IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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| PERALEZ REAL ESTATE, INC., a Washington Corporation,<br><br>Plaintiff,<br><br>v.<br><br>WOODINVILLE BUSINESS CENTER NO. 1, Limited Partnership, a Washington Limited Partnership, NED LUMPKIN, General Partner, AL DYKES, General Partner, and A. DYKES & COMPANY, INC., a Washington Corporation,<br><br>Defendants. | ) | No. 64578-1-I<br><br>UNPUBLISHED OPINION |
| UBI BUSINESS SERVICES, INC., a Washington Corporation,<br><br>Plaintiff,<br><br>v.<br><br>WOODINVILLE BUSINESS CENTER NO. 1, Limited Partnership, a Washington Limited Partnership, NED LUMPKIN, General Partner, and AL DYKES, General Partner,<br><br>Defendants. | ) | |
| WOODINVILLE BUSINESS CENTER | ) | |

NO. 1, Limited Partnership, a ) FILED: July 5, 2011

Washington Limited Partnership, )
)
Respondent, )
)
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 )
comprised thereof, )
)
Appellants. )

Schindler, J. — Woodinville Business Center No.1 (WBC), a Washington limited partnership, was formed in 1980 for the purpose of developing a warehouse and office complex in Woodinville. Albert Dykes was a real estate investment broker and the managing general partner of WBC. The limited partnership agreement provides that Dykes could receive a real estate sales commission that was not "larger than is normal for the real estate industry in the area" for sale of the complex, but that total commissions were "not to exceed 6 percent." In 2008, WBC sold the property for $10.3 million. Dykes paid himself a six percent sales commission of $618,000. WBC sued Dykes for breach of contract and breach of fiduciary duty. A jury found that Dykes was not entitled to receive a six percent commission of $618,000 and found in favor of WBC "for the difference between $618,000 and $412,000." The trial court ruled that Dykes breached his fiduciary duty to WBC by failing to disclose material facts as to the sale of the property, including the amount paid for commissions and other fees. On appeal, Dykes contends the trial court erred in awarding prejudgment interest and in deciding

the fiduciary duty claim. In the alternative, Dykes argues substantial evidence does not support the trial court's finding that he breached a fiduciary duty to the partnership. We affirm.

FACTS

In 1980, Ned Lumpkin, Albert Dykes, and John Kloster formed a limited partnership to purchase property in Woodinville to construct four commercial buildings on the property, lease and operate the buildings, and then sell the property and buildings. The partners agreed that Lumpkin would provide the majority of the funding to purchase the property and Lumpkin, Inc. would construct the four buildings for a 10 percent fee. The partners also agreed that Dykes, doing business as Marcol, would manage the project for a five percent management fee, receive five percent of the construction costs as an acquisition and development fee, and receive a real estate sales commission when the project was sold. The agreement allowed Dykes to receive a real estate sales commission for the sale or lease of the property that was "normal for the real estate industry," with total commission not to exceed six percent. The agreement provides, in pertinent part:

> Marcol may receive a real estate commission or co-broker with other brokers at the time of sale or lease of the property. However, the partnership will not be obligated to pay a commission larger than is normal for the real estate industry in the area and the total commissions at time of sale are not to exceed 6 percent.

The partners designated Dykes as the Managing General Partner with authority to make and execute contracts on behalf of the partnership.

The partners obtained additional investors and by the late 1980's, Lumpkin Inc.

constructed two of the four buildings on the property for the warehouse/office complex.

In 2004, Dykes entered into a contract on behalf of WBC with another construction company to build the next two buildings and complete the project. In 2005, Lumpkin sued WBC and Dykes for breach of the partnership agreement and breach of fiduciary duty. While the lawsuit was pending, Dykes entered into an agreement on behalf of WBC with Roger Harman, broker for Peralez Real Estate, to assist him in leasing the buildings. In October 2006, Dykes entered into another agreement with another company Harman owned, UBI Business Services (UBI), to assist Dykes with sales strategy and analysis. Shortly thereafter, Dykes increased UBI's compensation by agreeing that WBC would pay Harman 20 percent of the commission Dykes would receive when the property sold.

