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COURT OF APPEALS  
DIVISION ONE

JUL 16 2010

NO. 64578-1

COURT OF APPEALS STATE OF WASHINGTON  
DIVISION ONE

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WOODINVILLE BUSINESS CENTER NO. 1, a Washington Limited  
Partnership,

WBC/Third-party Plaintiff,

v.

ALBERT L. DYKES, an individual and former General Managing Partner  
of Woodinville Business Center No. 1, and MARGARET RYAN-  
DYKES, an individual, and the marital community composed thereof,

Mr. Dykes/Third-party Defendants.

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REPLY BRIEF OF APPELLANTS

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## I. ARGUMENT

- A. **WBC's contention that Washington courts have fully considered, and rejected, the argument that a court's determination whether damages are liquidated is reviewed *de novo*, is not supported by case law.**

WBC's brief suggests that Mr. Dykes' argument -- that a trial court's determination whether or not a party's damages are liquidated is reviewed *de novo* -- relies solely on the holding of an outlier case, *McConnell v. Mothers Work, Inc.*, 131 Wn. App. 525, 128 P.3d 128 (2006). Mr. Dykes is aware, and does not dispute that Washington courts have consistently stated that "an award of prejudgment interest is reviewed for abuse of discretion." See e.g., *Scoccolo Const. v. City of Renton*, 158 Wn.2d 506, 519, 145 P.3d 371 (2006). Mr. Dykes's argument is rather that no Washington appellate court has fully addressed the distinction between a trial court's determination that a party's damages are liquidated, and its award of prejudgment interest on a liquidated sum. Mr. Dykes further argues that to the extent that Washington courts have addressed this issue, and concluded that the standard of review for both is abuse of discretion, the rulings are in error.

**1. *Scoccolo*, and the other cases cited by both WBC and Mr. Dykes stand only for the proposition that a trial court's award of prejudgment interest is reviewed for abuse of discretion.**

WBC's brief cites a number of Washington cases, including *Scoccolo Const. v. City of Renton*, 158 Wn.2d at 519, all holding that "an award of prejudgment interest is reviewed for abuse of discretion." With the exception of this Court's opinion in *Polygon NW Co. v. Am. Nat'l Fire Ins. Co.*, 143 Wn. App. 753, 189 P.3d 777 (2008), no Washington case states that the determination whether damages are liquidated, and the award of prejudgment interest, are both reviewed for abuse of discretion. As for WBC's contention that no Washington case supports Mr. Dykes's argument that the determination whether damages are liquidated is reviewed *de novo*, Appellants' brief cites several cases that support its contention. *See* Appellants' Brief at 25-26 (citing cases that directly support its assertion that conclusions of law are reviewed *de novo*, and that a court's ruling that damages are liquidated is a conclusion of law).

Both Mr. Dykes's and WBCs' briefing demonstrate the paucity of legal analysis addressing this question. The most detailed analysis of the issue was performed by this Court in *Polygon NW Co.*, the only case in which the majority opinion addressed a dispute regarding the appropriate standard of review of a trial court's determination whether or not damages

are liquidated. In the *Polygon NW* opinion, this Court noted that the parties disputed the proper standard of review of a trial court's conclusion that damages are liquidated, but then cited the ruling in *Scoccolo Const.* as dispositive of the issue, and therefore no further analysis was required. *Polygon NW Co., Inc.*, 143 Wn. App. at 790 n.13. In support of its argument that the issue has already been fully addressed, WBC cites to footnote 8 of appellant Icicle Seafood's brief to the Washington Supreme Court in the case *Endicott v. Icicle Seafoods, Inc.*, 167 Wn.2d 873, 224 P.3d 761 (2010) as evidence that the court fully considered, and rejected, the argument that a determination whether or not damages are liquidated is reviewed *de novo*. Respondent's Brief at 15. Setting aside the fact that Icicle Seafoods's brief has no precedential value, it cannot reasonably be argued that footnote 8 constitutes a complete analysis of the issue. It is also important to note that WBC's assertion that *Endicott* demonstrates that the Washington Supreme Court has considered and rejected the arguments made in Mr. Dykes's brief is supported by nothing more than speculation as there is nothing in the court's opinion that could be cited for that proposition.

