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Division I
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No. 745441

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.

REPLY BRIEF OF APPELLANT MICHAEL MOCKOVAK AND BRIEF IN OPPOSITION TO CROSS-APPEAL

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I. SUMMARY OF REPLY

Courts have a special role to play in cases where one of the parties has legitimate business-related legal claims, with real economic consequences, but is the subject of community scorn and the facts are likely to inflame passion and prejudice. Here, Mockovak has been convicted of soliciting the murder of his brother-in-law. The risk of prejudice was obvious from the start.

How then can a court conduct a trial to assure that the decision reflects the merits of the legal claims and is not distorted by prejudice? The legislature provides some essential tools, and courts have devised others.

Some categories of cases are especially likely to involve bitter disputes, where one side or the other will be deemed the villain. Divorces often present those risks. After a long marriage, with children, where the marital estate is ample, there is an obvious risk that a cheating spouse will be punished for an extramarital affair by putting a thumb (or even a foot) on the scale when dividing the marital estate. To limit that risk, the legislature has created two safeguards. The issue of fault is deemed legally irrelevant to the division of assets, and the entire process is placed in the hands of a judge, not a jury. *See* RCW 26.09.030; RCW 26.09.080. As with a divorce between spouses, a business divorce carries many of the

same risks of prejudice. The legislature, therefore, has taken the same approach. When one owner of a business is disqualified from continuing to own shares, the disqualified owner is very likely to have done something wrong or else he wouldn't be disqualified. But the law does not allow whatever the disqualified owner did wrong to affect the fair division of assets. The legislature provides that the judge, not a jury, must decide fair value. Even the judge has special constraints, requiring an express statement of the reasoned basis for the valuation. *See* RCW 23B.13.300; *In re Marriage of Monaghan*, 78 Wn. App. 918, 925, 899 P.2d 841 (1995).

The legislature has not ordered that all kinds of cases involving risks of prejudice are bench trials. When cases are tried to a jury, courts have fashioned tools to guard against prejudice. Courts make *in limine* rulings to prevent improper facts and argument from swaying the jury. Courts rein-in counsel who appeal to passion and prejudice and who ask the jury to decide the case based on something other than the law and the facts. Courts offer curative instructions to put the cased back on track, to lessen the impact of counsel's excesses. And when those safeguards are not followed, the appellate courts reverse, order a new trial, and provide direction about the governing rules and procedures for the retrial.

There is no question here that the safeguards failed. The Superior Court allowed the jury to decide issues that, by statute, must be decided by the judge. The Superior Court recognized the obvious risk of prejudice, entered *in limine* orders to minimize that prejudice, but then failed to rein-in counsel's unrelenting violations of the *in limine* orders. The Superior Court recognized that certain claims were legally void, but yielded to counsel's repeated demands to inject portions of those same claims into the trial. Before closing argument, the Superior Court foresaw that counsel again would seek to ask the jury to compensate a party for emotional injuries that the Superior Court already had removed from the case, but when counsel ignored those directions, the Superior Court failed to correct the misconduct and failed to give curative instructions.

This Court should reverse, order a new trial, and provide clear guidance about which claims the court must decide, what claims are in the case, what conduct by counsel is not acceptable, and what the trial court should do when counsel fails to comply with the rules that this Court and the trial court set.

II. REPLY ARGUMENT

A. The Superior Court Failed to Follow the Statutory Command That the Court, Not the Jury, Must Determine the "Fair Value" of Mockovak's Cancelled Shares in KMEC.

The plain language of RCW 23B.13.300 establishes a unique and "exclusive" judicial procedure to determine the "fair value" of Mockovak's cancelled KMEC shares. The Superior Court committed legal error when it disregarded the statute and allowed the jury to make that "fair value" determination.

King claims that the Superior Court's ruling was discretionary, and that this Court should review it for abuse of discretion. King Br. at 30-31. The statute, however, imposes a non-discretionary obligation upon the court to determine fair value. *See* Opening Br. at 11-16. The Superior Court's failure to follow that statutory mandate is 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"). The Superior Court's decision to allow the jury to decide a question over which the superior court has "exclusive" jurisdiction is legal error requiring reversal.

1. The Superior Court Committed Legal Error By Failing to Determine the "Fair Value" of Mockovak's Cancelled KMEC Shares.