In April 2006, Lumpkin contacted Harman to ask about the lease agreement and efforts to sell the WBC property. Harman told Lumpkin he needed authorization from Dykes to talk to him. Dykes instructed Harman to not provide Lumpkin with the information he requested and "[i]gnor[e]" him.

Lumpkin's suit against Dykes and WBC was tried in April 2007. At the conclusion of the bench trial, the court found that according to the terms of the partnership agreement, "Ned Lumpkin's construction company, Lumpkin, Inc., . . . had the contractual right to perform specified construction services and to be compensated for that work," and "[t]he contract was breached when Lumpkin, Inc. was denied the opportunity to construct buildings 3 and 4 and to be compensated for this work at the agreed upon rate." The trial court also concluded that as the managing partner, Dykes

breached his fiduciary duty to Lumpkin by concealing material information.[1]

In August 2007, the partners voted to remove Dykes as managing general partner but authorized him to remain in that capacity until January 15, 2008 in order to complete the anticipated sale of the property.

On December 31, 2007, Dykes signed an "Exclusive Real Estate Brokerage and Property Management Agreement" on behalf of WBC. The brokerage agreement addresses the payment of the real estate commission and provides, in pertinent part:

> See page 11 Commission on Sale of Property—Marcol/Albert Dykes . . . will receive a real estate commission or co-broker with other brokers at the time of sale or lease of the property. Total Commission shall be limited to no more than 6 percent.

On January 15, 2008, a buyer entered into a purchase and sale agreement with WBC to purchase the complex for $10.3 million with a closing date of January 25. That same day, Dykes drafted a letter on behalf of WBC naming himself as the "exclusive broker in the sale of this property." In another letter dated January 15, addressed to the closing agent, Dykes lists the amounts to be paid to him, including a sales commission of $618,000, or six percent of the sales price, as well as a leasing commission, and property and construction management fees totaling approximately $200,000. On January 16, Lumpkin replaced Dykes as managing general partner but allowed Dykes to retain the authority to complete the sale.

Dykes provided the January 15 letters to the closing agent with further instructions on how to disburse the funds from the sale at closing. Dykes also gave the closing agent an invoice from UBI for 20 percent of Dykes's sales commission, or

[1] This court affirmed the trial court's ruling in an unpublished opinion. Lumpkin, Inc. v. Woodinville Business Center No.1, noted at 145 Wn. App. 1049, 2008 WL 2792019.

$123,600. The escrow agent used the documents Dykes provided as well as his instructions in preparing the closing documents for the sale of the property.

Lumpkin received a copy of the seller's closing statement the night before closing scheduled for January 25. The next day, Lumpkin instructed the closing agent to withhold the leasing and management fees Dykes requested. However, because he did not want to jeopardize the sale, Lumpkin did not object to the disbursement of the sales commission.

After the sale closed, Dykes told the closing agent that the UBI invoice would be paid separately by WBC and should not be deducted from his sales commission. As instructed, the closing agent disbursed $618,000 to Dykes. WBC did not pay the invoice for a sales commission that UBI later submitted.

In March 2008, UBI and Peralez Real Estate filed a lawsuit against WBC and Lumpkin for damages alleging breach of the contract between UBI and WBC. WBC and Lumpkin filed an answer, affirmative defenses, and a third party complaint against Dykes. The third party complaint against Dykes alleged breach of the partnership agreement and breach of fiduciary duty. Following mediation, the parties settled all claims except UBI's breach of contract claim against WBC, and WBC's third party claims against Dykes for breach of fiduciary duty and breach of the partnership agreement for the sales commission.

