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COURT OF APPEALS, DIVISION I,
STATE OF WASHINGTON

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

Plaintiffs/Respondents/Cross-Appellants,

v.

MICHAEL MOCKOVAK, M.D., an individual,

Defendant/Appellant/Cross-Respondent.

MICHAEL MOCKOVAK, M.D., an individual,

Defendant/Counterclaimant/Appellant,

v.

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

Plaintiffs/Counterclaim Defendants/Respondents.

MICHAEL MOCKOVAK, M.D., an individual,

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

and

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

v.

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

Third-Party Defendants/Respondents.

JOSEPH KING, M.D., an individual,

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

v.

MICHAEL MOCKOVAK, M.D., an individual,

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

BRIEF OF APPELLANT MICHAEL MOCKOVAK

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I. INTRODUCTION

This matter arises from a business dispute in which the Plaintiff Dr. Joseph King (“King”), suing on behalf of jointly owned Clearly Lasik® corporations and himself, asked the jury to award damages against his co-owner, appellant Dr. Michael Mockovak (“Mockovak”), because Mockovak had been convicted of attempting to arrange the murder of King. CP 1-28. Mockovak, in turn, countersued for recovery of the value of his share of the Clearly Lasik® business. CP 894-918. Mockovak’s conviction was *res judicata* for purposes of the civil trial. CP 690-94. King’s trial strategy was to persuade the jury that King should be awarded money and Mockovak should get nothing, for the simple reason that Mockovak is a convicted criminal.

The risk of unfair prejudice was apparent from the start. The trial court’s errors made it impossible for Mockovak to receive a fair trial, and the jury awarded neither side any money. Mockovak submits that the trial court committed the following errors:

- At the threshold, the trial court committed legal error by allowing the jury to decide the fair value of Mockovak’s cancelled shares in one of the Clearly Lasik® corporations. Under RCW 23B.13.300, fair value must be determined exclusively by the trial court.

- The trial court erred by failing to strike jurors who demonstrated actual bias toward Mockovak's conviction, admitting evidence in violation of its own order excluding unfairly prejudicial evidence of the criminal allegations, and then failing to provide corrective jury instructions that would have mitigated the prejudice and bias against Mockovak.
- The trial court erred by allowing evidence and argument regarding King's alleged emotional distress damages, which had been dismissed from the case, and then by failing to order a new trial based on jury nullification arguments.
- The trial court committed legal error by allowing King to present a declaratory judgment claim to the jury on King's claim for breach of an alleged oral partnership agreement, where the trial court already had correctly ruled that the purported oral partnership agreement was itself barred by the statute of frauds and that no damages could be recovered under the void contract.
- The trial court committed legal error by failing to award Mockovak his \$200,000 share of a \$400,000 payment

under a separate, written contract to which Mockovak was a signator and beneficiary.

Those multiple errors require reversal and remand for re-trial of Mockovak's affirmative claims, except for the \$200,000 contract payment which the Court should hold Mockovak is entitled to receive as a matter of law.

II. ASSIGNMENTS OF ERROR

1. Did the trial court err by failing to make the statutorily prescribed *judicial* determination of fair value of Mockovak's cancelled shares in KMEC as required by RCW 23B.13.300?
2. Did the trial court err by failing to strike potential jurors who demonstrated actual bias regarding Mockovak's conviction, by allowing unfairly prejudicial evidence regarding the criminal conduct to be presented to the jury in violation of the court's *in limine* exclusion of such evidence, and by failing to give curative instructions at the conclusion of trial (Mockovak's Proposed Instruction (Unnumbered) and Mockovak's Proposed Instruction No. 5)?
3. Did the trial court err by failing to grant a new trial based on King's attempt to nullify the jury?
4. Did the trial court err by allowing King to present to the jury a claim for a declaratory judgment remedy based upon a purported

oral partnership agreement, where the court had dismissed the oral partnership agreement as void under the statute of frauds?

5. Did the trial court err by failing to hold, as a matter of law, that King owed Mockovak \$200,000 for Mockovak's one-half share of a separate, written contract waiving the non-compete for the Victoria office?

III. STATEMENT OF THE CASE

Before November 12, 2009, Mockovak and King were business partners in the successful Clearly Lasik® business operating six Lasik eye surgery clinics in the United States and Canada. They were in the process of negotiating the division of that business and had scheduled an arbitration for the end of 2009. CP 1676-77; RP 125:5-6 (G).¹ On November 12, 2009, Mockovak was arrested in an FBI sting operation and charged with attempting to arrange for the murder of King. CP 11-28; 902.

King immediately brought this business-related lawsuit on behalf of King & Mockovak Eye Center ("KMEC") and Clearly Lasik, Inc. ("CLI"), collectively the "Clearly Lasik® business." CP 1-9. On December 11, 2009, King obtained a Temporary Restraining Order to

¹ The Verbatim Report of Proceedings was not numbered sequentially and was transcribed by two different court reporters, Rawlins (designated here as "R") and Girgus (designated here as "G").

prevent Mockovak “[f]rom selling, [or] attempting to sell” his interest in the businesses. CP 80-83. When King convinced the court to enjoin Mockovak from the business, he told the court that the injunction “is not going to affect Dr. Mockovak’s right to earn from the operation of the business. Everyone remains with an incentive to make the business profitable and successful, and Dr. Mockovak stands to gain by that.” Trial Ex. 156.

Instead of continuing to sustain the profits of the jointly owned Clearly Lasik® business, King immediately shifted the KMEC and other Clearly Lasik® businesses to King Lasik, Inc., P.S. (“King Lasik”) – using the same patient base, office leases and equipment, and employees, and appropriating and continuing to use the Clearly Lasik® brand. By virtue of the injunction, Mockovak could not sell his shares in the Clearly Lasik® business. King wanted the Clearly Lasik® businesses all for himself, and the best way to achieve that was to leave Mockovak in place as a nominal shareholder who had no control over the business so King could assume complete control of the entire business.

Also in 2009, King and his wife filed a personal lawsuit against Mockovak for infliction of emotional distress. *See King, et al. v. Mockovak*, No. 09-2-47040-5 (2009). That lawsuit was dismissed by the superior court, and the dismissal was affirmed on appeal. *See King v.*

Mockovak, No. 67479-0-I, 173 Wn. App. 1019, 2013 WL 619545 (2013) (unpublished).

Mockovak's medical license was suspended on January 26, 2010, which made him ineligible to continue to hold shares in the Washington Clearly Lasik® business, KMEC. CP 3126. King did not offer Mockovak the fair value of his shares in KMEC or any other Clearly Lasik® business. *See* RP 809:10-17 (R). King did not wind up the affairs of any alleged partnership or provide Mockovak an accounting and payment. *See* RP 843:6-13 (R). King simply took the business for himself. *See* RP 809:10-17 (R).

Mockovak was convicted and sentenced after trial on March 17, 2011. CP 902; Trial Ex. 18.

On July 29, 2011, Mockovak filed counterclaims against KMEC and CLI and third-party claims against King, Christian Monea ("Monea") – who was the Chief Executive Officer of CLI – and King Lasik. CP 894-918. On August 18, 2011, King filed personal counterclaims against Mockovak, which King Lasik later joined in part. CP 919-49; 2390-418.

On June 15, 2011, the trial court held that the criminal convictions were *res judicata* for purposes of the civil case. CP 690-94. The parties thereafter stipulated to the facts that formed the basis for the conviction that were *res judicata* for purposes of the civil trial. CP 2385-89.

Prior to trial, the trial court dismissed the Plaintiff corporations' claim for Tortious Interference with Prospective Advantage or Business Expectancy, King's counterclaim for Intentional Injury to Others Under Restatement (Second) of Torts § 870, and King and King Lasik's counterclaim for Unjust Enrichment. CP 4675. The trial court allowed for trial King's counterclaim for Breach of Partnership Contract and the Plaintiff corporations' claim for Breach of Fiduciary Duty. *Id.*

Prior to trial, Mockovak asked the trial court to decide the fair value of Mockovak's canceled KMEC shares, as required by RCW 23B.13.300, but the trial court refused and left that determination to the jury. CP 5919-32; 6195-97.