One final point concerning the Washington Supreme Court's opinion in *Endicott* is germane to this dispute. In *Endicott*, the court

reiterated that “a ruling based on an erroneous legal interpretation is necessarily an abuse of discretion.” *Endicott*, 167 Wn.2d at 886 (citing *Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993)). This rule is entirely consistent with Mr. Dykes’s argument that a trial court’s conclusion that a party’s damages are liquidated is appropriately reviewed *de novo* because in both circumstances, an appellate court must first review the trial court’s interpretation of the law as applied to the facts, and where the trial court’s legal conclusion is incorrect, reversal is required.

In sum, WBC’s contention that this issue has already been fully considered, and rejected, by Washington courts finds no support in the cases cited by either WBC or Mr. Dykes. If anything, the cited cases demonstrate that Washington courts have not yet fully considered whether the appropriate standard of review of a trial court’s conclusion of law that damages are liquidated is *de novo* or abuse of discretion. WBC’s *stare decisis* argument therefore fails and this Court should perform its own analysis of the appropriate standard of review of the trial court’s legal conclusion that WBC’s damages were liquidated.

**2. WBC's argument that appellate courts consolidate their review of a trial court's conclusion that damages are liquidated, with its award of prejudgment interest, is not supported by the cited cases.**

WBC conducts a review of the cases cited in Mr. Dykes's brief and argues that only one standard of review is required because the courts consolidate their review of a trial court's legal conclusion that damages are liquidated, with their review of the trial court's award of prejudgment interest. Respondent's Brief at 16. This argument is contrary to the text of the opinions cited in both Mr. Dykes's and WBC's briefs. This Court's opinion in *Polygon NW Co., Inc.* is illustrative. When reviewing a trial court's conclusion that damages are liquidated, the test is whether the finder of fact exercised discretion to determine either the measure, or the amount of the damages. *Polygon NW Co., Inc.*, 143 Wn. App. at 790-91; see also *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968) (a liquidated claim may be calculated with exactness based on the evidence presented, without reliance on opinion or discretion). In contrast, an appellate court's review of a trial court's award of prejudgment interest examines the policy considerations made by the trial court. *Polygon NW Co.*, 143 Wn. App. at 793-94. Contrary to WBC's argument, these are in fact two separate analyses, demonstrating that an appellate court's review

of a trial court's legal conclusion that damages are liquidated is fundamentally different than the appellate court's review of the policy grounds for the trial court's award of prejudgment interest.

In conclusion, WBC's contention that Washington courts have fully adjudicated the issue whether a trial court's determination that a party's damages are liquidated is reviewed *de novo*, or for abuse of discretion, is not supported by the Washington case law. Moreover, WBC's contention that Washington courts consolidate their review of trial court's determination whether a party's damages are liquidated, with their review of the award of prejudgment interest and therefore only one standard of review is needed, is contrary to the plain language of opinions like *Polygon NW Co., Inc.* For these reasons, this Court should hold that the appropriate standard of review of a trial court's conclusion of law that damages are liquidated is *de novo*.

**B. The trial court's conclusion that WBC's damages were liquidated was based on an incorrect interpretation of the law and under either an abuse of discretion, or a *de novo* standard of review, constitutes reversible error.**

Where a trial court's conclusion of law is based on an incorrect interpretation of the law, it is reversible error. *Endicott*, 167 Wn.2d at 886 (decided under an abuse of discretion standard of review); *In re Custody of E.A.T.W.*, 168 Wn.2d 335, 348-49, 227 P.3d 1284 (2010) (decided under a

*de novo* standard of review). Whether this Court reviews the trial court's ruling that WBC's damages were liquidated under an abuse of discretion, or *de novo* standard of review, the conclusion that the trial court's ruling was reversible error remains the same.