The trial began on September 15, 2009. At the beginning of trial, WBC argued that because the breach of fiduciary duty claim against Dykes was equitable in nature, the trial court rather than the jury should decide that claim. The court ruled that the jury

would decide the breach of contract claim and the court would decide whether Dykes breached a fiduciary duty. The court dismissed UBI's breach of contract claim against WBC.[2]

During the six-day trial, the parties presented evidence about a "normal" commission for the sale of the WBC property and whether the six percent commission Dykes paid himself was excessive. The buyer's real estate agent Steve Henderson testified that he received a two percent commission for the sale of the WBC property. Henderson also testified that a three to four percent commission split between the buyer's agent and the seller's agent was typical for the sale of commercial property in the area. WBC's real estate expert testified that a two to three percent commission, split between agents, was a normal commission for commercial property selling for $10 million. Dykes testified that "the . . . range of . . . commissions for a commercial property of this type would probably range, I'd say, between 5 and 12 percent, sometimes higher." Dykes's real estate expert testified that commissions as high as 10 percent, split between agents, were normal.

The court instructed the jury on the measure of damages for the breach of contract claim against Dykes. The instruction tells the jury that if the jury finds WBC proved breach of contract as to the amount of the commission paid, and if the "breach results in a lesser commission owing Albert Dykes then that paid to him at closing of $618,000, then you should enter judgment in favor of WBC against Albert Dykes in the amount of the difference between the commission you determined to be proper and

[2] The court ruled that lack of consideration barred UBI's breach of contract claim against WBC. UBI then reached an agreement with Dykes on the remaining claims. UBI does not appeal the trial court's ruling.

owing" and the amount paid.[3]

The jury found in favor of WBC. The verdict form states that Dykes "was not entitled to receive $618,000 (6%) commission on the sale" of the WBC property, and that the jury finds in favor of WBC for "the difference between $618,000 and $412,000."

On the breach of fiduciary duty claim against Dykes, the court ruled in favor of WBC. The court found that Dykes breached his fiduciary duty to the partnership by failing to timely disclose material information regarding the sales commission and other fees. The court awarded WBC $100,000 for breach of fiduciary duty.

WBC filed a motion to award prejudgment interest on the jury award of $206,000 for breach of contract and to award attorney fees. The court ruled that the jury award of $206,000 was liquidated damages and awarded prejudgment interest. The court entered a total judgment against Dykes of $407,865.62, consisting of the awards for breach of contract and breach of fiduciary duty, prejudgment interest, attorney fees, and costs.

## ANALYSIS

On appeal, Dykes contends the trial court erred in awarding WBC prejudgment interest on the jury award for breach of contract and deciding the breach of fiduciary

[3] Jury Instruction No. 20 states:

> It is the duty of the court to instruct you as to the measure of damages. WBC claims that Albert Dykes has breached his contract with the limited partnership by receiving a commission of $618,000 which is claimed to exceed the amount to which he is entitled by contract with the limited partnership.
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> If you find that Defendant WBC has proven that Albert Dykes breached his contract with it regarding the amount of commission to which he was entitled from the sale of the partnership asset, and if that breach results in a lesser commission owing Albert Dykes then that paid to him at closing of $618,000, then you should enter judgment in favor of WBC against Albert Dykes in the amount of the difference between the commission you determined to be proper and owing under the contract between WBC and Dykes and the $618,000 he was paid at closing.

duty claim. In the alternative, Dykes claims the court erred in relying on the findings and conclusions from the prior lawsuit between WBC and Dykes in finding Dykes breached a fiduciary duty and ordering Dykes to disgorge $100,000 to WBC. Dykes also claims substantial evidence does not support the trial court's decision that he breached a fiduciary duty to WBC.

Prejudgment Interest

Dykes argues the trial court erred in ruling that the breach of contract damages awarded by the jury were liquidated damages.