Jury selection began on November 18, 2015. During *voir dire*, over *three-quarters* of the prospective jurors indicated that they "would [] have difficulty being fair in resolving the business dispute in favor of the person who sits in prison." RP 122:16-23 (R). Thirty jurors agreed with the observation of Juror No. 27 that "the person perpetrating the act, I would have a hard time agreeing that they should be allowed some monetary award for the fact that they definitely harmed the business. The business, the trial certainly was in the press. People could read about it and see what was going on. There had to be some impact on the business. I would have a very hard time there." RP 137:17-138:8 (R). The trial

court failed to individually inquire as to these jurors, and was satisfied by a show of hands that jurors could be fair and impartial, notwithstanding their clear expression of bias toward Mockovak, due to his criminal conduct. RP 149:15-150:5 (R).

At trial, King testified that he and Mockovak had only an alleged “oral partnership agreement” which could not be performed in one year. RP 144:6-7; 145:4-146:25 (G). Mockovak moved to dismiss King’s claim for breach of the purported oral partnership agreement on the ground that any such alleged agreement is barred by the statute of frauds. CP 6252-72. At King’s urging, the trial court deferred ruling on Mockovak’s motion until King completed his case-in-chief. CP 6296-98. The trial court then ruled that King’s alleged partnership contract was void under the statute of frauds and that King could not recover damages on his breach of oral partnership claim. CP 7083-85. The court nonetheless allowed King to continue to pursue his request for a declaratory judgment that the oral partnership was valid and was terminated through Mockovak’s criminal act. *Id.*

At trial, Mockovak did not seek to continue to own with King the Clearly Lasik® businesses. Mockovak asked only to be paid for what King took, and to be paid the fair value of Mockovak’s cancelled shares in one of the Clearly Lasik® businesses, KMEC. CP 5604-14. Mockovak

tried claims for an accounting of amounts owed Mockovak, including a determination of the fair value of Mockovak's shares in KMEC. Mockovak tried other claims individually and on behalf of CLI, all of which sought recovery of the value of Mockovak's share of the business that had been taken from him. CP 7158-60; 5604-14.

Throughout the trial, King relentlessly hammered his theme that Mockovak should receive nothing because Mockovak had been convicted of soliciting King's murder. For example, he told the jury that "[o]ne man tried to murder his business partner and leave a family without a father and a husband" (RP 803:13-14 (R)), and asked jurors to "send a strong and clear message" to Mockovak (RP 198:4-9 (R)), instructing the jury that "[Mockovak] is entitled to nothing under these circumstances." RP 801:17-18 (R); *see also* RP 175:7-15 (R).

In closing argument, King asked the jury to nullify the law. King was repeatedly told by the trial court not to allude to any alleged emotional harm to King and his family, as those claims had been dismissed (RP 747:24-25; 748:2-5, 9-10 (R)), but King repeatedly ignored the trial court's admonitions and told the jury that Mockovak's arrest had "*changed Dr. King's life and his family's life,*" (RP 772:9-14 (R) (emphasis added)), and that the arrest was an "ordeal" for the family:

[King] and Holly and his kids, as you heard him testify,

didn't finish their meal and left McDonald's and returned their camping van and booked their first flight home and arrived home the next day. They went to bed together in their bedrooms, slept with the children.

RP 773:3-7 (R) (emphasis added). Then King's counsel told the jury that they "have the right to help provide . . . King and . . . [his] famil[y] with closure" (RP 804:23-805:1 (R)).

The jury found that Mockovak had breached his fiduciary duty to the corporations, and that a partnership had existed but was terminated by Mockovak's criminal act. The jury awarded nothing to King or the businesses, but it also awarded nothing to Mockovak on his affirmative claims. CP 7156-60.

After trial, Mockovak moved for a new trial on the basis of King's erroneous and prejudicial arguments intended to nullify the jury, and requested that the Court award Mockovak, as a matter of law, his one-half share of a \$400,000 payment by a Clearly Lasik® competitor to King for waiving a non-compete in a contract as to which Mockovak was an express beneficiary. CP 7204-11. The court denied the motion. CP 7405-08.

The trial record is voluminous, and Mockovak will discuss the relevant portions of the trial record in the context of the specific arguments to which they apply.

IV. ARGUMENT

A. The Court Should Order a New Trial on Mockovak's Affirmative Claims, Because the Trial Court Legally Erred by Failing to Follow the Statutorily Prescribed Procedure for Paying Mockovak the Fair Value of His Cancelled Shares in KMEC.

Despite a clear legislative directive, and consistent legislative history and case law requiring the fair value of cancelled corporate shares to be determined objectively by the “court” and not a jury, the trial court, over Mockovak’s objection, allowed the jury to decide the fair value of Mockovak’s cancelled shares – all in the context of the free-for-all of a trial in which King did everything he could to persuade the jury that Mockovak should not be paid anything for his share of the business for a single reason – that he is in prison convicted of attempted murder of King. This was legal error, which this Court reviews *de novo*. *State v. Karp*, 69 Wn. App. 369, 372, 848 P.2d 1304 (1993) (citation omitted) (“Interpretation of statutes is a matter of law subject to independent appellate review”). That legal error infected the entire trial and requires reversal and remand on all Mockovak’s affirmative claims.

1. RCW 23B.13.300 Requires the Court to Determine the Value of Cancelled Shares in a Corporation.

In advance of trial, the court ruled that Mockovak and King were each 50% owners of the shares in KMEC, that Mockovak’s KMEC shares were cancelled due to ineligibility on January 26, 2010, and that Mockovak was to be paid the fair value of his cancelled shares as of January 27, 2011, because the statutory valuation date is one year and one

day after the shares are cancelled due to ineligibility. *See* CP 2078, 4678-81; RCW 18.100.116(2). No party appealed those rulings.

Under Washington’s Dissenters’ Rights statute, RCW 23B.13, the “court” – not a jury – is required to appraise the “fair value” of cancelled corporate shares. The plain language of RCW 23B.13.300 establishes a unique and exclusively judicial procedure to determine the “fair value” of Mockovak’s KMEC shares.

Entitled “Court action,” RCW 23B.13.300 requires a court, not the jury, to determine the fair value of cancelled shares:

(1) If a demand for payment under RCW 23B.13.280 remains unsettled, the corporation shall . . . petition *the court to determine the fair value* of the shares and accrued interest.

(5) *The jurisdiction of the court . . . is plenary and exclusive. The court may appoint one or more persons as appraisers* to receive evidence and recommend decision on the question of fair value.

(6) Each dissenter made a party to the proceeding is entitled to judgment (a) for the amount, if any, *by which the court finds the fair value of the dissenter's shares, plus interest.*

(Emphases added). Under RCW 23B.13.300(5), “[t]he jurisdiction of the *court . . . is plenary and exclusive*” (emphasis added). The statute provides that “[t]he court may appoint one or more persons as appraisers to receive evidence and recommend decision on the question of fair

value.” RCW 23B.13.300(5). A jury cannot fulfill that statutory function, because a jury cannot appoint “appraisers.”

Under RCW 23B.13.310(1), the “court . . . shall determine all costs of the proceeding, including the reasonable compensation and expenses of appraisers appointed by the court [and] [t]he court shall assess the costs against the corporation” unless the “court” finds that dissenter “acted arbitrarily, vexatiously, or not in good faith in demanding payment under RCW 23B.13.280.” The express statutory procedures in RCW 23B.13.300 and .310 work only if the court, not a jury, decides fair value. *See State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (Washington courts give effect to a statute’s plain meaning).

Notwithstanding these multiple and clear statutory directives that the appraisal of fair value of cancelled shares is exclusively a judicial function, the trial court allowed the jury to determine the fair value of Mockovak’s cancelled shares based on its observation that “no law said that a jury cannot do this evaluation.” RP 4:9-10 (R). The trial court’s observation flouts repeated directives in RCW 23B.13.300 that the “court” is to make the fair value determination and that the court’s jurisdiction is “exclusive.”

Even if RCW 23B.13.300 were not so clear, the legislative history of the statute underscores that only the court may conduct a fair valuation.

