial court's findings of fact and conclusions of law; analysis; and damages

awards are based overwhelmingly on legal concepts, with little attention or substantiation given to the equity claims.

In determining whether a jury trial is appropriate in this regard:

> … the preliminary task is to determine whether the various claims are equitable or legal, for if all the claims are legal, the "primary" character of an action is not in question and the right to a jury trial is clear.
>
> The distinction between legal and equitable claims is based on the nature of the action, not the form of the action. The court must examine the pleadings on file at the time the court rules on the motion to strike the jury demand, and "'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.'" More importantly, courts must examine the remedy sought.[40]

Belikov sought and was awarded primarily money damages based on his assertions that he purchased and obtained ownership of R-Amtech through the usual means of buying stock and capitalizing the company; and that Maryann Huhs "looted" the company. CP 1842-46, 1853. He argued the Huhses deprived him of his ownership through their alleged breach of fiduciary duty; fraud; conversion; negligent misrepresentation and concealment; and fraudulent transfer, all of which sound in law. The remedy he sought and was awarded was primarily monetary and

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[40] *Auburn Mechanical, Inc. v. Lydig Const., Inc.*, 89 Wn. App. at 898-899, *citing S.P.C.S.*, and other authority, including 1 *Dan B. Dobbs, Dobbs Law of Remedies* §2.6(3) at 156 (2d ed. 1993): "[O]verwhelmingly, courts characterize claims according to the remedies sought rather than according to subject matter or substantive rules involved."

enforcement of his purchase of the company. CP 1800-34. In its findings of fact and conclusions of law, the trial court ruled that the Huhses had "looted" R-Amtech. CP 1846-47. All such alleged wrongdoing is actionable at law, and the trial court treated it as such.

The trial court awarded Belikov ownership of R-Amtech, again based primarily on legal principles. CP 1842-46, 1853. In that regard, the trial court ruled in section B-1 of its Findings of Fact, entitled "**Mr. Belikov is the legal owner of R-Amtech**," in twelve lengthy paragraphs (paras. 18-29), that Belikov owns R-Amtech based on concepts of law. CP 1842-46, 1853. Apparently as an afterthought, the trial court added in section B-2, entitled "**Mr. Belikov is the beneficial owner of R-Amtech**," in a single paragraph (para. 30), stating the following as the sole basis for Belikov's ownership of R-Amtech in equity:

> As alternate grounds, Mr. Belikov has established that he is the beneficial owner of R-Amtech. In December 2003, Maryann Huhs drafted a letter to the Costa Rican Tourism Institute describing Mr. Belikov as the beneficial owner of R-Amtech. Although the signed version has been lost, at her deposition, Maryann Huhs admitted signing the letter. Her testimony to the contrary is not credible. Similarly, in August 2004, Maryann Huhs described herself to Attorney Annette Becker of K&L Gates (then Preston Gates & Ellis) as a nominee, holding R-Amtech's 99% ownership of Games International on behalf of NB, a reference to Nikolay Belikov.[41] CP 1846.

[41] The Huhses disputed the accuracy of these factual conclusions.

These factual points, even if all accurate, fall far short of establishing grounds in equity for Belikov's corporation ownership rights. Maryann Huhs's purported statements and understandings could not create enforceable rights in equity (or in law, for that matter).

In its conclusions, the trial court explained its interpretation of jurisprudence as a basis for an equitable concept of "beneficial ownership" of a corporation. CP 1853-54. The errors of that interpretation are detailed below. Briefly, no statute, regulation or jurisprudence supports the notion of beneficial ownership of a corporation in equity. The trial court erred[42] by concluding that one person may own a corporation for another's benefit without any prior agreement between the two, or arrangement within the corporation itself. As Belikov admits he did not ever discuss ownership of R-Amtech with Maryann Huhs or with his and R-Amtech's attorney, John Huhs, there could not possibly have been an understanding that Maryann Huhs would own the corporation on Belikov's behalf and for his benefit.

Thus, if equity did play any role in the trial court's determination that Belikov owns R-Amtech, such role was nominal at best; factually unsubstantiated; jurisprudentially erroneous; and irrelevant given that "equity will not act if there is a complete and adequate remedy at law."

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[42] Based on authority Belikov submitted that is patently inapposite.

Certainly, equitable concepts (if any) related to ownership of a corporation or the Huhses' "looting" of its assets do not predominate over causes of action at law. A jury should have decided the issue.

The trial court also concluded that the Huhses breached fiduciary duties to Belikov. CP 1847, 1855-56. Breach of fiduciary duty, in the instant context, is a claim at law. Addressing a claim of breach of fiduciary duty, the Washington Supreme Court reinforced the principle that the "distinction between actions at law and those at equity is based on the nature rather than the form of the proceeding."[43] When a cause of action for breach of fiduciary duty is used to seek recovery only for the plaintiff (as it was here), "the action is considered legal in nature."[44]

The trial court fixed the amount of and awarded enormous monetary damages against the Huhses. While not exclusively determinative, the nature of the relief requested and remedy awarded are compelling as to a determination of whether an action is at law or equity. For all of Belikov's 14 theories and novel concepts, as well as how he named and crafted them, he sought and recovered money in this action based on legal concepts. His claims should have been heard by a jury.

A detailed explanation of Belikov's claims regarding the Suncadia Property gift is presented below. However, nothing in the record,

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[43] *Allard v. Pac. Nat. Bank*, 99 Wn.2d 394, 400-01, 663 P.2d 104 (1983).
[44] *Id.*

including Belikov's arguments or the trial court's rulings, suggests that there is any basis for a determination that a claim of conversion based on a lawyer's violation of RPC 1.8(c) could sound in equity. Any related factual determinations should have been made by a jury.

