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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 39236-4-II
(Formerly No. 27823-9-III)

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JOEL C. MCCORMICK

Respondent-Plaintiff

v.

DUNN & BLACK, P.S.

Appellant-Defendant

RESPONSE BRIEF OF RESPONDENT, JOEL MCCORMICK

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I. INTRODUCTION

In previous litigation between these parties, this Appellate Court considered and determined whether attorney Joel McCormick, one of the three founding principals in the Defendant law firm, was entitled to a buy-out *upon his termination of employment* in 2002. See McCormick v. Dunn & Black, P.S., 140 Wn. App. 873 (2007) ("McCormick I"). It was conclusively established that there was no stock redemption agreement, and, since Mr. McCormick remained a shareholder, the termination of his employment did *not* trigger any rights or obligations under Washington's Professional Services Corporation Act, RCW 18.100 *et seq.* (the "Act"). Fundamental to this Court's previous ruling was Mr. McCormick's continued status as a shareholder, and the absence of any contract governing his shareholder interest.

Mr. McCormick accepted the prior ruling of this Court, and simply continued as a passive shareholder of the firm. Subsequently, however, Mr. McCormick retired from the practice of law and became statutorily ineligible to continue to be a shareholder. Due to that fundamental change of circumstance, the Professional Services Corporation Act—which previously did not apply—now applies to govern Mr. McCormick's rights and obligations with regard to his shareholder interest.

In an effort to deny Mr. McCormick his statutory rights that now apply under the Act, Dunn & Black asserted that Mr. McCormick's long-defunct Employment Agreement was the functional equivalent of a stock redemption agreement that defines and limits his shareholder interest. But that argument is not consistent with contract law governing terminated contracts; is not consistent with the actual terms of the Employment Agreement; and is not consistent with Dunn & Black's previous argument—and this Court's previous ruling—that the terminated Employment Agreement was definitely *not* a stock redemption agreement, and its termination had no effect on Mr. McCormick's shareholder interest. The Trial Court properly rejected Dunn & Black's argument as a matter of law.

Dunn & Black also raised various arguments regarding the interpretation and application of the Professional Services Corporation Act. Specifically, Dunn & Black argued that Mr. McCormick was subject to the Act's obligations, but was not entitled to the corresponding rights provided in the Act. The Trial Court rejected Dunn & Black's strained statutory interpretation, and again granted summary judgment in favor of Mr. McCormick. **Dunn & Black do not challenge the Trial Court's rulings with regard to the statutory interpretation issues presented below. Rather, Dunn & Black raises two new statutory interpretation**

issues, which were never argued nor considered below. Not only are these issues raised for the first time in this appeal, they are based on a factual assertion that is directly *opposite* of what Dunn & Black asserted below.

This Court should uphold the orders on summary judgment entered by the Trial Court.

II. ASSIGNMENTS OF ERROR

Dunn & Black identify four issues pertaining to its assignment of error. Opening Brief, p. 2. The first two relate to the long-defunct Employment Agreement, and whether the Trial Court correctly ruled on the issues presented below. Dunn & Black's third and fourth issues, however, which have to do with the interpretation and application of the Act, are new issues that Dunn & Black did not raise below. The Trial Court could not have "erred" with regard to issues it never considered or ruled upon.

III. STATEMENT OF THE CASE

1. Mr. McCormick, an attorney, incorporated the law firm of McCormick, Dunn & Black, P.S. ("Firm") as a professional services corporation under RCW 18.100 in 1992 with two colleagues, attorneys Robert Dunn and John Black. Each of the three founding attorneys made an initial contribution of \$5,000 and was granted an equal number of

shares. Thus, each became an equal one-third owner of the Firm. Complaint and Answer, ¶ 11 (CP 5, 13); McCormick I, 140 Wn. App., at 878.

2. Both the Firm's Articles of Incorporation and its Bylaws contemplated the creation of a separate stock redemption agreement. While the parties intended to draft a stock redemption agreement, no such stock redemption agreement was ever drafted or entered into. Complaint and Answer, ¶14 (CP 5, 13); McCormick I, at 892. Further, a repayment by the Firm to each shareholder of his initial \$5,000 capital contribution did not constitute a stock redemption. Complaint and Answer, ¶ 14 (CP 5, 13); McCormick I, at 885-86.

3. Mr. Dunn and Mr. Black terminated Mr. McCormick's employment on October 10, 2002, effective 30 days later, on November 10, 2002, and changed the name of the Firm from McCormick, Dunn & Black, P.S. to Dunn & Black, P.S.¹ None of the Defendants bought, reacquired or redeemed Mr. McCormick's shares or otherwise terminated his stock ownership. Complaint and Answer, ¶ 12 (CP 5, 13); McCormick I, at 879-80.