See 16 David K. DeWolf, *et al.*, Washington Practice § 1:2 (4th ed. 2015) (citing cases and *Gunn v. Riely*, 185 Wn. App. 517, 525 n.6, 344 P.3d 1225 (2015) (where statute is ambiguous, court may review legislative history to determine meaning). The Legislature passed the Washington Business Corporation Act in 1965 (RCW 23A), based largely on the Model Business Corporation Act (“Model Act”). The Legislature replaced RCW 23A in 1989 with RCW 23B, incorporating provisions of the 1984 Revised Model Act. Appendix A (SB 5583 Final Legislative Report (1989)). The Senate Journal for RCW 23B underscores the plain language of the statute and states that Section .300 “retains the concept of *judicial appraisal* as the ultimate means of determining fair value.” Appendix B (Official Legislative History, Senate Journal 51st Legis. 3092-93 (1989)) (emphasis added).

In 1999, the Revised Model Act “clarifie[d] that there is no right to a jury trial” under the Model Act. See Model Act Annotated Vol. 3 (4th ed. 2013) at 13-99. The Annotated Model Act explains that “[a]ll jurisdictions provide for judicial resolution of appraisal disputes” and that “Washington . . . substantially follow[s] the 1984 Model Act.” *Id.* at 13-101. The Official Comment to the Model Act explains that “[s]ince the nature of the [appraisal] proceeding is similar to a proceeding in equity or

for an accounting . . . there is no right to a jury trial.” *Id.* at 13-99. “There shall be no right to a jury trial.” 1999 Model Act § 13.30(d).²

Washington case law interpreting RCW 23B.13.300 is consistent with its plain language and legislative history. “***The court*** makes the ultimate valuation decision in a dissenter’s rights action.” *Eagleview Tech., Inc. v. Pikover*, 192 Wn. App. 299, 307-08, 365 P.3d 1264 (2015) (emphasis added) (citing *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 142, 331 P.3d 40 (2014)) (RCW 23B.13.300 requires that ***the court*** conduct an independent, objective evaluation, and the court may not substitute its judgment for an expert’s analysis) (emphasis added). The need for objectivity is plainly the reason why the Legislature delegated the fair valuation appraisal to the court alone. *See id.*

Even King recognized that the determination of fair value must be made by the court, not a jury. In April 2015, King explained, “If KMEC contests Mockovak’s estimate of the fair value of the [KMEC] shares, ***the fair value of his shares will be determined by this Court at trial[.]***” CP

² Consistently, Delaware law provides that an appraisal for “fair value” of a stockholder’s shares is determined “by the Court[.]” *See* 8 Del. C. § 262(a) (Appraisal rights”); *see, e.g., M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 525-26 (Del. 1999) (in an appraisal proceeding “the Court of Chancery has the discretion to select one of the parties’ valuation models as its general framework or to fashion its own.”) (citations omitted). Delaware corporations law jurisprudence is persuasive to Washington courts. *See Sound Infiniti, Inc. v. Snyder*, 169 Wn.2d 199, 209, 237 P.3d 241 (2010) (stating that Delaware’s corporations law jurisprudence is influential).

1439 at ¶8 (emphasis added). And in September 2015, King told the court that “Mockovak’s claims for money loaned, surgical services, corporate obligations paid, and for an accounting . . . will be taken into account when determining the fair value of Mockovak’s shares . . . *This is not a jury issue.*” CP 3076 (emphasis added). Indeed, before committing legal error by allowing the jury to appraise the fair value of Mockovak’s cancelled KMEC shares, even the trial court seemed to understand that it alone was obliged to determine fair value: “If I decide that bifurcation is legally required, then does it make any sense to have the bench phase after the jury phase?” CP 6166.

For all these reasons, this Court should rule that the trial court committed legal error by allowing the jury to decide the fair value of Mockovak’s cancelled KMEC shares.

2. Allowing the Jury to Appraise the Fair Value of Mockovak’s Cancelled KMEC Shares Infected the Entire Trial.

The trial court concluded that the fair valuation of cancelled shares was “intertwined” with legal claims the jury was charged with deciding. RP 4:17-21 (R). Yet RCW 23B.13.300 admits of no exception for cases involving both judicial and jury questions. The trial court must appraise the fair value of cancelled shares.

Indeed, the intertwining of issues is precisely what prejudiced the fair valuation of Mockovak's cancelled KMEC shares and the entire trial of Mockovak's affirmative claims. The fair value determination should have been made objectively by the trial court based on economic factors. Mockovak had the right to know the "factors and methods . . . used in reaching [the] finding of value" (*see In re Marriage of Monaghan*, 78 Wn. App. 918, 925, 899 P.2d 841 (1995) (citations omitted)), and that such a valuation was reached with the "exercise of reasoned judgment." *See Suther v. Suther*, 28 Wn. App. 838, 843, 627 P.2d 110 (1981). Significantly, the appraisal must have been made "without regard to the events that triggered" the cancellation. *See Eagleview Tech, Inc.*, 192 Wn. App. at 309 (citation omitted).

King repeatedly asked the jury to award Mockovak nothing for the simple reason that Mockovak stood convicted of attempted murder. RP 175:7-15; 801:14-18 (R); *see* Section IV.B.2 below. By allowing the jury to decide fair value, the trial court virtually assured that the valuation would be infected with the "events that triggered" cancellation – i.e., Mockovak's arrest and conviction – and that the valuation reached would be unfair.

Correspondingly, a judicial determination that Mockovak was owed money for his cancelled KMEC shares would have blunted the

impact of King's appeal to the jury's moral disapprobation of Mockovak and changed the result of the entire trial of Mockovak's affirmative claims. *E.g.*, *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 670, 673, 230 P.3d 583 (2010) (though relevant to only one claim, evidence pertaining to immigration status was unfairly prejudicial and thus new trial was warranted). Accordingly, the Court should reverse and order a new trial on Mockovak's affirmative claims.

B. The Court Should Order a New Trial on Mockovak's Affirmative Claims, Based on the Trial Court's Errors in (1) Failing to Strike Potential Jurors Who Were Biased Against Mockovak Because of His Criminal Conviction; (2) Allowing Evidence Related to the Underlying Criminal Allegations to be Presented to the Jury in Violation of *in Limine* Exclusion of Such Evidence; and (3) Failing to Give the Jury Curative Instructions to Neutralize the Prejudice to Mockovak.

King's primary focus at trial was Mockovak's criminal conduct, and the gist of his position was that the jury should award King money and Mockovak nothing because Mockovak is an unrepentant criminal.³ Mockovak, in turn, asked the jury to treat him like any person who is entitled to one half the value of his business when he no longer can serve as a 50% shareholder. King continually played the trump card that Mockovak's criminal act should be preclusive. As detailed below, the

³ *See, e.g.*, RP 139:15-24 (G); 293:8-13 (R); 297:8-13 (R); 301:10-17 (R); 308:23-309:6 (R); 523:3-11 (G); 523:23-524:3 (G); 775:17-25 (R); 776:11-16 (R); 780:10-17 (R); 789:3-5 (R); 801:17-18 (R).

Court should reverse because the trial court did not exclude jurors who demonstrated actual bias, allowed unfairly prejudicial evidence of the criminal allegations, and refused curative jury instructions that would have mitigated the unfair prejudice to Mockovak.

1. The Trial Court Abused Its Discretion by Failing to Exclude Prospective Jurors Who Admitted Bias.

This Court reviews a trial court's denial of a "for cause" challenge to a prospective juror for abuse of discretion. *See State v. Tingdale*, 117 Wn.2d 595, 600, 817 P.2d 850 (1991); *see also* 14A Teglund, Washington Practice § 29:16 (2d ed. 2015).

Under RCW 4.44.170 a party may challenge a prospective juror for cause on the following grounds:

- (1) For such a bias as when the existence of the facts is ascertained, in judgment of law disqualifies the juror, and which is known in this code as implied bias.
- (2) For the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging, and which is known in this code as actual bias

The proof must indicate that the challenged juror cannot try the issue impartially and without prejudice to the substantial rights of the party challenging. *Ottis v. Stevenson-Carson Sch. Dist.*, 61 Wn. App. 747, 752, 812 P.2d 133 (1991). In *State v. Witherspoon*, 82 Wn. App. 634, 919

P.2d 99 (1996), for example the court concluded that actual bias was demonstrated where a juror demonstrated bias in favor of police officers in stating that she didn't know whether she could presume a defendant to be innocent in the face of a police officer's testimony indicating guilt.