Thus, it is clear that the trial court could not, and did not, properly determine that this matter's issues are primarily, or even significantly, equitable in nature.

ii. Point 4: The minimal equitable issues did not present complexities in the trial which affected the orderly determination by a jury

While this case involves numerous issues, nothing about it is beyond a jury's comprehension. The trial court's rulings themselves illustrate this. Much of the trial addressing the purchase of R-Amtech stock; R-Amtech's capitalization; distribution of Tetris proceeds; and the Huhses' collection of dividends involved testimony about accounting. RP 5/15 35:19-60:18; 5/19 108:10-194:8; 5/20 5:3-44:18; 5/29 55:17-152:25; 6/4 68:1-162:13; and 6/5 195:16-200:4. Accounting issues specifically have been held to be within a jury's capacity:

> We cannot agree that whatever accounting is required in this case has made it cognizable solely in equity. The main issues are legal. In concluding otherwise and basing his decision to strike the jury on that conclusion, the trial judge exercised his discretion for untenable reasons and must be reversed … LSCC urges that we consider complexity alone a sufficient reason for denying a trial by jury. …

> We note initially that the complexity presented here does not being [sic] to approach that presented in national securities litigation or international antitrust litigation. … A trial by jury cannot be denied merely because the questions of fact are complicated or involve figures which are difficult to carry in mind. If the action is purely legal in essence and nature, the parties have a right to a trial by jury.[45]

The issues the trial court discerned might have been complex, as in *S.P.C.S.*, but they are purely legal in nature.

iii. Point 5: The equitable and legal issues are not easily separable.

It would be impossible to separate this matter's tangential equitable issues from the legal concepts Belikov alleged and the trial court applied. The trial court's order striking the jury demand states that "the legal and equitable claims, in large part, are factually-related and submission of the legal claims to a jury while trying the equitable claims to the court is neither practical nor desirable." CP 815-17.

iv. Point 6: Great weight should be given to the constitutional right of trial by jury, and the trial court should go beyond the pleadings to ascertain the real issues.

The trial court's order striking the jury demand does not reveal the extent of deference, if any, toward a jury trial that the trial court considered. The only additional explanation the trial court offered is that "[a]lthough some legal claims remain after summary judgment, the

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[45] *S.P.C.S.*, 29 Wn. App. at 935-936 (citations omitted).

primary claims are equitable,"[46] and "... the relief sought by plaintiff goes well beyond a request for money damages." That the former statement is inaccurate is explained above. Regarding the latter, the only relief Belikov requested other than monetary damages was rescission of real estate gifts and ownership of R-Amtech, both of which were asserted and adjudicated almost exclusively on legal principles.

2. *The trial court erred in not applying the applicable statute of limitations to Belikov's claims against the Huhses regarding ownership of R-Amtech.*

Applying the discovery rule, the trial court ruled that "Mr. Belikov did not and could not reasonably have known of the wrongful acts of Maryann and Al Huhs before July 15, 2009 – that is three years before this action was filed." CP 1848. However, the trial court also determined both that (1) Belikov did not want to own R-Amtech, having made an "unwise attempt to avoid record ownership"; and that (2) Belikov did not know, and could not reasonably have known through due diligence, that someone else owned it for years prior to his filing suit. These conclusions are wholly inconsistent.

The trial court summarized the evidence the Huhses presented regarding inquiry notice as limited to "two exhibits" that were insufficient.

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[46] Very little of Belikov's claims were dismissed on summary judgment. The summary judgment orders do little, if anything, to distinguish between law and equity with regard to issues being summarily adjudicated. CP 251-53; 254-55; 511-15; 516-17 and 795-96.

CP 1848. It found significant that Maryann Huhs "continued to deal with him as the owner of R-Amtech" by "ask[ing] Mr. Belikov to personally pay attorney Von Funer's legal bills, falsely asserting that R-Amtech was insolvent, and sought his assistance with the renewal of the Russian patents." CP 1848.

The discovery rule extends the commencement of the statutory time period, but only to the extent the plaintiff could not have learned he had a claim.[47] It was not enough for Belikov simply to claim he was unaware of the Huhses' alleged wrongdoing; he must show he could not have discovered the relevant facts sooner.[48] A plaintiff's actual knowledge will be inferred if the plaintiff, by the exercise of due diligence, could have discovered it. "The plaintiff is also charged with exercising due diligence to learn of the claim; if the plaintiff fails to exercise due diligence, he or she is charged with the knowledge due diligence would have revealed."[49]

Thus, the discovery rule stays commencement of a statutory time to file suit only until such time as when a plaintiff, through due diligence, should have discovered the basis for the cause of action. "[A] cause of

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[47] *In re Estates of Hibbard*, 118 Wn. 2d 737, 749–50, 826 P.2d 690 (1992).
[48] *Martin v. Dematic*, 315 P.3d 1126, 1133 (Div. 1 2013).
[49] *Green v. A.P.C.*, 136 Wn.2d 87, 91, 960 P.2d 912 (1998); *see also Sherbeck v. Lyman's Estate*, 15 Wn. App. 866, 868–69, 552 P.2d 1076 (1976); *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 772, 733 P.2d 530 (1987).

action may accrue for purposes of the statute of limitations if a party *should have* discovered salient facts regarding a claim."[50] A cause of action will then accrue even if actual discovery did not occur until later.[51] "Notice sufficient to excite attention and put a person on guard or to call for an inquiry is notice of everything to which such inquiry might have lead."[52]

As presented throughout this brief, the Huhses offered far more evidence of inquiry notice than the two emails the trial court referenced. It is unclear how Maryann Huhs's request that Belikov pay legal fees or renew patents indicates she was treating him as R-Amtech's owner, certainly to the extent of relieving him of undertaking due diligence regarding his purported ownership.

Again, R-Amtech was founded in 1996. Belikov, by his own understanding, (1) was at all times since its inception chairman of R-Amtech's board of directors; (2) attended board meetings regularly through 2005; (3) sent and received communications over many years wherein Maryann Huhs was stated as R-Amtech's sole owner; and (4) never once, by his own admission, discussed his purported ownership of R-Amtech with either Maryann Huhs, or with his lawyer, John Huhs.

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[50] *Green v. A.P.C.*, 136 Wn.2d at 95.
[51] *Allen v. State*, 118 Wn. 2d 753, 758, 826 P.2d 200, 203 (1992).
[52] *Sherbeck v. Lyman's Estate*, 15 Wn. App. 866 at 870.

