

COURT OF APPEALS  
DIVISION II

No. 39236-4-II

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COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON  
BY *cm*  
DEPUTY

JOEL C. MCCORMICK

Respondent-Plaintiff

v.

DUNN & BLACK, P.S., et al.

Appellant-Defendant

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Opening Brief of Defendant-Appellant Dunn & Black, P.S.

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## I. Introduction

The parties are before this Court for the second time. In *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 167 P.3d 610 (2007), *pet. den.*, 163 Wn.2d 1042 (2008) (“*McCormick I*”), this Court held that Joel McCormick (“McCormick”) had no legal basis to force his former law firm to buy out his equity interest following the termination of his employment. Subsequently, McCormick resigned from the Washington State Bar Association (“WSBA”). McCormick now seeks once again to compel the repurchase of his shares for “fair value.” As before, this Court should confirm that the parties established the law firm with the intent to create no “buy out” rights in favor of a departing shareholder and that Washington’s Professional Service Corporation Act, RCW 18.100 et. seq. imposes no such a duty when the parties expressly declined to impose it upon themselves.

## II. Assignment of Error

The trial court erred in entering the *Order Granting Plaintiff’s Motion for Summary Judgment (re Employment Agreement) and Order Denying Defendants’ Motion for Summary Judgment and Granting Plaintiff’s Cross-Motion for Summary Judgment (re Professional*

*Services Corporation Act*) dated February 4, 2009. (CP 44)(“*February 4 Order*”).

### **Issues Pertaining to Assignment of Error**

1. Does Section 18 of the Employment Agreement define and limit McCormick’s shareholder interests?

2. Does judicial estoppel bar Dunn & Black’s contention that Section 18 limits and defines McCormick’s shareholder interests where there is no dispute that the Employment Agreement is not stock redemption agreement?

3. Is Section 18 as a “private agreement” within the meaning of RCW 18.100.116(1) such that McCormick is limited to the return of his paid-in capital (\$5,000) upon the transfer of his equity interest?

4. Does RCW 18.100.116(2) apply in light of the trial court’s ruling that McCormick’s resignation is not a “transfer?”

### **III. Statement of the Case**

The issues surrounding the termination of Plaintiff-Respondent Joel C. McCormick (“McCormick”) from Defendant-Appellant Dunn & Black (“Dunn & Black”)<sup>1</sup> were resolved in *McCormick I*. In that case this Court rejected McCormick’s contention that Dunn & Black had a

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<sup>1</sup> Defendants John Black and Robert Dunn were dismissed by the trial court in their individual capacities. (CP 43).

duty to “buy out” his shares upon the termination of his employment. This Court held that the parties made no stock redemption agreement and declined to impose on the parties a contract they had not created for themselves. 140 Wn.App. at 890-92.

The present action arose when McCormick notified Dunn & Black of his retirement and resignation from the Washington State Bar Association (“WSBA”) effective August 12, 2008. McCormick demanded “fair value” for his equity stake in the law firm pursuant to Washington’s Professional Service Corporation Act, RCW 18.100 et. seq. (“the Act”). Dunn & Black responded that McCormick’s resignation left him “ineligible” to remain a shareholder under the Act. Dunn & Black advised McCormick that although the Act requires him to sever any and all “financial interest” in the law firm, his financial interest was limited to what was provided for in his Employment Agreement which he drafted for himself (and the other founders) when they formed the firm in 1992.

McCormick filed a Complaint for Declaratory Judgment on or about September 29, 2008. (CP 1). Thereafter, Dunn & Black filed its Answer, Affirmative Defenses, and Counterclaims. (CP 11). The case was assigned to Judge Allen Nielsen of Stevens County Superior Court, the trial judge from *McCormick I*. Upon McCormick’s Motion for

Change of Judge, this action was re-assigned to Judge David Frazier of Whitman County Superior Court. (CP 8-10).

McCormick filed a Motion for Summary Judgment on December 4, 2008. (CP 12-14). The Motion sought a declaration that McCormick's Employment Agreement had no current force or effect, and could not now be applied to define or limit McCormick's shareholder interest in the law firm. Dunn & Black opposed McCormick's Motion. (CP 25-26). Dunn & Black argued that the elements of judicial estoppel are not present and offered admissible evidence that McCormick and the other founders specifically chose not to create and extend any "buy out rights" to a departing shareholder. This intent derived from their common experiences at a prior law firm. As a result, the founders agreed that a departing shareholder would be entitled to a return of capital and nothing more. (CP 21). McCormick filed a Reply. (CP 27).

Dunn & Black also filed a Motion for Summary Judgment. (CP 16-21). Dunn & Black's Motion sought a determination as a matter of law that McCormick is not entitled to a stock redemption under RCW 18.100 et. seq. or otherwise. McCormick opposed Dunn & Black's Motion and cross-moved for summary judgment. (CP 22-23). Dunn & Black submitted a Reply. (CP 29-30).

The Motions were argued January 7, 2009, in Spokane County Superior Court before Judge David Frazier of Whitman Country Superior Court. The verbatim report of proceedings from the hearing (RP) and the trial court's February 4, 2009, *Order Granting Plaintiff's Motion for Summary Judgment (re Employment Agreement)*; and *Order Denying Defendants' Motion for Summary Judgment and Granting Plaintiff's Cross Motion for Summary Judgment (Re Professional Service Corporation Act) (CP 44)* ("the February 4 Order) are included in the record provided to this Court.

Copies of *McCormick I* and selected portions of the Professional Service Corporation Act, RCW 18.100 et. seq. are included in the Appendix for convenient reference.

#### IV. Argument

##### 1. Standard of Review.

Appellate courts review de novo the summary judgment decisions of trial courts. *Cnty. Telecable of Seattle v. City of Seattle*, 164, Wn.2d 35, 41, 186 P.3d 1032 (2008). An appellate court must make the same inquiry as the trial court in reviewing the evidence and questions of law presented by the case. *Reed v. ANM Health Care*, 148 Wn. App. 264, 268-69, 2008 Lexis 2858 (2008). Summary judgment is proper if there

are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

2. Facts.<sup>2</sup>

Joel McCormick, John Black, and Robert Dunn were partners in another Spokane law firm when they met in December 1992 to discuss forming a law firm. They incorporated McCormick, Dunn & Black PS on December 30, 1992. Each contributed \$5,000 in capital to the corporation and each was named as a director. McCormick served as the firm's President. *McCormick I*, supra, 140 Wn. App. at 878.

When the law firm was formed, the founders discussed and specifically decided they would not create and extend "buy out" rights to a departing shareholder because of their experiences at their prior firm. They decided that a departing shareholder would be entitled to a return of his capital and nothing more. (CP 21, ¶6-7).

At the firm's first meeting of the directors, it was agreed that 300 shares would be issued to Msrs. McCormick, Dunn, and Black in consideration of their respective cash contributions. No actual stock certificates were issued. In 1994, the firm repaid all three shareholders their respective \$5,000 contributions. 140 Wn. App. at 878.

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<sup>2</sup> The Facts are drawn from *McCormick I* and from the pleadings and admissible evidence submitted in the present action.

McCormick, Dunn, and Black signed identical Employment Agreements.<sup>3</sup> McCormick himself drafted the Employment Agreement form as well as the Articles of Incorporation and the Bylaws. 140 Wn. App. 879-80; (CP 21, ¶5).

McCormick was removed as a director and fired as an employee on October 28, 2002. Prior to his termination, McCormick had introduced clients of the firm to members of another law firm he planned to join. In addition, prior to his termination, McCormick was unable to get along with staff members, mismanaged files, allowed uncollectible accounts to accrue, performed substandard work, refused to work on certain cases, and did not provide work for firm associate attorneys. 140 Wn. App. at 879-80.

In April 2003, McCormick sued Dunn & Black, Robert Dunn, and John Black alleging claims for dissolution, breach of fiduciary duty, wrongful wage deprivation, and other claims. The trial court granted summary judgment in favor of Dunn & Black on all claims (except the ERISA claim which was later resolved.) In affirming the trial court, this Court held that “nothing in [RCW 18.100.100] implies a duty to

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<sup>3</sup> In *McCormick I*, McCormick claimed not to remember having signed the Employment Agreement. 140 Wn.App. at 879. McCormick’s present position is that his Employment Agreement had no effect after he was fired.

purchase the shares of an ousted director” and that “courts do not have the power, under the guise of interpretation, to rewrite contracts the parties have deliberately made for themselves.” 140 Wn. App. at 890-92 (citations omitted).

As to the buyout issue, the Court noted the evidence that “the parties did not form the firm with the intent that there would be a stock buyout,” 140 Wn. App. at 890, and that although the Articles of Incorporation and the By-Laws contemplate a stock redemption agreement, the parties never made one. 140 Wn. App. at 891-92.

In August 2008, after *McCormick I*, McCormick retired from the practice of law and resigned his WSBA membership. McCormick’s resignation took effect as of August 12, 2008. (CP 1, 11). Upon resignation, McCormick became “ineligible” to remain a shareholder in Dunn & Black under RCW 18.100.100 and was required to sever all financial interests in the firm. (CP 1, 11).

3. McCormick’s shareholder interests are subject to the Employment Agreement. (Issue no. 1)

In the *February 4 Order*, the trial court erroneously declared as a matter of law that “Plaintiff’s former Employment Agreement has no current force or effect with regard to his shareholder interest in

Defendant Law Firm, and cannot now be applied to define or limit such interest.” (CP 44, pg. 2, lns. 20-22). The trial court held:

[the Employment Agreement] only addresses Mr. McCormick’s employment status and what occurs when that status is terminated, and other things, of course, relating to the employment. But that it does not create any redemption rights or any type of rights or definitions of what occurs with respect to the shareholder interest of Mr. McCormick when he left the corporation, his employment, or now when he is no longer eligible to be a shareholder in the corporation.

(RP, pg. 7, lns. 11-20). For the reasons that follow, the trial court took an improperly narrow view of the Employment Agreement and the fundamental “no buy-out” principle and terms embedded within it.

The trial court’s conclusion that the Employment Agreement does not affect McCormick’s interest as a shareholder ignores the explicit intent of Dunn & Black’s founders, including McCormick. The founders affirmatively chose not to create and extend buy out rights to any shareholder who chose to leave the firm. This intent is established by undisputed evidence that trial court failed to address. In his Declaration, John Black described the founders’ shared experience and how it influenced their intentions in forming Dunn & Black:

6. We had practiced together as shareholders ... for many years prior to forming the new firm. During our meetings in December 1992 prior to formation of McCormick, Dunn & Black, P.S. one of the founding principals that we discussed for our new firm was the issue of whether the firm would provide a buyout to outgoing principals. In our old firm, one of the key problems that the law firm had encountered was that there were numerous senior lawyers who had recently decided to withdraw or retire from the firm and that had saddled that firm with significant buyouts of their shareholder interests payable over a period of time. The effect of that situation was that there was little or no monies left for the practicing lawyers for any raises, which in turn had lead to the departure of many other lawyers in that firm. *The three of us specifically discussed and agreed that McCormick, Dunn & Black, P.S. would be founded on the principal that there would be no buyouts for any leaving principal/shareholder other than the original monies which each contributed to form the new firm. We specifically agreed that the intent would be that the practicing partners would maximize their income during the life of the firm but that if any of us left the firm or their employment was terminated, that they would only be entitled to the return of the original money contribution.* This would in turn ensure that incoming attorneys would not be saddled with significant buyouts after they had left the firm and at a time when they were providing no benefit to the firm after their departure. *We absolutely rejected the concept of a 'buyout' should any of us retire or withdraw from the firm. We discussed and agreed that if a shareholder left the law firm, the shareholder would receive back his \$5,000 in capital and would be entitled to nothing more."*

7. [Mr. Dunn] and I left it to Mr. McCormick to draft the documents necessary to implement this intent and expected him to do so as he promised he would. *It was my belief that the employment agreement that Mr. McCormick prepared for McCormick, Dunn & Black and*

*signed by the three of us reflects our agreement concerning a buyout. I still believe that to be the case.*

(CP 21)(emphasis added).