In *voir dire* here, almost all the prospective jurors testified that Mockovak would have to overcome a significant hurdle in light of his conviction in order to be awarded money against his criminal victim.⁴ RP 122:16-23; 137:10-138:8; 139:19-140:13; 140:16-142:12; 144:2-16; 145:10-146:24 (R). Thirty-three prospective jurors agreed that they “would [] have difficulty being fair in resolving the business dispute in favor of the person who sits in prison.” RP 122:16-23 (R). Thirty jurors agreed with the observation of Juror No. 27 that “the person perpetrating the act, I would have a hard time agreeing that they should be allowed some monetary award for the fact that they definitely harmed the business. The business, the trial certainly was in the press. People could read about it and see what was going on. There had to be some impact on the business. I would have a very hard time there.” RP 137:17-138:8 (R). As Juror 26 testified:

⁴ At the time of Mockovak's challenge, 43 jurors remained out of the original group of 54. Mockovak challenged over 30 jurors for cause. RP 169:1-7 (R).

It is, man, it is a really tough question. I don't know that -- I think that it is fair to say that the gut reaction is that there was a pretty serious harm here and hard to overlook that.

RP 140:21-141:11 (R). And 24 prospective jurors agreed with the proposition that “Dr. Mockovak, in this foot race, is . . . some yards behind in overcoming the presumption that the business was harmed” and had a “predisposition to think that the fact of the conviction means that the business was harmed and that Dr. Mockovak will have to overcome that feeling before [they] have seen any evidence.” RP 142:5-12; 144:2-16 (R).

Notwithstanding this overwhelming evidence of jury bias, the trial court denied Mockovak’s motion to exclude dozens of prospective jurors for bias. While the court asked jurors generally if they could be fair and impartial (to which they agreed by show of hands) (RP 149:15-150:5 (R)), the trial court made no individual inquiry of prospective jurors who had expressed actual bias. The failure to exclude such prospective jurors constituted an abuse of discretion.

2. The Trial Court Erred by Allowing Unfairly Prejudicial Evidence That It Had Excluded *in Limine*, and by Failing to Give the Jury Appropriate Corrective Instructions.

Prior to trial, Mockovak moved to exclude evidence regarding the prurient details of the criminal allegations against Mockovak, because

Mockovak was not permitted to challenge his convictions in light of the court's order that the convictions were *res judicata* (CP 690-94), and because the *res judicata* stipulation was all that King needed to pursue his civil claims. (CP 5146-48, Motion *in limine* B). Below is the colloquy leading to the court's *in limine* ruling excluding such evidence:

MR. PHILLIPS: So that the question is for purposes of this business dispute, what does Dr. King have the right to talk about with respect to the criminal conviction other than the fact of the criminal conviction? In my view the answer is very, very little, without it entirely being prejudicial, both in terms of inflaming the jury in a case in which there are no loss of enjoyment of life claims. There are no emotional distress damages. There are only business claims for economic damages. Therefore, it would inevitably result in the jury trying to get inside of the criminal allegations and the details of that, when none of it has any bearing on the case whatsoever.

...
MR. GOODNIGHT: The [evidence] will be relevant to show intent as to either breach of fiduciary duty or the breach of a partnership agreement.

...
MR. PHILLIPS: If you can't prove intent based on [a] stipulation relating to a crime of a[tttempted] murder and of solicitation of murder for crime of theft, that is *prima facie*. You could rule as a matter of law right now, to the extent that the intent is required for the breach of fiduciary duty, it is established by that issue of preclusive order, the *res judicata*, or whatever you want to call it. It is not necessary.

MR. GOODNIGHT: I certainly agree with that. That is true. Intent is an issue for the breach of fiduciary duty. The fact is the intent of the duty under the criminal conviction and the stipulation that is preclusive doesn't mean that other evidence of intent should be excluded.

THE COURT: All right. I am granting this motion.

RP 24:21-25:9; 28:11-24; 29:4-21 (R). *See also* CP 5146-48; 6201-05.

Notwithstanding the trial court's exclusion of such evidence, during trial the court allowed King to present evidence on some of the most prejudicial criminal allegations – for example, Mockovak's alleged intended calculated theft of a life insurance policy by arranging the murder of King. King claimed that such evidence went to "motive" or "intent" – the same failed rationale which led the trial court to grant the motion *in limine* excluding such evidence in the first place. RP 108:4-11 (G); 746:8-18 (R); Trial Ex. 42. The trial court sometimes sustained objections to questions that went to the motive for the crimes (RP 277:25-278:3 (G)), and told King's counsel that "I'm really concerned about some of the questions that were asked by your side on this trial. I thought some of them definitely crossed the line" (RP 348:3-5 (G)), but King persisted in crossing the line.

Mid-trial, Mockovak requested a corrective instruction:

MR. PHILLIPS: I do want to request an instruction from the Court with respect to Dr. Mockovak's obligations under the *res judicata* order not to challenge the conviction, and that the reason that he has not responded to questions by Mr. Goodnight with respect to that is because of his obligations under the Court's order. Now, he said that. But that's the Court's order. And the questions were clearly designed to put Dr. Mockovak in an embarrassing position with respect to matters that this Court has excluded repeatedly on motion both in the rulings on motion *in*

limine, and then sustained with respect to questions throughout the trial thus far.

RP 282:8-19 (G). The trial court denied the request “without prejudice to a future request that you may make.” RP 284:24-25 (G).

In closing argument, King’s counsel continued (just as he had in his opening statement (RP 187:6-9; 187:17-188:1 (R)) and throughout trial, to allude to the salacious details about the criminal allegations:

But he told you, ladies and gentlemen, that he could not recall Dr. King's handwritten note to him to change the beneficiary from Mockovak to his wife, Holly. That is Exhibit 42, the change of beneficiary form. . . . Mr. Mockovak started plotting Dr. King's murder three days after receiving the handwritten note from his brother-in-law. This plan of the murder [of] Dr. King and [to] take the practice was not a spur of the moment decision.

RP 777:22-25; 778:13-17 (R). Mockovak requested the following jury instruction be given to the jury before they began deliberations:

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

CP 7589. The ensuing colloquy demonstrates that the trial court had lost the thread of its prior *in limine* exclusion ruling:

MR. PHILLIPS: This issue relating to the facts of the criminal case, there has been a lot of leakage on that issue

and from my perspective for illegitimate reasons. Dr. Mockovak, you ruled on a motion *in limine* that the stipulation was going to be it. Mr. Goodnight argued that he needed to put all of this evidence in for purposes of proving the reasons why he had to separate, but you granted that motion. Then we heard, although that you did regulate it to a degree, we heard stuff about the life insurance policies --

THE COURT: Life insurance policy went to the motive.

MR. PHILLIPS: Went to what?

THE COURT: Went to the motive, they are claiming breach of fiduciary duty.

MR. PHILLIPS: You don't get motive out of the criminal stipulation, Your Honor?

MS. DUNNINGTON: The court explicitly allowed Exhibit 42 on that issue.

MR. PHILLIPS: You also got a lot of stuff relating to his taking a picture of the family. You had stuff relating to they are being in the restaurant in Australia. You have stuff relating to Dr. Mockovak ominously being in the house with a knife a few weeks earlier. All of this stuff was hearsay and inappropriate given the fact that Dr. Mockovak can say nothing about that crime, can do nothing to provide the jury with any perspective on that. While some of that evidence got in, it does seem to me it reinforces the reason why the court needs to say something to the jury about the fact that Dr. Mockovak has no right to and had no opportunity to respond to them.

RP 745:24-747:7 (R). The court denied the corrective instruction, contradicting its earlier *in limine* exclusion of such unfairly prejudicial evidence to which Mockovak could not respond. RP 747:17 (R).

The Court of Appeals reviews a trial court's refusal to give an instruction for abuse of discretion. *Goodman v. Boeing Co.*, 75 Wn. App. 60, 68, 877 P.2d 703 (1994) (citation omitted), *aff'd in part and rev'd in*

part on other grounds, 127 Wn.2d 401, 899 P.2d 1265 (1995). Where the trial court fails to provide a jury instruction that correctly states the law, the Court reviews such refusal *de novo*. *Griffin v. West RS, Inc.*, 143 Wn.2d 81, 87, 18 P.3d 558 (2001).