Perhaps most significantly, Belikov alleges he had tens of millions of dollars in equity and financial expectations in a company he claims, without any documentation, that he formed and has owned since 1996. Yet, he never confirmed that ownership with his attorney or with the person he alleges he appointed president to work for him as R-Amtech's primary employee. RP 5/27 43:12-15; 5/27 47:20-48:1. If Belikov actually believed he owned the company, it would be patently unreasonable for him and his attorney not to ensure proper legal ownership was in place. The trial court found significant that "no one apparently ever informed Mr. Belikov of any potential legal detriments of not maintaining record ownership." CP 1845. This would be the responsibility of John Huhs, as Belikov's lawyer who was integral to R-Amtech's structure, ownership and business during the company's first five years, and on whom Belikov claims he always relied. RP 5/27 38:21-23; 39:7-10; 43:18-44:24; 116:16-119:23; 5/28 18:4-11. An attorney's knowledge is imputed to the client.[53] At a minimum, without a stock certificate or any other documentation of ownership, Belikov and his lawyer were on inquiry notice that he did not own R-Amtech.

Belikov's claims are time-barred and not saved by the discovery rule as a matter of overwhelming and uncontested evidence. This action

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[53] *Hill v. Dep't of Labor & Indus.*, 90 Wn.2d 276, 279, 580 P.2d 636, 638 (1978).

was brought over 16 years after R-Amtech was formed; 14 years after Maryann Huhs purchased stock; seven years after Tetris was sold and R-Amtech ceased deriving the high profits from it; four and a half years after R-Amtech closed its office; and four years after Belikov ceased communicating with the Huhses. "An action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument" must be commenced within three years."[54] An action upon a contract in writing or arising out of a written agreement must be commenced within six years.[55]

Any claim for relief upon constructive trust, whether upon breach of fiduciary duty, unjust enrichment, fraud, negligence, or negligent misrepresentation must be brought within three years.[56] The statute of limitations for a promissory estoppel claim generally is three years.[57]

Because "beneficial ownership of a corporation" does not exist as a recognized basis for liability in equity,[58] no precedent addresses a specific statute of limitations for it. The trial court provides no explanation of its rationale in enforcing beneficial ownership that allows extrapolation from

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[54] RCW 4.16.080(3).
[55] RCW 4.16.040(1).
[56] RCW 4.16.80(2); *Goodman v. Goodman*, 128 Wn.2d 366, 373, 907 P.2d 290 (1995) (claim for constructive trust is subject to the three year statute of limitation period).
[57] *See Central Heat, Inc. v. Daily Olympian, Inc.*, 74 Wn.2d 126, 132, 443 P.2d 544 (1968). Courts often apply statutes of limitations of analogous actions at law. *See, e.g.*, *City of Bothell v. King Cnty.*, 45 Wn. App. 4, 11, 723 P.2d 547, 551 (1986).
[58] *See* discussion below.

a recognized equitable theory. However, as all theories in equity are subject to three or six-year statutes of limitations, it too should be ruled time-barred.

A defendant who is alleged to have been a plaintiff's fiduciary is not held to a higher standard – the fiduciary may invoke the bar of the statute of limitations when the plaintiff has notice of facts constituting the action that causes the alleged injury and thereafter fails to commence suit within the prescribed statutory period.[59]

To any extent he was not already aware, Belikov was notified that Maryann Huhs was R-Amtech's sole owner at or around the time of the Tetris sale in January 2005. TR 613, 733. Belikov disregarded numerous opportunities to object or intervene to avoid repercussions of circumstances he purportedly believes were improper. Belikov did not awaken in July 2012 to discover Maryann Huhs was wrongfully claiming she owned R-Amtech, enjoying its benefits to his detriment, and allowing him to avoid taxes and government registration. Both his legal ownership and "beneficial ownership" claims should be dismissed because they were not brought within three, or even six, years of the date when he should have known he had any claim.

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[59] *Sherbeck*, 15 Wn. App. at 869.

The discovery rule generally implicates questions of fact, rendering it subject to the substantial evidence standard of review. However, the overwhelmingly compelling evidence here renders it an issue of law subject to *de novo* review. This Court has ruled that "[i]t is true that when a plaintiff discovered a cause of action, or whether a plaintiff exercised reasonable diligence to discover the action, is generally a question of fact. But if reasonable minds could not differ, it is a question of law."[60] A question of law is reviewed *de novo.*[61]

Regarding substantial evidence, the record must demonstrate a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true.[62] "The requirement of substantial evidence necessitates that the evidence be such that it would convince 'an unprejudiced, thinking mind.'"[63] When a trial court has weighed the evidence in a bench trial, appellate review determines whether substantial evidence supports its findings of fact and, if so, whether the findings

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[60] *Cawdrey v. Hanson Baker Ludlow Drumheller, P.S.*, 129 Wn. App. 810, 818, 120 P.3d 605 (2005).
[61] *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn.App. 546, 556, 132 P.3d 789, 794 (2006) ("We review questions of law and conclusions of law *de novo.*").
[62] *Hegwine v. Longview Fibre Co.*, 132 Wn. App. 546, 555-56, 132 P.3d 789, 793 (2006) *aff'd,* 162 Wn. 2d 340, 172 P.3d 688 (2007).
[63] *Burnside v. Simpson*, 123 Wn.2d 93, 107-08, 864 P.2d 937 (1994); *Adcox v. Children's Orthopedic Hosp.*, 123 Wn.2d 15, 35, 864 P.2d 921 (1993).

support the trial court's conclusions of law.[64] Even under this standard, the Court should reverse the trial court's application of the discovery rule.

3. The trial court erred by ruling Belikov is the owner of R-Amtech.

A. Legal Ownership

The trial court ruled that Belikov consciously avoided legal ownership of R-Amtech;[65] but concluded that he could nonetheless own the company and enjoy the benefits of non-ownership. Those benefits included avoidance of significant U.S. and Russian taxes, and registration with Russian authorities. Conceptually, this is repugnant to justice. It also demonstrates Belikov's intentions and understandings regarding his purported ownership of R-Amtech at law; and demonstrates Belikov's unclean hands with respect to his claims he owns the company in equity.[66]

Regardless, the trial court's conclusions do not withstand evidentiary scrutiny under standards set forth in *Burnside v. Simpson*, i.e., that "[t]he requirement of substantial evidence necessitates that the evidence be such that it would convince 'an unprejudiced, thinking mind.'" Belikov has no stock certificate or other documentation that he purchased stock. To show he ostensibly bought stock, he pointed to

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[64] *Keever & Assocs. v. Randall,* 129 Wn. App. 733, 737, 119 P.3d 926 (2005).
[65] The trial court's usage of the undefined term "record ownership" as what Belikov avoided can be interpreted only to mean "legal ownership."
[66] *See. e.g., Hardy v. Hardy*, 910 N.E.2d 851, 853 (Ind. Ct.App. 2009) (rejecting plaintiff's request to impose constructive trust on property that he transferred to his children because the transfer was effectuated to avoid possible excise taxes and fines).

descriptions of deposits within R-Amtech's accounting that are ambiguous at best, and explained as a placeholder by R-Amtech's accountant.