Two guiding principles govern an award of prejudgment interest: (1) An award of prejudgment interest is intended to prevent a party from being unjustly enriched by retaining money it knows is owed to the aggrieved party; and (2) A defendant is not required to pay prejudgment interest when he or she is unable to determine the amount of the damages owed, without reliance on the discretion of the court. See *Polygon NW Co., Inc.*, 143 Wn. App. at 793; *Aker Verdal A/S v. Neil F. Lampson, Inc.*, 65 Wn. App. 177, 189, 828 P.2d 610 (1992).

**1. WBC's contention that damages are always liquidated unless the measure of damages is disputed is not a correct statement of Washington law.**

WBC argues that the trial court's ruling that its damages were liquidated was appropriate because the jury's verdict determined only the amount, **not the measure**, of its damages.<sup>1</sup> Respondents Brief at 22, 23,

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<sup>1</sup> Appellant Dykes understands WBC's definition of "measure of damages" to mean the formula or method of calculating the damages, *e.g.* fair market value versus replacement cost. In Appellants' Brief, "measure" of damages was used generically to refer to the "amount" of the damages. As used in Appellants' Reply Brief, "measure of damages" adopts the definition used by WBC.

25-28, *passim*. Thus, under WBC's interpretation of the test to determine whether a party's damages are liquidated, only if the finder of fact exercised discretion to determine the measure of the damages, not the amount, are damages are liquidated. This argument was previously made, and rejected, by the court in *St. Hilaire v. Food Servs. of Am., Inc.*, 82 Wn. App. 343, 354, 917 P.2d 1114 (1996). To avoid the holding of *St. Hilaire*, WBC argues that since 1996 Washington courts have "clarified" the rule, adopting the argument rejected in *St. Hilaire* that if the measure of damages is not disputed, the damages are as a matter of law liquidated. Respondent's Brief at 26. As evidence of this evolution in the law, WBC cites *Egerer v. CSR West, LLC*, 116 Wn. App. 645, 654, 67 P.3d 1128 (2003). WBC correctly notes that the court in *Egerer* found that the measure of damages was set forth under RCW 62A.2-713(1), providing that the plaintiff's damages were the difference between the market value of fill material at the time of the breach of the sales contract, less the contract price. *Egerer*, 116 Wn. App. at 650. WBC fails, however, to state that the court in *Egerer* also held that the amount of damages were readily calculable by the defendant, without reliance on the discretion of the court, because plaintiff obtained a quote of the market price for a suitable alternative fill material at the time of the defendant's breach of the

sales contract. *Id.* In *Egerer*, neither the measure of damages, nor the amount of the damages, required the discretion of the finder of fact. In sum, there is nothing in the opinion in *Egerer* that suggests that only where the measure of damages are disputed are the damages unliquidated.

Importantly, the Washington Supreme Court's opinion in *Safeco Ins. Co. v. Woodley*, 150 Wn.2d 765, 82 P.3d 660 (2004) settles any remaining arguments that the law governing the determination of liquidated damages has been "clarified" since *St. Hilaire*. In *Woodley*, the Washington Supreme Court restated the rule from *Prier* that damages are liquidated where they are "otherwise capable of calculation with 'exactness, without reliance on opinion or discretion.'" *Woodley*, 150 Wn.2d at 773. The opinion further reads:

In this case, the ratio for determining the pro rata share of legal expenses that Safeco is obligated to pay under [*Winters v. State Farm Ins. Co.*, 144 Wn.2d 869, 31 P.3d 1164 (2001)] can be applied without reliance on opinion or discretion. The baseline amount of legal expenses to which the pro rata percentage would apply, however, has not yet been determined, and such a determination lies within the discretion of the trial judge. **Because the amount of legal expenses has not yet been determined, the claim cannot be considered liquidated and Woodley is not entitled to prejudgment interest.**