¹ Dunn & Black include in their Opening Brief personal attacks and disputed allegations about the reason for Mr. McCormick's termination. *See* p. 7. As these allegations are not relevant to any issue presented to this Court, Mr. McCormick will not address their inaccuracy.

4. Mr. McCormick filed suit against the Defendants in April 2003 to recover, among other things, the fair value of his one-third ownership interest in the Firm. The Trial Court dismissed Mr. McCormick's claims on summary judgment, and this ruling was upheld by this Appellate Court. This Court ruled, among other things, that the termination of Mr. McCormick's Employment Agreement—and his resulting termination of employment—did not affect his stock ownership. Complaint and Answer, ¶ 13 (CP 5, 13); McCormick I, at 892-94.

5. Mr. McCormick remained a shareholder after his employment with the Firm was terminated. Since he was duly licensed to practice law at that time, and there was no stock redemption agreement, this Court concluded there was nothing to trigger a buy-out obligation for his shares. Specifically, this Court determined that "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," and ruled that Washington's Professional Services Corporations Act, RCW 18.100.100, "does not provide for stock redemption upon employment termination." McCormick I, at 891-92.

6. In August 2008, Mr. McCormick retired from the practice of law and resigned his membership in the Washington State Bar Association. As a result, Mr. McCormick's license to practice law in this

state was terminated, effective August 12, 2008. (CP 50); Complaint and Answer, ¶15 (CP 6, 14).

7. By correspondence dated August 22, 2008, Mr. McCormick's counsel notified Dunn & Black that Mr. McCormick had become statutorily ineligible to remain a shareholder in the Firm, and that this fundamental change in circumstance gave rise to statutory rights to which he was not previously entitled. (CP 50); Complaint and Answer, ¶ 17 (CP 6, 14). In accordance with the Professional Services Corporation Act, RCW 18.100.100 and .116 Mr. McCormick demanded payment from the remaining shareholders or the Firm itself of the fair value of his shares. Id.

8. Dunn & Black responded by asserting that Mr. McCormick's "shareholder interests are defined by the [Employment] Agreement," and suggested those interests were limited by the Employment Agreement's termination clause. (CP 53 and 55); Complaint and Answer, ¶ 18 (CP 6, 18).

10. Mr. McCormick filed a declaratory judgment action to address the narrow issue of whether the Employment Agreement—which was terminated in 2002, and which was not a stock redemption agreement—applied to define or limit his shareholder interests. (CP 6-7).

11. Dunn & Black filed a counterclaim for a declaratory judgment seeking a declaration that the Act did not apply. (CP 15).

12. Both parties agreed that the material facts were undisputed, and both filed motions for summary judgment. (CP 18, 61 and 96). After a hearing on January 7, 2009, the Trial Court denied Dunn & Black's motion for summary judgment, rejecting its interpretation of the Act, and granted Mr. McCormick's motions for summary judgment, both with regard to the Employment Agreement, and to the application of the Act. (CP 314). This appeal follows.

IV. ARGUMENT

A. THE EMPLOYMENT AGREEMENT, WHICH WAS TERMINATED IN 2002, AND WHICH IS NOT A STOCK REDEMPTION AGREEMENT, DOES NOT DEFINE OR LIMIT MR. MCCORMICK'S SHAREHOLDER INTEREST.

Dunn & Black's first two assignments of error address whether the Trial Court properly considered whether Mr. McCormick's terminated Employment Agreement could be applied now to define or limit Mr. McCormick's shareholder interest. The long-defunct Employment Agreement—which is not a stock redemption agreement—cannot be applied against Mr. McCormick to deny him his statutory shareholder rights.

1. **Mr. McCormick's Employment Agreement, Terminated Almost 7 Years Ago, Has No Current Legal Force or Effect.**

It is undisputed that Dunn & Black terminated Mr. McCormick's Employment Agreement in accordance with that contract's 30 day termination provision, effective November, 2002. (CP 5 and 13, ¶14). That contract did not contain any "savings clause" or any other express provisions that the parties agreed were to survive termination. (CP 48, 144-150). As a result, upon termination, the Employment Agreement ceased to have further legal force or effect.

It is black letter law that:

A party to a contract fixing no time during which it is to continue in force is no longer bound by its provisions when the other party terminates it.