The notion that revenue R-Amtech received and was entitled to retain through its license agreement with Elorg constitutes Belikov's personal capitalization of R-Amtech, or that it "came from Mr. Belikov,"[67] disregards the legal truism that a corporate entity is legally distinct from its owner.[68] Belikov did not direct "his money" to fund R-Amtech. Elorg could not successfully argue it did either, as, again, R-Amtech's Tetris profits were its contractual entitlement. At most, Elorg could claim stock ownership in R-Amtech, but Belikov sold Elorg as part of the Tetris sale in January 2005, relinquishing any rights he had in it or Tetris.[69]

B. Equitable Ownership

That there is no recognized concept of equitable "beneficial ownership" of a corporation is readily apparent from the absence of any relevant authority cited by Belikov or the trial court. The trial court misapplied authority in its conclusions,[70] ruling as follows:

> A beneficial owner has been defined as "[o]ne who does not have title to property but has rights in the property which are the normal incident of owning the property."[71]

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[67] CP 1854.
[68] *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 475, 12 S.Ct. 1655 (2003).
[69] TR 648.
[70] The trial court adopted wholesale Belikov's proposed Conclusions of Law on this issue.
[71] *Citing Black's Law Dictionary* p. 142 (5th Ed. 1979).

> In another context, Washington courts reaffirmed the doctrine in 2012.[72] Similarly, RCW 23B.07.320, adopted in 1989, recognizes the requirement that a corporation "establish a procedure by which the beneficial owner of shares that are registered in the name of a nominee is recognized by the corporation as the shareholder."[73]

The cited *Black's Law Dictionary* definition is general, does not relate to corporate ownership, and does not mention any theory in equity. The two cited cases are inapposite. *In Re Rapid Settlements* was a corporate disregard case that analyzed two commonly owned entities.[74] No analysis whatsoever is made about beneficial ownership of a corporation in equity. *Bays v. Haven* adjudicated ownership of real property, again with no mention of equity.[75]

RCW 23B.07.230, entitled **Shares held by nominees**, pertains only to a corporation's establishment of a procedure whereby a nominee

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[72] *Citing In re Rapid Settlements, Ltd. v. Symetra Life Ins. Co.*, 166 Wn. App. 683, 693-94, 271 P.3d 925 (2012) (describing two corporations as sharing an 'identity of beneficial ownership and control'); and "*Bays v. Haven*, 55 Wn. App. 26 324, 328, 777 P.2d 562 (1989) ("purchaser under executory real estate contract has substantial rights and is beneficial").

[73] Stating that "Regulations issued under federal securities include the following description of a beneficial owner of securities; and citing to17 CFR § 240.13d-3. "Determination of beneficial owner."

[74] This case merely held that "the entities were one and the same because Credit was a wholly-owned Case subsidiary, Case's secretary/treasurer was Credit's president, all Credit employees were paid by Case, the credit manager of Credit was also an employee of Case, both companies had the same address, the same lawyer, the same agent, the same auditors, and Credit's sole business was to handle retail financing for Case. ... In sum, a clear identity of control and ownership exists between RSL and 3B. Mr. Feldman is the beneficial owner, sole director, and controlling officer of each entity." *In re Rapid Settlements*, 166 Wn. App. 683, 693-694, 271 P.3d 925 (2012).

[75] This case merely held that "[u]nder Washington case law a purchaser under an executory real-estate contract has substantial rights and is clearly the beneficial owner of the real property. We hold that this type of ownership satisfies the requirement of unity of title." *Bays v. Haven*, 55 Wn. App. 324, 328, 777 P.2d 562 (1989).

owns registered stock in the name of a beneficial owner. That R-Amtech had no such procedure speaks volumes as to the parties' intentions. The statute does not mention equitable ownership of corporations. 17 CFR § 240.13d-3, containing regulations pertinent to the Securities & Exchange Act, is irrelevant because it governs publicly traded corporations. It also requires anyone claiming to be the beneficial owner of a corporation to fulfill federal reporting requirements.[76] Again, equitable ownership is not mentioned. Both statutes contemplate a nominee owning stock for its principal by agreement with the principal in an arrangement sanctioned by the corporation.

The Huhses do not dispute that the term "beneficial owner" exists, and is even applied to ownership of a corporation in certain contexts. However, they do dispute that equity recognizes a theory of beneficial ownership of a corporation that can be applied to award civil remedies. Corporate ownership is subject exclusively to analysis at law and the adequate remedies law provides. Had the parties intended Belikov to hold some enforceable ownership interest in R-Amtech, in his own name or in Maryann Huhs's, it would have been an easy matter for them to effect it by way of contract. The absence of any such agreement demonstrates the parties had no such intention.

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[76] 15 USC § 78m.

4. The trial court erred by finding that Al Huhs violated RPC 1.8(c).

The legal questions surrounding this assignment of error include whether RPC 1.8(c), can be the basis of a civil remedy; any document Al Huhs drafted constitutes "an instrument on behalf of a client giving the lawyer a substantial gift from a client" as proscribed by RPC 1.8(c); and any such violation renders a gift void *ab initio*, and therefore not subject to the statute of limitations, or voidable, and therefore subject to the statute of limitations. These are all questions of law properly reviewed *de novo.*[77]

Whether or not Al Huhs, in violation of RPC 1.8(c), solicited a gift from or unduly influenced Belikov is not an issue, as neither was alleged, argued, or supported by evidence at trial. However, if contested, these points would be subject to a substantial evidence standard of review.