*Id.* (emphasis added). The Washington Supreme Court in *Woodley* held that although the measure of the damages was known (the ratio for

determining Safeco's pro rata share of its insured's legal expenses), the damages were nevertheless unliquidated because the amount of the damages (the insured's attorney's fees) was yet to be determined. *Id.*

In sum, *St. Hilaire* remains a correct statement of the law, and while it is certainly true that a dispute over the measure of damages is sufficient to render the damages unliquidated, it is not true under Washington law that **only if** the measure of damages is disputed are the damages unliquidated. The *sine qua non* of the test to determine whether a party's damages are liquidated remains an act of discretion by the finder of fact to determine either the measure, or the amount of the damages.

**2. *St. Hilaire* remains the case most analogous to the facts of this case.**

The court's ruling in *St. Hilaire* – where the finder of fact exercises discretion to determine the amount of the plaintiff's damages, they are unliquidated – remains good law and is the case most analogous to the case at bar. Appellants' Brief contained an analysis of the court's ruling in *Dautel v. Heritage Home Ctr., Inc.*, 89 Wn. App. 148, 948 P.2d 397 (1997), the case relied on most heavily in the trial court's ruling that WBC's damages were liquidated. WBC asserts that Mr. Dykes argues that *Dautel* is limited to circumstances in which the court is given a choice between one of two possible amounts for the damages. Respondent's

Brief at 21. In fact, Appellants' Brief correctly stated that in *Dautel*, the court held that because the plaintiff's damages were readily calculable without the discretion of the finder of fact, the damages were liquidated. Appellants' Brief at 29. The facts of *Dautel* on which the ruling is based were that the damages were readily calculable without the discretion of the finder of fact because they were either zero, or an additional 10% sales commission. *Id.* WBC's contention that *Dautel* stands for the proposition that in any case where only the amount, not the measure of the damages is disputed is not a correct interpretation of the case. Respondent's Brief at 22.

WBC further argues that the court's opinion in *Egerer* should guide this Court's analysis of the case at bar. This argument similarly fails. In *Egerer*, the amount of the damages was calculated by multiplying the market value of the fill material at the time of defendant's breach of the sales contract (\$8.25/cubic yard) by the total number of cubic yards purchased, less the contract price for fill material (\$0.50/cubic yard) multiplied by the total number of cubic yards purchased. *Egerer*, 116 Wn. App. at 650. The defendant argued that the market price should have been calculated using the price paid by the plaintiff when it actually contracted for replacement fill (\$6.39/cubic yard), or from plaintiff's earlier contract

price (\$1.10/cubic yard). *Id.* at 653. The court had only to look to the statute, RCW 62A.2-723 to settle the dispute. RCW 62A.2-723 states that the market price is determined at the time the buyer learned of the breach, or at any reasonable time before or after the breach. Thus, the market price obtained by the plaintiff at the time it learned of the defendant's breach (\$8.25/cubic yard), was the correct market price. As in *Dautel*, the defendant in *Egerer* could have readily calculated the plaintiff's damages any time prior to trial because the statute clearly identified the plaintiff's measure of damages, and the market price at the time of the breach was known.

Therefore, *St. Hilaire*, not *Dautel* or *Egerer*, is the case most analogous to the case at bar. As was true in *St. Hilaire*, Mr. Dykes could not have calculated how much he owed WBC with reasonable exactness until the jury exercised its discretion to determine the "normal" commission to which Mr. Dykes was entitled.