This trial court did not address the effect of Mr. Black's testimony but this Court must. See *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998)(In reviewing a summary judgment order, an appellate court accomplishes its charge by examining all evidence presented to the trial court). Mr. Black's testimony about the founders' "no buy-out" mindset speaks directly to the central issues of this case. It links the founders' intent directly to the Employment Agreement and demonstrates that the Agreement was a vital instrument in shaping the relationship between the founders. Indeed, Section 18 articulates the same principle: upon termination the attorney-shareholder receives a return of capital and nothing more. Section 18 states:

#### SECTION EIGHTEEN TERMINATION

This agreement may be terminated by either party upon thirty days written notice to the other. Termination by the corporation requires a two-thirds vote of corporate shareholders. The terminating attorney shall be entitled to payment of the amount of his initial stock contribution to the firm, said amount being payable over a three year period in equal monthly installments. The terminating attorney shall not be entitled to any other amounts, unless agreed to by the remaining principals.

(CP 25, Ex. A; emphasis added); *McCormick I*, 140 Wn. App. at 879.

The trial court's conclusion that that the Employment Agreement did not apply to McCormick's shareholder interests followed from McCormick's implausible argument that the Agreement was effective only during the McCormick's employment. This conclusion cannot be reconciled with the evidence of founders' intent. Moreover, the conclusion is inconsistent with provisions of the Employment Agreement itself. For example, Section 20 states:

This agreement shall be binding upon the parties hereto, their successors, and assigns, and to the estate, heirs, legatees, executors, administrators, and beneficiaries of the attorney.

(CP 25, Ex. A). Clearly, any successor of a shareholder remains bound by the Agreement whether the shareholder is alive or deceased, or employed, terminated, or retired.

The touchstone of contract interpretation is the parties' intent. See *Tanner Elec. Co-op. v. Puget Sound Power*, 128 Wn.2d 656, 674, 911 P.2d 1301 (1996). Here, the firm's Articles, By-Laws, and Employment Agreements were drafted (by McCormick himself) with the intent to form and manage a law firm in a manner different from their prior firm. The founders explicitly resolved among themselves that a departing or terminated employee-shareholder would have no buy-out rights and would receive the return of his capital and nothing more. The

evidence supporting this intent is not in dispute. The trial court erroneously failed to consider the Employment Agreement in the context of this evidence. The trial court should have ruled that McCormick's shareholder interests are shaped, defined, and limited by Section 18 of the Employment Agreement. The trial court's failure to do so is reversible error.

In *McCormick I*, this Court reviewed RCW 18.100.100 and held there that it imposes no duty to repurchase the shares of "an ousted director." The Court noted that the parties made no share redemption agreement and reiterated the principle that "[c]ourts may not ... substitute their judgment for that of the parties to rewrite the contract or interfere with the internal affairs of corporate management. 140 Wn. App. at 891-92 (citations omitted.) McCormick's resignation from the WSBA left him ineligible to remain a Dunn & Black shareholder but this change in status cannot retroactively alter the terms and principles upon which the law firm was founded. McCormick alone decided to resign from the WSBA. That decision cannot somehow create a duty upon Dunn & Black that did not otherwise exist. Indeed, by applying the Act in a manner contrary to the founders' intent, the trial court inserted itself into the management of Dunn & Black's corporate affairs and departed from the fundamental holding of *McCormick I*.

4. Judicial estoppel does not apply to bar Dunn & Black's contention that McCormick's shareholder interests are shaped by the Employment Agreement. (Issue no. 2)

The trial court mistakenly invoked judicial estoppel to bar Dunn & Black's argument that the Employment Agreement defines and limits McCormick's shareholder interests. (RP, pg.62, Ins. 10-15). The trial court accepted McCormick's argument that Dunn & Black was attempting to portray the Employment Agreement as a stock redemption agreement when Dunn & Black had argued to the contrary in *McCormick I*. (CP 13, pg. 7-9).

This argument distorts and mischaracterizes Dunn & Black's position. All parties agree, and this Court recognized in *McCormick I*, that no stock redemption agreement was ever executed. Dunn & Black's contention is simply that the founders agreed there would be no buy-out and that a departing shareholder should receive nothing but the return of his capital upon leaving the firm. (CP 21). This intent, expressed in Section 18 of the Employment Agreement, establishes a ceiling on the value of an equity interest that McCormick may claim but that does not mean the Employment Agreement is held out as a stock redemption agreement. It means the Employment Agreement establishes parameters on the value of a departing shareholder's equity interest. It is misguided to assume that only a stock redemption agreement can

perform that function when the Employment Agreement addresses the matter too. It was error to estop Dunn & Black from advancing these critical points of law and fact.

Judicial estoppel is an equitable rule that prevents a party from taking a position in one court proceeding then later seek an advantage by taking a clearly inconsistent position in another proceeding. See *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007). The elements of judicial estoppel are: (1) the party to be estopped must be asserting a position inconsistent with an earlier position; (2) the party seeking estoppel must have relied upon and been misled by the other party's first position; and (3) injustice would result from allowing the estopped party to change positions. See *Save Columbia Credit Un. v. Columbia Cred. Un.*, 134 Wn. App. 175, 186, 139 P.3d 386 (2006).

The trial court did not apply these elements to the facts. In fact, Dunn & Black has taken no inconsistent positions nor has Plaintiff relied upon or been misled by any earlier position. In the absence of reliance and an inconsistency, there can be no resulting injustice. The doctrine simply does not fit this case. The Washington Supreme Court has warned that judicial estoppel should not be invoked in a technical manner or as "a sword to be wielded by adversaries" unless necessary to secure substantial equity. *Miller v. Campbell*, 164 Wn.2d 529, 544, 192 P.3d

352 (2008). Nevertheless, the trial court accepted McCormick's argument at face value and without thorough analysis. In so doing, the trial court committed legal error.

5. Section 18 of the Employment Agreement is a "private agreement" within the meaning of RCW 18.100.116(1) which limits McCormick to the return of his capital. (Issue no. 3)

In the *February 4 Order*, the trial court denied Dunn & Black's Motion for Summary Judgment and granted McCormick's Cross-Motion as to the meaning and effect of Washington's Professional Service Corporation Act ("the Act"), RCW 18.100 et. seq. The trial court declared "as a matter of law that [McCormick's] shares have not been transferred or extinguished, and [the Act], including both RCW 18.100.116(1) and (2) applies to govern the rights and obligations of the parties with regard to the shares currently held by Plaintiff." (CP 44; VT, pgs. 8-11).

The trial court's ruling was fundamentally wrong in important respects. The trial court correctly found that McCormick's resignation left him ineligible to be a shareholder of Dunn & Black and that McCormick must "divest himself of his ownership interest." (RP, pg. 63, ln. 15). Pursuant to RCW 18.100.060, only individuals "duly licensed or otherwise legally authorized" to practice law in the State of Washington are eligible to be shareholders in a law firm organized under

the Act. When an eligible shareholder becomes ineligible, the shareholder must “sever ... all financial interests” in the corporation. RCW 18.100.100. McCormick changed from an “eligible person” to an “ineligible person” (the terms are defined in RCW 18.100.030) when he resigned from the WSBA. (CP 1, 11). However, the trial court erred in ruling that divesting ownership under the Act means Dunn & Black must pay McCormick “fair value” for his equity interest.

RCW 18.100.116<sup>4</sup> states in pertinent part:

(1) *If:*

(a) (i) . . . . .

(ii) *A shareholder of a professional corporation becomes an ineligible person;*

(iii) . . . . .

(iv) . . . . .; and

(b) *The shares held by the deceased shareholder or by such ineligible person are less than all of the outstanding shares of the corporation, then*

*the shares held by the deceased shareholder or by the ineligible person may be transferred to remaining shareholders of the corporation or may be redeemed by the corporation pursuant to terms stated in the articles of*

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<sup>4</sup> RCW 18.100.116(1)(a)(ii), upon which McCormick relies, was added to the Act in 1997, five years after the law firm was formed. (Appendix, C-1). Accordingly, McCormick may not rely upon the existence of the Act itself to contend that Dunn & Black must buy out his equity interest.

*incorporation or by laws of the corporation, or in a private agreement. In the absence of any such terms, such shares may be transferred to any individual eligible to be a shareholder of the corporation.*

*(2) If such a redemption or transfer of the shares held by a deceased shareholder or an ineligible person is not completed within twelve months after the death of the deceased shareholder or the transfer, as the case may be, such shares shall be deemed to be shares with respect to which the holder has elected to exercise the right of dissent described in chapter 23B.13 RCW and has made written demand on the corporation for payment of the fair value of such shares. The corporation shall forthwith cancel the shares on its books and the deceased shareholder or ineligible person shall have no further interest in the corporation other than the right to payment for the shares as is provided in RCW 23B.13.250. For purposes of the application of RCW 23B.13.250, the date of the corporate action and the date of the shareholder's written demand shall be deemed to be one day after the date on which the twelve-month period from the death of the deceased shareholder, or from the transfer, expires.*

No terms of redemption are established by Dunn & Black's Articles of Incorporation, By-Laws, or otherwise. However, the statute speaks not only of "redemption" but also of the "transfer" of the shares of an ineligible person.

Neither "transfer" nor "private agreement" is defined by the Act. Accordingly, each term is accorded its ordinary meaning. *Glavis v. Dept. of Trans.*, 140 Wn. App. 693, 709, 167 P.3d 584 (2007) citing *American Legion v. City of Walla Walla*, 116 Wn.2d 1, 8, 802 P.2d 784 (1991). There is no legal or factual reason to limit the term "private

agreement” to mean a share redemption agreement, particularly when considering what constitutes a “transfer” (as opposed to a “redemption”) under the Act. Section 18 of the Employment Agreement<sup>5</sup> should be deemed to be a “private agreement” for purposes of RCW 18.100.116(1)(b).

The common dictionary meaning of “transfer” is: “to make over the possession or legal title of to another” or “to make over the possession or control of” something. (CP 30, Ex. C). Nothing in this definition requires that the taking of possession or legal title be accompanied by a payment or an exchange of value. But even if a “transfer” does contemplate payment, the agreed value given for a “transfer” of McCormick’s equity interest is defined and limited in Section 18 (the “private agreement”) to the return of McCormick’s capital.

This interpretation of RCW 18.100.116(1) comports fully with the plain meaning of the statutory language and the evidence that the founders

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<sup>5</sup> Again, Section 18 provides in pertinent part:

...The terminating attorney shall be entitled to payment of the amount of his initial stock contribution to the firm, said amount being payable over a three year period in equal monthly installments. The terminating attorney shall not be entitled to any other amounts, unless agreed to by the remaining principals.

(CP 25, Ex. A); *McCormick I*, 140 Wn. App. at 879.

of Dunn & Black intended to extend no buy-out rights to a departing shareholder. There is also no dispute that Dunn & Black tendered to McCormick the return of his capital as required by Section 18. (CP 11). McCormick rejected it. Under these circumstances, the trial court erred in failing to hold that the requirements of RCW 18.100.116(1) have been met and the “transfer” of McCormick’s shares to Dunn & Black is complete whether McCormick accepts the tender or not.

6. RCW 18.100.116(2) has no application to this case.  
(Issue no. 4)

The trial court’s decision concerning the interpretation and effect of the Act mistakenly held that RCW 18.100.116(2) applies to this case. In fact, this provision does not apply.

RCW 18.100.116(2) is not a model of clarity. By its terms, it appears intended to place a twelve month limitation on the disposition of shares held by a deceased shareholder or ineligible person so that the management of the corporation’s affairs is not indefinitely affected. If disposition is not concluded within the 12 month period, the corporation must cancel the shares and the dissenting shareholder provisions of RCW 23B.13 et. seq. take effect. However, it does not apply in all circumstances where there is a dispute over the valuation and is

particularly inapplicable where, as here, the “transfer” is subject to a “private agreement” pursuant to RCW 18.100.116(1).