The trial court ruled that Al Huhs was a lawyer for Belikov when Belikov agreed to gift the Suncadia Property.[78] CP 1848-49. In finding Al Huhs violated RPC 1.8(c), the trial court ruled as follows:

> 77. The court's decision, however, turns on Mr. Huhs's violation of the Rules of Professional Conduct. RPC 1.8(c) prohibits an attorney from preparing "an instrument giving the lawyer or person related to the lawyer any substantial gift." As to Suncadia, Al Huhs violated RPC 1.8(c) by drafting the Declaration of Gift … and, more significantly, by drafting the Operating Agreement for Victory Holding …, through which title passed first to Mr. Belikov. Oddly, although Mr. Huhs believes that he drafted a subsequent

[77] *Hegwine*, 132 Wn.App. at 556.
[78] Al Huhs disputes this as presented at trial, but it is not the subject of this appeal.

> document transferring membership in Victory Holdings from Mr. Belikov to his family, the document was not located. Nonetheless, Al Huhs and Maryann Huhs signed a Quit Claim Deed on behalf of Victory Real Estate Holdings, LLC that transferred title to the Suncadia house to themselves as individuals.
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> 78. There is no doubt that Mr. Huhs violated RPC 1.8(c) in preparing these documents including the missing document. He was intimately involved in drafting documents that provided a substantial gift-a home valued at $1.5 million dollars to him and his wife. …[79]

The trial court's demonstrable errors in this regard are as follows:

1) The cited provision of RPC 1.8(c) actually provides: "A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, ***or prepare on behalf of a client*** an instrument giving the lawyer or a person related to the lawyer any substantial gift … [emphasis added]." The trial court's omission of the clause "on behalf of a client" is crucial, as neither the Victory operating agreement, nor the quitclaim deed, nor any other document Al Huhs prepared was drafted on Belikov's behalf.[80] Belikov testified he did not ask Al Huhs to prepare any documentation related to the Suncadia Property. RP 5/29 52:11-15.

2) As demonstrated above, no document Al Huhs prepared was an "instrument giving" Al Huhs a gift.

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[79] CP 1859-60.

[80] Al Huhs did prepare the Declaration of Gift on Belikov's behalf, but this document did not give, and could not give, Al Huhs a gift.

3) Al Huhs did not testify he "believes that he drafted a subsequent document transferring membership in Victory Holdings from Mr. Belikov to his family." The relevant testimony is at RP 6/3 128:8 - 140:3. At most, he testified he did not recall how the transfer was documented, which is not surprising, given the passage of seven years. Comment 6 to RPC 1.8(c) provides as follows:

> A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. …

The trial court apparently concluded that Al Huhs's preparation of documents merely related to the circumstances of the gift suffices to render that gift *ipso facto* void *ab initio* without any requirement of a showing of solicitation, undue influence or circumstances that an RPC concerned with lawyer conflicts of interest is designed for.

A. The Declaration of Gift is Not a Conveyance Instrument

The declaration of gift merely memorialized instructions Belikov had previously provided to his agents. By its own terms, it did not gift anything to the Huhses, or create any rights in their favor. It contained only Belikov's statements that he earlier had taken action resulting in the

gift, and of his conditions of that gift. Even if it is construed as a promise to make a gift, "[a] mere promise to make a gift is not enforceable."[81]

B. Al Huhs did Not Unduly Influence or Solicit a Gift from Belikov

Al Huhs did not solicit the gift or unduly influence Belikov into making it. This is demonstrated by the absence of any such allegation or argument, and by Belikov's own testimony that he agreed to make the gift months before Al Huhs even knew about it. Again, to make the gift, Belikov had to consult with his own financial advisors at MSSB; arrange and document the transfer of funds from his trust; execute documents regarding ownership of Victory; and release Victory from his trust.[82] That he did so over a course of several months through his advisors demonstrates that Al Huhs could not have unduly influenced Belikov.

RPC 1.8(c) is concerned with conflicts of interest, and is designed to prevent lawyers from unduly influencing clients into making gifts to them, most typically in the wills and trusts context. To the extent this RPC might contemplate civil liability, its Comment 6 allows client gifts to attorneys, qualified only by the notion that "such a gift ***may*** be ***voidable*** by the client under the doctrine of undue influence … [emphasis added]." A client would have to demonstrate undue influence, itself a tort, for a cause

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[81] *Oman v. Yates*, 70 Wn.2d 181, 186, 422 P.2d 489 (1967).
[82] In contrast to a will or trust which confer enforceable legal rights in and of themselves.

of action to accrue. The few instances in which this has been reported uniformly involve testamentary bequests from typically elderly clients for whom lawyers prepared wills or trust agreements. The clients are deceased, and their heirs challenge the lawyers' gifts based on alleged undue influence. Undue influence easily can be inferred from such circumstances, and bequests are rescinded.[83]

In Washington, the tort of undue influence requires proof that the defendant exercised such persuasion as to destroy the plaintiff's own "free agency."[84] Again, Belikov made no allegation or argument of solicitation or undue influence; and no evidence may be inferred from the circumstance of a psychologically healthy donor, admittedly a "sophisticated businessman,"[85] who earlier had given the Huhses another real estate gift,[86] and gone through additional steps with his MSSB advisors to effect the gift.

Belikov's only legal theories of Al Huhs's liability for violating RPC 1.8(c) are "conversion"[87] and, less clearly, "breach of fiduciary duty."[88] "Conversion is the willful interference with another's property

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[83] *E.g., In re Estate of Knowles*, 135 Wn. App. 351, 143 P.3d 864 (2006), and cited cases.
[84] *Ferguson v. Jeanes,* 27 Wn. App. 558, 563, 619 P.2d 369 (1980).
[85] RP 5/27 35:21-23. "A client's sophistication does not relax the requirements of RPC 1.8, though it may be relevant to its satisfaction." *Valley/50th Ave., L.L.C. v. Stewart,* 159 Wn.2d 736, 745, 153 P.3d 186 (2007).
[86] Property in Costa Rica that Belikov also sought to rescind by this action. CP 1860-61.
[87] CP 1828-29.
[88] CP 1825-26.

without lawful justification, resulting in the deprivation of the owner's right to possession."[89] The declaration of gift alone demonstrates "lawful justification" defeating the conversion claim. Breach of fiduciary duty cannot be analyzed, as it was broadly alleged against both Al Huhs and Maryann Huhs for unstated activity. No allegation suggests how Al Huhs purportedly breached a fiduciary duty to Belikov by a gift.