King has no response to the plain language of RCW 23B.13.300 and its straightforward directive that the superior court shall determine fair value. *See* Opening Br. at 11-13. The statute states the [t]he jurisdiction of the court . . . is plenary and exclusive." RCW 23B.13.300(5).

Reflecting the Superior Court's exclusive responsibility, RCW 23B.13.310(1) plainly states that 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." If the statute were not plain, the legislative history of the statute reinforces that the superior court is the sole arbiter of the fair value of a dissenter's shares. *See* Opening Br. at 13-15.

King does not address the language of the statute or its legislative history, but instead claims that "[t]his was not an action brought under RCW 23B.13.300". King's Br. at 34. But that is not so. The Superior Court ruled that King and Mockovak were the sole shareholders of KMEC and that fair value must be determined under RCW 23B.13.300. *See* CP 1427-29; 3075-76, 4680-81. The court's ruling then required the court, not the jury, to decide the fair value of the shares.[1]

King's argument also flatly contradicts what he told the Superior Court. King represented that once the Court determined that King and

[1] Mockovak argued that CLI had acquired the shares of KMEC, but the trial court ultimately accepted King's argument. Based on the Superior Court's ruling on that issue, Mockovak sought to have the court apply the statute's command that the court decide the issue of fair value.

Mockovak were the sole shareholders in KMEC and that KMEC was a Washington corporation, the value of his shares must be determined by the court pursuant to the provisions of RCW 23B.13.300. King explained, "[i]f 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 1439 at ¶8 (emphasis added). King told the Superior 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).

Despite the statute's command, the Superior Court instructed the jury to decide "fair value" pursuant to RCW 23B.13. *See* CP 7126; RP 684:24-85:4, 686:8-13, 691:24-92:8 (R).

King argues that there is no authority holding that the fair valuation of shares under RCW 23B.13.300 must be decided by the superior court, leaving the remainder of the case to be decided by the jury, (King Br. at 35), but that claim ignores the specific statutory directive of RCW 23B.13.300 that the superior court's jurisdiction is exclusive and that Washington case law is uniform in holding that the determination of fair value is solely for the court. Opening Br. at 11-16.

CR 42(b) (King Br. at 32) does not govern here. That rule engages the court's discretion to determine whether the court should order separate or consolidated trials with respect to multiple claimants or defendants or to bifurcate liability and damages – all of which a jury is authorized to decide. CR 42 does not apply.

The question is whether the Superior Court could delegate to the jury its exclusive jurisdiction to determine fair value under RCW 23B.13.300. The clear answer to that question is that the Superior Court could not so delegate, and it was legal error to do so.

2. Mockovak Was Prejudiced By Letting the Jury Determine the "Fair Value" of Mockovak's Cancelled KMEC Shares.

King offers no resistance to the inevitable conclusion that if the Superior Court erred in failing to keep for itself the determination of "fair value," that legal mistake obviously prejudiced Mockovak. *See* Opening Br. at 16-18. Allowing the jury to appraise Mockovak's KMEC shares prejudiced the entirety of Mockovak's affirmative claims.

The fair value determination should have been made *objectively* by the Superior Court based on economic factors. *See In re Marriage of Monaghan*, 78 Wn. App. at 925 (citations omitted) (right to know the "factors and methods . . . used in reaching [the] finding of value"); *Suther v. Suther*, 28 Wn. App. 838, 843, 627 P.2d 110 (1981)

(valuation must be reached with the "exercise of reasoned judgment."). Significantly, the appraisal must have been made "without regard to the events that triggered" the cancellation. *See Eagleview Tech, Inc. v. Pikover*, 192 Wn. App. 299, 309, 365 P.3d 1264 (2015) (citation omitted).

King made certain that the jury was entirely unfit to make a fair value determination. *See, e.g.*, RP 105:1-4; 175:7-15; RP 779:23-780:2; 801:14-18 (R). That is why the legislature delegated this objective function solely to the court. The importance of following the statutory command is important not only in Mockovak's case, but in all cases where the court rules that RCW 23B.13.300 applies.

B. The Court Should Order a New Trial on Mockovak's Affirmative Claims Because the Superior Court Failed to Safeguard Mockovak's Right to a Fair Trial.

1. The Superior Court Erred in Failing to Strike Biased Jurors.

The evidence of juror bias in this case is extensive. Almost all prospective jurors testified during *voir dire* that Mockovak would have to overcome a significant hurdle in light of his conviction in order to be awarded money against his criminal victim. 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:

> 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 141:7-11 (R).