In any case, RCW 18.100.116(2) cannot possibly apply here given the trial court’s ruling that no “transfer” occurred as a result of McCormick’s resignation. At McCormick’s insistence, the trial court ruled that [McCormick’s] shares have not been transferred or extinguished ....” (CP 44). The trial court stated at the January 7 hearing: “... I feel as a matter of law that the fact that Mr. McCormick resigned from the bar and became ineligible doesn’t automatically result in a transfer.” (RP, pg. 13). This ruling does not help McCormick’s position. If no “transfer” took place upon resignation, what event triggers the beginning of the 12 month period specified in RCW 18.100.116(2)? Again, subsection (2) cannot apply until 12 months has passed following a “transfer:”

*(2) If such a redemption or transfer of the shares held by ... an ineligible person is not completed within twelve months after ...the transfer ...*

Washington courts must construe all parts of a statute to give effect and meaning to each provision. See *Morgan v. Johnson*, 137 Wn.2d 887, 892, 976 P.2d 619 (1999). By its own terms, RCW 18.100.116(2) does not apply unless a “transfer” remains incomplete 12

months after the “transfer.” Neither the trial court nor McCormick has identified an event that qualifies as a “transfer.” All that was established by the by the *February 4 Order* is that McCormick’s resignation is not a “transfer.” Consequently, RCW 18.100.116(2) cannot apply.

Indeed, if the trial court was incorrect and McCormick’s resignation is a “transfer,” then the trial court erred in entering the *Decision & Order re Plaintiff’s Petition for Further Relief*, dated April 3, 2009, (“*Decision & Order*”).<sup>6</sup> (CP 58). In the *Decision & Order*, the trial court authorized McCormick’s access to corporate records on the rationale that McCormick remains a Dunn & Black shareholder. McCormick cannot have it both ways. If he remains a shareholder despite his resignation, there has been no “transfer” triggering RCW 18.100.116(2). If there was a “transfer” upon resignation, then McCormick is not a shareholder and the trial court should not have compelled Dunn & Black to produce corporate records on the premise that McCormick had that status. In any event, this Court

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<sup>6</sup> Dunn & Black contested McCormick’s Petition for Further Relief in proceedings leading to the *Decision & Order* and unsuccessfully sought to stay both the *February 4 Order* and the *Decision & Order*. Because Dunn & Black had no choice but to comply with the *Decision & Order*, assigning error to it now would be pointless. Nevertheless, Dunn & Black believe the *Decision & Order*, like the *February 4 Order*, is contrary to law.

need not resolve the point because the case is completely and properly resolved under RCW 18.100.116(1)(b).

#### V. Conclusion

This Court held in *McCormick I* that “McCormick is not entitled to a share buyout” upon the termination of his employment. 140 Wn. App. at 892. McCormick’s resignation from the WSBA should not lead to a different outcome. The trial court should have held that upon resignation, McCormick’s equity interest transfers to Dunn & Black upon the return of his capital because the Employment Agreement functions as a “private agreement” under RCW 18.100.116(1)(b) and the Agreement establishes, defines, and limits Dunn & Black’s obligations. Any other conclusion contradicts the considered intentions of Mssrs. Dunn, Black, and McCormick when they founded the law firm in 1992.

This Court should vacate the trial court’s *February 4 Order* and direct the entry of summary judgment in favor of Dunn & Black.

Respectfully submitted this 13<sup>th</sup> day of July, 2009.

KARR TUTTLE CAMPBELL

By: 

Thomas D. Adams, WSBA #18470  
Attorneys for Appellant-Defendant  
Dunn & Black, P.S.

## APPENDIX



LEXSEE 140 WN. APP. 873

JOEL C. MCCORMICK III, *Appellant*, v. DUNN & BLACK, PS, ET AL., *Respondents*.

No. 35948-1-II

COURT OF APPEALS OF WASHINGTON, DIVISION TWO

140 Wn. App. 873; 167 P.3d 610; 2007 Wash. App. LEXIS 2658

September 18, 2007, Filed

**SUBSEQUENT HISTORY:** Review denied by McCormick v. Dunn & Black, PS, 163 Wn.2d 1042, 187 P.3d 270, 2008 Wash. LEXIS 526 (Wash., June 4, 2008)

**SUMMARY:**

## WASHINGTON OFFICIAL REPORTS SUMMARY

**Nature of Action:** An attorney who was terminated as an employee and removed as a director of a law firm that was incorporated as a professional service corporation sought damages from the firm and the remaining two directors/majority shareholders, claiming that (1) the corporation was actually a partnership that had dissolved, (2) the majority shareholders breached their fiduciary duties, and (3) the corporation should be judicially dissolved for "oppressive" conduct. The plaintiff also claimed a violation of the Employee Retirement Income Security Act of 1974 and wrongful deprivation of wages.

**Superior Court:** The Superior Court for Spokane County, No. 03-2-02522-9, Allen Nielson, J., on July 18, 2006, entered summary judgments in favor of the defendants.

**Court of Appeals:** Holding that the properly formed corporation was not a partnership, that the majority shareholders did not breach any fiduciary duties to the plaintiff, and that the corporation did not engage in oppressive conduct, the court *affirms* the judgments.

**HEADNOTES**

## WASHINGTON OFFICIAL REPORTS HEADNOTES

**[1] Judgment -- Summary Judgment -- Review -- Role of Appellate Court.** An appellate court reviews a summary judgment de novo, applying the same standard as the trial court under CR 56(c). The court views the facts submitted and the reasonable inferences from those facts in the light most favorable to the nonmoving party and decides whether reasonable persons could reach but one conclusion from all the evidence.

**[2] Appeal -- Assignments of Error -- Authority -- Lack of Citations to Authority -- Inference of No Authority.** Where no authorities are cited in support of a proposition, an appellate court is not required to search for authority and may assume that counsel has found none after diligent search.

**[3] Partnership -- Formation -- Incorporation of Business -- In General.** Under RCW 25.05.055(2), a business incorporated under Title 23B RCW cannot be a partnership under the Revised Uniform Partnership Act (chapter 25.05 RCW).

**[4] Partnership -- Formation -- Incorporation of Business -- Prior Meetings and Discussions -- Effect.** Evidence that individuals met to discuss forming a business together and soon thereafter filed a certificate of incorporation with the State is insufficient to establish that the individuals formed a partnership before they formed a corporation.

**[5] Corporations -- Corporate Form -- Stockholders Equally Sharing Profits and Losses -- Effect.** The fact

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that shareholders in a closely-held corporation agree to equally share profits and losses does not change the corporation into another business form.

**[6] Corporations -- Stock -- Repurchase by Corporation -- Compliance With Statutory Procedures -- Necessity.** A corporation cannot redeem outstanding shares of stock absent compliance with the procedures set forth in RCW 23B.06.030(3) and cannot, under RCW 23B.06.030(4), redeem all shares.

**[7] Corporations -- Dissolution -- Discretion of Court -- In General.** The judicial dissolution of a corporation is at the discretion of the trial court.

**[8] Corporations -- Dissolution -- Factors -- Benefit to Shareholders -- Injury to Public.** In deciding whether to dissolve a corporation in a proceeding by a shareholder under RCW 23B.14.300(2), a court must consider whether dissolution will be beneficial or detrimental to all of the shareholders or will be injurious to the public.

**[9] Corporations -- Dissolution -- Disfavored Status -- In General.** The dissolution of a corporation in a proceeding by a shareholder under RCW 23B.14.300(2) is a drastic remedy that a court should approach with extreme caution.

**[10] Corporations -- Dissolution -- Grounds -- Proof -- Shifting Burdens of Production.** Once a minority shareholder in a corporation who seeks to have the corporation dissolved under RCW 23B.14.300(2) demonstrates overreaching conduct by those in control of the corporation, the burden shifts to those in control to show legitimate business justifications for their conduct.

**[11] Corporations -- Officers -- Personal Liability -- Business Judgment -- Elements.** Under the "business judgment rule," corporate management is immunized from liability in a corporate transaction where (1) the decision to undertake the transaction is within the power of the corporation and (2) there is a reasonable basis to indicate that the transaction was made in good faith.

**[12] Corporations -- Dissolution -- Disfavored Status -- Deference to Corporate Management.** In a shareholder action to dissolve a corporation under RCW 23B.14.300(2), the shareholder's claims must be considered against the backdrop of established deference to corporate governance.

**[13] Corporations -- Dissolution -- Grounds -- Oppression -- What Constitutes -- Reasonable Expectations Test.** For purposes of RCW 23B.14.300(2)(b), under which a corporation may be judicially dissolved in a proceeding by a shareholder if the corporation's directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent, whether a corporate act is "oppressive" may be determined by either of two tests, one of which is the "reasonable expectations" test. The "reasonable expectations" test defines "oppression" as a violation by the majority of the reasonable expectations of the minority. "Reasonable expectations" are those spoken and unspoken understandings on which the founders of a venture rely when commencing the venture. Application of the reasonable expectations test is most appropriate in situations where the complaining shareholder was one of the original participants in the venture--one who committed capital and resources.

**[14] Corporations -- Dissolution -- Grounds -- Burden and Degree of Proof.** A corporate shareholder seeking dissolution of the corporation under RCW 23B.14.300(2) has the burden of establishing the requisite jurisdictional facts and equitable grounds for dissolution by a preponderance of the evidence.

**[15] Corporations -- Directors -- Removal -- Absence of Written Notice -- Validity -- Articles of Incorporation and Bylaws.** A majority of shareholders in a corporation may vote to remove a director from office without providing written notice of the removal where the corporation's articles of incorporation and bylaws allow a director to be removed from office with or without cause by a majority of shareholders and nothing in the articles or bylaws requires written notice of removal.

**[16] Corporations -- Dissolution -- Grounds -- Oppression -- What Constitutes -- Exclusion From Shareholders Meetings -- No Evidence of Meetings.** A minority shareholder in a corporation does not establish that corporate officers or directors engaged in "oppressive" conduct as to justify dissolution of the corporation under RCW 23B.14.300(2)(b) by excluding the minority shareholder from shareholder meetings if the minority shareholder fails to present evidence that the officers and directors actually held any shareholder meetings.

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**[17] Corporations -- Dissolution -- Grounds -- Oppression -- Reasonable Explanation -- Effect.** A corporate act for which there is a reasonable explanation does not constitute "oppressive" conduct as to justify dissolution of the corporation in a proceeding by a shareholder under RCW 23B.14.300(2).

**[18] Corporations -- Dissolution -- Grounds -- Oppression -- Exclusion of Removed Director From Managerial Decisions.** A corporation's officers or directors do not engage in "oppressive" conduct as to justify dissolution of the corporation in a proceeding by a shareholder under RCW 23B.14.300(2) by excluding a removed director from managerial decisions.

**[19] Contracts -- Construction -- Amendment -- Judicial Amendment.** Courts may not, under the guise of contract interpretation, interfere with the freedom of contract or rewrite a contract that parties have deliberately made for themselves.

**[20] Corporations -- Management -- Judicial Interference -- Validity.** Courts may not interfere with the internal affairs of corporate management.

**[21] Corporations -- Professional Service Corporation -- Termination of Employee -- Redemption of Stock -- Necessity.** RCW 18.100.100 does not require a professional service corporation to redeem the shares of a terminated employee.

**[22] Contracts -- Implied Contracts -- Judicial Formation -- Validity.** Courts may not, based on general considerations of abstract justice, make a contract for parties that they did not make themselves.

**[23] Corporations -- Professional Service Corporation -- Dissolution -- Grounds -- Oppression -- Termination of Employee -- Failure To Redeem Stock -- Absence of Redemption Agreement.** Absent the existence of a stock redemption agreement, a professional service corporation does not engage in "oppressive" conduct as to justify dissolution of the corporation in a proceeding by a shareholder under RCW 23B.14.300(2) by failing to redeem the shareholder's shares after the shareholder's employment by the corporation is terminated.

**[24] Attorney and Client -- Professional Service Corporation -- Termination of Attorney -- Redemption of Stock -- Necessity -- Absence of**

**Redemption Agreement -- Ethical and Confidentiality Concerns.** The fact that ethical and confidentiality issues might arise as a result of an attorney retaining shares in a professional service corporation from which the attorney has been terminated does not justify a court requiring the corporation to redeem the attorney's shares in the absence of a stock redemption agreement.

**[25] Corporations -- Stock -- Stockholders -- Fiduciary Duties -- Breach -- Liability -- Test.** A shareholder in a corporation is not liable for breach of fiduciary duty unless: (1) the shareholder breached a fiduciary duty to the corporation and (2) the breach was a proximate cause of the losses sustained.