Undue influence as a theory of liability is a "species of fraud" the "essence" of which is unfair persuasion.[90] Thus, "[a] will, gift, or contract can be invalidated on the basis of undue influence, a form of fraud, when it can be said that the influence exerted by the donee was so persistent or coercive as to 'subdue and subordinate the will of the (donor) and take away his freedom of action.'"[91] Consistent with the standard of proof for a showing of fraud,[92] "[a] party claiming undue influence must prove it by clear, cogent, and convincing evidence."[93] Not only did Belikov fail to meet this standard, he did not even mention undue influence.

The trial court reached its conclusions based solely on the erroneous legal conclusion that RPC 1.8(c) proscribes a lawyer's drafting

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[89] *Lowe v. Rowe*, 173 Wn. App. 253, 263, 294 P.3d 6 (2012).
[90] *In Interest of Perry*, 31 Wn. App. 268, 272-273, 641 P.2d 178 (1982), *citing* 1 Restatement (Second) of Contracts § 177, comment b at 491 (1981).
[91] *Peters v. Skalman*, 27 Wn. App. 247, 255, 617 P.2d 448 (1980.
[92] *Stiley v. Block*, 130 Wn.2d 486, 505, 925 P.2d 194 (1996)("Each element of fraud must be established by 'clear, cogent and convincing evidence.'").
[93] *In re Estate of Jones*, 170 Wn. App. 594, 606, 287 P.3d 610 (2012).

any document howsoever related to a client gift. The declaration of gift, Victory operating agreement and quitclaim deed Al Huhs drafted were not "instruments giving the lawyer a gift," or ones that he "prepared on behalf of a client." While the declaration of gift was prepared on behalf of Belikov, it did not, and could not, give Al Huhs a gift.

5. The trial court erred by ruling that a lawyer may be civilly liable to a client based on the lawyer's violation of RPC 1.8(c).

Per the RPCs' Scope, "[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached."[94]

Comment 6 to RPC 1.8(c) specifically states the tort concept under which such a gift "***may*** be ***voidable***" ("... such a gift may be voidable by the client under the doctrine of undue influence ..." [emphasis added]). Comment 7 does not require another lawyer's involvement on the client's behalf in preparing a simple gifting document; rather, it only recommends another lawyer be engaged in certain instances ("If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance the client ***should*** have the detached advice that another lawyer can provide [emphasis added]").

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[94] Paragraph 20 of Scope of RPCs. "The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability."

The trial court based its rescission of the Suncadia Property gift on *LK Operating, LLC v. Collection Group, LLC.*[95] CP 1860. In affirming *LK Operating,* the Supreme Court ruled that "[a]s to those RPCs that can be suitable in this context, an RPC violation may have some relation or connection to a contract, but the contract itself does not violate the public policy announced in the rule, and so is still enforceable."[96] There must be a demonstration that a lawyer's RPC violation implicates an RPC's public policy concern, and is injurious to the public.[97] Even in the lawyer-client business transaction context, the court ruled that "a contract is not automatically unenforceable based solely on the fact that it has some connection to some RPC violation."[98] Specifically,

> To justify a transaction with a client, the attorney has the burden of showing: "(1) there was no undue influence; (2) he or she gave the client exactly the same information or advice as would have been given by a disinterested attorney; and (3) the client would have received no greater benefit had he or she dealt with a stranger."[99]

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[95] 181 Wn.2d 48, 88, 331 P.3d 1147 (2014). *LK Operating* addressed a lawyer's violation of RPC 1.8(a). The courts refused to enforce his firm's contract with a client for public policy reasons. It did not address RPC 1.8(c), client-to-lawyer gifts, or a lawyer's defense of a rescission claim based on tort theories.

[96] The Supreme Court further held: "Such a holding would shift the guiding inquiry from whether the *contract* is injurious to the public to whether the *RPC violation* is injurious to the public-the former is relevant when determining whether a contract is unenforceable because it violates public policy, while the latter is relevant in attorney disciplinary proceedings [emphasis in the original]. It would also ignore the clear admonishment that 'the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.'"

[97] *LK Operating, LLC v. Collection Group, LLC*, 181 Wn.2d 48 at 86.

[98] *Id.*

[99] *Id.*[citations omitted].

Assuming *arguendo* that the trial court was correct in extrapolating reasoning applicable to RPC 1.8(a) to RPC 1.8(c), all of those circumstances are clearly satisfied here.

In sum, the trial court's ruling on Belikov's claim is premised on the erroneous belief that all gifts from clients to lawyers are "void" if the lawyer drafts a related document. The RPCs do not provide this, or create a private right of action for civil liability.

6. The trial court erred in not applying the applicable statute of limitations to Belikov's claim that Al Huhs violated RPC 1.8(c).

Even had solicitation, undue influence or the improper drafting of an instrument giving Al Huhs a gift occurred, Belikov would be time-barred in his attempts to rescind his gift. Like most other torts, undue influence is subject to a three-year statute of limitations. The gift was finalized in 2007. This lawsuit was commenced in July 2012, and the RPC 1.8(c) claims were alleged only in July 2013, both more than three years later.

The trial court erroneously concluded that RPC 1.8(c) renders improperly solicited gifts to attorneys void *ab initio*, and not at most "voidable" (as Comment 6 itself states), such that the statute of limitations does not apply. Neither RPC 1.8(c), nor any court, has held that a client-to-lawyer gift is "void at inception," even where the gift may have been

obtained by improper solicitation or undue influence. To the contrary, it is well established that instruments obtained by undue influence are merely voidable; and a "voidable" claim must be timely according to applicable statutes of limitations.[100] In the lawyer professional liability context, this court has held:

> Burns misreads as if it stood for the proposition that clients are never time-barred from suing a professional for overcharging them. He contends that the passage of time cannot validate an otherwise voidable contract. ... Burns cites no authority for the proposition that voidability trumps the statute of limitations in a fee dispute, and we therefore reject that argument.[101]

7. The trial court erred in awarding $900,000 in attorneys' fees to Belikov.

The trial court erred in awarding $900,000.00 in attorneys' fees to Belikov based on its conclusion that the Huhses breached fiduciary duties to Belikov; and then by awarding fees in an amount that far exceeds fees attributable to the legal effort to prove that theory under any lodestar analysis. CP 1259-61; 1275-78; 1279-84.