The parties disagree on the standard of review for determining whether the trial court erred in ruling that the jury award on breach of contract claim is liquidated. Dykes cites McConnell v. Mothers Work, Inc., 131 Wn. App. 525, 536, 128 P.3d 128 (2006) to argue that our review is de novo. WBC cites Scoccolo Construction, Inc. v. City of Renton, 158 Wn.2d 506, 519, 145 P.3d 371 (2006) to argue that the standard of review is abuse of discretion. We adhere to our decision in Polygon Northwest Co. v. American National Fire Insurance Co., 143 Wn. App. 753, 790 n.13, 189 P.3d 777 (2008). In Polygon, we considered and rejected the argument that the standard of review is de novo and concluded that the supreme court set forth the correct standard of review in Scoccolo. Polygon, 143 Wn. App. at 790 n.13. In reaching that conclusion, we also pointed out that although the McConnell court held the standard of review was de novo, the opinion cites Kiewit-Grice v. State, 77 Wn. App. 867, 895 P.2d 6 (1995), which held that we review an award of prejudgment interest for abuse of discretion.

Kiewit-Grice clearly states that the appellate courts "review a trial court's

award of prejudgment interest for abuse of discretion." Kiewit-Grice, 77 Wn. App. at 872. This correct statement of the law was adopted by the

> Supreme Court in Scoccolo, whose pronouncement is of course final, in any event.

Polygon, 143 Wn. App. at 790 n.13.

We also reject the distinction Dykes seeks to make between the determination of whether the damages are liquidated and the award of prejudgment interest. Dykes argues that the determination of whether a claim is liquidated is a question of law that we review de novo, separate from the award of prejudgment interest. Neither the case law nor the cases Dykes cites make this distinction.[4]

A court has the authority to award prejudgment interest if the amount due is liquidated, or the amount is based on a specific contract for the payment of money and "the amount due is determinable by computation with reference to a fixed standard." Prier v. Refrigeration Eng'g Co., 74 Wn.2d 25, 32, 442 P.2d 621 (1968). If the fact finder does not need to exercise discretion to determine the measure of damages, the claim is liquidated. Egerer v. CSR West, LLC, 116 Wn. App. 645, 653, 67 P.3d 1128 (2003). The amount due is liquidated "where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion." Prier, 74 Wn.2d at 32. The fact that a claim is disputed does not mean the amount due is not a liquidated amount, "so long as it may be determined by reference to an objective source such as fair market value." Egerer, 116 Wn. App. at 653. An amount is liquidated "even though the adversary successfully challenges the amount and succeeds in reducing it." Prier, 74 Wn.2d at 33.

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[4] See Tri-M Erectors, Inc. v. Donald M. Drake Co., 27 Wn. App 529, 537, 618 P.2d 1341 (1980) (affirming trial court's denial of prejudgment interest on attorney fees because claim was not liquidated); Aker Verdal A/S v. Neil F. Lampson, Inc., 65 Wn. App. 177, 191-92, 828 P.2d 610 (1992) (affirming the trial court's determination that the claim was not liquidated because there was a genuine dispute as to the measure of damages that required the jury to exercise discretion).

Here, the trial court relied on Dautel v. Heritage Home Center, Inc., 89 Wn. App. 148, 948 P.2d 397 (1997) in determining that because the jury did not exercise discretion in determining the measure of damages in deciding the amount Dykes was entitled to receive as a sales commission, the jury award was liquidated. The court ruled, in pertinent part:

> In this case, the -- basically, the measure of damages was the difference between a commission that Dykes took and a commission the jury determined would have been normal at that time. The jury exercised its discretion to weigh evidence of what a, quote, normal commission would have been, and they accepted evidence that a normal commission would have been 4 percent, not 6 percent. Once the jury made that decision, there was no further discretion or option utilized to arrive at the amount. It was simply a mathematical calculation at that point that they took the 4 percent commission from the 6 percent commission and ended up with $206,000 precisely.
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> I think under the authority of Dautel that this action by the jury was not the type of exercise of discretion that would take their determination of a 4 percent commission and not a 6 percent commission into the realm of unliquidated damages. I think that the Dautel case does stand for the proposition that under those circumstances, that type of evaluation, that type of calculation by the jury, was simply a mathematical determination of what they believed to be the correct amount of the commission involved in the case. So I believe that at that point, there was little actual discretion exercised. Actually, no discretion exercise. It was simply determining: What's the correct amount, 4 percent or 6 percent? And they determined it was 4 percent. I think under the circumstances, the evidence in this case, under the -- the authority of the Dautel case, that the amount was a liquidated sum and prejudgment interest should be calculated.[5]