**[26] Corporations -- Directors -- Freedom To Decide Corporate Affairs.** A corporation's directors are its executive representatives charged with its management; courts will not interfere with the reasonable and honest exercise of the directors' judgment.

**[27] Corporations -- Directors -- Fiduciary Duties -- Breach -- What Constitutes -- Distribution of Bonuses to Current Employees -- Exclusion of Terminated Shareholder.** A corporation's directors do not breach a fiduciary duty to a terminated shareholder employee by distributing bonuses to current employees as an exercise of a regular business practice.

**[28] Corporations -- Directors -- Fiduciary Duties -- Breach -- What Constitutes -- Exclusion of Removed Director From Managerial Decisions.** A corporation's directors do not breach a fiduciary duty to a removed director by excluding the director from managerial decisions.

**[29] Appeal -- Decisions Reviewable -- Moot Questions -- In General.** An appellate court may decline to consider a moot issue.

**COUNSEL:** James M. Kalamon (of *Paine Hamblen Coffin Brooke & Miller, LLP*) and Devra S. Hermosilla (of *Bullard Smith Jernstedt Wilson*), for appellant.

Thomas D. Adams (of *Karr Tuttle Campbell*); and Pamela H. Salgado, Jerret E. Sale, and Deborah L. Carstens (of *Bullivant Houser Bailey, PC*), for respondents.

**JUDGES:** [\*\*\*1] PENOYAR, J.

**OPINION BY: PENOYAR****OPINION**

[\*877] [\*\*612] ¶1 PENOYAR, J. -- Joel McCormick III appeals the trial court's grant of summary judgment dismissing his claims. In 1992, McCormick, Robert Dunn, and John Black formed a corporation. Each made a \$5,000 cash contribution to the corporation that was repaid to them in 1994. Each of the parties received 100 shares of stock. Following McCormick's employment termination, he sought to have his shares redeemed. McCormick sued, claiming that the corporation was actually a partnership, the majority shareholders breached their fiduciary duties, and the corporation should be judicially dissolved for oppression. Dunn and Black filed summary judgment motions seeking dismissal of these [\*878] claims, which the trial court granted. McCormick appeals the trial court's dismissal of his claims for (1) dissolution of partnership, (2) breach of fiduciary duty, and (3) dissolution of the corporation. He also appeals the trial court's denial of his summary judgment motion regarding the employment agreement. We affirm.

**FACTS**

¶2 Black, McCormick, and Dunn met in December 1992 to discuss forming a law firm. The law firm McCormick, Dunn, and Black, PS, incorporated on December 30, 1992, by filing a certificate [\*\*\*2] of incorporation. The articles of incorporation listed Black, Dunn, and McCormick as the incorporators. The three incorporators were also the initial directors. Dunn was the secretary, treasurer, and chairman of the board of directors for the firm. Black was the vice president. McCormick was the president. Each of the incorporators made a \$5,000 cash contribution to the corporation.

[\*\*613] ¶3 The articles state that "[t]he aggregate number of shares of stock that the Corporation is authorized to issue is three hundred (300) at \$1.00 par value." 1 Clerk's Papers (CP) at 98. At the first meeting, the directors agreed that 300 shares of stock were to be issued in consideration for the three shareholders' \$5,000 cash contribution. McCormick, Dunn, and Black each received 100 shares. No actual stock certificates were issued.

¶4 In 1994, the firm repaid all three shareholders their \$5,000 capital contributions. A memorandum dated August 4, 1994, which Dunn signed as secretary, states:

A meeting of the Board of Directors was held this date. It was decided among Joel C. McCormick, Robert A. Dunn, and John C. Black that bonus checks in the amount of \$5000.00 each are to be issued to each of [\*\*\*3] the three partners of McCormick, Dunn & Black.

[\*879] 2 CP at 238. On May 28, 1993, the three directors unanimously agreed that the firm would provide \$300,000 worth of life insurance for the benefit of each principal attorney in the firm, "the proceeds at death to serve specifically for the purpose of eliminating any buy-out obligation of the firm or its surviving shareholders in the event that one of the attorney principals should die." 2 CP at 284-85. They eventually discontinued the life insurance.

¶5 Black and Dunn both signed employment agreements. Whether McCormick signed an employment agreement is in dispute. McCormick asserts that he cannot recall whether he had ever seen or signed an employment agreement for himself and cannot find a written employment agreement in his personal records. In his deposition, Dunn stated that he saw McCormick's employment agreement before turning it over to McCormick for copying. McCormick signed as a witness to Black and Dunn's employment agreements. The employment agreement states:

This agreement may be terminated by either party upon thirty days written notice to the other. Termination by the corporation requires a two-thirds vote of corporate shareholders. [\*\*\*4] The terminating attorney shall be entitled to payment of the amount of his initial stock contribution to the firm, said amount being payable over a three year period in equal monthly installments. The terminating attorney shall not be entitled to any other amounts, unless agreed to by the remaining principals.

5 CP at 820. McCormick drafted the employment agreement. According to Black and Dunn, McCormick also drafted the articles and the bylaws.

¶6 McCormick introduced members of the Herrig,

Vogt, and Stoll law firm to clients McCormick, Dunn, and Black, PS, represented. Dunn and Black felt that McCormick was unable to get along with staff members, mismanaged files, allowed uncollectible accounts to accrue, performed substandard work, refused to work on certain cases, and did not provide work for associates. They terminated McCormick as a firm employee on October 28, 2002. McCormick's employment [\*880] was terminable upon 30 days written notice. <sup>1</sup> Dunn and Black testified that they removed McCormick as a director at an October 10, 2002 meeting. McCormick contends that he is still a director, absent written proof to the contrary.

<sup>1</sup> Although McCormick disputes the existence of an employment contract, [\*\*\*5] he does not dispute that his employment was terminable upon 30 days written notice.

¶7 The articles state that "[i]f any Director, officer, shareholder, agent or employee of the Corporation becomes legally disqualified to render services as an attorney within the State of Washington, he shall forthwith sever all employment with and financial interest in the Corporation." 1 CP at 99. The bylaws the firm adopted state:

The number of Directors of the Corporation shall initially be three (3). Each Director shall hold office until his death, resignation, retirement, removal, disqualification or his successor is elected and qualifies. Directors shall be shareholders of this Corporation and legally qualified to render services as lawyers in the State of Washington.

1 CP at 103. The bylaws go on to say:

Directors may be removed from office with or without cause by a vote of shareholders [\*\*614] holding a majority of the shares entitled to vote at an election of Directors. However, unless the entire Board is removed, an individual Director may not be removed, if the number of shares voting against the removal would be sufficient to elect a Director, if such shares were voted cumulatively at an annual [\*\*\*6] election. If any Directors are so removed, new Directors may be

elected at the same meeting.

1 CP at 104. The firm adopted the bylaws at the first board of director's meeting.

¶8 The firm conducted business as a corporation. The board of directors held regular meetings. The firm filed corporate income tax returns with the Internal Revenue Service. As a corporation, the firm had bank accounts, insurance, a lease, and loans. The firm filed annual reports as a corporation with the secretary of state for Washington. [\*881] When referring to each other, the directors sometimes called each other principals and sometimes partners. The firm, currently known as Dunn and Black, PS, remains incorporated in Washington. The articles stated that the corporation's existence would be perpetual.

¶9 On April 15, 2003, McCormick sued Dunn and Black, PS, asserting claims for (1) dissolution of partnership, (2) breach of fiduciary duty, (3) dissolution of corporation, (4) violation of the Employee Retirement Income Security Act of 1974 (ERISA), <sup>2</sup> and (5) wrongful deprivation of wages. <sup>3</sup> Dunn and Black filed a motion for summary judgment on McCormick's partnership claim. McCormick filed a cross-motion for summary judgment on the [\*\*\*7] partnership issue. The trial court granted Dunn and Black's summary judgment motion and denied McCormick's motion. The trial court found that, as a matter of law, the corporation had not dissolved. It found that McCormick, Dunn, and Black did not form a partnership. The trial court found that at the very outset the three promoters wanted a corporation, not a partnership. The trial court dismissed McCormick's dissolution of partnership claim.

<sup>2</sup> 29 U.S.C. § 1140.

<sup>3</sup> Dunn and Black filed counterclaims, alleging (1) fraudulent misrepresentation, (2) negligent misrepresentation, (3) breach of contract, (4) breach of good faith and fair dealing, (5) promissory estoppel, (6) breach of fiduciary duty, and (7) declaratory judgment. The trial court granted McCormick's summary judgment motion dismissing the counterclaims. Because Dunn and Black did not appeal this ruling, we are not reviewing the counterclaims.

¶10 Dunn and Black filed a motion seeking dismissal of McCormick's claims for corporate dissolution, breach of fiduciary duty, and wrongful withholding of wages.

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McCormick filed a motion seeking a declaration that the employment agreement did not preclude his claim that he was entitled to [\*\*\*8] a buyout. The trial court granted the summary judgment motions, except McCormick's motion regarding the employment agreement.<sup>4</sup> McCormick obtained a CR 54(b) order from the trial court with respect to [\*882] the court's summary judgment orders, and this appeal followed.

4 The ERISA claim remains set for trial.

## ANALYSIS

### I. DISSOLUTION OF PARTNERSHIP

[1] ¶11 We review a grant of summary judgment de novo, applying the same standard as the trial court. *City of Seattle v. Mighty Movers, Inc.*, 152 Wn.2d 343, 348, 96 P.3d 979 (2004). Summary judgment is appropriate only if the pleadings, affidavits, depositions, and admissions on file demonstrate the absence of any genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). We must consider all facts submitted and all reasonable inferences from them in the light most favorable to the nonmoving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A court should grant the summary judgment motion only if, from all the evidence, reasonable persons could reach but one conclusion. *Wilson*, 98 Wn.2d at 437.

¶12 McCormick argues that the parties created a de facto partnership. While conceding that the firm was [\*\*\*9] incorporated, McCormick argues that "incorporation does not defeat the existence of a partnership." [\*\*615] Appellant's Br. at 18. Relying on *Stipcich*,<sup>5</sup> McCormick asserts that an entity may be a partnership based on the parties' intent and conduct even though it is incorporated.

5 *Stipcich v. Marinovich*, 13 Wn.2d 155, 124 P.2d 215 (1942).

¶13 McCormick asserts that the parties formed a partnership at their initial meeting in December 1992 when they decided to enter into business together. McCormick points to the equal capital contribution and their oral agreement to share profits and losses equally as evidence of an intention to form a partnership. McCormick asserts that the firm neglected corporate requirements, including not: (1) issuing stock certificates,

(2) providing notice for meetings, and (3) holding meetings. McCormick argues that [\*883] because a partnership has a statutory obligation under RCW 25.05.300(1) to dissolve and wind up its affairs upon dissociation, the firm must be dissolved.

¶14 McCormick's reliance on *Stipcich* is misplaced. In *Stipcich*, the court found that the parties intended to form a partnership when they entered into a contract for a business relationship. *Stipcich*, 13 Wn.2d 155. [\*\*\*10] The contract did not specify the nature of the business relationship. *Stipcich*, 13 Wn.2d at 162. One of the parties owned a corporation, which was mentioned in the contract. *Stipcich*, 13 Wn.2d at 156. However, the court did not find that the corporation was actually a partnership. Rather, the court found that the corporation was distinct from a separate partnership between the parties. *Stipcich*, 13 Wn.2d at 161. In the other cases McCormick cited, the courts found a partnership where there was no written or express agreement between the parties. See *Malnar v. Carlson*, 128 Wn.2d 521, 910 P.2d 455 (1996); *Goeres v. Ortquist*, 34 Wn. App. 19, 658 P.2d 1277 (1983). In neither of these two cases was the business incorporated.