17A Am. Jur. 2d §531, *citing* Warren v. Stoddart, 105 U.S. 224, 26 L.Ed. 1117 (1881). *See also*, Walters v. Center Electric, Inc., 8 Wn. App. 322, 335, *review denied*, 82 Wn.2d 1005 (1973) (the immediate effect of termination of a contract "necessarily includes expiration of the rights of all parties" in the contract); Cascade Auto Glass v. Progressive, 135 Wn. App. 760 (2006) (no rights exist under original employment contract after it is terminated and unilaterally replaced).

It is unnecessary for this Court to consider or determine whether the Employment Agreement was ever intended to govern Mr.

McCormick's shareholder interests. That contract, which Dunn & Black itself terminated nearly 7 years ago, cannot now be resurrected or applied against Mr. McCormick.

2. **Intent Cannot be Used to Add to, Modify or Contradict the Terms of a Contract.**

Dunn & Black's arguments are based on the repeated assertion that the parties "intended" that there would never be a buy-out of a departing shareholder's equity interest. *See* Opening Brief, pp. 4, 9, 10, 11, 12, 14 and 20. As evidence of this "intent," Dunn & Black cite to Mr. Black's self-serving declaration, which was prepared and filed in support of the underlying summary judgment motion. *Id.* at p. 9; CP 91-95. But this assertion of an alleged intent to preclude a stock redemption is not consistent with the Firm's original Articles and Bylaws, which both refer to a stock redemption agreement that was to be drafted to govern their shareholder interests. *See McCormick I*, at 892; CP 5, ¶14, and CP 13, ¶14; Opening Brief, p. 8. While the parties intended to draft a stock redemption agreement, no such agreement was ever drafted. *Id.* Regardless, Dunn & Black cannot use one person's unilateral subjective intent—which is not reflected in the Employment Agreement—to modify the terms of that agreement.

Dunn & Black quote the general rule that "the touchstone of contract interpretation is the parties' intent." Opening Brief, p. 12, *citing* Tanner Elec. Co-op v. Puget Sound Power, 128 Wn.2d 656, 674 (1996). In Tanner, the court refused to insert a provision into a contract, despite the alleged intent of one of the parties. Id. Parol evidence of intent is admissible only for the purpose of determining the meaning of words *actually contained in a contract*, and is not admissible for the purpose of "importing into a writing an intention not expressed therein...*It is the duty of the court to declare the meaning of what is written, and not what was intended to be written.*" Berg v. Hudesman, 115 Wn.2d 657, 669 (1990), *quoting* J.W. Seavey Hop Corp. v. Pollock, 20 Wn.2d 337, 348-49 (1944). Extrinsic evidence of intent cannot be used "to add to, subtract from, modify, or contradict the terms of a fully integrated contract." Bort v. Parker, 110 Wn. App. 561, 574, *review denied* 147 Wn.2d 1013 (2002).

Specifically:

Admissible extrinsic evidence does **not** include (1) evidence of a party's unilateral or subjective intent as to the meaning of a contract word or term, (2) evidence that would show an intention independent of the contract, or (3) evidence that varies, contradicts or modifies the written language of the contract.

Bort, 110 Wn. App. at 574; *see also*, Go2Net, Inc. v. C I Host, Inc., 115 Wn. App. 73, 84 (2003); Paradise Orchards, v. Fearing, 112 Wn. App. 507, 517 (2004), *review denied* 153 Wn.2d 1027 (2005).

The Employment Agreement at issue has nothing to do with a shareholder's ownership interest. This Appellate Court previously determined that, regardless of the alleged intention of the parties to either recognize or preclude a buyout, the parties "never made a stock redemption agreement...The Courts do not have the power to make a stock redemption agreement where the parties failed to do so." McCormick I, at 892, *citing* Clements v. Olsen, 46 Wn.2d 445, 449-50 (1955); Croy Constr. Co. v. Whatcom-Skagit Crane Serv., 3 Wn. App. 222, 224 (1970). Likewise, the Trial Court correctly determined:

They obviously failed to enter into—even though maybe they intended to, they didn't enter into any type of an agreement for redeeming stock if a member left for a buyout. They didn't say, "There won't be any." They didn't say, "This is what it will be."

RP 58, ln. 18-22.

Dunn & Black acknowledge that this Court may not re-write a contract the parties made for themselves, or impose on the parties terms not contained in the contract. Opening Brief, pp. 3, 8 and 13, *citing* McCormick I, at 890-92. Yet that is precisely what Dunn & Black is now

asking this Court to do—create a contract whereby the parties "agree" that they would *not* be entitled to a buyout. Just as this Appellate Court could not previously create a contract providing that there would be a buyout, it cannot now create a contract providing there will not be a buyout. McCormick I, at 892.

3. **The Employment Agreement is Not a Stock Redemption Agreement.**

Dunn & Black take issue with the Trial Court's determination that Mr. McCormick's

[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 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 61, ln. 4-15; Opening Brief, p. 9.