The trial court had excluded unfairly prejudicial evidence of the criminal allegations because Mockovak was precluded from responding to it and because such evidence was unnecessary, given the parties' stipulation regarding the *res judicata* effect of the convictions. But the trial court nonetheless repeatedly allowed such evidence and argument in a manner inconsistent with its *in limine* ruling. The trial court, therefore, abused its discretion by failing to provide the requested curative instruction at the end of trial. RP 747:17 (R).

Based on improper evidence and argument regarding the criminal allegations, and because King continued to pound the drum that the jury should award Mockovak nothing because he is a criminal, Mockovak also asked for a jury instruction that recited the Washington Constitutional provision, Article 1, Section 15 that "[n]o conviction shall work [a] corruption of blood, nor [the] forfeiture of [the] estate." CP 5633; RP 674:2-678:5 (R). As Mockovak's counsel explained:

The jury legitimately is in a quandary over that question with respect to whether or not the discussion should begin or end with respect to his conviction. Now, counsel said,

“hey, we haven’t argued that.” That has been the most fundamental theme of their case. At every possible opportunity his conviction has been thrown in the face of the jury to remind the jury just how bad a guy he is, so that he doesn’t get anything in this case. It has been the emotional motif of the other side. I tried to prevent that to some degree to the other. The court has sustained the objections but there have been lots of leaks to the jury. I think that the jury needs to have this statement.

RP 677:5-19 (R).

The record is replete with examples of King’s appeal to the jury to award Mockovak nothing because he is supposedly an unrepentant criminal. *See* page 18, n.3 above. The curative instruction Mockovak requested was necessary given: (1) demonstrations of jury bias that Mockovak’s conviction constituted a significant hurdle for Mockovak to overcome; (2) King’s violation of the court’s *in limine* exclusion of sordid detail regarding the criminal allegations; and (3) King’s repeated appeal to the jury to deny Mockovak relief because Mockovak is a criminal. *Id.*; RP 678:5; RP 777:22-25; 778:13-17 (R). The trial court’s failure to give the jury the proposed curative instruction – even a simple accurate statement of what the Washington Constitution says and which was necessary to avoid unfair prejudice – constituted a manifest abuse of discretion.

The prejudice to Mockovak was obvious and infected the trial of all Mockovak’s affirmative claims. In *State v. Young*, 129 Wn. App. 468, 119 P.2d 870 (2005), the court granted a new trial, because the nature of

the defendant's prior criminal conviction was inadvertently disclosed to the jury, and the disclosure was inherently prejudicial. The trial court failed to give a curative instruction to the jury, and the appellate court thus held the jury instructions as a whole did not "adequately address the problem of the prejudicial impact of the inherently prejudicial disclosure." *Id.* at 477. Here, the trial court held that disclosure of detail of the criminal allegations was unfairly prejudicial because Mockovak had no right to respond and rebut. King's violation of that order was deliberate, not inadvertent, and his appeal to the jury to decide everything based on Mockovak's criminal record required a corrective instruction to protect the legal requirement embodied in the Washington Constitution's proscription of just such unfair appeals to prejudice.

C. The Court Should Order a New Trial on Mockovak's Affirmative Claims, Because King's Counsel Improperly Argued for Jury Nullification.

In closing argument, King argued that he should be compensated for emotional trauma. King's argument amounted to an appeal to jury nullification because the trial court had granted Mockovak's motion *in limine* excluding evidence and argument on King's alleged emotional distress and loss of enjoyment of life (CP 6249-51), and the trial court had instructed the jury that King had no such claims. RP 164:21-165:2 (G). King and his counsel, however, repeatedly infected the trial with evidence

and argument related to King's and his family's alleged emotional trauma *after* the court's instruction. RP 190:16-191:24; 580:11-22 (G). RP 395:11-24; 772:9-14; 773:3-7; 773:22-24; 775:13-16; 780:6-9; 804:15-805:2 (R). This misconduct amounted to a request for jury nullification and requires granting a new trial on Mockovak's affirmative claims. This Court reviews the trial court's denial of a motion for a new trial for an abuse of discretion. *Moore v. Smith*, 89 Wn.2d 932, 942, 578 P.2d 26 (1978).

On November 18, 2015, the court granted Mockovak's motions to "exclude all evidence and argument on [King's] emotional distress, loss of enjoyment of life, [and] personal security costs." From beginning to end of trial, however, King ignored the court's *in limine* exclusion of such evidence and argument.

In opening statement, King's counsel told the jury: "I will ask you to put an end to this *ordeal for Dr. King and his family*, to say, 'no,' and 'you will be held accountable.' I will ask you to send a strong and clear message that *this ordeal ends here* in this courtroom with your vote." RP 198:4-9 (R) (emphasis added).

Mr. Mockovak's crimes constituted an absolute and total betrayal of Dr. King. Dr. King was not only his partner, his medical practice partner, he was his brother-in-law. Mr. Mockovak had been in the King family home many times visiting with Dr. King and Holly King, who is here in the

courtroom and their children, including just weeks before he was arrested. *Mr. Mockovak's crimes were absolutely devastating to Dr. King and his family. . . .*

RP 174:10-19 (R); *see also* RP 186:16-19 (R) (emphasis added).

It is difficult or impossible for me to describe and there is no way that it will even be described to you in this case all this meant to Dr. King and his family. . . . They were terrified. They installed security in their home, a police car was stationed outside of their home. Their neighborhood association was put on watch alert, their children's schools were notified. They spent time in hotel rooms and slept together in the bed in the bedrooms.

RP 194:4-6, 8-13 (R) (emphasis added).

While the trial court eventually cut off King's testimony concerning his alleged "emotional distress," King sought every opportunity to violate the court's proscription:

KING: I want my family to be able to move on. Michael Mockovak in my view is a cancer to my family's happiness and to our practice. We need to cut him out like a surgeon would cut out cancer. This is the end --

RP 139:20-24 (G).

KING: The trauma that we have experienced is still ongoing. My daughter still gets nightmares.

RP 367:12-14 (R).

This repeated misconduct led the court to instruct the jury that "there are no claims by Dr. King for emotional distress, and for any loss of enjoyment of life to Dr. King and his family. And you will not be

asked to award damages in this case based on such evidence.” RP 164:21-165:2 (G). King persisted, however, which led the trial court to tell King’s counsel that “I’m really concerned about some of the questions that were asked by your side on this trial. I thought some of them definitely crossed the line,” RP 348:3-5 (G).

Undaunted, King’s counsel then tried to let the jury know that King had not been compensated for the emotional trauma he and his family has supposedly suffered:

Q. Now, the jury knows, I think, that you do not have a claim in this case. You are not pursuing a claim for emotional distress or loss of enjoyment of life, but have you ever been compensated by Mr. Mockovak for emotional distress?

MR. PHILLIPS: Your Honor, I object to the question. It's completely inappropriate.

MR. GOODNIGHT: The jury needs to know --

MR. PHILLIPS: No.

MR. GOODNIGHT: -- whether he's been --

MR. PHILLIPS: Side bar.

THE COURT: It's sustained.

RP 580:11-22 (G).

The trial court then specifically instructed King’s counsel that he was not to address emotional distress in closing argument:

I want to minimize the risk of there being objections during the closing arguments. . . I want to warn you both about going into the realm of . . . attempted murder, attempted murder, attempted murder, you know what I am talking about. . . . When you go to the emotional distress and that kind of stuff --

RP 747:24-25; 748:2-5, 9-10 (R). King's counsel persisted:

MR. GOODNIGHT: I think that they are entitled to know that there is -- they know that there has been absolutely nothing paid from Dr. [Mockovak] to [D]r. [King].

MR. PHILLIPS: That is an express attempt to nullify the jury. "Emotional distress is not in the case, you know why, my guy [King] has lost it. You can pay him now for all of the stuff that he didn't get before." . . . That is entirely inappropriate, Your Honor, that is why you sustained the objection yesterday.

THE COURT: I am not going to include that instruction either.