[2-5] ¶15 Under the Washington Revised Uniform Partnership Act (RUPA), chapter 25.05 RCW, "[a]n association formed under a statute other than this chapter, a predecessor statute, or a comparable statute of another jurisdiction is not a partnership under this chapter." RCW 25.05.055(2). A "corporation" is an association formed under a statute other than the RUPA. See Washington Business Corporation Act, Title 23B RCW. A corporation begins to exist the day it files the articles of incorporation. RCW 23B.02.030(1). [\*\*\*11] McCormick does not cite to, nor could we find, any case law that an incorporated business can actually be a partnership based on the parties' conduct. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *State v. Logan*, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000) (quoting *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962)). In light of RCW 25.05.055(2), McCormick's partnership argument is not persuasive.

[\*884] ¶16 McCormick argues that the parties formed a partnership before they incorporated the firm. The trial court found that at the very outset, the three

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promoters wanted a corporation, not a partnership. The record indicates that the parties met in December 1992 to form a business. On December 30, 1992, they filed a certificate of incorporation for the firm. The written documents in the record clearly show that McCormick and the other parties intended to form a corporation and not a partnership.

¶17 McCormick argues that because the parties agreed to share their profits and losses equally, they intended to form a partnership. How the parties shared [\*\*\*12] their losses and profits is irrelevant to whether a corporation was formed. In closely held corporations, shareholders sometimes agree to share profits and losses equally. *See Croy Constr. Co. v. Whatcom-Skagit Crane Serv.*, 3 Wn. App. 222, 223, 473 P.2d 438 (1970). This does not change a corporation into another business form. Under RCW 25.05.055(2), an incorporated business cannot be a partnership. The evidence in the record does not support McCormick's claim that the parties initially formed a partnership. McCormick is not entitled to partnership dissolution. Thus, Dunn and Black are entitled to summary [\*\*616] judgment on McCormick's partnership claims as a matter of law. We affirm the trial court's dismissal of McCormick's partnership claim.

#### A. Stock Redemption and Corporate Dissolution

[6] ¶18 McCormick argues that when the shareholders had their \$5,000 capital contribution repaid, it also redeemed all of the outstanding corporate stock. Relying on RCW 23B.06.030, McCormick asserts that a corporation cannot exist without outstanding stock. He argues that once stock is redeemed, the corporation ceases to exist. According to McCormick, once the stock was redeemed, the corporation ceased to exist [\*\*\*13] and became a de facto partnership.

[\*885] ¶19 Dunn and Black counter that there was no stock redemption. They assert that the firm reimbursed the incorporators for their initial cash contributions without redeeming the outstanding shares. Dunn and Black argue that the reimbursement could not have redeemed the stock because it did not comply with the statutory requirements of RCW 23B.06.030(3) for share redemption. They argue that RCW 23B.06.030(4) prohibits corporations from redeeming all of its shares.

¶20 RCW 23B.06.030 provides:

- (1) A corporation may issue the number

of shares of each class or series authorized by the articles of incorporation. *Shares that are issued are outstanding shares until they are reacquired, redeemed, converted, or canceled.*

(2) The reacquisition, redemption, or conversion of outstanding shares is subject to the limitations of subsection (4) of this section and to RCW 23B.06.400.

(3) *Redeemable shares are deemed to have been redeemed and not entitled to vote after notice of redemption is delivered to the holders in compliance with RCW 23B.01.410 and a sum sufficient to redeem the shares has been deposited with a bank, trust company, or other financial institution under an irrevocable [\*\*\*14] obligation to pay the holders the redemption price on surrender of the shares.*

(4) At all times that shares of the corporation are outstanding, one or more shares that together have unlimited voting rights and one or more shares that together are entitled to receive the net assets of the corporation upon dissolution *must be outstanding.*

(Emphasis added.) There is evidence that the firm's stock was issued in consideration for the three shareholders' \$5,000 cash contribution. On August 4, 1994, the directors issued \$5,000 "bonus checks" to each of the parties. 2 CP at 238. The memorandum and notes from this meeting do not indicate that this money was to redeem the outstanding shares. The record is unclear whether the parties intended this money to be repayment for the initial cash contribution. Dunn and Black are correct that the \$5,000 payment [\*886] did not redeem the shares, because the bonus checks did not comply with RCW 23B.06.030(3). No notice of redemption was made or delivered to the shareholders in compliance with RCW 23B.01.410. Under RCW 23B.06.030(4), the firm did not redeem its shares because it did not comply with the procedural requirements. Shares remain outstanding until [\*\*\*15] they are reacquired, redeemed, converted, or canceled. RCW 23B.06.030(1). Additionally, RCW 23B.06.030(4) does not allow all shares to be redeemed.

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¶21 Chapter 23B.14 RCW specifically sets forth the circumstances under which a corporation may be dissolved. <sup>6</sup> RCW 23B.06.030(4) provides that shares must remain outstanding but does not specify the outcome when this mandate is broken. McCormick does not cite to, nor could we find, any cases holding that corporations cease to exist if all stock is redeemed. As previously noted, "[w]here no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *Logan*, 102 Wn. [\*\*617] App. at 911 (quoting *DeHeer*, 60 Wn.2d at 126). Because the shares were never redeemed, we affirm the trial court's finding that as a matter of law, the corporation had not dissolved.

6 See RCW 23B.14.010 (dissolution by initial directors, incorporators, or board of directors); RCW 23B.14.020 (dissolution by board of directors and shareholders); RCW 23B.14.200 (administrative dissolution); RCW 23B.14.300 (judicial dissolution).

## II. DISSOLUTION OF CORPORATION FOR OPPRESSION

[7-18] ¶22 Judicial [\*\*\*16] dissolution is at the trial court's discretion. *Scott v. Trans-Sys., Inc.*, 148 Wn.2d 701, 707, 64 P.3d 1 (2003) (citing *Bergman v. Johnson*, 66 Wn.2d 858, 863, 405 P.2d 715 (1965)). Under RCW 23B.14.300(2)(b), the superior courts may dissolve a corporation in a proceeding by a shareholder if it is established that "[t]he directors or those in control of the corporation have acted, are [\*887] acting, or will act in a manner that is illegal, oppressive, or fraudulent."<sup>7</sup>

7 This is based on the Model Business Corporation Act section 14.30 (1999).

¶23 In deciding whether to grant dissolution, the trial court should consider whether that solution will be beneficial or detrimental to all shareholders or injurious to the public. *Scott*, 148 Wn.2d at 708 (citing *Henry George & Sons, Inc. v. Cooper-George, Inc.*, 95 Wn.2d 944, 953, 632 P.2d 512 (1981)). "[T]he remedy of liquidation is so drastic that it must be invoked with extreme caution." *Scott*, 148 Wn.2d at 708-9 (alteration in original) (quoting *Polikoff v. Dole & Clark Bldg. Corp.*, 37 Ill. App. 2d 29, 36, 184 N.E.2d 792 (1962)).

¶24 Once overreaching conduct has been demonstrated, the burden shifts to the majority

shareholders to show there were legitimate business justifications [\*\*\*17] for the conduct. *Scott*, 148 Wn.2d at 709. Under the business judgment rule, corporate management is immunized from liability in a corporate transaction where (1) the decision to undertake the transaction is within the power of the corporation and the authority of management and (2) there is a reasonable basis to indicate that the transaction was made in good faith. *Scott*, 148 Wn.2d at 709 (citing *Nursing Home Bldg. Corp. v. DeHart*, 13 Wn. App. 489, 498, 535 P.2d 137 (1975)). A court must consider a plaintiff's claims for judicial dissolution "against the backdrop of established deference to corporate governance." *Scott*, 148 Wn.2d at 709.

¶25 RCW 23B.14.300 does not define the term "oppressive," nor does the Model Business Corporation Act. Washington courts have adopted two tests for oppressive conduct. *Scott*, 148 Wn.2d at 711. The "reasonable expectations" test defines oppression as a violation by the majority of the reasonable expectations of the minority. *Scott*, 148 Wn.2d at 711 (quoting *Robblee v. Robblee*, 68 Wn. App. 69, 76, 841 P.2d 1289 (1992)). "Reasonable expectations are those spoken and unspoken understandings on which the founders of a venture rely when commencing the venture." [\*888] *Scott*, 148 Wn.2d at 711 [\*\*\*18] (internal quotation marks omitted) (quoting *Robblee*, 68 Wn. App. at 76). Where, as here, the complaining shareholder was one of the original participants in the venture by committing capital and resources, the reasonable expectations test is most appropriate. *Scott*, 148 Wn.2d at 711. Under this test, the complaining shareholder has the burden of proof, by a preponderance of the evidence, to establish the requisite jurisdictional facts and the equitable grounds for dissolution. *Scott*, 148 Wn.2d at 712.

¶26 In *Robblee*, the minority shareholder tried to show that the majority shareholder acted oppressively with evidence that the majority shareholder fired the minority shareholder, tried to have him removed as an officer and director, and changed the organization of the corporation in order to take over the minority shareholder's functions. *Robblee*, 68 Wn. App. at 75. The court found that there was no oppression because there were legitimate and reasonable explanations for the conduct the minority shareholder characterized as oppressive. *Robblee*, 68 Wn. App. at 75-77.

### A. Director Termination and Shareholder Decisions

¶27 McCormick asserts that Black and Dunn excluded him from corporate decision-making. [\*\*\*19] [\*\*618] He further argues that Black and Dunn excluded him from shareholder and director meetings after terminating his employment. McCormick asserts that he has not received notice of a single directors meeting since October 2002.

¶28 Black and Dunn counter that they removed McCormick as a director at the October 10, 2002 meeting. They argue that only directors are entitled to manage the firm's affairs and did not act oppressively by excluding McCormick from the decision making process. They also assert that there have been no shareholder meetings since McCormick left the firm.

¶29 McCormick argues that Black and Dunn have failed to show that McCormick is no longer a director. He contends [\*889] that absent written evidence that he has been removed, he continues to be a director.

¶30 In their depositions, Dunn and Black state that McCormick was removed as a director at the October 10, 2002 meeting. The articles of incorporation allow a director to be removed from office. The bylaws state that a director may be removed from office with or without cause by a majority vote of shareholders. Nothing in the bylaws or articles requires written documentation of removal. Dunn and Black's votes to remove McCormick as a [\*\*\*20] director were sufficient since they held a majority of the shares. McCormick does not argue that the director removal was oppressive. Rather, McCormick challenges whether there was ever a removal. He argues that this is a question of fact that precludes summary judgment.

¶31 However, there must be a *genuine* issue of material fact to preclude summary judgment. CR 56(c). There is no genuine issue about whether McCormick was removed. Viewed in the light most favorable to McCormick, the evidence in the record is that McCormick was removed as a director. McCormick's argument that his director removal was not put in writing does not create a genuine issue of material fact. Neither the articles nor the bylaws required the removal to be in writing.

¶32 McCormick asserts he has not received notice of shareholder meetings. Dunn and Black respond that there have been no shareholder meetings since McCormick left the firm. There is no evidence in the record that Dunn and

Black held a shareholder meeting that excluded McCormick after they terminated his employment. It is the minority shareholder's burden to show oppressive conduct before the burden shifts to the majority shareholders to establish legitimate [\*\*\*21] business justifications for the conduct. *Scott*, 148 Wn.2d at 709. Where there is no evidence that McCormick has been excluded from shareholder meetings, McCormick has not established that there has been oppressive conduct. Furthermore, acts are not oppressive where there is a reasonable explanation for them. *Robblee*, 68 Wn. App. at [\*890] 76-77. Dunn and Black did not oppress McCormick by excluding him from managerial decisions after removing him as a director. The trial court properly granted summary judgment on the judicial corporate dissolution claim.

#### B. Shareholder Interest Buyout

[19-23] ¶33 McCormick argues that Dunn and Black's failure to pay him the fair value of his one-third interest in the law firm constitutes an oppressive act. McCormick asserts that he reasonably expected that his interest in the law firm would be redeemed based on: (1) the parties' intent to form a new law firm after Winston & Cashatt refused to dilute their stock redemption buyout rights, (2) the article's reference to a potential stock redemption right agreement, (3) the bylaws' reference to a potential stock redemption agreement, (4) Dunn's stating that he would like a buyout of his stock if he departed, and (5) the life insurance. [\*\*\*22] McCormick argues that genuine issues of material fact exist as to whether his expectations of a stock buyout are reasonable.