The Trial Court's determination is consistent with the clear terms of the Employment Agreement. By its own terms, and as its own title suggests, the Employment Agreement defines and governs employment rights only, not any ownership interest:

The relationship hereunder is that of an employer and employee...Nothing contained in this agreement shall be construed to give the attorney

any interest in the tangible or intangible assets of the corporation.

CP 144, at Section One.

An agreement that cannot be construed to give an attorney an ownership interest in the corporation likewise cannot be construed to take the attorney's interest away. The Employment Agreement's termination clause, Section 18—which applies when one's *employment* is terminated—cannot fairly be read to apply outside the employment context to define Mr. McCormick's shareholder interest.

There is no dispute that the Employment Agreement *is not*, and was never intended to be, a stock redemption agreement. McCormick I at 892; Opening Brief p. 14; *see also* CP 209 at ln. 5-6 ("Dunn & Black has never argued that the Employment Agreement is a stock redemption agreement"); RP 12 at ln. 9-10 ("We have never said and do not say now that the employment agreement is a stock redemption agreement"). But contrary to these admissions, Dunn & Black argues that the founders "agreed" there would be no buyout, and that the Employment Agreement reflects that agreement and "establishes parameters on the value" of a shareholder's equity interest. Opening Brief, pp. 14-15. These two contrary positions are mutually exclusive: either there is an agreement governing the redemption of stock or there is not. Dunn & Black cannot

admit the Employment Agreement is not a stock redemption agreement, but at the same time argue that it is an agreement governing whether stock would be redeemed, and for how much.

4. **Judicial Estoppel Applies to Prevent the Defendants from Asserting that Mr. McCormick's Shareholder Interest is Defined or Limited by His Terminated Employment Agreement.**

Dunn & Black's argument that Mr. McCormick's shareholder interest is defined and limited by his former Employment Agreement is not only inconsistent with the terms of that agreement and their own admissions, it is directly contrary to its argument—and this Appellate Court's ruling—in McCormick I.

Judicial estoppel "precludes a party from gaining an advantage by asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." Cunningham v. Reliable Concrete, 126 Wn. App. 222, 224 (2005), *citing* Johnson v. Si-Cor, Inc., 107 Wn. App. 902, 906 (2001). Judicial estoppel applies if (1) the position of the party to be estopped is "clearly inconsistent" with its previous one; and (2) "that party must have convinced the court to accept that previous position." Miller v. Campbell, 137 Wn. App. 762, 769 (2007).

In McCormick I, Dunn & Black argued—and this Court agreed—that there had been no stock redemption, and that Mr. McCormick

remained a shareholder following his termination of employment. McCormick I, at 885-86, 894. Specifically, the \$5,000 payment that was made to Mr. McCormick, and that was applied to satisfy the obligations contained in the Employment Agreement's termination clause, Section 18, did not constitute a redemption of shares, and had no effect on Mr. McCormick's shareholder interest. McCormick I, at 885-86.

This ruling that there was no stock redemption and no stock redemption agreement was critical to this Court's ultimate conclusion that Mr. McCormick was not then entitled to a buy-out. Following Arizona law, this Court held "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." McCormick I at 891, *citing Fearnow v. Ridenour, Swenson, Cleere & Evans, PC*, 213 Ariz. 24, 31, 138 P.3d 723 (2006). Washington's Professional Services Corporation statute, RCW 18.100.100, which requires shareholders to be duly licensed, "does not provide for stock redemption upon employment termination." Id. at 892.

Dunn & Black's current assertion that Mr. McCormick's shareholder interest is defined by his Employment Agreement's termination clause, and is limited to that clause's \$5,000 severance provision, is completely inconsistent with its previous arguments and this

Court's previous ruling. Defendants cannot have it both ways. They cannot argue to their advantage that there was no stock redemption agreement, and that the termination of the Employment Agreement—and payment of the \$5,000 pursuant to its termination clause—did *not* affect Mr. McCormick's shareholder interests, and then turn around in this action and argue the opposite: that the Employment Agreement is a stock redemption agreement governing the redemption and value of shares.

As a matter of law, judicial estoppel precludes Defendants from now making the clearly inconsistent argument that Mr. McCormick's shareholder interest is now defined by the terminated Employment Agreement, and limited by the \$5,000 already paid pursuant to that agreement's termination clause.

B. THE TRIAL COURT CORRECTLY RULED THAT THE PROFESSIONAL SERVICES CORPORATION ACT APPLIES TO GOVERN THE RIGHTS AND OBLIGATIONS OF THE PARTIES WITH REGARD TO MR. MCCORMICK'S SHAREHOLDER INTEREST.