The "[a]ppellate court applies a two-part review to awards or denials of attorney fees: (1) the court reviews de novo whether there is a legal basis for awarding attorney fees by statute, under contract, or in equity and (2) the court reviews a discretionary decision to award or deny

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[100] *Gerimonte v. Case*, 42 Wn. App. 611, 613, 712 P.2d 876 (1986).
[101] *Burns v. McClinton,* 135 Wn. App. 285, 301, 143 P.3d 630 (2006).

attorney fees and the reasonableness of any attorney fee award for an abuse of discretion."[102]

A. Award of Fees was Improper

The trial court awarded Belikov attorneys' fees based on its conclusions that the Huhses breached fiduciary duties to him. The precedents Belikov cited, and on which the trial court relied, addressed actions brought to benefit directly parties other than and in addition to the plaintiffs. As specifically stated in Belikov's cited precedent, *Green v. McAllister*,[103] an attorneys' fee award based on breach of fiduciary duty is not compelled when a plaintiff brings suit for himself alone: "Especially when the plaintiff is suing to recover for himself alone, fiduciary breach does not mandate an award of attorney fees."

The basis for breach of fiduciary duty as an exception to the rule that parties bear their own litigation costs stems from the "common fund doctrine." When one party acts for the benefit of many, courts have deemed it inherently unfair to allow everyone to share in the reward without also bearing part of the cost.[104] This action benefited only

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[102] *Gander v. Yeager*, 167 Wn. App. 638, 647, 282 P.3d 1100 (2012).
[103] 103 Wn. App. 452, 468, 14 P.3d 795 (2000).
[104] *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 717, 732 P.2d 974 (1987) ("The test for awarding fees in a trust case is whether the litigation and the participation of the party seeking attorney fees caused a benefit to the trust."); *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 799, 557 P.2d 342 (1976). Such instances are distinguished from breach of fiduciary actions in which attorneys' fees are not awarded. *See, e.g., Kelly v. Foster*, 62 Wn. App. 150, 155, 813 P.2d 598 (1991) ("While a breach of

Belikov, as was his intention. No common fund is at issue, and Belikov's suit was not to preserve assets for any other person or class.

B. The Trial Court's Calculation of Fees was Improper

Belikov arbitrarily applied a blanket 30% reduction to all work his attorneys performed, and the trial court accepted this as a proper measure to determine recoverable attorneys' fees. The law does not countenance such an approach. First, it fails to segregate costs associated with pursuing claims and defenses for which there is no recognized equitable basis justifying an award of attorneys' fees. Second, it relies on Belikov's own, unsubstantiated interpretation of what claims are and are not covered by the trial court's order awarding fees.

Washington law places the "burden of segregating, like the burden of showing reasonableness overall" on the party seeking to recover attorneys' fees.[105] This heavy burden cannot be met by conclusory allegations that all claims are "related." Lawsuits frequently involve wide arrays of claims stemming from the same set of facts. Allowing parties to recover all of their attorneys' fees because a basis for such recovery is

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fiduciary duty was found by the jury, that fact alone does not mandate an award of attorney's fees as part of the cost of litigation.").

[105] *Loeffelholz v. Citizens for Leaders with Ethics & Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 690, 82 P.3d 1199 (2004).

provided by a single cause of action would result in a loser-pays system.[106] Summarizing relevant law, this Court has ruled:

> Regardless of the difficulty involved in segregation, the *Travis* court made it clear that the trial court has to undertake the task. [citations omitted] Thus, we reverse and remand the entire CPA attorney fees award for the trial court to either undertake the appropriate segregation or to clarify its order if it actually conducted the segregation.[107]

A party may be relieved of the burden to segregate billing entries only if such segregation is not "reasonably possible."[108] At a minimum, Belikov should have been required to remove any billing entry that specifically relates to any claim other than breach of fiduciary duty.[109] Failure to require a party to segregate claims or demonstrate why it is not reasonably possible to do constitutes an abuse of discretion.[110]

Thus, the trial court erred in awarding Belikov fees, and erred again in the amount it awarded.

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[106] *Travis v. Washington Horse Breeders Ass'n, Inc.*, 111 Wn.2d 396, 411, 759 P.2d 418 (1988); *Sing v. John L. Scott, Inc.*, 83 Wn. App. 55, 73, 920 P.2d 589 (1996) *rev'd on other grounds*, 134 Wn.2d 24, 948 P.2d 816 (1997).
[107] *Smith v. Behr Process Corp.* 113 Wn. App. 306, 344-345, 54 P.3d 665 (2002).
[108] *Loeffelholz*, 119 Wn. App. at 691.
[109] *Sing*, 83 Wn. App. at 74 ("A number of billing entries specifically identify work done on one claim or another. The trial court could have reasonably deducted at least those fees associated solely with the tort claim. We hold that the trial court abused its discretion by failing to segregate the attorney fees incurred in prosecuting the CPA action from those incurred in preparing other legal claims.").
[110] *Loeffelholz*, 119 Wn. App. at 692-93.

8. The trial court erred in releasing the Huhses' **Lis Pendens.**

After the trial court entered judgment rescinding the Suncadia Property gift, and the Huhses complied by transferring title to Belikov, the Huhses filed a *lis pendens* on the property. CP 1743-44. The trial court, Hon. Mariane Spearman presiding, erroneously granted Belikov's motion to release the *lis pendens*. CP 1796-99.

RCW 4.28.320[111] empowers the Huhses to record a *lis pendens* while this litigation remains pending, and the trial court could in its discretion cancel the *lis pendens* only if the litigation is "settled, discontinued or abated." Law governing *lis pendens* was promulgated early in our state's jurisprudential history and has seen little modification. The law as stated by our Supreme Court is as follows:

> [W]e hold that the appellants on the record before us are entitled to prosecute this appeal for the benefit of their grantee who obtained his rights, subsequent to the commencement of this action and the filing of the notice of lis pendens. When a party makes a purchase of real estate, the subject-matter of a pending action, such action will be deemed as still pending until its final determination on appeal, and a motion to dismiss the appeal because of such

[111] At any time after an action affecting title to real property has been commenced, ... the plaintiff [or] the defendant ... may file with the auditor of each county in which the property is situated a notice of the pendency of the action ...: PROVIDED, HOWEVER, ... the court in which the said action was commenced may, at its discretion, at any time after the action shall be settled, discontinued or abated, on application of any person aggrieved and on good cause shown and on such notice as shall be directed or approved by the court, order the notice authorized in this section to be canceled of record ...