¶34 Dunn and Black counter that McCormick could not have reasonably expected he would be entitled to a buyout because of the employment agreement terms. They further argue that the parties did not form the firm with the intent that there would be a stock buyout. They assert that Dunn never stated that he thought he was entitled to a buyout.

[\*\*619] ¶35 Neither party cites, nor could we find, a Washington case deciding whether a departing law firm member is entitled to a buyout of shares absent an express agreement. However, other jurisdictions have addressed this issue. Under the Florida Professional Service Corporation Act, shares of stock in a professional corporation can be transferred only to a duly licensed member of the profession but are otherwise freely transferable. FLA. STAT. ANN. § 621.09 (1993). The

140 Wn. App. 873, \*890; 167 P.3d 610, \*\*619;  
2007 Wash. App. LEXIS 2658, \*\*\*22

Florida statutes do not impose a duty on the corporation to redeem the shares of a terminated corporate employee. *Corlett, Killian, Hardeman, McIntosh & Levi, PA* [\*891] v. *Merritt*, 478 So. 2d 828, 829 (Fla. Dist. Ct. App. 1985). 8 Florida courts hold that in a close corporation [\*\*\*23] or a professional service corporation setting, there is no statutory requirement of redemption. *Corlett*, 478 So. 2d at 831 (citing *Werber v. Imperial Golf Club, Inc.*, 413 So. 2d 41 (Fla. Dist. Ct. App. 1982); *Brown v. Fin. Serv. Corp. Int'l*, 489 F.2d 144 (5th Cir. 1974)). Absent a redemption provision in the articles or bylaws, the Florida courts will not write such an agreement for the parties. *Corlett*, 478 So. 2d at 831-32 (citing *Lane, Geley, Woolsey & Centrone, PA Inc. v. Woolsey*, 377 So. 2d 743, 745 (Fla. Dist. Ct. App. 1979), cert. denied, 388 So. 2d 1120 (Fla. 1980)).

8 Some states provide that stock must be redeemed at book value upon employment termination unless there is an alternative provision in the articles of incorporation or bylaws. See, e.g., *Moroze & Sherman, PC v. Moroze*, 104 A.D.2d 70, 481 N.Y.S.2d 699 (1984).

¶36 Arizona's previous Professional Corporation Act required a professional corporation to redeem shares from a terminated employee. See *Kenneth A. Vinall, DDS, PC v. Hoffman*, 133 Ariz. 322, 651 P.2d 850 (1982). However, the act was repealed in 1995 and the new act specifically deleted the provision requiring professional corporations to redeem shares. See [\*\*\*24] *Fearnow v. Ridenour, Swenson, Cleere & Evans, PC*, 213 Ariz. 24, 31, 138 P.3d 723 (2006). In Arizona, as long as a lawyer is licensed to practice law, he may have shares in a law firm professional corporation, even when he is no longer employed by the corporation. *Fearnow*, 213 Ariz. at 31.

¶37 Similar to the Florida and current Arizona statutes, RCW 18.100.100 requires that all shareholders in professional service corporations be licensed. However, nothing in that requirement implies a duty to purchase the shares of an ousted director. Furthermore, courts do not have the power, under the guise of interpretation, to rewrite contracts the parties have deliberately made for themselves. *Clements v. Olsen*, 46 Wn.2d 445, 448, 282 P.2d 266 (1955). Courts may not interfere with the freedom of contract or substitute their judgment for that of the parties to rewrite [\*892] the contract or interfere with the internal affairs of corporate management. *Clements*, 46 Wn.2d at 449-50; *Croy*, 3

Wn. App. at 224.

¶38 McCormick contends that he is entitled to a share buyout because the articles and bylaws contemplate a stock redemption agreement. However, the parties never made a stock redemption agreement. At one point, [\*\*\*25] the firm did have life insurance for the parties. The life insurance agreement was not a stock redemption agreement and it only paid proceeds in the event of an attorney's death. Additionally, they discontinued the life insurance. The courts do not have the power to make a stock redemption agreement where the parties failed to do so. See *Clements*, 46 Wn.2d at 449-50; *Croy*, 3 Wn. App. at 224. The statute does not provide for stock redemption upon employment termination. See RCW 18.100.100. We "cannot, based upon general considerations of abstract justice, make a contract for parties that they did not make themselves." *Wagner v. Wagner*, 95 Wn.2d 94, 104, 621 P.2d 1279 (1980). McCormick is not entitled to a share buyout. Thus, it was not oppressive conduct for Dunn and Black to refuse to buyout McCormick's shares. We affirm the trial court's summary judgment ruling.

#### C. Remaining Law Firm Shareholder

[24] ¶39 McCormick argues that he is entitled to judicial corporate dissolution because he would otherwise retain ownership in a law firm in which he has no business or [\*\*620] professional relationship. He argues that, as a shareholder, he has the right to confidential client information under RCW 23B.16.020 [\*\*\*26] that cannot be revealed to those outside the attorney-client relationship. McCormick argues that if he exercised his shareholder rights, he would wreak havoc on the firm.

¶40 It does not appear that Washington courts have addressed the ethical and confidential obligations of an attorney remaining a shareholder of a legal corporation after employment has been terminated. McCormick does [\*893] not cite any Washington case law addressing this issue. McCormick argues that an Arizona case requires a corporation to redeem the shares of a terminated employee "to avoid absurd results." Appellant's Br. at 37 (citing *Vinall*, 133 Ariz. at 324). However, *Vinall* relied on the former Arizona Professional Corporation Act, which required a corporation to repurchase the shares of a departing shareholder from a professional corporation. See *Fearnow v. Ridenour, Swenson, Cleere & Evans, PC*, 210 Ariz. 256, 110 P.3d 357 (2005), remanded on other grounds, 138 P.3d 723 (2006). That act was repealed, and the new act specifically deleted the provision requiring

corporations to redeem shares. *Fearnow*, 210 Ariz. at 260. *Vinall* is no longer controlling law in Arizona. *Fearnow*, 210 Ariz. at 260. Currently, Arizona allows [\*\*\*27] lawyers to continue to hold shares in a professional corporation law firm where they are not employed as long as they are licensed to practice law. *Fearnow*, 213 Ariz. at 31.

¶41 Florida has also addressed the ethical obligations of a shareholder lawyer in a professional corporation. See *Corlett*, 478 So. 2d at 833. In *Corlett*, the Florida Court of Appeals rejected the lawyer shareholder's argument that share redemption was required because shareholders "would have an ongoing right of access to the corporation's books and records, which arguably could make them privy to certain client confidences." *Corlett*, 478 So. 2d at 834. The court held that "none of the ethical dilemmas or '[a]bsurdities [which] could result because of this unique position,' are so compelling as to warrant a court-imposed redemption obligation on the part of the corporation." *Corlett*, 478 So. 2d at 834 (alterations in original) (quoting *Vinall*, 133 Ariz. at 324).

¶42 The Illinois Court of Appeals has also addressed the potential ethical issues when a lawyer leaves a professional corporation. See *Trittipo v. O'Brien*, 204 Ill. App. 3d 662, 561 N.E.2d 1201 (1990). The court stated, "We, like the *Corlett* court, recognize that the failure to compel [\*\*\*28] the redemption of his shares may produce harsh results and the potential for [\*894] ethical problems. It is our belief, however, that these concerns do not justify unauthorized judicial intervention." *Trittipo*, 204 Ill. App. 3d at 673.

¶43 McCormick may be right that retaining shares to the firm could create ethical and confidential issues. However, this does not justify judicial intervention where the parties failed to execute a stock redemption agreement.

### III. BREACH OF FIDUCIARY DUTIES

¶44 McCormick argues that Dunn and Black breached their fiduciary duties to him. McCormick does not cite any Washington case law on corporate fiduciary duties. McCormick asserts that "when majority shareholders abuse their control and attempt to freeze out a minority shareholder," they breach their fiduciary duties. Appellant's Br. at 38. McCormick argues that Dunn and Black breached their fiduciary duty to him when they helped themselves to all of the firm's profits.

McCormick argues that Dunn and Black did not give him any of the firm's profits after terminating his employment. Also, he argues that refusing to redeem his shares, using his name with the bank, and not allowing him to participate in business decisions [\*\*\*29] constituted a breach of fiduciary duty.

[25] ¶45 We review the summary judgment dismissal of McCormick's claim de novo. *Mighty Movers*, 152 Wn.2d at 348. The elements necessary to establish liability for breach of a fiduciary duty are: (1) that a shareholder breached his fiduciary duty to the corporation and (2) that the breach was a proximate cause of the [\*\*621] losses sustained. *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 509, 728 P.2d 597 (1986).

¶46 McCormick argues that Dunn and Black owe "a high duty of candor, good faith, trust, confidence, and absolute loyalty" to him. Appellant's Br. at 37. Other states have imposed fiduciary duties of "good faith and utmost loyalty" toward other shareholders in close corporations. See *Zimmerman v. Bogoff*, 402 Mass. 650, 660, 524 N.E.2d 849 (1988). Washington courts have not outlined the scope of [\*895] the duty owed by a shareholder to his or her fellow shareholders beyond the common sense prohibition against retaining personal profit owing to the corporation. See *Interlake Porsche*, 45 Wn. App. at 508-09 (unauthorized personal use of corporate funds breached fiduciary duty).

¶47 Dunn and Black argue that they did not violate any fiduciary duty to McCormick [\*\*\*30] for distributing profits as bonuses after terminating McCormick's employment because this was the firm's regular practice throughout its existence. The record indicates and McCormick acknowledges that the firm regularly distributed profits as bonuses to its employees.

[26, 27] ¶48 In a similar case, Division One of our court upheld a trial court's decision that the corporation owed the minority shareholder compensation for the period of his employment but not beyond that. *Croy*, 3 Wn. App. at 225. A corporation's directors are its executive representatives charged with its management, and the courts will not interfere with the reasonable and honest exercise of the directors' judgment. *Croy*, 3 Wn. App. at 224. Here, the directors distributed the corporation's profit as bonuses to its current employees, a practice that the firm had throughout its existence. When he was an employee, McCormick regularly received the corporation's profits as bonuses. This distribution of

bonuses to current employees is a reasonable and honest exercise of the directors' judgment that the courts should not interfere with. This is not a breach of a fiduciary duty.

[28] ¶49 Dunn and Black argue that they did not violate any fiduciary [\*\*\*31] duty to McCormick because he was not entitled to participate in managerial corporate affairs. As noted previously, McCormick contends that there must be written evidence of his director removal. There is nothing within the bylaws or articles that require written evidence of the removal. Dunn and Black's votes to remove McCormick as a director were sufficient since they held a majority of the shares. The evidence in the record is that they removed McCormick as a director. There is no genuine [\*896] issue of material fact that would preclude summary judgment. Because McCormick was no longer a director, he was not entitled to participate in the managerial corporate affairs. Dunn and Black did not breach their fiduciary duty to McCormick.

#### IV. EMPLOYMENT AGREEMENT

¶50 McCormick filed a motion for summary judgment seeking a declaration that if an employment agreement existed, it did not preclude him from receiving a buyout of his shares. The trial court denied McCormick's motion for partial summary judgment

regarding the employment agreement effect.

[29] ¶51 McCormick asserts that the "trial court erred when it ruled that, as a matter of law, the alleged written employment agreement precluded McCormick from receiving [\*\*\*32] a buyout of his one-third interest in the law firm where (1) material issues of fact exist regarding whether McCormick was subject to such an agreement, and (2) the terms of the written agreement govern only an employee's employment with the law firm and not ownership interest in the law firm." Appellant's Br. at 39-40.

¶52 The trial court properly dismissed McCormick's: (1) dissolution of partnership, (2) breach of fiduciary duty, and (3) dissolution of corporation claims. McCormick does not have a claim where he is entitled to the buyout of his shares. Thus, whether the employment agreement precludes a buyout is moot. We affirm.

HOUGHTON, C.J., and QUINN-BRINTNALL, J., concur.

Stewart M. Landefeld et al., *Washington Business Entities: Law and Forms* (2d ed.)

*Washington Corporation Laws Annotated*, 2007 ed.

*Annotated Revised Code of Washington* by LexisNexis

## Chapter 18.100 RCW Professional service corporations

### Chapter Listing

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#### Notes:

Materials specifically authorized to be printed and distributed by secretary of state: RCW 43.07.140.