Washington's Professional Services Corporation Act, RCW 18.100 *et. seq.*—which did not previously apply when Mr. McCormick was duly licensed and eligible to continue to be a shareholder—now applies to provide statutory rights that were previously unavailable to Mr. McCormick.

1. **Brief Summary of Statutory Scheme.**

Pursuant to the Act, only individuals who are duly licensed to practice law in Washington may be shareholders of a law firm organized as a professional services corporation. RCW 18.100.010, .030(3), .050(1) and .060. If a shareholder "becomes ineligible" to hold shares, that shareholder "shall sever all...financial interests in such corporation forthwith." RCW 18.100.100. The statute places a corresponding duty on the corporation to "require compliance with this provision" or face dissolution. Id. Dunn & Black admits that this Act applies to Mr. McCormick now that he is no longer licensed to practice law. Opening Brief, p. 8.

The Act then outlines what a shareholder who becomes ineligible is permitted to do with his or her shares in order to comply with the requirement to sever all financial interests:

If:

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

...and

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

the shares held 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. (Emphasis added).

RCW 18.100.116(1).

Dunn & Black argued below that the legislature *required* there to be a *pre-existing* stock redemption agreement. CP 63, ln. 5-6; CP 72, ln. 16-17. On the contrary, the Act recognizes that there may not be such an agreement:

In the absence of any such terms, such shares may be transferred to any individual eligible to be a shareholder of the corporation.

Id. Again, such a transfer is permissive—the shares "may" be transferred as outlined—and is not mandatory.

While the parties made offers and demands back and forth following the time Mr. McCormick became ineligible, no agreement was ever reached regarding the transfer or redemption of Mr. McCormick's shares as permitted by RCW 18.100.116(1). *See* Complaint and Answer, ¶¶ 2, 3 and 17, 18 (CP 11 and 14); Counterclaim, ¶ 27 (CP 15), and correspondence at CP 50, 53, 55 and 83. Absent some agreement regarding the disposition of his shares, Mr. McCormick remains a shareholder. *See* RCW 23B.06.030(1)("shares that are issued are

outstanding shares until they are reacquired, redeemed, converted or cancelled"); McCormick I, at 886.

Contrary to Dunn & Black's argument below, a shareholder who "becomes ineligible" does not automatically lose his or her shares, nor are his or her shareholder rights extinguished. On the contrary, the Act allows an "ineligible person" to continue to hold shares for 12 months (a "safe harbor" period) while making arrangements for, or negotiating the severance of his financial interests as permitted. RCW 18.100.116(2). If there is no voluntary stock transfer or redemption as permitted by subsection .116(1) within the 12 month safe harbor period, then subsection .116(2) provides mandatory default provisions that apply:

If such a redemption or transfer of the shares held by...an ineligible person is not completed within twelve months...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...**ineligible person shall have** no further interest in the corporation other than **the right to payment for the shares as provided in RCW 23B.13.250.** ... (Emphasis added)

RCW 18.100.116(2).

Mr. McCormick finds himself in precisely the situation governed by this Act. He "became ineligible" to continue to hold shares when he

gave up his law license in August, 2008. Since that time he attempted to negotiate the transfer or redemption of his shares as permitted by subsection .116(1). But there has been no agreement for the voluntary transfer or redemption of his shares. Once the 12 month "safe harbor" period expires, both Mr. McCormick and the corporation will be subject to the rights and obligations contained in the mandatory default provisions of subsection .116(2).

Dunn & Black previously recognized the consequences of this precise situation. In the prior briefing to this Court in McCormick I, Dunn & Black acknowledged:

Nor does Washington law require redemption when an attorney leaves his or her law firm. **As long as McCormick is licensed to practice law in Washington, he can own shares in what is now Dunn & Black, P.S.** See RCW 18.100.100.

• • •

Shares shall be reacquired by the firm only upon the death of a shareholder or the transfer of shares to an "ineligible" person—i.e., one who is not licensed to practice law in the State of Washington. RCW 18.100.116(2).

CP 136 and 132.

The Trial Court correctly interpreted and applied RCW 18.100.116, giving effect to all of its provisions. *Accord* Jones v. Sisters of Providence, 140 Wn.2d 112, 116 (2000); Estate of Black, 153 Wn.2d

152, 163 (2004)(statutes should be read reasonably and as a whole, giving effect to all of the language used, with no portion of the statute rendered meaningless or superfluous); State v. Roggenkamp, 153 Wn.2d 614, 623-24 (2005); King Cnty v. Seattle, 70 Wn.2d 988, 991 (1967) (courts must not read into a statute matters which are not there or modify the statute by construction).