3. **It is not the timing of the act of discretion, but simply the necessity of the act of discretion, that is determinative of whether the damages are liquidated.**

WBC argues that it is Mr. Dykes's contention that it is the order of the act of discretion that is determinative. Respondent's Brief at 27-28. WBC completely misapprehends Mr. Dykes's argument. It has been

WBC's contention, and it was the reasoning applied by the trial court, that because the amount of WBC's damages could be readily calculated by the trial court after the jury exercised its discretion to determine the value of a "normal" commission, the damages were liquidated. Appellants' Brief simply argued that WBC's interpretation was an erroneous statement of the law. Appellants' Brief at 32-33.

In *Prier*, the court discussed the reasons for requiring the damages to be readily calculable without reference to the discretion of the finder of fact:

The difficulty is that it cannot well be said one ought to pay money, unless he can ascertain how much he ought to pay with reasonable exactness.

*Prier*, 74 Wn.2d at 34 (citing 5 A. Corbin, Contracts § 10467 n.69 (1964)).

In *Aker Verdal A/S v. Neil F. Lampson, Inc.*, 65 Wn. App. 177, 189, 828 P.2d 610 (1992), the court, restating the principle from *Prier*, wrote: "A defendant should not, however, be required to pay prejudgment interest on damages when he is unable to ascertain the amount owed." See also *Hadley v. Maxwell*, 120 Wn. App. 137, 142, 84 P.3d 286 (2004); *Lakes v. Von Der Mehden*, 117 Wn. App. 212, 217, 70 P.3d 154 (2003). WBC suggests that the dispositive inquiry is whether the judge, after the jury determined that the normal commission was 4%, had to exercise discretion

to determine the measure of the damages. Under WBC's proposed interpretation of *Dautel* and *Egerer*, it is immaterial that Mr. Dykes could not readily calculate whether, or even how much he owed until the jury exercised its discretion to determine the "normal" commission, however, under the correct rule set forth in *Prier*, the dispositive question is whether the defendant could readily calculate the damages without reliance on the discretion of the court. The trial court's determination that WBC's damages were liquidated constitutes reversible error precisely because it is contrary to the principle set forth in *Prier* and *Aker Verdal A/S*, and prior to the jury's exercise of discretion to determine the "normal" commission it was not possible for Mr. Dykes to calculate WBC's damages.

In sum, WBC's analysis fails for two reasons: (1) Damages are liquidated where the determination of the measure of damages, or the amount of the damages, requires the discretion of the court; and (2) The question under *Prier* is not whether the damages are readily calculable by the court, rather the issue is whether Mr. Dykes could have readily calculated the damages before the jury exercised discretion to determine the amount of the "normal" commission. Because the answer to the second question is plainly "no," WBC's damages are unliquidated and the

trial court's award of prejudgment constitutes reversible error under either a *de novo*, or an abuse of discretion standard of review.

**C. WBC mischaracterizes Mr. Dykes's argument that the court abused its discretion by granting WBC's motion to strike the jury's consideration of the breach of fiduciary duty claim.**

**1. The burden of proof lies with WBC, not Mr. Dykes, to show that the trial court's failure to consider even one of the *Brown* factors is not an abuse of its discretion.**

In a rather nifty bit of legal Jiu-Jitsu, WBC argues that Mr. Dykes has failed to identify a single case in which an appellate court has held that a trial court abuses its discretion where it fails to perform an analysis of **all** of the *Brown* factors. Respondent's Brief at 30 (emphasis added). Mr. Dykes did not argue that the trial court abused its discretion by failing to analyze each and every *Brown* factor, rather, Mr. Dykes argued that WBC's failure to properly advise the court of the factors to be considered in its decision, along with the court's apparent failure to consider even one of the *Brown* factors, constitutes an abuse of the court's discretion. The relevant language from *Brown v. Safeway Stores*, 94 Wn.2d 359, 368, 617 P.2d 704 (1980) states that the court's "discretion should be exercised with reference to a variety of factors, **including**, but not necessarily limited to, the following factors . . . ." The plain language of the Washington

Supreme Court's decision is that a trial court's consideration must include the factors cited in *Brown*. Mr. Dykes concedes that a court does not necessarily abuse its discretion by failing to consider all of the factors identified in *Brown*, but it is certainly not the case that where a trial court fails to apply the proper legal standard it is not an abuse of its discretion. WBC's case citations do not alter this conclusion.