> purchase and transfer should be denied, as the appeal is for the benefit of the vendee.[112]

"Generally, the doctrine of lis pendens continues for the duration of the litigation until it is terminated by a judgment and the expiration of any appropriate period for appeal, or appellate determination, if an appeal is taken."[113]

9. Request for remand to new trial judge.

The Huhses respectfully request that, in the event this matter is remanded for a new trial, that such remand be to a new trial judge. The Huhses are concerned that Judge Halpert is so predisposed against them that she would not be able to preside over a new trial with the impartiality required of an effective trial judge. This clearly is demonstrated by the trial court's findings and conclusions.[114]

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[112] *Trumbull v. Jefferson County*, 60 Wash. 479, 482-483, 111 P. 569 (1910), *citing Sykes v. Beck*, 12 N. D. 242, 96 N. W. 844 (1903) (emphasis added). PATTON AND PALOMAR ON LAND TITLES, 3d (2013), at §583 cites *Trumbull* for the notion that "When notice of *lis pendens* has been effected, whether at common law or pursuant to statute, its effect continues not only till the entry of judgment but so long as an appeal is pending and during the time permitted to petition for a rehearing."

[113] AMJUR LISPEND § 59. *State ex rel. Bannister v. Goldman*, 265 S.W.3d 280, 284 (Mo.App. E.D 2008) summarized the vast concurrence of U.S. jurisdictions on this issue. *State ex rel. Lemley v. Reno*, 436 S.W.3d 232, 235 (Mo.App. E.D. 2013), held "[w]e see no reason to reject or modify our earlier analysis in *Bannister* and hold that a plaintiff bringing an action purporting to affect a legal interest in real property has an absolute right to retain a recorded *lis pendens* during the pendency of appellate review."

[114] The trial court's findings and conclusions are replete with such statements as: the Huhses were "falsifying corporate records and duping Fireaway into believing that it was contracting with a Belikov-owned firm"; "Maryann Huhs…was completely non-credible"; "this was not a routine transfer of funds for tax purposes but was intended by the Huhs to loot R-Amtech"; "the court specifically does not find credible Maryann Huhs's testimony"; "the statement about R-Amtech's finances was false"; "nonetheless, it is clear that over the course of a number of years, the Huhses preyed upon their once

Generally, the standard for remand to a new trial judge is a demonstrated appearance of bias or prejudice. This Court has ruled:

> It is "fundamental to our system of justice" that judges are fair and unbiased. Moreover, "[t]he appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice." "The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial." Even "a mere suspicion of irregularity, or an appearance of bias or prejudice" should be avoided by the judiciary [citations omitted].[115]

But as the Court also concluded in *GMAC*, a determination by circumstances that "a just and expeditious resolution of this case will be best served by remanding this case to a different judge for further proceedings on remand" so that a new judge may "provide a fresh perspective to the proper and prompt resolution of this case" is adequate.[116]

The Huhses respectfully urge that a new trial judge's fresh perspective is essential to the fair administration of justice in this instance.

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good friend Nikolay Belikov. At every turn, they placed their own financial interests above those of Mr. Belikov. They owed him a fiduciary duty and yet lied to him and to others regarding their actions and intentions." CP 1841-44, 1852.

[115] *GMAC v. Everett Chevrolet, Inc.*, 179 Wn. App. 126, 154, 317 P.3d 1074 (2014). *See also Olympic Healthcare Svces. II LLC v. Dep't of Social & Health Svces.*, 175 Wn. App. 174, 184, 304 P.3d 491 (2013)(The appearance of fairness doctrine is meant to prevent "a biased or potentially interested judge from ruling on a case." [citations omitted]. Sustaining a claim that the appearance of fairness was violated requires evidence of the judge's bias. [citations omitted]. "Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing." [citations omitted]).

[116] *GMAC*, 179 Wn. App. at 154.

Even though the new trial judge would not be a trier of fact in a jury trial, the complex legal and evidentiary issues this matter presents should not be made by a trial judge whose convictions about the Huhses' credibility, veracity and circumstances are so clearly predisposed.

CONCLUSION

This is a classic case of a plaintiff eating his cake and wanting it too, with the added implication of that plaintiff harming his business partner in the process. The parties wanted and intended Belikov and other Russian nationals to jointly own R-Amtech with Maryann Huhs. When Belikov refused ownership to preserve his own economic interests, and inserted Maryann Huhs as the company's owner, Maryann Huhs accepted, and Belikov avoided, the burdens and risks of ownership. All concerned, including the trial court, agree that Belikov declined legal ownership of the corporation. Then who owned it since 1998 when Maryann Huhs bought the stock?

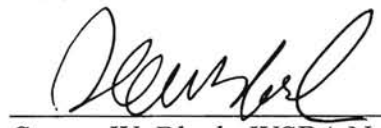
There is no recognized concept of beneficial ownership of a corporation in equity. Civil liability under RPC 1.8(c), to the extent available, is an issue at law. The facts and circumstances, requested remedies, trial court conclusions, and *Scavenious* factors all conclusively demonstrate this matter should have been tried to a jury.

The trial court concluded that Belikov did not want to own R-Amtech, and made an "unwise attempt to avoid record ownership." This is wholly inconsistent with the trial court's conclusion that Belikov did not know, and could not reasonably have known through due diligence, that someone else owned it for years prior to his filing suit. Uncontested evidence, as accepted by the trial court in its findings, demonstrates that the action must be time barred.

RPC 1.8(c) is not designed for civil liability, and no court has held to the contrary. Al Huhs did not violate RPC 1.8(c), and Belikov does not allege or support with evidence any undue influence of the variety this RPC is concerned with. Any claim for civil liability Belikov might have under RPC 1.8(c), such claims being at most voidable, are time barred.

RESPECTFULLY SUBMITTED this 26th day of January, 2015.

FOSTER PEPPER PLLC



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CERTIFICATE OF SERVICE

I hereby certify that I am a legal assistant at Foster Pepper PLLC and that on January 26, 2015, I filed this pleading with the Court of Appeals and have served this as follows:

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

Executed at Seattle, Washington, on January 26, 2015.

Terri Quale