2. **Dunn & Black Does Not Challenge Any Ruling the Trial Court Made With Regard to Statutory Interpretation Issues Presented Below.**

Dunn & Black argued below that some of the provisions of the Act apply, but others—particularly those provisions that grant Mr. McCormick a right to recover "fair value" for his shares—do not. **The issues and arguments concerning the Act that Dunn & Black presents in this appeal are not those presented below.**

To the Trial Court, Dunn & Black asserted that Mr. McCormick is no longer a shareholder, as his shares were automatically transferred by operation of law to the Firm when Mr. McCormick "tendered" his shares in conjunction with his demand for fair value (even though such tender was rejected). CP 70, ln. 10; CP 226, ln. 7—CP 227, ln. 21; RP 27, ln. 17-17; RP 30, ln. 3-6; RP 54, ln. 7-16.. Dunn & Black further argued that *the Firm* itself was free to transfer Mr. McCormick's shares to any other eligible person without Mr. McCormick's permission. CP 71, ln. 23-24.

And it argued that the mandatory default provisions of RCW 18.100.116(2) could never apply because there was no *pre-existing* basis for redemption in this case. CP 72, ln. 16-17. Mr. McCormick fully briefed and responded to these arguments below. CP 96-116; RP 34, ln. 24—RP 42, ln. 12. **Dunn & Black does not challenge the Trial Court's rulings with regard any of its previous arguments.** Rather, Dunn & Black raises two new statutory interpretation arguments for the first time on appeal.

3. **This Court Should Not Consider Arguments Raised for the First Time on Appeal.**

Issues not raised in the trial court will not normally be considered for the first time on appeal. RAP 2.5(a); Martin v. Johnson, 141 Wn. App. 611, 617 (2007); Better Fin. Solutions, Inc. v. Caicos Corp., 117 Wn. App. 899, 912-13 (2003). None of the exceptions outlined in RAP 2.5(a) apply in this case to allow Dunn & Black to avoid this general rule. It is simply disingenuous for Dunn & Black to argue that the Trial Court erred in ruling on an issue that was never raised, and for which the Trial Court made no ruling.

4. **Dunn & Black's New Argument on Appeal (Issue 3)—
That there Exists a "Private Agreement" for the
Redemption of Shares—Directly Contradicts the
Factual Assertions and Legal Arguments Made Below.**

It is undisputed and conclusively established that **there is no stock redemption agreement.** McCormick I, at 892 ("the parties never made a stock redemption agreement" and this Court may not "make a stock redemption agreement where the parties failed to do so"). More specifically, Mr. McCormick's former Employment Agreement was not a stock redemption agreement. Opening Brief, p. 14; RP 12, ln. 9-10 ("We have never said and do not say now that the employment agreement is a stock redemption agreement"). Yet, for this appeal, Dunn & Black asserts completely the opposite.

In an argument direct from "Alice in Wonderland"—what's down is up—Dunn & Black now asserts that Mr. McCormick's former Employment Agreement, more specifically, the termination clause contained therein, constitutes a "private agreement" for the redemption of shares as that term is used in RCW 18.100.116(1)(a shareholder who becomes ineligible may transfer or have his shares redeemed pursuant to a "private agreement"). *See* Opening Brief, p. 16-20. But contrary to this new argument—that there exists a private agreement—Dunn & Black repeatedly asserted below that there was **no** such "private agreement," and

their legal arguments were premised on the *absence* of any private agreement or pre-existing basis for redemption. For example:

- **It is also true that neither the Articles of Incorporation or a "private agreement" establish terms of redemption.** Consequently, under the clear language of RCW 18.100.116(1), Dunn & Black is free to transfer Plaintiff's former shares to any eligible individual. (CP 71, ln. 20-24)
- Subsection (2) applies to situations in which there is a pre-existing basis for redemption by the ineligible shareholder...Subsection (1) makes clear that redemption rights come from Articles of Incorporation **or a "private agreement."** **If no such rights are created by the parties – as in this case – Subsection (2) cannot be invoked.** (CP 72, ln. 15-21)
- If Subsection (2) creates a right of redemption even when **the founders of the law firm chose not to include such rights in the Articles of Incorporation or a "private agreement,"** then Subsection (1) would have no practical meaning. (CP 72, ln. 24-28)
- Plaintiff's equity interest...may be transferred to remaining shareholders...or may be redeemed by the corporation **pursuant to terms stated in...a private agreement.** In the absence of any such terms, such shares may be transferred to any individual eligible to be a shareholder...**Here, there are no "terms"** which require redemption... (CP 225, ln. 22 – CP 226, ln. 4)
- In sum, Plaintiff is "ineligible" to remain a shareholder in Dunn & Black and **nothing in RCW 18.100 et. seq. or any "private agreement"** creates a basis upon which Plaintiff

may seek payment for having to relinquish his shares. (CP 227, ln. 5-8)