In *Jackowski v. Borchelt*, 151 Wn. App. 1, 20, 209 P.3d 514 (2009), neither party appealed on the grounds that the trial court abused its discretion by failing to consider the factors identified in *Brown* in its ruling granting the defendant's motion to strike the plaintiff's jury demand. There is simply nothing in the court's opinion to suggest that the trial court did not consider the *Brown* factors in its decision. Moreover, the fact that the appellate court specifically identified the *Brown* factors as essential to the trial court's ruling supports the argument made by Mr. Dykes that the trial court in the case at bar erred by failing to address the *Brown* factors in its ruling. Similarly, in *Green v. Hooper*, 149 Wn. App. 627, 644-46, 205 P.3d 134 (2009), nothing in the opinion indicates that the trial court failed to consider the *Brown* factors in its decision denying the appellant's jury demand.

In *King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 718, 846 P.2d 550 (1993), the appellant initially demanded a jury trial, but later conceded that the relief sought was solely equitable in nature and that a jury trial was not available. The appellant tried the case to the court without objection, and only on appeal did the appellant argue that it should have had a jury trial. *Id.* WBC's citation of *King Aircraft* does nothing to support its argument as there is nothing in the opinion that suggests that a trial court need not consider any of the *Brown* factors in exercising its discretion to strike a party's jury demand.

None of the cases cited by WBC support the proposition that a court need not consider any of the *Brown* factors in its decision denying a party its right to a jury trial. Importantly, in the *Green* case, cited by WBC, the appellate court (citing primarily to *Brown*) wrote:

Article I, section 21 of the Washington Constitution provides that "[t]he right of trial by jury shall remain inviolate." This constitutional provision has been consistently interpreted as "guaranteeing those rights to trial by jury which existed at the time of the adoption of the constitution." "[T]here is a right to a jury trial where the civil action is purely legal in nature." However, there is no right to a trial by jury where the action is purely equitable in nature. "The overall nature of the action is determined by considering all the issues raised by all the pleadings." "In determining whether a case is primarily equitable in nature or is an action at law, the trial court is accorded wide discretion, the exercise of which will not be disturbed except for clear abuse.

*Green*, 149 Wn. App. at 645 (internal citations omitted). In the case at bar there were both legal and equitable issues and the trial court was therefore required to consider some, if not all of the factors identified in *Brown* in its consideration of WBC's motion to strike the jury's consideration of the claim for breach of fiduciary duty.

Finally, WBC states that Mr. Dykes has failed to present any argument as to why it was entitled to have the breach of fiduciary duty claim heard by the jury. Respondent's Brief at 32. Mr. Dykes offers the following response: Article I, section 21 of the Washington Constitution provides that "[t]he right of trial by jury shall remain inviolate." "In cases involving both legal and equitable issues, it is within the trial court's broad discretion "to allow a jury on some, none, or all issues presented." *Brown*, 94 Wn.2d at 367. Mr. Dykes contends that at the very least, before his constitutional right to a jury trial on a claim against him is denied, the trial court is required to base its ruling on the appropriate legal standard and failure to do so is reversible error.

**2. WBC's argument that its motion to strike the jury's consideration of the breach of fiduciary duty claim caused no prejudice ignores the fact that the motion was filed on the first day of trial.**

WBC's contention that its trial brief simply addressed an equitable issue, and was not a motion to strike, is not accurate. WBC argued to the

court that it should strike the jury's consideration of its claim for breach of fiduciary duty. Notwithstanding WBC's characterization, this was a motion to strike. WBC further argues that even if it was a motion to strike, Mr. Dykes can show no prejudice. This assertion too is incorrect. WBC presented its motion to strike in its trial brief filed on the morning of the first day of trial. It hardly requires explanation that counsel for Mr. Dykes was busy preparing for the trial and did not have sufficient time to review WBC's motion and prepare an adequate response. As for WBC's contention that Mr. Dykes did not object to the court's consideration of the issue, that argument would be more persuasive if WBC had served its trial brief more than a couple of hours before the hearing.

Mr. Dykes has clearly shown that the trial court's granting of WBC's motion to strike the jury's consideration of the breach of fiduciary duty claim was an abuse of its discretion because it was neither advised, nor did it consider the factors set forth in *Brown*. Mr. Dykes has also demonstrated that WBC's failure to timely note its motion, instead presenting its argument for the first time in its trial brief filed on the morning of the first day of trial, prejudiced Mr. Dykes's ability to properly respond to WBC's argument. The trial court's consideration, and granting, of WBC's motion to strike the jury's consideration of the breach

of fiduciary duty claim was an abuse of its discretion, and therefore constitutes reversible error.

**D. WBC's introduction of evidence of a prior ruling that Mr. Dykes breached his fiduciary duty to Mr. Lumpkin impermissibly prejudiced the trial court and denied Mr. Dykes the right to a fair trial.**

**1. WBC's argument that substantial evidence supports the trial court's judgment that Mr. Dykes did not properly disclose his commission to the partnership is not supported by WBC's citations to the record.**

Respondent's Brief cites to the record as support for its argument that the trial court's ruling that Mr. Dykes breached his fiduciary duty to the partnership is supported by substantial evidence. Respondent's Brief at 38-39. WBC's citation of Exhibits 36, 45, and 65 does not support WBC's contention that Mr. Dykes testified that he concealed his commission from the partnership. Moreover, the portions of the testimony cited by WBC is only evidence that Mr. Lumpkin disputed that Mr. Dykes was receiving payment of the "normal" commission. WBC fails to support its assertion that substantial evidence supported the trial court's conclusion that Mr. Dykes breached his fiduciary duty to the partnership by failing to disclose the terms of his commission, particularly in light of Mr. Dykes's evidence that Mr. Lumpkin's testimony, and the exhibits in the record, contain unequivocal evidence that Mr. Dykes had fully

disclosed the terms and the amount of his commission to the partnership and to Mr. Lumpkin. RP 510 (referring to Exhibit 21 identifying Mr. Dykes's commission of \$618,000); *see also* Ex. 11, p. 100055. Mr. Lumpkin testified that he did not object to the payment of a 6% commission to Mr. Dykes because it was consistent with the terms of the partnership agreement. RP 510. This demonstrates both that Mr. Lumpkin knew of the 6% commission as disclosed in the partnership agreement, and that Mr. Dykes's commission payment of \$618,000 was equivalent to a 6% commission.

The substantial weight of the evidence shows that after issuing payment to Mr. Dykes, Mr. Lumpkin began developing arguments intended to deprive Mr. Dykes of a portion, or all of his commission. In addition to the grounds cited in Appellants' Reply Brief as proof that the court abused its discretion by striking the jury's consideration of the breach of fiduciary duty claim, the jury should have heard WBC's claim for breach of fiduciary duty because the evidence makes clear that it arose out of Mr. Lumpkin's argument that Mr. Dykes was not entitled to a 6% commission. Contrary to WBC's assertion, none of the evidence rebuts the fact that Mr. Lumpkin, and all of the members of the partnership, knew the terms of Mr. Dykes's commission long before payment was made.

2. **WBC's assertion that evidence of the previous ruling that Mr. Dykes breached his fiduciary duty played no part in the trial court's ruling that he breached his fiduciary duty in this case, and its order that he disgorge \$100,000 of his commission, is not plausible.**

WBC suggests that there was nothing improper about submitting evidence of the ruling in the prior lawsuit that Mr. Dykes breached his fiduciary duty to Mr. Lumpkin. Respondent's Brief at 40-41. WBC further states that the prior ruling had no influence on the ruling of the trial court. *Id.* This then begs the question: Why would WBC go to the trouble of filing an untimely motion for summary judgment on the issue of collateral estoppel, in a trial brief filed on the first day of trial, subsequently concede that collateral estoppel was never pleaded but nevertheless insist that it was entitled to present evidence to the court of the prior ruling that Mr. Dykes breached his fiduciary duty, all of which WBC believed would be of no influence on the trial court's ultimate ruling? Mr. Dykes suggests that WBC's argument is neither logical, nor plausible.

Of course, it is not possible to know to what extent the trial court was influenced by WBC's argument that Mr. Dykes's breach of fiduciary duty in a prior case was evidence of his breach of fiduciary duty in the case at bar, though it is beyond dispute that it played a role in the court's

opinion. *See* RP 905; RP 14-15 (VROP Nov. 6, 2009). Mr. Dykes was entitled, as is any party, to a fair trial on the evidence. WBC's introduction of evidence that Mr. Dykes had previously been found to have breached his fiduciary duty to Mr. Lumpkin was intended, and did in fact, influence the ruling of the trial court in both its conclusion that Mr. Dykes breached his fiduciary duty, and its order that he disgorge \$100,000 of his commission. While it is certainly possible to find language in the trial court's ruling containing its findings of fact independent of the evidence of the prior breach of fiduciary duty ruling, WBC can cite to no evidence in the court's ruling that its decision was not influenced in whole or in part by the improper evidence. Mr. Dykes suggests that this is the proper lens through which to analyze this issue, and that a fair analysis of the evidence shows that the trial court's ruling that Mr. Dykes breached his fiduciary duty, and its order that he disgorge \$100,000 of his commission, were improperly influenced by inadmissible evidence that Mr. Dykes had previously been found to have breached his fiduciary duty to Mr. Lumpkin.

In sum, WBC's argument that substantial evidence supports the trial court's conclusion that Mr. Dykes breached his fiduciary duty to the partnership by failing to disclose the terms of his commission is contrary to the evidence in the record. Moreover, WBC's citations to the record stand at most for the proposition that Mr. Lumpkin disputed that the commission Mr. Dykes received was "normal." Finally, Mr. Dykes was entitled to a fair trial and WBC's introduction of improper evidence of a prior ruling that Mr. Dykes breached his fiduciary duty improperly influenced the trial court's finding that Mr. Dykes breached his fiduciary duty, and its order that he disgorge \$100,000 of his commission.

## **II. CONCLUSION**

Mr. Dykes respectfully requests that this Court hold that because the trial court: Relied on an erroneous interpretation of the law in its conclusion that WBC's damages were liquidated; Abused its discretion by granting WBC's motion to strike the jury's consideration of the claim for breach of fiduciary duty; and, Abused its discretion by allowing WBC to present inadmissible evidence of a prior ruling that Mr. Dykes breached his fiduciary duty, prejudicing the trial court's rulings on the breach of

fiduciary duty and disgorgement claims, the judgment of the trial court is reversed.

Respectfully submitted this 16th day of July, 2010.

LEE SMART, P.S., INC

By: 

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Of Attorneys for Appellant  
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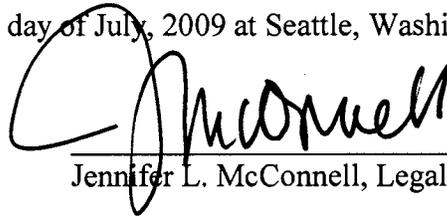
DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on July 16, 2010, I caused service of the foregoing pleading on each and every attorney of record herein:

**VIA LEGAL MESSENGER**

Mr. George W. Akers  
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DATED this 16th day of July, 2009 at Seattle, Washington.



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Jennifer L. McConnell, Legal Assistant