In Dautel, a former employee sued her employer, Heritage Home Center, for unpaid wages and commissions. Dautel, 89 Wn. App. at 151. One dispute in Dautel was over the proper percentage the employee was entitled to receive in commissions. Dautel, 89 Wn. App. at 155. Following a bench trial, the court ruled that the employee

[5] The holding in Dautel is not limited, as Dykes suggests, to cases where the fact finder is limited to a choice between two options. In Dautel, as here, the claim was liquidated because the trial court did not exercise discretion to determine the measure of damages, but only needed to determine whether the plaintiff was entitled to her full commission. Dautel, 89 Wn. App. at 155.

was entitled to an award of prejudgment interest on the commissions owed by the employer because the measure of damages was not in dispute. Dautel, 89 Wn. App. at 155. After the court determined the percentage, because the trial court could enter the judgment without "any exercise of discretion or opinion regarding the amount due," we held the claim for unpaid commissions were liquidated and affirmed. Dautel, 89 Wn. App. at 155.

> Regarding the claim for unpaid commissions, the dispute between the parties related to the proper percentage Dautel was entitled to be paid. The amount actually owing could be computed with exactness once the trial court determined that Dautel was entitled to her full commission rate of 20 percent. Therefore, the amount was a liquidated sum.

Dautel, 89 Wn. App. at 155.

Similarly, in Egerer, there was no dispute that the measure of damages was the difference between the contract price and the prevailing market price at the time of the breach. Egerer, 116 Wn. App. at 654. At trial, the parties disputed the market price at the time of the breach. Egerer, 116 Wn. App. at 649. Because the trial court did not exercise discretion to determine the measure of damages but weighed the evidence only to determine the market price, we held that the amount due was liquidated. Egerer, 116 Wn. App. at 653.

Here, as in Dautel and Egerer, there is no dispute as to the measure of damages. Dykes was entitled to a sales commission "normal for the real estate industry in the area and the total commissions at time of sale are not to exceed 6 percent." The parties disputed the percentage for a "normal" commission for a $10 million sale of commercial property. After the jury determined that Dykes was entitled

to a four percent commission, the amount owing could be calculated with exactness.[6] We hold the trial court did not abuse its discretion in awarding prejudgment interest on the award of damage for breach of contract claim.

Breach of Fiduciary Duty

For the first time on appeal, Dykes contends that by failing to address the factors set forth in Brown v. Safeway Stores, Inc., 94 Wn.2d 359, 368, 617 P.2d 704 (1980), the trial court erred in determining that the breach of fiduciary duty claim was equitable in nature.[7]

In determining whether a case is 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. Brown, 94 Wn.2d at 368.[8] If an action is equitable in nature, there is no right to a jury trial. Brown, 94 Wn.2d at 365.

Below, Dykes conceded that the breach of fiduciary duty claim was equitable in nature but argued nonetheless that the jury should decide the breach of fiduciary duty

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[6] Dykes's reliance on St. Hilaire v. Food Services of America, Inc., 82 Wn. App. 343, 353, 917 P.2d 1114 (1996) is unpersuasive. Unlike here, in St. Hilaire the measure of damages was in dispute. St. Hilaire, 82 Wn. App. at 354.

[7] Dykes also argues that he was prejudiced because WBC did not provide timely or adequate notice of the motion that the court decides the breach of fiduciary duty claim. But Dykes did not object below to the timeliness of the motion. We will not review an issue, theory, argument, or claim of error not presented at the trial court level. Lindblad v. Boeing Co., 108 Wn. App. 198, 207, 31 P.3d 1 (2001).