- Well, here, we know there's no stock redemption agreement. That's undisputed. We know that there are no provisions to speak to redemption in the articles of incorporation or the bylaws. **And we know that there is no private agreement.** So that gets us to... (RP 29, ln. 6-10)
- When he tendered his shares, he lost his status as a shareholder in the corporation. **The fact that there is no private agreement, there's no stock redemption agreement, are what they are.** That was the parties' choice...If the parties had wanted to made a stock redemption agreement they could have done so. (RP 54, ln. 15-22)
- You're never going to have a redemption in this case **because there is no agreement** to do so... (RP 55, ln. 11-12)

Given the previous ruling of this Court that there is no stock redemption agreement, and Dunn & Black's own repeated admissions that there is no "private agreement" for the transfer or redemption of shares, this Court should decline to follow Dunn & Black down the rabbit hole, and should reject Dunn & Black's new argument that there exists a "private agreement" for the redemption of shares.

5. **Mr. McCormick has Not Transferred his Shares, Pursuant to Any Purported Agreement.**

Even if we ignore all of the legal and factual inconsistencies that surround Dunn & Black's new argument on appeal, and assume that Mr.

McCormick's long-defunct Employment Agreement could be a "private agreement" for the transfer or redemption of his shares as contemplated by RCW 18.100.116(1), it is undisputed that Mr. McCormick's shares were never transferred or redeemed pursuant to that (or any other) agreement. In response to Mr. McCormick's demand for payment of fair value for his shares, Dunn & Black offered to settle this matter for \$5,000, an amount it asserted was tied to the long-defunct Employment Agreement. CP 53 and 55. **Mr. McCormick expressly rejected that offer.** CP 15, ¶ 27; CP 84. An "agreement," by definition, means there must be mutual assent by both parties. Hansen Transworld Wireless TV-Spokane, 111 Wn. App. 361, 376 (2002); Alaska Pac. v. Eagon Forest Prods., 85 Wn. App. 354, 360 (1997). There is no legal basis for Dunn & Black to unilaterally force Mr. McCormick to transfer his shareholder interest pursuant to terms he expressly rejected.

6. **Dunn & Black's Second New Argument (Issue 4) Also has No Merit: the Act Clearly Applies to Shareholders Who "Become Ineligible."**

Also for the first time on appeal, Dunn & Black argues that RCW 18.100.116(2) does not apply because Mr. McCormick's shares were not "transferred" from him or extinguished when he became ineligible. Opening Brief, p. 2 (issue no. 4), and p. 20-23. Again, this Court should not consider issues and arguments raised for the first time on

appeal. RAP 2.5(a); Martin v. Johnson, 141 Wn. App. at 617; Better Fin. Solutions Inc. v. Caicos Corp., 117 Wn. App. at 912-13. Regardless, it is clear that this new argument is based on a strained and unreasonable interpretation of the statute. Dunn & Black's new argument would preclude any shareholder who "becomes ineligible" from ever being entitled to the dissenting shareholder rights provided in RCW 18.100.116(2).

First of all, Dunn & Black misinterpret the word "transfer" as used in the statute: confusing "transfer *to*" with "transfer *by or from*." The Trial Court determined as a matter of law that Mr. McCormick's current and existing shares were neither transferred nor extinguished. CP 316, ¶ 2. Specifically, neither the fact that Mr. McCormick became ineligible, nor made a tender that wasn't accepted, operated to "transfer" his shares. RP 67, ln. 1-15. Dunn & Black argues that, since Mr. McCormick's shares weren't *transferred from* him after he became ineligible, the 12 month safe harbor provision contained in RCW 18.100.116(2) can never apply. Opening Brief, p. 21-22. But the safe harbor period in Subsection .116(2) begins to run when shares are *transferred to* an ineligible person, or otherwise when shares come to be held by an ineligible person, "as the case may be." Dunn & Black rhetorically asks: "what event triggers the beginning of the 12 month period specified by RCW 18.100.116(2)?"

Opening Brief, p. 21. The answer is expressly enumerated in RCW 18.100.116(1)(a)(ii): when Mr. McCormick became an "ineligible person."