And twenty-four 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 those prospective jurors 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). These responses constitute extensive and repeated evidence of "actual bias" under RCW 4.44.170(2).

Neither King's counsel nor the Superior Court made an *individual inquiry* of all these biased jurors in order to attempt to rehabilitate them. Rather, King asked those jurors *as a group* if they could follow the court's instructions (RP 131:4-132:4 (R)), and the Superior Court asked those *jurors as a group* to raise their cards if they felt they "simply cannot be fair and impartial in this case." RP 149:19-150:5 (R). This inquiry and attempt to rehabilitate was inadequate. *See Ottis v. Stevenson-Carson School Dist.*, 61 Wn. App. 747, 812 P.2d 133 (1991) (allegedly biased juror subject to additional, individual *voir dire*); *State v. Fire*, 100 Wn. App. 722, 728, 998 P.2d 362 (2000), *rev'd on other grounds*, 145 Wn. 2d 152, 34 P.3d 1218 (2001) (juror rehabilitation is possible by means of "thorough and thoughtful inquiry.").

A group polling about whether jurors can be fair and follow instructions is simply too cursory and amenable to predictable response to overcome concrete expressions of bias. *State v. Irby*, 187 Wn. App. 186, 196, 347 P.3d 1103 (2015), *rev. denied* 184 Wn.2d 1036 (2016) ("questions directed to the group cannot substitute for individual questioning of a juror who has expressed actual bias.") (citation omitted). As the court in *State v. Fire*, 100 Wn. App. at 728, held:

> The prosecutor attempted to rehabilitate the potential juror by asking him whether he would follow the court's instructions despite his strong feelings, and the potential

> juror responded affirmatively in one-word responses. The trial court refused to excuse the challenged juror for cause, focusing on these affirmative responses without recognizing that the potential juror's initial responses demonstrated actual bias.
>
> Just as most potential jurors will not respond affirmatively if asked, "Are you biased?" few will fail to respond affirmatively to a leading question asking whether they can be fair and follow instructions. See LAFAVE ET. AL, CRIMINAL PROCEDURE, § 22.3(c), at 308 (2d ed. 1999) ("[I]t is 'unlikely that a prejudiced juror would recognize his [or her] own personal prejudice-or knowing it, would admit it.' ") (quoting A. FRIENDLY & R. GOLDFARB, CRIME AND PUBLICITY 103 (1967)).

Id. (emphasis added).

The court went on to explain that "appellate deference to trial court determinations of the ability of potential jurors to be fair and impartial is not a rubber stamp." *Id.* at 729. The Court observed that there was "nothing in the potential juror's one-word affirmative responses to the mantra of rehabilitative questions that indicates he had come to understand that he must lay his preconceived notions aside, in order to serve as a fair and impartial juror." *Id.*

Similarly, in *State v. Witherspoon,* 82 Wn. App 634, 638, 919 P.2d 99 (1996), when a prospective juror admitted prejudice against African Americans, the appellate court held that "attempts to rehabilitate" the juror, where the juror agreed that he would presume the defendant to be innocent, were inadequate to overcome categorical statements of bias.

Because the Superior Court refused to excuse potential jurors who demonstrated actual bias against Mockovak, and did no more than obtain obligatory "group" responses to rehabilitate them, the Superior Court abused its discretion and should be reversed. This last point – about the proper procedures for assessing bias – is especially important not only for Mockovak's case but for all jury trials where prejudice is an obvious risk.

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

Mockovak successfully moved to exclude evidence regarding the details of the criminal allegations against Mockovak. The Superior Court agreed that it was essential to exclude that evidence because the court would not permit Mockovak to challenge any of the factual allegations relating to the convictions in light of the court's *res judicata* order (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; CP 6202. *See also* RP 24:21-25:9; 28:11-24; 29:4-21 (R).

Notwithstanding the court's exclusion order, the court permitted King to present evidence on some of the most prejudicial criminal allegations, including the allegation that Mockovak intended to benefit from a life insurance policy by arranging a "hit" on King during a family

vacation. King claimed that such evidence went to "motive" or "intent" – the same failed rationale which had led the Superior 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 Superior Court sustained some objections to questions that went to the motive for the crimes (RP 277:25-278:3 (G)), and expressed "concern[] . . . about some of the questions that were asked by [King's] 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:

> 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 777:22-78:17 (R).