MR. PHILLIPS: He is telling you that he wants to say it in the closing argument.

MR. GOODNIGHT: I want to be able to tell the jury you need to know that Dr. King has not received any payments.

THE COURT: No.

RP 749:17-24, 750:3-13 (R).

Having been twice admonished just before closing, King's counsel simply blew past the trial court's admonitions in closing argument:

*But that day, November 12th, also **changed Dr. King's life and his family's life**, and the practices. **It was an unbelievable betrayal. But the initial betrayal and the shocking realization that what his partner had done was really only the beginning of the long and exhausting ordeal.***

RP 772:9-14 (R) (emphasis added).

He and Holly and his kids, as you heard him testify, didn't finish their meal and left McDonald's and returned their camping van and booked their first flight home and arrived home the next day. They went to bed together in

their bedrooms, slept with the children.

RP 773:3-7 (R) (emphasis added).

Holly volunteered to book the travel and the hotels and *Dr. King sacrificed enormous amounts of time with his family.*

RP 773:22-24 (R) (emphasis added).

Now, *nobody deserves some of the hardships that life can deliver. Some of us have been through cancer, the treatments and terrible situations. But attempted murder by your own brother-in-law is unthinkable.*

RP 775:13-16 (R) (emphasis added).

Mr. Mockovak, at the end of the day, ladies and gentlemen, was willing to *take a father from their children, a husband from his wife, a son from his parents*

RP 780:6-8 (R) (emphasis added).

One man tried to murder his business partner and *leave a family without a father and a husband.*

RP 803:13-14 (R) (emphasis added).

Even though King had no *personal* “breach of fiduciary duty” claim, and the court had denied King’s attempt to add such a claim on the eve of trial (CP 4454-64; 5736-39), King’s counsel encouraged the jury to believe just the opposite:

Mr. Mockovak’s crimes were so much more than a breach of fiduciary duty. They were a profound betrayal. You heard him testify. He admitted that he had been in the King’s home many times. He had been with their children many times.

RP 779:23-780:2 (R) (emphasis added).

King's counsel even asked the jury through its verdict to give King and his family "closure" so they could "move on" by putting

an end to *this ordeal, this nightmare. You can see it with Dr. King. You can see it. You saw him heard him say numerous* times what he seeks here more than anything is closure. He is trying to move on. As officers of the court, you have the right to help provide that. *You can provide Dr. King and . . . [his] famil[y] with closure.*

RP 804:18-805:1 (R) (emphases added).

King also asked the jury not to award Mockovak damages based on other claims that the trial court had dismissed. He told the jury to require Mockovak to pay debts of the business (RP 795:3-5 (R)), but the trial court had dismissed King's damages claims based on debt payments. CP 7083-85; RP 527:6-7 (G). King also blamed Mockovak for failing to perform warranty work ("He has not honored a single warranty.") (RP 776:13 (R)), another claim that the Court threw out (CP 7083-85; RP 527:6-7 (G)), but which King used to persuade the jury to award Mockovak nothing.

For his grand finale, King's counsel in effect told the jury to ignore the court's instructions and decide the case based on "matters of the heart":

[T]he legal system . . . doesn't have the capacity to address

*the . . . issues that have surfaced throughout this case . . .
. But you can render a verdict that is just. It will matter.”*

RP 803:20-804:10 (R) (emphasis added). King’s argument that the “legal system doesn’t have the capacity” to do justice, but that the jury can take matters into its own hands to “render a just verdict” was a call for jury nullification. King attempted to convince the jury that it should be governed by its sympathy for Dr. King’s uncompensated emotional distress losses – which were not part of the case. King asked the jury to base its decision not on the claims that properly were part of the case, but upon emotional distress claims that the trial court had dismissed and that the trial court had excluded through an *in limine* order and repeated directives to counsel.

Jury nullification is the “knowing and deliberate rejection of the evidence or refusal to apply the law because the result dictated by law is contrary to the juror’s sense of justice, morality, or fairness.” *State v. Nicholas*, 185 Wn. App. 298, 300-01, 306, 341 P.3d 1013 (2014) (citing *State v. Elmore*, 155 Wn.2d 758, 761 n.1, 123 P.3d 72 (2005) (citing Black’s Law Dictionary 875 (8th ed. 2004))). Washington courts strongly discourage jury nullification by counsel. *See id.* at 306. “A fundamental value of America is the rule of law rather than rule by men. The Washington populace justifiably does not want activist [jurors] who base

decisions upon political views or moral judgments. . . . Jury nullification destroys the rule of law upon which America is based.” *See id.* at 308.

King’s deliberate misconduct could not be cured by yet another instruction from the trial judge. No further instruction could erase King’s repeated flouting of the trial court. Mockovak already had obtained *in limine* rulings, previously had objected, and even had obtained a corrective instruction from the trial court. Further objection in the presence of the jury – after the trial court had discouraged any interruption of closing argument (RP 747:24-25 (R)) – would have been itself highly prejudicial, “when the other party’s [conduct was] ‘in deliberate disregard of the trial court’s ruling’” *State v. Ra*, 144 Wn. App. 688, 700-01, 175 P.3d 609 (2008) (citations omitted) (where State deliberately elicited and argued evidence barred by pretrial order defendant was not required to assert objection during trial to preserve error); *see State v. Case*, 49 Wn.2d 66, 73, 298 P.2d 500 (1956) (“There comes a time, however, when the cumulative effect of repetitive prejudicial error becomes so flagrant that no instruction or series of instructions can erase it and cure the error.”); *Lioce v. Cohen*, 124 Nev. 1, 6, 174 P.3d 970 (2008) (“Because defense counsel’s closing arguments encouraged the jurors to look beyond the law and the relevant facts in deciding the cases before them, we agree that they amounted to misconduct.”).

The Court should hold that King's appeal for jury nullification requires reversal and remand for a new trial of Mockovak's affirmative claims.

D. The Court Should Order a New Trial On Mockovak's Affirmative Claims, Because the Trial Court Legally Erred by Failing to Dismiss King's Entire Breach of Contract Claim.

Based on unequivocal trial testimony by King that his alleged partnership agreement with Mockovak was an oral agreement that could not be performed in one year, the trial court correctly dismissed at the close of King's case-in-chief his claim for damages based upon breach of a purported oral partnership agreement. CP 7083-84. Inexplicably, however, the trial court allowed the jury to decide – under the auspices of the same “breach of contract” claim – whether such an oral partnership had existed and whether it was terminated by Mockovak's criminal conduct. CP 7085. It is black letter law that a contract that is void under the statute of frauds is void in its entirety and for all purposes. The trial court's contrary legal error is reviewed by this Court *de novo*. See, e.g., *Nationwide Mut. Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 187, 840 P.2d 851 (1992).

1. The Trial Court Correctly Dismissed King's Breach of Contract Damages Claim.

The Washington statute of frauds, RCW 19.36.010, provides:

In the following cases, specified in this section, any

agreement, contract and promise shall be void, unless such agreement, contract or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him or her lawfully authorized, that is to say: (1) *Every agreement that by its terms is not to be performed in one year from the making thereof*

(Emphasis added).

In cross-examination, King testified clearly and without hesitation that the alleged partnership was an oral agreement:

- Q. Answer my question, please. Did he show you any written partnership agreement at any point in that long examination? Yes or no.
- A. We did not have a written partnership agreement. We had an oral partnership agreement.

RP 144:3-7 (G).

According to King, the alleged oral agreement involved contractual obligations that could not be performed in one year but could be performed only over a number of years. The purported oral agreement required King and Mockovak to provide ongoing lifetime “warranty work” services to their patients who purchased such warranties. Those alleged obligations could not be performed in one year:

- Q. With respect to warranty work, and I think I learned this from Mr. Monea taking his deposition, that's an obligation that by definition has to extend over a number of years, correct?
- A. If the patient has purchased a lifetime warranty, yes, that would extend over a number of years.
- Q. And, in fact, your damages, your claimed damages in this case against Dr. Mockovak are for doing warranty

work for patients that he worked on in 2007, 2008, six, seven eight years later, correct?

A. Correct.

RP 145:4-14 (G).