Revolving fund of secretary of state, deposit of moneys for costs of carrying out secretary of state's functions under this chapter: RCW 43.07.130.

#### **18.100.010** Legislative intent.

It is the legislative intent to provide for the incorporation of an individual or group of individuals to render the same professional service to the public for which such individuals are required by law to be licensed or to obtain other legal authorization.

[1969 c 122 § 1.]

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**18.100.020**  
**Short title.**

This chapter may be cited as "the professional service corporation act".

[1969 c 122 § 2.]

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**18.100.030**  
**Definitions.**

As used in this chapter the following words shall have the meaning indicated:

(1) The term "professional service" means any type of personal service to the public which requires as a condition precedent to the rendering of such service the obtaining of a license or other legal authorization and which prior to the passage of this chapter and by reason of law could not be performed by a corporation, including, but not by way of limitation, certified public accountants, chiropractors, dentists, osteopaths, physicians, podiatric physicians and surgeons, chiroprodists, architects, veterinarians and attorneys-at-law.

(2) The term "professional corporation" means a corporation which is organized under this chapter for the purpose of rendering professional service.

(3) The term "ineligible person" means any individual, corporation, partnership, fiduciary, trust, association, government agency, or other entity which for any reason is or becomes ineligible under this chapter to own shares issued by a professional corporation. The term includes a charitable remainder unitrust or charitable remainder annuity trust that is or becomes an ineligible person for failure to comply with subsection (5)(b) of this section.

(4) The term "eligible person" means an individual, corporation, partnership, fiduciary, qualified trust, association, government agency, or other entity, that is eligible under this chapter to own shares issued by a professional corporation.

(5) The term "qualified trust" means one of the following:

(a) A voting trust established under RCW 23B.07.300, if the beneficial owner of any shares on deposit and the trustee of the voting trust are qualified persons;

(b) A charitable remainder unitrust as defined in section 664(d)(1) of the internal revenue code or a charitable remainder annuity trust as defined in section 664(d)(2) or 664(d)(3) of the internal revenue code if the trust complies with each of the following conditions:

(i) Has one or more beneficiaries currently entitled to income, unitrust, or annuity payments, all of whom are eligible persons or spouses of eligible persons;

(ii) Has a trustee who is an eligible person and has exclusive authority over the share of the professional corporation while the shares are held in the trust, except that a cotrustee who is not an eligible person may be given authority over decisions relating to the sale of shares by the trust;

(iii) Has one or more designated charitable remaindermen, all of which must at all times be domiciled or maintain a local chapter in Washington state; and

(iv) When distributing any assets during the term of the trust to charitable organizations, the distributions are made only to charitable organizations described in section 170(c) of the internal revenue code that are domiciled or maintain a local chapter in Washington state.

[1997 c 18 § 1; 1983 c 51 § 2; 1969 c 122 § 3.]

**18.100.035****Fees for services by secretary of state.**

See RCW 43.07.120.

**18.100.040****Application of chapter to previously organized corporations.**

This chapter shall not apply to any individuals or groups of individuals within this state who prior to the passage of this chapter were permitted to organize a corporation and perform personal services to the public by means of a corporation, and this chapter shall not apply to any corporation organized by such individual or group of individuals prior to the passage of this chapter: PROVIDED, That any such individual or group of individuals or any such corporation may bring themselves and such corporation within the provisions of this chapter by amending the articles of incorporation in such a manner so as to be consistent with all the provisions of this chapter and by affirmatively stating in the amended articles of incorporation that the shareholders have elected to bring the corporation within the provisions of this chapter.

[1969 c 122 § 4.]

**18.100.050****Organization of professional service corporations authorized generally — Architects, engineers, and health care professionals — Nonprofit corporations.**

(1) An individual or group of individuals duly licensed or otherwise legally authorized to render the same professional services within this state may organize and become a shareholder or shareholders of a professional corporation for pecuniary profit under the provisions of Title 23B RCW for the purpose of rendering professional service. One or more of the legally authorized individuals shall be the incorporators of the professional corporation.

(2) Notwithstanding any other provision of this chapter, registered architects and registered engineers may own stock in and render their individual professional services through one professional service corporation.

(3) Licensed health care professionals, providing services to enrolled participants either directly or through arrangements with a health maintenance organization registered under chapter 48.46 RCW or federally qualified health maintenance organization, may own stock in and render their individual professional services through one professional service corporation.

(4) Professionals may organize a nonprofit nonstock corporation under this chapter and chapter 24.03 RCW to provide professional services, and the provisions of this chapter relating to stock and referring to Title 23B RCW shall not apply to any such corporation.

(5)(a) Notwithstanding any other provision of this chapter, health care professionals who are licensed or certified pursuant to chapters 18.06, 18.225, 18.22, 18.25, 18.29, 18.34, 18.35, 18.36A, 18.50, 18.53, 18.55, 18.57, 18.57A, 18.64, 18.71, 18.71A, 18.79, 18.83, 18.89, 18.108, and 18.138 RCW may own stock in and render their individual professional services through one professional service corporation and are to be considered, for the purpose of forming a professional service corporation, as rendering the "same specific professional services" or "same professional services" or similar terms.

(b) Notwithstanding any other provision of this chapter, health care professionals who are regulated under chapters 18.59 and 18.74 RCW may own stock in and render their individual professional services through one professional service corporation formed for the sole purpose of providing professional services within their respective scope of practice.

(c) Formation of a professional service corporation under this subsection does not restrict the application of the uniform disciplinary act under chapter 18.130 RCW, or applicable health care professional statutes under Title 18 RCW, including but not limited to restrictions on persons practicing a health profession without being appropriately credentialed and persons practicing beyond the scope of their

credential.

[2001 c 251 § 29; 1999 c 128 § 1; 1997 c 390 § 3; 1996 c 22 § 1; 1991 c 72 § 3; 1986 c 261 § 1; 1983 c 100 § 1; 1969 c 122 § 5.]

**Notes:**

**Severability -- 2001 c 251:** See RCW 18.225.900.

**18.100.060**

**Rendering of services by authorized individuals.**

(1) No corporation organized under this chapter may render professional services except through individuals who are duly licensed or otherwise legally authorized to render such professional services within this state. However, nothing in this chapter shall be interpreted to:

(a) Prohibit a person duly licensed or otherwise legally authorized to render professional services in any jurisdiction other than this state from becoming a member of a professional corporation in this state organized for the purpose of rendering the same professional services;

(b) Prohibit a professional corporation from rendering services outside this state through individuals who are not duly licensed or otherwise legally authorized to render professional services within this state; or

(c) Require the licensing of clerks, secretaries, bookkeepers, technicians, and other assistants employed by a professional corporation who are not usually and ordinarily considered by custom and practice to be rendering professional services to the public for which a license or other legal authorization is required.

(2) Persons engaged in a profession and otherwise meeting the requirements of this chapter may operate under this chapter as a professional corporation so long as each shareholder personally engaged in the practice of the profession in this state is duly licensed or otherwise legally authorized to practice the profession in this state and:

(a) At least one officer and one director of the corporation is duly licensed or otherwise legally authorized to practice the profession in this state; or

(b) Each officer in charge of an office of the corporation in this state is duly licensed or otherwise legally authorized to practice the profession in this state.

[1998 c 293 § 1; 1983 c 51 § 3; 1969 c 122 § 6.]

**18.100.065**

**Authority of directors, officers to render same services as corporation.**

Except as otherwise provided in RCW 18.100.118, all directors of a corporation organized under this chapter and all officers other than the secretary and the treasurer shall be duly licensed or otherwise legally authorized to render the same specific professional services within this or any other state as those for which the corporation was incorporated.

[1998 c 293 § 2; 1983 c 51 § 7.]

**18.100.070**

**Professional relationships and liabilities preserved.**

Nothing contained in this chapter shall be interpreted to abolish, repeal, modify, restrict or limit the law now in effect in this state applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such

professional service and the standards for professional conduct. Any director, officer, shareholder, agent or employee of a corporation organized under this chapter shall remain personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him or by any person under his direct supervision and control, while rendering professional services on behalf of the corporation to the person for whom such professional services were being rendered. The corporation shall be liable for any negligent or wrongful acts of misconduct committed by any of its directors, officers, shareholders, agents or employees while they are engaged on behalf of the corporation, in the rendering of professional services.

[1969 c 122 § 7.]

#### **18.100.080**

##### **Engaging in other business prohibited — Investments.**

No professional service corporation organized under this chapter shall engage in any business other than the rendering of the professional services for which it was incorporated or service as a trustee as authorized by RCW 11.36.021 or as a personal representative as authorized by RCW 11.36.010: PROVIDED, That nothing in this chapter or in any other provisions of existing law applicable to corporations shall be interpreted to prohibit such corporation from investing its funds in real estate, personal property, mortgages, stocks, bonds, insurance, or any other type of investments.

[1984 c 149 § 170; 1969 c 122 § 8.]

#### **Notes:**

**Severability -- Effective dates -- 1984 c 149:** See notes following RCW 11.02.005.

#### **18.100.090**

##### **Stock issuance.**

Except as otherwise provided in RCW 18.100.118, no professional corporation organized under the provisions of this chapter may issue any of its capital stock to anyone other than the trustee of a qualified trust or an individual who is duly licensed or otherwise legally authorized to render the same specific professional services within this or any other state as those for which the corporation was incorporated.

[1998 c 293 § 3; 1997 c 18 § 2; 1983 c 51 § 4; 1969 c 122 § 9.]

#### **18.100.095**

##### **Validity of share voting agreements.**

Except for qualified trusts, a proxy, voting trust, or other voting agreement with respect to shares of a professional corporation shall not be valid unless all holders thereof, all trustees and beneficiaries thereof, or all parties thereto, as the case may be, are eligible to be shareholders of the corporation.

[1997 c 18 § 3; 1983 c 51 § 12.]

#### **18.100.100**

##### **Legal qualification of officer, shareholder or employee to render professional service, effect.**

B-5

Unless a director, officer, shareholder, agent or employee of a corporation organized under this chapter who has been rendering professional service to the public is legally qualified at all times to render such professional services within at least one state in which the corporation conducts business, he or she shall sever all employment with, and financial interests in, such corporation forthwith. A corporation's failure to require compliance with this provision shall constitute a ground for the forfeiture of its articles of incorporation and its dissolution. When a corporation's failure to comply with this provision is brought to the attention of the office of the secretary of state, the secretary of state forthwith shall certify that fact to the attorney general for appropriate action to dissolve the corporation.

[1998 c 293 § 4; 1969 c 122 § 10.]

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**18.100.110**  
**Sale or transfer of shares.**

No shareholder of a corporation organized as a professional corporation may sell or transfer his or her shares in such corporation except to the trustee of a qualified trust or another individual who is eligible to be a shareholder of such corporation. Any transfer of shares in violation of this section shall be void. However, nothing in this section prohibits the transfer of shares of a professional corporation by operation of law or court decree.

[1997 c 18 § 4; 1983 c 51 § 5; 1969 c 122 § 11.]

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**18.100.114**  
**Merger or consolidation.**

A corporation organized under this chapter may merge or consolidate with another corporation, domestic or foreign, organized to render the same specific professional services, only if every shareholder of each corporation is eligible to be a shareholder of the surviving or new corporation.

[1998 c 293 § 6; 1983 c 51 § 8.]

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**18.100.116**  
**Death of shareholder, transfer to ineligible person — Treatment of shares.**

(1) If:

- (a)(i) A shareholder of a professional corporation dies;
- (ii) A shareholder of a professional corporation becomes an ineligible person;
- (iii) Shares of a professional corporation are transferred by operation of law or court decree to an ineligible person; or
- (iv) A charitable remainder unitrust or charitable remainder annuity trust that holds shares of a professional corporation becomes an ineligible person; and

(b) The shares held by the deceased shareholder or by such ineligible person are less than all of the outstanding shares of the corporation, then

the shares held by the deceased shareholder or by the ineligible person may be transferred to remaining shareholders of the corporation or may be redeemed by the corporation pursuant to terms stated in the articles of incorporation or by laws of the corporation, or in a private agreement. In the absence of any such terms, such shares may be transferred to any individual eligible to be a shareholder of the

corporation.

