

STATE OF MICHIGAN  
COURT OF APPEALS

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FREDERICK H. LEVINE, M.D.,

Plaintiff/Counter-Defendant-  
Appellee/Cross-Appellant,

v

JAMES E. O'DORISIO, M.D.,

Defendant/Counter-Plaintiff-  
Appellant/Cross-Appellee.

UNPUBLISHED  
November 17, 2011

No. 299639  
Berrien Circuit Court  
LC No. 2004-003060-CK

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Before: WILDER, P.J., and HOEKSTRA and BORRELLO, JJ.

PER CURIAM.

In this professional limited liability corporation (PLLC) dissolution case, plaintiff, Frederick H. Levine, M.D., and defendant, James E. O'Dorisio, M.D., appeal the trial court's judgment after remand from this Court in favor of O'Dorisio. For the reasons stated in this opinion, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

I. FACTS & PROCEEDINGS

The parties are cardiothoracic surgeons who were in practice together. The operation of a vascular laboratory was part of the parties' practice. The parties formed a PLLC and entered into an operating agreement in 1996; the agreement covered the parties' entire practice, including the vascular laboratory. The PLLC was dissolved in January 2004 per its operating agreement. After the dissolution of the PLLC, Levine sued O'Dorisio for specific performance of O'Dorisio's contractual obligation to resign, and for an accounting and distribution of the PLLC's assets. In the parties' first appeal, *Levine v O'Dorisio*, unpublished opinion per curiam of the Court of Appeals, issued July 24, 2007 (Docket No. 266166), this court observed that:

The trial court awarded [O'Dorisio] one-half of the laboratory's 2004 annual profit, and one-half the value of partnership property remaining in his possession, which property was ordered sold. [Levine] was permitted to keep the partnership property that he took with him when leaving the business. On appeal, [O'Dorisio] challenges the trial court's valuation method and the amount it awarded him. On cross-appeal, [Levine] argues that the trial court erred by awarding [O'Dorisio]

the value of the vascular laboratory because the value of [O’Dorisio’s] capital account was greater.

This Court reversed the trial court’s distribution of the assets and remanded for enforcement of the operating agreement, which specifically addressed the procedure for dissolution and winding up of the company. *Id.* This Court instructed the trial court not to consider testimony from O’Dorisio’s expert regarding the value of the PLLC because the expert included future earnings and goodwill in his valuation and future earnings and goodwill “are not tangible assets that can be distributed by the dissolved company.” *Id.*

After remand, the trial court ordered an equal distribution of the accounts receivable collected by Levine after the PLCC’s dissolution. The trial court concluded that when Levine distributed the accounts receivable, Levine gave himself \$231,977.<sup>1</sup> O’Dorisio received a lesser portion of the accounts receivable, \$151,086. The trial court entered an order of judgment in favor of O’Dorisio for \$51,948.16, which included damages of \$40,445.50 – half the difference between the accounts receivable distributed to each party – and \$11,502.66 in statutory interest and accumulated interest. Accordingly, each party received accounts receivable in the amount of \$191,531.50.

The trial court rejected O’Dorisio’s request for valuation and distribution of the fair market value of the vascular laboratory, per this Court’s instructions on remand not to consider the goodwill and future earnings of the company as a tangible asset. The remainder of the trial court’s findings from before this Court’s remand remained unchanged. The trial court did not award O’Dorisio any portion of the net profits derived by Levine from his use of the vascular laboratory between the date of dissolution and the date of the sale of the laboratory. O’Dorisio appeals from the trial court’s decision on remand, and Levine cross-appeals.

On appeal, O’Dorisio challenges the trial court’s failure to award him half of Levine’s profits from the operation of the vascular laboratory between the time the company was dissolved and the sale of the laboratory. O’Dorisio also challenges the trial court’s decision not to consider the value of the vascular laboratory’s goodwill and equally distribute that value between the parties. On cross-appeal, Levine challenges the trial court’s equal distribution of the accounts receivable between the parties.

## II. PROFITS FROM THE OPERATION OF THE VASCULAR LABORATORY

O’Dorisio first argues on appeal that the trial court erred when it failed to allocate to O’Dorisio one-half of the net profits derived by Levine from Levine’s use of the vascular laboratory between the date of dissolution and the date of the sale of the laboratory. We review

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<sup>1</sup> The trial court explained that Levine actually gave himself \$256,977 in post-dissolution cash; however, the trial court reduced that amount by \$25,000 to account for the fact that the equipment was distributed to Levine and because Levine paid the balance of a loan that was secured by the vascular laboratory equipment.

the trial court's findings of fact for clear error and the court's conclusions of law de novo. *Heeringa v Petroelje*, 279 Mich App at 444, 448; 760 NW2d 538 (2008).

The company dissolved automatically pursuant to the operating agreement in January 2004; however, during the process of winding up, liquidation, and distribution of the company's assets, Levine continued the practice of medicine and used the vascular laboratory that was owned by the PLLC as part of his personal practice. The vascular laboratory was not sold until 2007. The operating agreement does not address a manager's receipt of profits in connection with the manager's personal use of the PLLC's property during the winding up of the PLLC. However, the operating agreement, Article XII, § 12.3(e), provides that managers "shall comply with any applicable requirements of applicable law pertaining to the winding up of the affairs of the company and the final distribution of its assets." Levine was a manager of the PLLC in this case, and the Michigan Limited Liability Company Act applies to the actions of managers. MCL 450.4404(5) provides:

Except as otherwise provided in an operating agreement or by vote of the members pursuant to section 502(4) and (7) [MCL 450.4502], a manager shall account to the limited liability company and hold as trustee for it any profits or benefit derived by the manager from any transaction connected with the conduct or winding up of the limited liability company or from any personal use by the manager of its property.

Levine and O'Dorisio agree that Levine received profits of about \$1,020,000 from his continued operation of the vascular laboratory between the date of dissolution and the date of the sale of the laboratory in 2007. Pursuant to MCL 450.4404(5), Levine, as the PLLC's manager, was required to hold in trust for the PLLC any profits derived from any transaction connected to the conduct or winding up of the PLLC. Moreover, MCL 450.4404(5) required Levine to hold in trust for the PLLC any profits derived from his personal use of the PLLC's property, including the profits that he received from his use of the vascular laboratory between the date of dissolution and the date of the sale of the laboratory in 2007. Article IV, § 9.1 of the operating agreement required that the PLLC's net profits be allocated equally between Levine and O'Dorisio. Accordingly, we conclude that the trial court should have allocated to O'Dorisio one-half of the net profits derived by Levine from Levine's use of the vascular laboratory between the date of the dissolution and the date of the sale of the laboratory.

We reject Levine's argument that MCL 450.4404(5) does not apply in this case because the PLLC terminated in January 2004, so there was no ongoing business entity for Levine to manage. Levine's argument is inconsistent with the plain language of Article XII, § 12.3(d) of the operating agreement, which provides that "[u]pon completion of the winding up, liquidation and distribution of the assets, the Company shall be deemed terminated." When Levine obtained profits from his use of the laboratory between the date of dissolution and the date of the sale of the laboratory, the winding up, liquidation, and distribution of the PLLC's assets was not complete. Thus, under the operating agreement, the PLLC was not terminated in January 2004.

Finally, we reject Levine's argument that the trial court did not err because the operating agreement addressed the winding up and liquidation of the PLLC and, therefore, MCL 450.4404(5) did not apply as MCL 450.4404(5) applies "except as otherwise provided in an

operating agreement.” As previously discussed, the operating agreement does not address a manager’s receipt of profits in connection with the manager’s personal use of the PLLC’s property during the winding up of the PLLC. Moreover, the operating agreement specifically provides that applicable law pertaining to the winding up of the company must be complied with and the agreement does not include a provision that conflicts with MCL 450.4404(5).

Accordingly, we find that the trial court erred by failing to divide the profits obtained by Levine from the continued use of the laboratory equally between the parties.

### III. CONSIDERATION OF THE VASCULAR LABORATORY’S GOODWILL

O’Dorisio challenges on appeal the trial court’s failure to consider the fair market value of the laboratory and distribute that value between the parties. Specifically, O’Dorisio asks this Court to order the trial court to consider and distribute the value of the laboratory’s goodwill. O’Dorisio maintains he is entitled to one-half of the value of the vascular laboratory’s goodwill, notwithstanding this Court’s contrary decision in the first appeal. We conclude that he is not.

We review this unpreserved issue for plain error as it involves a question of law and the facts necessary for its resolution have been presented. *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 377; 761 NW2d 353 (2008). “Under the law of the case doctrine, an appellate court ruling on a particular issue binds the appellate court and all lower tribunals with regard to that issue.” *Webb v Smith*, 224 Mich App 203, 209; 568 NW2d 378 (1997). However, “[t]he doctrine will not be applied if the facts do not remain materially or substantially the same or if there has been a change in the law.” *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007).

In the first appeal of this case, this Court concluded that the trial court erroneously relied upon evidence presented by the parties regarding the fair market value of the PLLC when distributing the PLLC’s assets because the trial court’s action was contrary to the PLLC’s operating agreement. We explained that it was inappropriate for the trial court to rely on O’Dorisio’s expert’s testimony regarding the value of the PLLC as an ongoing concern – particularly the PLLC’s goodwill and future earnings – because the PLLC was not to be valued for a future sale but, rather, dissolved. We emphasized that the future earnings and goodwill cannot be distributed by a dissolved PLLC as they are not tangible assets. Therefore, we ordered the trial court to enforce the operating agreement; more specifically, we directed the trial court to order the PLLC’s accountant to prepare an accounting and to distribute the assets according to the operating agreement. The operating agreement provided that the PLLC’s assets were to be sold and the profits distributed to the parties pro rata in proportion to their capital accounts. Accordingly, under the law of the case doctrine, the trial court could not award O’Dorisio one-half of the fair market value of the vascular laboratory as calculated by O’Dorisio’s expert because we expressly ruled that the trial court could not do so in the first appeal. *Webb*, 224 Mich App at 209. There is no plain error.

We reject O’Dorisio’s argument that this Court’s ruling in the first appeal was dictum. This Court’s statements with respect to O’Dorisio’s expert’s valuations and the distribution of goodwill were not incidental remarks but, rather, essential instructions to the trial court to ensure a proper distribution of the PLLC’s assets on remand. *Allison v AEW Capital Mgt, LLP*, 481

Mich 419, 437; 751 NW2d 8 (2008). We also reject O’Dorisio’s contention that this Court’s ruling with respect to O’Dorisio’s expert’s valuations and the distribution of goodwill were dicta because neither party addressed during the first appeal whether goodwill was an asset of the PLLC that could be distributed. Although a “decision is, generally, not a precedent as to a point which was not sufficiently argued and presented to the court, . . . if the point was an essential one the fact that it was duly presented and considered may be presumed.” *McNally v Bd of Canvassers of Wayne Co*, 316 Mich 551, 558; 25 NW2d 613 (1947). Finally, we reject O’Dorisio’s argument that the law of the case doctrine does not apply because this court’s decision in the first appeal was incorrect. The law of the case doctrine “applies without regard to the correctness of [this Court’s] prior determination.” *Driver v Hanley*, 226 Mich App 558, 565; 575 NW2d 31 (1997). Consequently, the trial court correctly declined to consider the fair market value of the vascular laboratory in accordance with this Court’s previous order, and O’Dorisio is not entitled to half of the value of the laboratory’s goodwill.

#### IV. DISTRIBUTION OF THE POST-DISSOLUTION ACCOUNTS RECEIVABLE

On cross-appeal, Levine challenges the trial court’s equal distribution of the accounts receivable between the parties. Levine argues that because the parties did not dispute the unequal distribution of the accounts receivable in the first trial court proceedings, the trial court should not have redistributed the cash equally between the parties on remand. Levine maintains that O’Dorisio waived any objection to the original unequal distribution before this Court remanded this case the first time.

We review a trial court’s findings of fact for clear error and apply a de novo standard of review when reviewing the court’s conclusions of law, such as issues of contract interpretation. *Manuel v Gill*, 481 Mich 637, 643; 753 NW2d 48 (2008); *Heeringa v Petroelje*, 279 Mich App 444, 448; 760 NW2d 538 (2008). We also review de novo whether the law of the case doctrine applies. *Kasben v Hoffman*, 278 Mich App 466, 470; 751 NW2d 520 (2008).

We find that the trial court properly determined that Levine and O’Dorisio were entitled to equal distributions of the accounts receivable, and we reject Levine’s argument that O’Dorisio waived any objection to the original unequal distribution. Levine’s argument that O’Dorisio was not entitled to an equal distribution of the accounts receivable would be contrary to the operating agreement and the law of the case. Article IX, § 9.3 of the operating agreement provides that “all distributions of cash or other property shall be made to the Members pro rata in proportion to the respective Capital Interests of the Members on the record date of such distribution.” The trial court found that the parties had positive and equal capital accounts. Therefore, the operating agreement required that the cash be distributed equally between Levine and O’Dorisio.

Furthermore, this Court instructed the trial court on remand to enforce the operating agreement and “allocate the liquidation distributions “in accordance with the positive Capital Account balances of the Members.” “Under the law of the case doctrine, an appellate court ruling on a particular issue binds all lower tribunals with regard to that issue. The law of the case mandates that a court may not decide a legal question differently where the facts remain materially the same.” *Kidder v Ptacin*, 284 Mich App 166, 170; 771 NW2d 806 (2009). The facts of this case have not materially changed since the first appeal. Accordingly, the trial court properly distributed the post-dissolution accounts receivable equally between the parties.

We also reject Levine’s alternative, unpreserved argument that if the trial court did not erroneously conclude that the parties were entitled to an equal distribution of the cash, then the trial court erroneously “ignored” O’Dorisio’s use of the PLLC’s income for personal expenses when it distributed the PLLC’s assets to the parties. The record does not illustrate that the trial court “ignored” O’Dorisio’s personal expenses. If O’Dorisio had used the PLLC’s funds for personal expenses, the PLLC’s accountant should have included O’Dorisio’s personal expenses in his calculation of O’Dorisio’s capital account pursuant to Article VIII, § 8.5 of the operating agreement. It is not clear from the record, however, whether the accountant’s computation of O’Dorisio’s capital account included the personal expenses—it very well may have. Indeed, if the accountant’s calculation of O’Dorisio’s capital account included the personal expenses, then there would be no error. The trial court provided Levine with an opportunity to present evidence that O’Dorisio “owed debts to the partnership that could act as an offset to an equal distribution of assets.” Levine took no advantage of this opportunity. Therefore, Levine has not demonstrated a plain error that is clear and obvious from the record before this Court. *Duray Dev, LLC v Perrin*, 288 Mich App 143, 150; 792 NW2d 749 (2010).

## V. CONCLUSION

We find that O’Dorisio is entitled to half of the profits derived from the use of the vascular laboratory by Levine from the date of the PLLC’s dissolution until the sale of the laboratory in 2007. We also find that the trial court correctly declined to consider the value of the laboratory’s goodwill in accordance with this Court’s previous order. Further, we find that the trial court correctly distributed the post-dissolution accounts receivable equally between the parties in accordance with the parties’ operating agreement.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ Joel P. Hoekstra

/s/ Stephen L. Borrello