According to King, the alleged oral partnership contract also required the two physicians to cover corporate obligations, such as fulfilling multi-year lease obligations, that could not be completed in one year:

Q. And in any event with respect to those obligations, the agreement to -- between you and Dr. Mockovak orally to stand behind those obligations no matter whether there was a personal guarantee or not, that was by definition a multi-year obligation, correct? Because they are leases of multiple years, correct?

A. Yes. The obligation would extend for a number of years.

RP 146:12-18 (G).

Q. These are not obligations that can be satisfied in six weeks, six months or a year. They are multiple year obligations that you say you and Dr. Mockovak agreed to, correct?

A. Yes. If we signed a lease, and it said we were going to pay a certain amount per month for a number of years that's a multi-year obligation.

RP 146:19-25 (G).

King's trial testimony definitively established that the alleged oral partnership agreement that served as the foundation for King's breach of contract claim was barred under RCW 19.36.010. Accordingly, on

December 1, 2015, the trial court granted Mockovak's motion to dismiss all of King's alleged breach of contract damages claims. CP 7083-85.

2. The Trial Court Erred by Failing to Dismiss the Entire Breach of Contract Claim.

Despite having correctly found that the alleged oral partnership contract violated the statute of frauds and dismissing King's breach of contract damages claim, the trial court also confusingly ruled that "Dr. King may otherwise proceed with his personal breach of partnership contract claim." CP 7085. Consistent with that puzzling ruling, and over Mockovak's objection (RP 529:9-17 (G)), the trial court allowed the jury to decide whether a partnership had existed and whether it had been terminated by Mockovak's criminal conduct. CP 7157. This was clear legal error.

The determination that the contract violates the statute of frauds renders the contract void and unenforceable in its entirety. "In general, if one promise is within the statute [of frauds], the entire contract is within the statute, and no part of the contract is enforceable unless the statute is satisfied." E. ALLEN FARNSWORTH, CONTRACTS § 6.10. Under Washington law, the statute of frauds is a "positive statutory mandate which renders void and unenforceable those undertakings which offend it." *Smith v. Twohy*, 70 Wn.2d 721, 725, 425 P.2d 12 (1967) (citations

omitted). *See also Tretheway v. Bancroft-Whitney Co.*, 13 Wn. App. 353, 360, 534 P.2d 1382 (1975). The plain language of the statute makes this point clear: “In the following cases, specified in this section, **any agreement, contract and promise shall be void**, unless such agreement, contract, or promise, or some note or memorandum thereof, be in writing . . .”. RCW 19.36.010 (emphasis added). A contract that violates the statute of frauds “is void and cannot form the basis of an action at law to recover damages for the breach thereof, as such an action presupposes a valid contract.” *Schweiter v. Halsey*, 57 Wn.2d 707, 714, 359 P.2d 821 (1961).

As the Washington Supreme Court held long ago, and it remains true today, a contract “being void in part, it is void as a whole.” *Swash v. Sharpstein*, 14 Wash. 426, 435, 44 P. 862 (1896) (citations omitted).

An agreement which produces no legal obligation is frequently called a void contract. Though the phrase void contract is often convenient, it is a contradiction in terms. If an agreement is void, it is by definition not a contract. Rather than saying a contract is void, it would be more accurate to say that no contract has been created. . . . The result is that the contract is of no effect, is null, and is incapable of being enforced.

25 David DeWolf, *et al.*, Washington Practice § 1:7 (3d ed. 2015).

Under this black letter law, the trial court erred when it found the alleged oral partnership contract was within the statute of frauds and dismissed King’s breach of contract damages claims, but then allowed the

jury to decide whether an oral partnership had existed and had been terminated. This was clear legal error.

Moreover, the partnership questions that the trial court allowed the jury to decide – even when it had found the alleged partnership contract was void under the statute of frauds – were not claims that King had asserted in the case. His alleged breach of partnership contract claim was pled solely as a damages claim. In paragraph 34 of his complaint, King alleged that “[a]s a result of Defendant’s breach, Dr. King has sustained damages in an amount to be proven at trial.” CP 2417. King’s proposed jury instruction on his alleged breach of contract claim (CP 7079, 7611-12) likewise was solely for damages. Those are the claims that the trial court dismissed under the statute of frauds. In short, King did not make a claim for declaratory relief that a partnership had existed and had been terminated through Mockovak’s criminal conduct. Yet the trial court allowed the jury to determine whether an oral partnership agreement – which was void under the statute of frauds – existed and had been terminated through Mockovak’s criminal conduct.

The trial court thus erred as a matter of law, not only in failing to follow black letter Washington law to void the entire alleged contract under the statute of frauds, but also in allowing the jury to decide declaratory relief that King had never pled.

3. The Court's Legal Error Infected the Trial of Mockovak's Affirmative Claims.

This legal error prejudiced Mockovak in the entire trial. King repeatedly invoked the theme of betrayal by a “partner” in appealing to the jury to award King damages and Mockovak nothing. RP 174:10-13; 186:16-19; 188:14-23; 300:12-14; 772:9-14; 779:23-780:2 (R). Separate and apart from King's claim that there was an alleged oral partnership agreement, Mockovak had two claims relating to the Victoria practice in Canada. CP 5609-14. Mockovak asked the jury to award him amounts that King owed Mockovak related to the Victoria practice, including a \$200,000 loan Mockovak made to that practice and another \$200,000 (one-half of a \$400,000 payment) that King pocketed for waiving a non-compete for the Victoria practice. *See* Section IV.E, below. King claimed Mockovak had only a partnership interest in Victoria. RP 282:6-25 (R). By allowing the jury to conclude that an alleged oral partnership existed and was terminated by Mockovak's criminal conduct, the jury easily could have decided not to award Mockovak money he was owed in Victoria because of the alleged termination of the oral partnership through his criminal conduct. Those were separate legal matters, but King was able to blur the distinction by injecting the void oral partnership agreement into the trial of Mockovak's affirmative claims and the jury's deliberations.

E. This Court Should Rule That Mockovak is Entitled as a Matter of Law to \$200,000 Under the 2008 and 2011 Agreements.

Mockovak was a party to a May 6, 2008 Share Purchase Agreement (“2008 Agreement”) (Trial Ex. 130), by which he and King and the Clearly Lasik® businesses procured the agreement with their competitor LASIK MD, not to compete against a number of Clearly Lasik® clinics, including the Victoria clinic, for a period of five years. Trial Ex. 130 at ¶¶6.5, 6.6(a)-(b), 6.8.

On June 7, 2011, unbeknownst to Mockovak who was in prison, LASIK MD agreed to pay \$400,000 to waive the final two years of the Non-Compete in the 2008 Agreement as to Victoria (“2011 Agreement”). Trial Ex. 131 at ¶¶2, 3(a)-(b); Trial Ex. 132; RP 498:14-499:6 (G); CP 6934, 6987-88 at 102:17-103:10.

King kept all \$400,000, even though Mockovak was entitled to half as a 50% shareholder. The ostensible rationale for King’s decision to keep all \$400,000 for himself was that “King and his immediate family, have outstanding claims against Mockovak for damages and injuries” and that the \$400,000 payment was “security for [King] against their existing and/or future claims against Mockovak[.]” Trial Ex. 131 at p. 1.

The jury awarded no money to King, and his family’s claims had been dismissed in prior litigation. *See King v. Mockovak*, No. 67479-0-I,

173 Wn. App. 1019, 2013 WL 619545 (2013) (unpublished); CP 7156-57. Thus, at the conclusion of trial, the only plausible basis for not paying Mockovak his \$200,000 contractual share of the non-compete waiver payment – King’s individual claim for compensation against Mockovak – had been removed.

The 2008 and 2011 Agreements are unambiguous contracts entitling Mockovak to a \$200,000 share of the \$400,000 payment to King for waiver of a non-compete as to which Mockovak was a contractual beneficiary. “The touchstone of contract interpretation is the parties’ intention, which [the court] attempt[s] to determine by focusing on the agreement’s objective manifestations.” *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 769, 275 P.3d 339 (2012) (citation omitted); *Mayer v. Pierce Cnty. Med. Bureau, Inc.*, 80 Wn. App. 416, 420-21, 909 P.2d 1323 (1995) (citations omitted) (stating that courts will not read ambiguity into contracts where it can reasonably be avoided, and that unambiguous contracts are interpreted by the court).