(2) If such a redemption or transfer of the shares held by a deceased shareholder or an ineligible person is not completed within twelve months after the death of the deceased shareholder or the transfer, as the case may be, such shares shall be deemed to be shares with respect to which the holder has elected to exercise the right of dissent described in chapter 23B.13 RCW and has made written demand on the corporation for payment of the fair value of such shares. The corporation shall forthwith cancel the shares on its books and the deceased shareholder or ineligible person shall have no further interest in the corporation other than the right to payment for the shares as is provided in RCW 23B.13.250. For purposes of the application of RCW 23B.13.250, the date of the corporate action and the date of the shareholder's written demand shall be deemed to be one day after the date on which the twelve-month period from the death of the deceased shareholder, or from the transfer, expires.

[1997 c 18 § 5; 1991 c 72 § 4; 1983 c 51 § 10.]

#### 18.100.118

##### Eligibility of certain representatives and transferees to serve as directors, officers, or shareholders.

If all of the outstanding shares of a professional corporation are held by an administrator, executor, guardian, conservator, or receiver of the estate of a former shareholder, or by a transferee who received such shares by operation of law or court decree, such administrator, executor, guardian, conservator, receiver, or transferee for a period of twelve months following receipt or transfer of such shares may be a director, officer, or shareholder of the professional corporation.

[1983 c 51 § 11.]

#### 18.100.120

##### Name — Listing of shareholders.

Corporations organized pursuant to this chapter shall render professional service and exercise its authorized powers under a name permitted by law and the professional ethics of the profession in which the corporation is so engaged. The corporate name of a professional service corporation must contain either the words "professional service" or "professional corporation" or the abbreviation "P.S." or "P.C." The corporate name may also contain either the words "corporation," "incorporated," "company," or "limited," or the abbreviation "corp.," "inc.," "co.," or "Ltd." With the filing of its first annual report and any filings thereafter, professional service corporation shall list its then shareholders: PROVIDED, That notwithstanding the foregoing provisions of this section, the corporate name of a corporation organized to render dental services shall contain the full names or surnames of all shareholders and no other word than "chartered" or the words "professional services" or the abbreviation "P.S." or "P.C."

[1993 c 290 § 1; 1982 c 35 § 169; 1969 c 122 § 12.]

#### Notes:

**Intent -- Severability -- Effective dates -- Application -- 1982 c 35:** See notes following RCW 43.07.160.

#### 18.100.130

##### Application of Business Corporation Act and Nonprofit Corporation Act.

(1) For a professional service corporation organized for pecuniary profit under this chapter, the provisions of Title 23B RCW shall be applicable except to the extent that any of the provisions of this chapter are interpreted to be in conflict with the provisions thereof, and in such event the provisions and sections of this chapter shall take precedence with respect to a corporation organized pursuant to the provisions of this chapter.

(2) For a professional service corporation organized under this chapter and chapter 24.03 RCW as a nonprofit nonstock corporation, the

provisions of chapter 24.03 RCW shall be applicable except to the extent that any of the provisions of this chapter are interpreted to be in conflict with the provisions thereof, and in such event the provisions and sections of this chapter shall take precedence with respect to a corporation organized under the provisions of this chapter.

[1991 c 72 § 5; 1986 c 261 § 2; 1983 c 51 § 6; 1969 c 122 § 13.]

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#### 18.100.132

##### Nonprofit professional service corporations formed under prior law.

A nonprofit professional service corporation formed pursuant to \*chapter 431, Laws of 1985, may amend its articles of incorporation at any time before July 31, 1987, to comply with the provisions of this chapter. Compliance under this chapter shall relate back and take effect as of the date of formation of the corporation under \*chapter 431, Laws of 1985, and the corporate existence shall be deemed to have continued without interruption from that date.

[1986 c 261 § 4.]

##### Notes:

\*Reviser's note: Chapter 431, Laws of 1985 enacted RCW 24.03.038, which was repealed by 1986 c 261 § 7.

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#### 18.100.133

##### Business corporations, election of this chapter.

A business corporation formed under the provisions of Title 23B RCW may amend its articles of incorporation to change its stated purpose to the rendering of professional services and to conform to the requirements of this chapter. Upon the effective date of such amendment, the corporation shall be subject to the provisions of this chapter and shall continue in existence as a professional corporation under this chapter.

[1991 c 72 § 6; 1986 c 261 § 5.]

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#### 18.100.134

##### Professional services — Deletion from stated purposes of corporation.

A professional corporation may amend its articles of incorporation to delete from its stated purposes the rendering of professional services and to conform to the requirements of Title 23B RCW, or to the requirements of chapter 24.03 RCW if organized pursuant to RCW 18.100.050 as a nonprofit nonstock corporation. Upon the effective date of such amendment, the corporation shall no longer be subject to the provisions of this chapter and shall continue in existence as a corporation under Title 23B RCW or chapter 24.03 RCW.

[1991 c 72 § 7; 1986 c 261 § 3; 1983 c 51 § 9.]

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#### 18.100.140

##### Improper conduct not authorized.

Nothing in this chapter shall authorize a director, officer, shareholder, agent or employee of a corporation organized under this chapter, or

a corporation itself organized under this chapter, to do or perform any act which would be illegal, unethical or unauthorized conduct under the provisions of the following acts: (1) Physicians and surgeons, chapter 18.71 RCW; (2) anti-rebating act, chapter 19.68 RCW; (3) state bar act, chapter 2.48 RCW; (4) professional accounting act, chapter 18.04 RCW; (5) professional architects act, chapter 18.08 RCW; (6) professional auctioneers act, chapter 18.11 RCW; (7) cosmetologists, barbers, and manicurists, chapter 18.16 RCW; (8) boarding homes act, chapter 18.20 RCW; (9) podiatric medicine and surgery, chapter 18.22 RCW; (10) chiropractic act, chapter 18.25 RCW; (11) registration of contractors, chapter 18.27 RCW; (12) debt adjusting act, chapter 18.28 RCW; (13) dental hygienist act, chapter 18.29 RCW; (14) dentistry, chapter 18.32 RCW; (15) dispensing opticians, chapter 18.34 RCW; (16) naturopathic physicians, chapter 18.36A RCW; (17) embalmers and funeral directors, chapter 18.39 RCW; (18) engineers and land surveyors, chapter 18.43 RCW; (19) escrow agents registration act, chapter 18.44 RCW; (20) \*maternity homes, chapter 18.46 RCW; (21) midwifery, chapter 18.50 RCW; (22) nursing homes, chapter 18.51 RCW; (23) optometry, chapter 18.53 RCW; (24) osteopathic physicians and surgeons, chapter 18.57 RCW; (25) pharmacists, chapter 18.64 RCW; (26) physical therapy, chapter 18.74 RCW; (27) registered nurses, advanced registered nurse practitioners, and practical nurses, chapter 18.79 RCW; (28) psychologists, chapter 18.83 RCW; (29) real estate brokers and salesmen, chapter 18.85 RCW; (30) veterinarians, chapter 18.92 RCW.

[1994 sp.s. c 9 § 717; 1987 c 447 § 16; 1982 c 35 § 170; 1969 c 122 § 14.]

**Notes:**

\*Reviser's note: The definition of "maternity home" was changed to "birthing center" by 2000 c 93 § 30.

**Severability -- Headings and captions not law -- Effective date -- 1994 sp.s. c 9:** See RCW 18.79.900 through 18.79.902.

**Severability -- 1987 c 447:** See RCW 18.36A.901.

**Intent -- Severability -- Effective dates -- Application -- 1982 c 35:** See notes following RCW 43.07.160.

**18.100.145**

**Doctor of osteopathic medicine and surgery — Discrimination prohibited.**

A professional service corporation that provides health care services to the general public may not discriminate against a qualified doctor of osteopathic medicine and surgery licensed under chapter 18.57 RCW, who has applied to practice with the professional service corporation, solely because that practitioner was board certified or eligible under an approved osteopathic certifying board instead of board certified or eligible respectively under an approved medical certifying board.

[1995 c 64 § 2.]

**18.100.150**

**Indemnification of agents of any corporation authorized.**

See RCW 23B.17.030.

**18.100.160**

**Foreign professional corporation.**

A foreign professional corporation may render professional services in this state so long as it complies with chapter 23B.15 RCW and each individual rendering professional services in this state is duly licensed or otherwise legally authorized to render such professional services within this state.

[1998 c 293 § 7.]

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1 any of its capital stock to anyone other than the trustee of a  
2 qualified trust or an individual who is duly licensed or otherwise  
3 legally authorized to render the same specific professional services  
4 within this state as those for which the corporation was incorporated.

5 **Sec. 3.** RCW 18.100.095 and 1983 c 51 s 12 are each amended to read  
6 as follows:

7 Except for qualified trusts, a proxy, voting trust, or other voting  
8 agreement with respect to shares of a professional corporation shall  
9 not be valid unless all holders thereof, all trustees and beneficiaries  
10 thereof, or all parties thereto, as the case may be, are eligible to be  
11 shareholders of the corporation.

12 **Sec. 4.** RCW 18.100.110 and 1983 c 51 s 5 are each amended to read  
13 as follows:

14 No shareholder of a corporation organized as a professional  
15 corporation may sell or transfer his or her shares in such corporation  
16 except to the trustee of a qualified trust or another individual who is  
17 eligible to be a shareholder of such corporation. Any transfer of  
18 shares in violation of this section shall be void. However, nothing in  
19 this section prohibits the transfer of shares of a professional  
20 corporation by operation of law or court decree.

21 **Sec. 5.** RCW 18.100.116 and 1991 c 72 s 4 are each amended to read  
22 as follows:

23 (1) If:

24 (a)(i) A shareholder of a professional corporation dies(~~(, or if)~~);

25 (ii) A shareholder of a professional corporation becomes an  
26 ineligible person;

27 (iii) Shares of a professional corporation are transferred by  
28 operation of law or court decree to an ineligible person(~~(, and if)~~);  
29 or

30 (iv) A charitable remainder unitrust or charitable remainder  
31 annuity trust that holds shares of a professional corporation becomes  
32 an ineligible person; and

33 (b) The shares held by the deceased shareholder or by such  
34 ineligible person are less than all of the outstanding shares of the  
35 corporation(~~(+)~~), then

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1 ((+1)) the shares held by the deceased shareholder or by the  
2 ineligible person may be transferred to remaining shareholders of the  
3 corporation or may be redeemed by the corporation pursuant to terms  
4 stated in the articles of incorporation or by laws of the corporation,  
5 or in a private agreement. In the absence of any such terms, such  
6 shares may be transferred to any individual eligible to be a  
7 shareholder of the corporation.

8 (2) If such a redemption or transfer of the shares held by a  
9 deceased shareholder or an ineligible person is not completed within  
10 twelve months after the death of the deceased shareholder or the  
11 transfer, as the case may be, such shares shall be deemed to be shares  
12 with respect to which the holder has elected to exercise the right of  
13 dissent described in chapter 23B.13 RCW and has made written demand on  
14 the corporation for payment of the fair value of such shares. The  
15 corporation shall forthwith cancel the shares on its books and the  
16 deceased shareholder or ineligible person shall have no further  
17 interest in the corporation other than the right to payment for the  
18 shares as is provided in RCW 23B.13.250. For purposes of the  
19 application of RCW 23B.13.250, the date of the corporate action and the  
20 date of the shareholder's written demand shall be deemed to be one day  
21 after the date on which the twelve-month period from the death of the  
22 deceased shareholder, or from the transfer, expires.

--- END ---

COURT OF APPEALS  
DIVISION II

No. 39236-4-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON  
BY *Cm*  
DEPUTY

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JOEL C. MCCORMICK

Respondent-Plaintiff

v.

DUNN & BLACK, P.S., et al.

Appellant-Defendant

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CERTIFICATE OF SERVICE

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I hereby certify that on the 13<sup>th</sup> day of July, 2009, I caused to be served a copy of Opening Brief of Defendant-Appellant Dunn & Black, P.S. by E-Mail and Federal Express overnight mail on the following:

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