[8] In Brown, the court set forth the following factors that the court should consider in determining whether a claim is equitable in nature:

> "(1) who seeks the equitable relief; (2) is the person seeking the equitable relief also demanding trial of the issues to the jury; (3) are the main issues primarily legal or equitable in their nature; (4) do the equitable issues present complexities in the trial which will affect the orderly determination of such issues by a jury; (5) are the equitable and legal issues easily separable; (6) in the exercise of such discretion, great weight should be given to the constitutional right of trial by jury and if the nature of the action is doubtful, a jury trial should be allowed; (7) the trial court should go beyond the pleadings to ascertain the real issues in dispute before making the determination as to whether or not a jury trial should be granted on all or part of such issues."

Brown, 94 Wn.2d at 368 (quoting Scavenius v. Manchester Port Dist., 2 Wn. App. 126, 129-30, 467 P.2d 372 (1970)).

claim. Where, as here, an argument is not raised below, we may refuse to review that argument for the first time on appeal. RAP 2.5(a); Sorrel v. Eagle Healthcare, Inc., 110 Wn. App. 290, 299, 38 P.3d 1024 (2002) ("Where the trial court had no opportunity to address the issue, we decline to consider it."); Lindblad v. Boeing Co., 108 Wn. App. 198, 207, 31 P.3d 1 (2001) ("We will not review an issue, theory, argument, or claim of error not presented at the trial court level."); Demelash v. Ross Stores, Inc., 105 Wn. App. 508, 527, 20 P.3d 447 (2001) ("We generally will not review an issue, theory or argument not presented at the trial court level."). "The purpose of this rule is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials." Demelash, 105 Wn. App. at 527.[9]

In the alternative, Dykes claims substantial evidence does not support the trial court's decision that he breached a fiduciary duty to WBC and the court erred in ordering him to disgorge $100,000.

A partnership relationship is fiduciary in character and imposes the obligation of candor and utmost good faith. Partners are accountable to each other and the partnership as fiduciaries. Bishop of Victoria Corp. Sole v. Corporate Bus. Park, LLC, 138 Wn. App. 443, 457, 158 P.3d 1183 (2007). A partner has an obligation of good faith and fair dealing to discharge duties to the partnership and other partners under the terms of the partnership agreement. RCW 25.05.165(4). As part of this obligation, each partner must fully disclose all material information relating to the partnership. J&J

[9] Even so, the Brown factors support the trial court's decision. The court considered Dykes's jury demand and determined that the primary issue of WBC's claim of breach of fiduciary duty was equitable in nature, the claims were easily separable, and the court heard the evidence before making a final decision. Brown, 94 Wn.2d at 366.

Celcom v. AT&T Wireless Servs. Inc., 162 Wn.2d 102, 107, 169 P.3d 823 (2007). A partner must avoid self-dealing, secret profits, and conflicts of interest. RCW 25.05.165(2)(a)–(c).[10]

The trial court ruled that Dykes breached his fiduciary duty to the partnership by failing to disclose material information regarding the sales commission and the other fees he incurred on behalf of WBC. The court's findings state, in pertinent part:

> Given the importance of this event for everyone -- for Mr. Dykes, for Mr. Lumpkin, for the limited partners -- it appears to the Court that there was a duty on Mr. Dykes to disclose in a -- in the spirit of good faith and loyalty under the law under the Revised Uniform Partnership Act that would have required him to disclose material information to Mr. Lumpkin, the general partner, and also that would benefit the limited partners.
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> . . . .
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> Certainly, when you total up the number of fees listed on the closing statement beginning with the 618,000 and then the other fees that -- which were disputed in the amount of 201,000 or so, and plus the $123,000 invoice from Mr. Harman, all of these things were of obviously great importance. And Mr. Lumpkin testified credibly that with respect to the [Harman] invoice, he was not aware of that, and had not seen these other things until it was presented to him at the eleventh hour.
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> . . . .
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> It seemed to the Court, given the critical nature of the commissions to be taken in this case, again, this was something that needed to be disclosed well in advance of the eleventh hour of the closing dates here. It was not disclosed, and I find that it was a material fact which was not disclosed in a timely manner.