King's repeated injection of facts relating to the criminal allegations was deeply prejudicial and unfair.

3. The Superior Court Erred by Failing to Give Curative Jury Instructions.

Confronted with King's relentless injection of facts from the criminal trial, Mockovak sought to limit the prejudice, at least in part, by asking the Superior Court to give curative instructions. One instruction

would have let the jury know that Mockovak was not permitted to challenge the criminal allegations[2] and that the jury 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 second curative instruction acknowledged that "Mockovak has been convicted of crimes which will be accepted as fact for purposes of this trial." Quoting from the Washington Constitution's Declaration of Rights, the instruction states: "You may consider whether Mockovak's conviction had any effect on the value of his "estate," but you may not, under the Washington Constitution's Declaration of Rights, conclude that he has "forfeited" his estate by virtue of his conviction." CP 5633.

The Superior Court refused to give the curative instructions, even though the Superior Court itself previously had ruled that the details of Mockovak's criminal conviction were prejudicial and had entered an *in limine* order excluding "unfairly prejudicial evidence or argument regarding Mockovak's criminal conduct." CP 5146-48 & 6202. When

[2] King argues (King Br. at 41) that Mockovak did challenge his conviction at trial by citing one oblique sentence in Mockovak's testimony. That assertion is not correct. The parties' stipulation, in which Mockovak accepted the convictions, was admitted into evidence (Trial Ex. 19). In addition, in opening and closing arguments, Mockovak's counsel repeatedly affirmed that Mockovak accepted his criminal convictions in the civil jury trial.

King persisted in presenting such "unfairly prejudicial evidence" and argument at trial, the Superior Court, at the very least, should have limited the prejudice through curative jury instructions. As was the case in *State v. Young*, 129 Wn. App 468, 476, 110 P.3d 870 (2005), "no one can seriously dispute" that the tawdry disclosures about the criminal case were inherently prejudicial, and that without at least an attempt to cure the prejudice with an instruction, Mockovak's claims could not be fairly adjudicated.

Though King claims that the proposed instructions were confusing, Mockovak's counsel informed the Superior Court that Mockovak was open to alternative formulations of the curative instructions satisfactory to the court as long as the instructions were given to the jury. RP 674:13-20, 676:8-10 (R). The Superior Court rejected any formulation of the two curative instructions.

Because the Superior Court repeatedly allowed the jury to hear evidence and argument related to the criminal allegations, inconsistent with its own *in limine* ruling, the Superior Court abused its discretion by denying Mockovak's curative instructions.

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

King's closing argument was a transparent call for jury nullification. King urged that the jury could overcome the fact that emotional distress damages were not awardable and could take matters into its own hands to "render a just verdict." King told jurors to display "the full weight of your authority as officers of this court to fully compensate Dr. King . . . for the harm that he has suffered and to put an end to this ordeal, this nightmare. You can see it with Dr. King. You can see it. . . . 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. Such a verdict will be absolutely just and right." RP 804:16-805:2 (R).

King claims that his counsel was merely engaged in "aggressive advocacy" when he encouraged the jury to do justice for King's family even though the court had excluded emotional distress damages and his "family" was not the plaintiff. King Br. at 45. But the Court had specifically instructed King's counsel not to touch upon those subjects in his closing (RP 747:24-25, 748:17-18 (R)), and King's counsel flouted the Court's instruction.

King's assertion that Mockovak should not be permitted to argue jury nullification, because he failed to repeatedly object during King's closing argument is not well-taken. First, the Superior Court specifically instructed counsel that it did not want objections or disruptions in closing argument. RP 747:24-25, 748:15-18 (R). Second, when a party deliberately argues a theory or evidence that the Superior Court already has excluded, his adversary does not waive the issue by failing to object on every occasion that counsel violates the Court's rulings. *State v. Ra*, 144 Wn. App. 688, 701, 175 P.3d 609 (2008). The purpose of requiring an objection is to bring improper conduct to the court's attention, thereby allowing the court address it. The Superior Court was well aware of King's counsel's misconduct, had already attempted to rein it in, and already had instructed the jury that emotional distress damages were not a part of the case.