The 2008 Agreement plainly shows that the Victoria non-compete was drafted in favor of both King *and* Mockovak. Likewise, the 2011 Agreement unambiguously provided all \$400,000 to King solely because King alleged he had offsetting claims against Mockovak, which the jury ultimately rejected.

The trial court erred as a matter of law in failing to award Mockovak his \$200,000 share of the non-compete waiver, and this Court should reverse and rule as a matter of law – given the jury’s decision to award King no personal damages – that Mockovak is entitled to \$200,000 for his share of the \$400,000 payment under the 2008 and 2011 Agreements. *Dave Johnson Ins., Inc.*, 167 Wn. App. at 769 (where factual dispute is resolved, contract interpretation is a question of law and is reviewed *de novo*) (citations omitted).

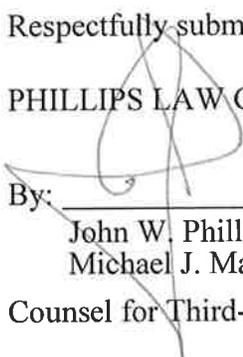
V. CONCLUSION

For the reasons set forth above, this Court should reverse and remand consistent with the relief sought in this appeal.

DATED this 20th day of June, 2016.

Respectfully submitted,

PHILLIPS LAW GROUP, PLLC

By: 

John W. Phillips, WSBA #12185

Michael J. Madderra, WSBA #48169

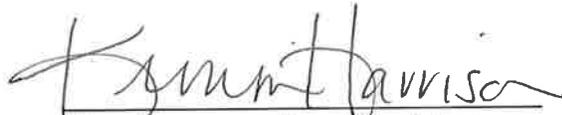
Counsel for Third-Party Plaintiff-Appellant

CERTIFICATE OF SERVICE

I certify that on this day I caused to be served upon the individuals listed below, a true and correct copy of the foregoing document by email per the parties' agreement:

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DATED at Seattle, Washington this 20th day of June, 2016 in
Seattle, Washington.


Kimm Harrison, Legal Assistant

APPENDIX A

Votes on Final Passage:

Senate 47 0
 House 93 1 (House amended)
 Senate 46 0 (Senate concurred)

Effective: July 23, 1989

SB 5580

C 78 L 89

By Senators McCaslin and DeJarnatt; by request of Office of Financial Management

Allowing write-offs of uncollectible accounts.

Senate Committee on Governmental Operations
 House Committee on State Government

Background: One of the major recommendations in a study of accounts receivable by the Legislative Budget Committee in 1987 was that the Office of Financial Management, in cooperation with the Attorney General's Office, study the state's control of write-offs, including the Attorney General's role in the process.

OFM has made a number of findings:

- The control of write-offs is an appropriate function for agency management, subject to review by the State Auditor for compliance with OFM policies and statutes.
- Accounts should be written off whenever an agency finds there is no cost-effective means of pursuing them. The current standard is "if there are no other available and lawful means" of collecting.
- The Attorney General should be involved in write-offs only when necessary to pursue legal action.

OFM is also revising its policies to require that each agency adopt procedures in cooperation with the Attorney General's Office to specify any needed involvement of the Attorney General.

Summary: Uncollectible accounts or other debts may be written off if there is no other cost-effective means of collecting the amounts due for all accounts of the Department of Revenue and several accounts of the Departments of Employment Security and Social and Health Services.

Mandatory approval by the Attorney General and the Office of Financial Management is removed, as are two mandatory waiting periods before the write-off

process can begin. In the Department of Revenue a \$100 limit on the amount of write-off is deleted. Two special methods of write-offs for the Department of Social and Health Services — cancellation of hospital charges for the mentally ill and waiver of collections of overpayments of assistance — are repealed.

Votes on Final Passage:

Senate 47 0
 House 98 0

Effective: July 23, 1989

SB 5583

C 165 L 89

By Senators Pullen, Newhouse, Nelson, Rasmussen and Talmadge

Replacing the Washington business corporation act.

Senate Committee on Law & Justice
 House Committee on Judiciary

Background: The present Washington Business Corporation Act (RCW 23A) adopted in 1965 was based largely on the Model Business Corporation Act proposed by the Committee on Corporate Laws of the American Bar Association. In 1984, the Model Business Corporation Act was completely revised in response to extensive comments by parties throughout the country. The 1984 Revised Model Business Corporation Act contains significant improvements over the prior version in organization, language, and concepts.

Concern exists that the provisions contained in the existing Washington Business Corporation Act are outdated. It is suggested that the present act be amended to incorporate provisions of the 1984 Revised Model Business Corporation Act.

Summary: The Washington Business Corporation Act is substantially revised to incorporate provisions of the 1984 Revised Model Business Corporation Act.

Technical changes in language are added.

Appropriate methods of written and oral notice are clarified.

Votes on Final Passage:

Senate 48 0
 House 96 0

Effective: July 23, 1989

APPENDIX B

RCW 23B.13.300 COURT ACTION

CURRENT SECTION

(1) If a demand for payment under RCW 23B.13.280 remains unsettled, the corporation shall commence a proceeding within sixty days after receiving the payment demand and petition the court to determine the fair value of the shares and accrued interest. If the corporation does not commence the proceeding within the sixty-day period, it shall pay each dissenter whose demand remains unsettled the amount demanded.

(2) The corporation shall commence the proceeding in the superior court of the county where a corporation's principal office, or, if none in this state, its registered office, is located. If the corporation is a foreign corporation without a registered office in this state, it shall commence the proceeding in the county in this state where the registered office of the domestic corporation merged with or whose shares were acquired by the foreign corporation was located.

(3) The corporation shall make all dissenters, whether or not residents of this state, whose demands remain unsettled, parties to the proceeding as in an action against their shares and all parties must be served with a copy of the petition. Nonresidents may be served by registered or certified mail or by publication as provided by law.

(4) The corporation may join as a party to the proceeding any shareholder who claims to be a dissenter but who has not, in the opinion of the corporation, complied with the provisions of this chapter. If the court determines that such shareholder has not complied with the provisions of this chapter, the shareholder shall be dismissed as a party.

(5) The jurisdiction of the court in which the proceeding is commenced under subsection (2) of this section is plenary and exclusive. The court may appoint one or more persons as appraisers to receive evidence and recommend decision on the question of fair value. The appraisers have the powers described in the order appointing them, or in any amendment to it. The dissenters are entitled to the same discovery rights as parties in other civil proceedings.

(6) Each dissenter made a party to the proceeding is entitled to judgment (a) for the amount, if any, by which the court finds the fair value of the dissenter's shares, plus interest, exceeds the amount paid by the corporation, or (b) for the fair value, plus accrued interest, of the dissenter's after-acquired shares for which the corporation elected to withhold payment under RCW 23B.13.270.

HISTORY AND COMMITTEE COMMENTARY

ORIGINAL SECTION Laws 1989, ch. 165, §152 (eff. 7-1-90)
Same as current.

OFFICIAL LEGISLATIVE HISTORY Senate Journal 51st Legis. 3092-93 (1989)
Section 13.30 Court Action.

Proposed section 13.30 retains the concept of judicial appraisal as the ultimate means of determining fair value. The proceeding is to be commenced by the corporation within 60 days after receiving a demand for

payment under Proposed section 13.28. Proposed subsection 13.30(a) makes this time period jurisdictional; if the petition is not commenced within this period the corporation must pay the additional amounts demanded by the shareholders under Proposed section 13.28. Each shareholder may sue directly for this amount, if necessary, and in an appropriate case may be entitled to charge the corporation with the costs of suit.

All demands for payment made under Proposed section 13.28 are to be resolved in a single proceeding brought in the county where the corporation's principal office is located or, if none, in other specified counties. All shareholders making Proposed section 13.28 demands must be made parties, with service by publication authorized if necessary. Appraisers may be appointed within the discretion of the court. The final judgment establishes not only the fair value of the shares in the abstract but also determines how much each shareholder who made a Proposed section 13.28 demand should actually receive.

If the corporation fails to commence a judicial proceeding to establish the fair value of the shares as required by this section, it must pay the full amount claimed under this section.

* * * * *