RCW 18.100.116(1)(a) outlines various circumstances in which an ineligible person comes to hold shares in a professional services corporation. This occurs when: a shareholder dies (RCW 18.100.116(1)(a)(i)); a shareholder "becomes an ineligible person" (.116(1)(a)(ii)); shares are transferred by operation of law to an ineligible person (.116(1)(a)(iii)); and a charitable trust that holds shares becomes ineligible (.116(1)(a)(iv)). If *any* of these triggering events happen (and the shares are less than all of the outstanding shares), then the subsequent provisions of the act apply to provide what the ineligible shareholder is permitted to do, or is required to do. Each subsequent section of the statute refers repeatedly to "such shares" held by "such ineligible person." See 18.100.116(1)(b) and (2). The word "such" is a descriptive and relative adjective that refers back to and identifies something previously spoken of. Jepson v. Labor & Indus., 89 Wn.2d 394, 404 (1977). In this case, both the permissive transfer and redemption provisions contained in .116(1)(b), and the mandatory default provisions of .116(2) apply to "**such shares**" held by "**such ineligible person**." "Such shares" and "such ineligible person" relate back to the triggering circumstances listed in

.116(1)(a), including both shares transferred to an ineligible person, and a shareholder who becomes an ineligible person.

Dunn & Black would have this Court treat each subsection of RCW 18.100.116 individually, and without reference to the other subsections, or the other provisions of the Act. But that would violate the long accepted principle that all provisions of a statute must be read together. Jones v. Sisters of Providence, 140 Wn.2d at 116; State v. Roggenkamp, 153 Wn.2d at 623-24. The statutory scheme is simple. A shareholder must remain eligible to hold shares. If he or she is not eligible, or becomes ineligible, then he/she must sever all financial interests. The Act provides what an ineligible shareholder is permitted to do, and barring that, what an ineligible shareholder is required to do to divest him/herself of the shares. It is not reasonable to conclude, as Dunn & Black suggest, that the legislature would intend that the provisions of the Act apply only to some ineligible shareholders, but not others.

7. **If RCW 18.100.116(2) Does Not Apply, then Dunn & Black Face Dissolution Per RCW 18.100.100.**

If Dunn & Black's interpretation is correct, and RCW 18.100.116(2) does not apply because Mr. McCormick's shares have not been extinguished or transferred, then there are no mandatory default provisions governing the disposition of Mr. McCormick's shares. Since

there has been no voluntary redemption or transfer as permitted by .116(1)(b), Mr. McCormick remains a shareholder. *See* RCW 23B.06.030(1)(shares remain outstanding "until they are reacquired, redeemed, converted, or cancelled"); McCormick I, at 886. Dunn & Black acknowledge that RCW 18.100.100 requires Mr. McCormick to "sever all financial interest" in the Firm. Opening Brief, p. 8. That section also places a corresponding duty on the corporation to ensure that all shareholders are eligible:

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 the appropriate action to dissolve the corporation.

If the mandatory default provisions of .116(2) do not apply as suggested by Dunn & Black, the Act requires the dissolution of the Firm, since it cannot continue to operate as a professional services corporation with an ineligible shareholder.

V. CONCLUSION

This Court conclusively established in McCormick I that there was no stock redemption agreement, and that Mr. McCormick remained a shareholder of the Firm. The Professional Services Corporation Act did

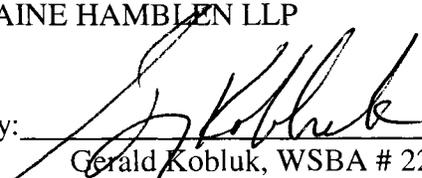
not previously apply because Mr. McCormick was eligible to be a shareholder. Now that Mr. McCormick is no longer eligible to be a shareholder, that Act now applies, and both he and the Firm are subject to rights and obligations that did not previously exist. Dunn & Black may not avoid its obligations—or deny Mr. McCormick his statutory shareholder rights—by now arguing that there has always been a stock redemption agreement (the Employment Agreement).

The Trial Court correctly rejected Dunn & Black's arguments as a matter of law. This Court should uphold the Trial Court's rulings, and should not consider new arguments raised for the first time on appeal.

RESPECTFULLY SUBMITTED this 11th day of August, 2009.

PAINE HAMBLEN LLP

By: _____



Gerald Kobluk, WSBA # 22994

Attorney for Joel C. McCormick, Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11TH day of August, 2009, I caused to be served a true and correct copy of the foregoing to the following:

| | | |
|---------------|------------------|-------------------------------|
| <u>X</u> | U.S. MAIL | Thomas D. Adams |
| <u> </u> | OVERNIGHT MAIL | Karr Tuttle Campbell, P.S.C |
| <u> </u> | FAX TRANSMISSION | 1201 Third Avenue, Suite 2900 |
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Marsha Ungricht
Marsha Ungricht

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