King's counsel argued to the Superior Court before closing that he "want[ed] the jury to know that Dr. King has not been paid anything from Mr. Mockovak." RP 749:10-11 (R). Mockovak's counsel correctly noted that such argument was "an express attempt to nullify the jury. 'Emotional distress is not in the case[.]' " RP 749:20-22 (R). And the Superior Court agreed that such argument was inappropriate. RP 750:3-12 (R). But in closing, King's counsel told jurors that this was their

opportunity to "do justice" and "to fully compensate Dr. King . . . for the harm that he has suffered [] to put an end to this ordeal, this nightmare," RP 804:2-19 (R), and "provide Dr. King and . . . [his] famil[y] with closure." 804:16-805:2 (R)

Finally, King claims that his counsel's appeal to jury nullification was not prejudicial, because the jury didn't award damages to either side. King Br. at 48-49. In making that argument, King ignores that the jury may have awarded Mockovak no damages precisely because of King's appeal to jury nullification. The jury easily could have concluded that because it could not award emotional distress damages to King, it could put an "end to this ordeal, this nightmare . . . and provide Dr. King and . . . [his] famil[y] with closure" by refusing to award Mockovak the monetary damages to which he was entitled.

In *State v. O'Donnell*, 191 Wash. 511, 71 P.2d 571 (1937), the prosecutor improperly commented on the defendants' character during his opening statement. The defendants were subsequently convicted, they appealed, and the appellate court found that a new trial was warranted. That the defendants "were proven guilty by evidence properly before the jury" did not obviate the need for a new trial given the misconduct that had occurred and the need to protect the standard of judicial fairness. *Id.* at 518-19.

King's repeated emphasis on his and his family's uncompensable emotional trauma and suffering was plainly designed to ask the jury to do its own rough justice by ignoring the law, which prohibited King from recovering for emotional distress. That is not simply aggressive advocacy. It was an appeal for jury nullification requiring a new trial on Mockovak's affirmative claims.

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

King fails to respond to Washington law that holds "***[e]very agreement that by its terms is not to be performed in one year from the making thereof***" "*shall be void.*" RCW 19.36.010 (emphasis added). Nor does King have any response to black letter law that a contract that is void under the statute of frauds is void in its entirety and for all purposes. Opening Br. at 40-42. Under black letter law, the Superior Court correctly dismissed King's partnership contract damages claim, but erred in failing to dismiss King's claim for declaratory relief under the partnership contract.

Instead, King argues that the statute of frauds does not apply because: (a) the alleged "partnership contract" was for an indefinite term and thus valid; (b) the alleged contract "was subsequently modified" to address corporate debts; and (c) that any error in allowing the breach of

contract claim go to the jury was "harmless." King Br. at 22-26. King's arguments fail for multiple reasons.

Indefinite term. King claims that he and Mockovak entered into an oral partnership agreement to build an ophthalmological practice, and that the agreement was not subject to the statute of frauds because it was terminable at will. King's argument is a transparent attempt to recast his claim and to ignore King's own testimony. King sued Mockovak claiming that the oral partnership contract imposed multi-year obligations to perform warranty surgeries and to pay lease obligations that were not terminable at will and could not be performed within a year. As King clearly testified:

> Q. And in any event with respect to those obligations, the agreement to -- between you and Dr. Mockovak orally to stand behind those [lease] 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). King expressly testified that the purported oral partnership agreement included multi-year obligations.

Modification. King also claims for the first time on appeal that the alleged contractual obligations to perform warranty surgeries and lease obligations were not part of the original partnership contract but were, rather, "modifications" that do not need to satisfy the statue of frauds. King Br. at 24-25. King made no such allegation in his complaint (CP

2417), and nowhere did he make that argument at trial. Moreover, there is no evidence to support King's newly-minted theory of contract modification. Rather, King testified that he and Mockovak agreed at the outset to be personally responsible for the debts of the business and that the guarantee and lease obligations were simply examples of that original commitment. *See* RP 84:12-85:5, 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 never argued to the Superior Court that the obligations were a modification of the original partnership contract. How could he? He testified that the two physicians agreed personally to cover all debts of the business, and the lease and guarantee obligations were simply examples of such debts.

This Court should reject King's "modification" argument because it was not made to the Superior Court, and thus is waived by King on appeal. RAP 2.5(a); *Herberg v. Swartz*, 89 Wn.2d 916, 925, 578 P.2d 17 (1978) ("An issue, theory or argument not presented at trial will not be considered on appeal.") (citation omitted). Moreover, the record evidence contradicts King's "modification" argument and King cites no evidence – let alone substantial evidence – in support of his new theory. CP 6284 ("Dr. King and Mockovak agreed between each other to repay the

obligations that their business incurred . . . Mockovak's emails and letters demonstrate that he understood their partnership to include the repayment of debts and lease obligations.").

In addition, King incorrectly interprets the one authority he cites, 25 Wash. Practice, *Contract Law and Practice* §3:15. That section states, "Oral modifications to a written contract are considered valid and enforceable and a writing evidencing the modification is not required. However, the subsequent modifications cannot create a new agreement or obligation; they can only modify the terms of the existing agreement." As the explanation itself confirms, a "modification" does not provide any basis for holding that a contract violative of the statute of frauds is only void in part, and not – as provided by black letter law – void as a whole.

According to King's trial testimony, the original partnership agreement covered leases and warranty surgeries – in which case it's subject to the statue of frauds. Even under King's new theory, untethered to his testimony, the modifications (the requirements to make lease payments and perform warranty surgeries) created new obligations that can't be performed in one year – in which case the modifications also would be subject to the statute of frauds. In both cases the statute of frauds applies to avoid the entire contract.

Harmful error. King claims that because the jury was not permitted to award damages on King's void partnership claim, any error Superior Court was harmless. King Br. at 25-26. King is simply wrong. King repeatedly invoked the theme of betrayal by a "partner" in appealing to the jury to award Mockovak nothing. RP 174:10-13; 186:16-19; 188:14-23; 300:12-14; 772:9-14; 779:23-780:2 (R).

In addition, 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. King claimed Mockovak had only a partnership interest in Victoria. RP 282:6-25 (R). Thus, 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 for waiver of the Victoria non-compete, because of the alleged termination of the oral partnership through his criminal conduct. Indeed, that was plainly the theme King's counsel exploited throughout the trial.

The record is clear. King's breach of oral contract partnership claim is void under the statute of frauds. The Superior Court correctly dismissed King's partnership damages claim, but committed legal error by allowing the jury to decide King's claim for declaratory relief under the void contract. The Superior Court's legal error prejudiced Mockovak by allowing King to argue to the jury that Mockovak deserved nothing because Mockovak breached the oral partnership contract.

E. King's Attempt to Assert Emotional Distress Damages is Barred as a Matter of Law, and the Superior Court Properly Refused King's Fifth Attempt to Resurrect this Claim.

The Court should reject King's cross-appeal claim that the Superior Court should have permitted his eleventh-hour bid to add an emotional distress claim under his breach of partnership contract claim. King Br. at 26-30.

1. Any Amendment To Add Emotional Distress Damages Would Have Been Futile Given that the Underlying Contract Was Void Under the Statute of Frauds.

As explained in Section II.D above, the entire alleged partnership contract was void under the statute of frauds. The Superior Court properly had struck all of King's alleged partnership damages claims. Any amendment, therefore, to add emotional distress damages would have been futile. *Ino Ino, Inc., v. City of Bellevue*, 132 Wn.2d 103, 142, 937 P.2d 154 (1997) ("court may consider whether the new claim is futile or untimely.") (citations omitted).

2. King's Proposed Amendment Was Futile Because Damages for Emotional Distress Cannot Be Recovered for Breach of Fiduciary Duty.

King provided no legal authority for the proposition that emotional distress damages are recoverable under a breach of oral partnership contract claim. Every reported Washington case for breach of partnership fiduciary duties has authorized damages solely for economic losses from the breach of the "for profit" partnership. *See, e.g., J&J Celcom v. AT&T Wireless Services, Inc.*, 481 F.3d 1138, *certified question answered* 162 Wn.2d 102, 169 P.3d 823, *answer to certified question conformed to* 508 F.3d 1177 (9th Cir. 2007) (defrauded partners may be entitled to constructive trust on partnership assets and profits); *Kittilsby v. Vevelstad*, 103 Wn. 126, 173 P. 744 (1918) (defrauded partner entitled to half sale proceeds); *Galbraith v. Devlin*, 85 Wn. 482, 148 P. 589 (1915) (partner's fraud entitled other partner to proportionate share of purchase price).

King's attempt to recover emotional distress damages for breach of fiduciary duty was futile. King's request to amend, therefore, was properly denied. *See Matsyuk v. State Farm Fire & Casualty Co.*, 155 Wn. App. 324, 338-39, 229 P.3d 893 (2010) (denying motion to amend where new claim would be futile), *rev'd on other grounds*, 173 Wn.2d 643 (2012).

3. Any Proposed Amendment Would Have Been Barred by *Res Judicata*.

King's eleventh-hour amendment was yet another failed attempt to resurrect claims he already lost in a prior case and prior appeal. At the end

of 2009, King filed two civil suits against Mockovak in King County Superior Court: this case and his suit for personal damages, including emotional distress damages. *Joseph King, et al. v. Michael Mockovak*, Cause No. 09-2-47040-56 (the "King litigation"). Both suits were based on Mockovak's arrest. CP 1286-91 at ¶¶6-25 and CP 1314-20 at ¶¶3.1-3.26.

The Superior Court dismissed the King litigation on June 8, 2011. CP 1322-23. On June 20, 2011, King filed a motion to amend to add a cause of action under Restatement (Second) of Torts §870 for emotional distress damages. CP 1324-37. On August 9, 2011, the Superior Court denied King's motion to amend. CP 1359.

As soon as the Superior Court dismissed the King litigation, King asserted counterclaims in this case (on August 18, 2011) to include the claims dismissed in the King litigation. CP 944-49.

King then appealed the dismissal of the King litigation.

On February 19, 2013, the Court of Appeals affirmed dismissal of the King Litigation. *King v. Mockovak*, 173 Wn. App. 1019 (2013) (unpublished), terminating the King litigation.

On October 14, 2015, the Superior Court in this case dismissed King's claim under Restatement (Second) of Torts, Section 870 and his unjust enrichment claim – the same claims King had attempted to pursue in the failed King litigation. CP 4673-76. King then moved to amend his complaint to add a breach of fiduciary duty claim "[b]ased on the [alleged] partnership." Mockovak objected, explaining that "[p]resumably, King

has asked to assert a new claim one day after this Court's summary judgment ruling, because he believes he can reinstate personal damage claims that he no longer has as a consequence of dismissal of the Section 870 claim and the Unjust Enrichment Claims." CP 4685. In reply, King admitted that his proposed breach of partnership fiduciary duty claim was nothing more than another attempt to tack on a claim for emotional distress damages. CP 4806 ("the breach of fiduciary duty damages Dr. King is seeking ***are identical*** to those that were claimed under Dr. King's § 870 claim."). On November 9, 2015, the Superior Court denied King's attempt to resurrect a claim that by then had been rejected four times by three different courts. CP 5736-39.

The doctrine of *res judicata* requires a party to assert all his individual claims arising from the same transactions in one case. He cannot pick and choose where to assert his individual claims. If his individual claims fail in one court, he may not move them to another court and call them something else. King attempted to recover emotional distress damages in the King litigation. He failed. When King attempted to include the same claims in this case, they failed on the merits. King's last-minute attempt to insert a claim for those same damages under yet another theory – this time using his void breach of partnership contract claim – also was barred under the doctrine of *res judicata*. *See Sound Built Homes, Inc. v. Windermere Real Estate/South, Inc.*, 118 Wn. App. 617, 628, 72 P.3d 788 (2003) (citing *Kelly v. Hansen*, 87 Wn. App. 320, 941 P.2d 1108 (1997) (*res judicata* prevents a claim from being relitigated

"or even litigated for the first time, if it could have been raised, and in the exercise of reasonable diligence should have been raised in the prior proceeding"); Tegland, Washington Practice, Civil Procedure, §35.24 at 522 (*res judicata* operates to bar "all matters that were considered or could have been considered in the prior action"); Restatement of Judgments (Second) Section 24, Comment a ("regardless of the number of substantive theories or variant forms of relief flowing from those theories . . . [t]he law of *res judicata* now reflects the expectation that parties who are given the capacity to present their 'entire controversies' shall in fact do so").

Because King's last-minute amendment was barred by the doctrine of *res judicata*, any such amendment would have been futile.

4. Not Only Was King's Proposed Amendment Barred as a Matter of Law, But the Superior Court Acted with Appropriate Discretion To Deny King's Attempt to Resurrect an Emotional Distress Damages Claim.

King attempted to amend his partnership contract claim to include a claim for breach of fiduciary duty came *50 months* after he pled the claim. He already had made a claim on behalf of the businesses for "breach of fiduciary duty," so he knew what such a claim looked like. If King felt he also had a personal breach of fiduciary duty claim based on the alleged partnership, he should have made that claim 2009 when he asserted the corporate breach of fiduciary duty claim. The Superior Court plainly acted within its discretion in rejecting the proposed last-minute

amendment. *See Wilson v. Horsley*, 137 Wn.2d 500, 507, 974 P.2d 316 (1999) citing (1999) citing *Herron v. Tribune Pub. Co., Inc.*, 108 Wn.2d 162, 165-66, 736 P.2d 249 (1987) (affirming denial of motion to amend to add "counterclaim" when motion related to "compulsory counterclaim" that should have been pled at outset, movant had been aware of the factual basis for the amendment from the commencement of his case, and permitting such an amendment on the eve of trial would constitute "unfair surprise" to the non-moving party).

Wallace v. Lewis County is directly on point. The court there found "undue delay" and affirmed denial of the Wallaces' motion to amend, because they had been aware of the factual basis for the claim from the outset of the case, and did not seek amendment until "a month before the scheduled summary judgment hearing and more than a year and half after filing their initial complaint[.]" *Wallace v. Lewis County*, 134 Wn. App. 1, 26, 137 P.3d 101 (2006). 1, 26, 137 P.3d 101 (2006). *Accord, Del Guzzi Const. Co., Inc. v. Global Northwest, Ltd., Inc.*, 105 Wn.2d 878, 719 P.2d 120 (1986) (no abuse of discretion when trial court denied a motion to amend pleadings filed a week before summary judgment); *Donald B. Murphy Contractors, Inc. v. King County*, 112 Wn. App. 192, 199–200, 49 P.3d 912 (2002) (trial court reasonably denied motion to amend filed 10 days before summary judgment).

Permitting King to assert a new counterclaim days before trial would have prejudiced Mockovak because he no longer could seek summary judgment on the new damages claim; the deadline for doing so had passed. "Perhaps the most important factor listed by the [Supreme] Court for denying leave to amend is that the opposing party will be prejudiced if the movant is permitted to alter a pleading." 6 Wright, Miller & Kane, Fed. Practice and Procedure § 1487 (2010) (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 91 S. Ct. 795 (1971); *U.S. v. Hougham*, 364 U.S. 310, 81 S. Ct. 13 (1960)); *Wallace*, 134 Wn. App. at 25.

For all these reasons, this Court should affirm the Superior Court's denial of King's eleventh-hour proposed amendment.

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

Mockovak specifically alleged his right to one-half the proceeds ($400,000) paid by Lasik, MD to eliminate the non-compete provision in a contract to which Mockovak was unambiguously the beneficiary. Mockovak's claim was denominated "unjust enrichment" because King withheld Mockovak's $200,000 share on the sole ground that it would constitute "security for [King] against their existing and/or future claims against Mockovak[.]" in this case. Trial Ex. 131 at 1. Because the jury awarded King no damages, the sole basis for withholding the $200,000

that King had kept as security vanished, and the Superior Court should have awarded Mockovak those funds in light of the jury's verdict.

King claims that Mockovak did not assert a breach of contract claim so his entitlement to the $200,000 withheld by King as security is not before the Court. That argument misses the mark. Mockovak asserted and tried his entitlement to the $200,000, by claiming that King had been unjustly enriched, and the only question was whether King was entitled to continue to withhold it as security for his claims against Mockovak, such that he had not been unjustly enriched. The jury resolved that question against King. Accordingly, as a matter of law, the Superior Court should have awarded Mockovak the $200,000 unjustly withheld by King.

The fact that Mockovak was "in prison" and was no longer practicing medicine in 2011 is irrelevant. King Br. at 49-50. Mockovak's rights under the 2008 contract are unambiguous, and the contract does not require Mockovak to be licensed, to practice medicine or to practice in Victoria, for that matter, in order to be paid amounts to which he is contractually entitled. The only cloud over Mockovak's entitlement to his share under the two contracts was King's claim to it as "security" for King's affirmative claims that the jury rejected. As a matter of law, the Court should remand with direction to the superior court to award Mockovak the $200,000 that King withheld from him.

III. CONCLUSION

For the reasons set forth above, this Court should reverse, remand consistent with the relief sought in this appeal, and reject King's cross-appeal.

DATED this 20th day of September, 2016.

Respectfully submitted,

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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 September, 2016 in Seattle, Washington.

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