The court concluded that "the failure to disclose in this case was not merely negligent,

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[10] RCW 25.05.165(2)(a)–(c) provides, in pertinent part:

> (2) A partner's duty of loyalty to the partnership and the other partners is limited to the following:
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> (a) To account to the partnership and hold as trustee for it any property, profit, or benefit derived by the partner in the conduct and winding up of the partnership business or derived from a use by the partner of partnership property, including the appropriation of a partnership opportunity;
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> (b) To refrain from dealing with the partnership in the conduct or winding up of the partnership business as or on behalf of a party having an interest adverse to the partnership; and
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> (c) To refrain from competing with the partnership in the conduct of the partnership business before the dissolution of the partnership.

but in the Court's view was purposefully done to benefit Mr. Dykes at the expense of the partnership."

There is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing that a finding of fact is not supported by substantial evidence. Fisher Props., Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 369, 798 P.2d 799 (1990). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the declared premise. Brin v. Stutzman, 89 Wn. App. 809, 824, 951 P.2d 291 (1998). This court defers to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. Boeing Co. v. Heidy, 147 Wn.2d 78, 87, 51 P.3d 793 (2002).

Substantial evidence supports the findings that Dykes breached his fiduciary duty to the partnership. The trial court found credible Lumpkin's testimony that he did not receive the information until the evening before the closing, and that he did not know about the UBI invoice until after the sale closed. While Lumpkin knew the general terms of the sales commission, Dykes did not disclose in advance that he was taking the full six percent. Dykes also failed to disclose that he promised on behalf of WBC to pay UBI $123,600. The record supports the trial court's ruling that Dykes's failure to disclose material facts was a violation of his duty of loyalty to the partnership.

Dykes also argues the trial court erred by improperly relying on the finding that he breached his fiduciary duty in the previous lawsuit between Lumpkin and Dykes. But Dykes stipulated to the admission of the findings of fact and conclusions of law

from the prior lawsuit, Exhibit 105, for consideration by the trial court on the issue of breach of fiduciary duty in this lawsuit. Dykes's attorney stated, "That is correct. Mr. Akers has correctly read the stipulation that we agreed to." The court responded, "All right. Those exhibits will be admitted with the exception of the numbers that have been specified, and Exhibits 14 and 105 will be reviewed by the Court."

And while the court considered the history of the relationship between Dykes and WBC and the finding that Dykes previously breached his fiduciary duty to the partnership, the trial court did not conclude that Dykes breached his fiduciary duty to the partnership based on the prior ruling.

The trial court considered a number of factors in ruling on the breach of fiduciary duty claim, including the nature of the duty, the intentional breach of that duty, the jury verdict concluding that Dykes received an excessive sales commission, and the instructions Dykes gave to Harman to ignore Lumpkin's questions about the sale. The significance the court attributed to the findings from the prior lawsuit related only to the finding that because Dykes knew or should have known he owed WBC a fiduciary duty, he intentionally disregarded his obligation to WBC. The court ruled, in pertinent part:

> [B]ecause [the prior finding] points out the fact that this was not an isolated incident, and it did place Mr. Dykes on clear notice that he had been found in violation of fiduciary duty at that time relating to another transaction and it did have serious consequences. This previous case makes in this Court's view Mr. Dykes' violation here all the more purposeful and egregious.

Dykes also argues the trial court erred in ordering Dykes to disgorge $100,000 in fees for the breach of fiduciary duty to the partnership. We disagree. The principle that a breach of ethical duties may result in denial or disgorgement of fees is well

recognized, and a trial court's award is reviewed for abuse of discretion. Cotton v. Kronenberg, 111 Wn. App. 258, 275, 44 P.3d 878 (2002). Because the record supports the findings that Dykes breached his fiduciary duty to the partnership, the court did not abuse its discretion in ordering Dykes to disgorge $100,000.

We affirm the trial court's determination that WBC was entitled to prejudgment interest on the jury award for breach of contract damages, the trial court ruling that Dykes breached his fiduciary duty, and entry of the judgment against Dykes.

WE CONCUR: