IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SHO SHIA WANG, a single person,	
	)
Respondent and Cross-Appellant,	)
	)
v.	)
	)
TA CHI, INC., LOTUS FRUIT PACKERS, INC.,	)
	)
Appellants,	)
	)
JONG SENG COLD STORAGE, LLC, a Washington limited liability company, FUGACHEE ORCHARD PARTNERSHIP, a Washington general partnership, SUMMER FRUIT PACKERS, INC., a Washington corporation, STANDARD FRUITS, INC., a Washington corporation, TSW INVESTMENTS, INC., a Washington corporation, WLH GROUP U.S.A., INC., a Washington corporation, and JNW INVESTMENTS, INC., a Washington Corporation,	)
	)
Respondents.	)
	)

No. 29141-3-III

Division Three

UNPUBLISHED OPINION

Brown, J. • Ta Chi, Inc. and its subsidiary, Lotus Fruit Packing, Inc. (collectively referred to as Ta Chi), engaged in the fruit business. Ta Chi employed Shou Shia Wang to manage its orchards. Ms. Wang sued for money owed on loans from her to Ta Chi. Ta Chi counterclaimed alleging, inter alia, Ms. Wang breached her fiduciary duties. After a bench trial, the court concluded Ta

Chi was liable to Ms. Wang for $765,000 for prior loans, but concluded Ms. Wang breached her fiduciary duties and was liable to Ta Chi for $146,296. The court partly rescinded a contract negotiated by Ms. Wang on Lotus Fruit Packing, Inc.'s behalf for the sale of assets from one of Ms. Wang's companies to Lotus. Both parties appealed.

We address Ta Chi's multiple error assignments in six issues, whether the trial court erred in: (1) excluding deposition designations attached to Ta Chi's post-trial brief, (2) finding no basis to reimburse Ta Chi for management fees paid to Ms. Wang, (3) rejecting Ta Chi's statute of limitations defense to Ms. Wang's loan claims, (4) not awarding additional damages to Lotus beyond rescinding its contract with Summer Fruit Packer's, Inc., (5) finding Ms. Wang and her entities did not divert apple handling revenue, and (6) not extending Ms. Wang's and Summer Fruit's liability for alleged revenue received from packing Ta Chi's fruit. In her cross-appeal, Ms. Wang contends the court erred in concluding she violated a fiduciary duty as Ta Chi's manager when she used Ta Chi funds to defend a lawsuit arising from a valid contract entered into by Ta Chi. Both parties appeal the trial court's denial of their requests for attorney fees. We affirm.

FACTS

Buddhist Master Xin Tien (Master) decided to go into the orchard business.

The Master asked Ms. Wang to negotiate the purchase of an orchard and to become its manager. He asked Chung Guang Shen, who lived and worked in Tawan, to raise money for the venture. The Master and Mr. Shen formed Ta Chi, Inc.

Ms. Wang prepared an orchard development plan. She estimated it would take approximately $5 million in capital to manage and expand the orchard. As Ta Chi's manager, Ms. Wang formulated budgets, borrowed money, set up bank accounts, and kept financial records. She decided what to plant, when to harvest, and where to pack and sell Ta Chi's fruit.

Ta Chi's directors and shareholders failed to capitalize the company as Ms. Wang felt was necessary. In 2002, she began loaning her own money to Ta Chi. None of her loans was evidenced by a promissory note or other written agreement. Ms. Wang testified the loans were to be repaid as the orchard developed and became profitable and funds became available. While Ms. Wang told Ta Chi the money was borrowed, she concealed her identity as the lender. In her personal financial statements, Ms. Wang recorded the loans as being her assets.

During her management of Ta Chi and Lotus, Ms. Wang was involved in at least five fruit businesses generating substantial income for her: (1) Fugachee

Orchard Partnership (Fugachee), a 570-acre apple orchard; (2) Jong Seng Cold Storage, LLC (Jong Seng), a controlled atmosphere storage facility; (3) Summer Fruit Packers, Inc. (Summer Fruit), a cherry packer; (4) Standard Fruits, Inc. (Standard), an export company; and WLH Group U.S.A., Inc. (WLH), a second export company. As Ta Chi's manager, she arranged for her entities to store and market Ta Chi's fruit.

In late 2004, Ms. Wang formed Summer Fruit to pack Ta Chi's cherries. Its principal asset was a cherry line purchased for about $275,000. Ms. Wang concealed her ownership of Summer Fruit from Ta Chi and Lotus for the next three years.

In 2005, Ms. Wang had Ta Chi contract with Summer Fruit for packing its cherries. Ta Chi received a final grower return of $28,613 from Summer Fruit, but Summer Fruit's initial grower statements showed that Ta Chi should have received $37,989. Similarly, the final Bing cherry return was $38,704, but an initial report showed that Ta Chi should have received $47,575. At trial, Ms. Wang was unclear why Summer Fruit reduced the return to Ta Chi.

In April 2006, Ms. Wang proposed Ta Chi enter the fruit packing and storage business. She recommended Ta Chi (1) purchase Jong Seng's storage facility, (2) expand the facility to accommodate packing lines, (3) buy a new apple

packing line, and (4) purchase Summer Fruit's cherry line. Lotus was formed in September 2006 to operate the packing business. Ms. Wang received a management fee from Lotus. Ta Chi was Lotus' majority shareholder and the remaining interest was owned by Tung-Cheng Wu, who invested $1 million of his money in Lotus.

In an April 2006 letter, Ms. Wang told Ta Chi her friends wanted to sell the Jong Seng facility and she believed purchasing it was "a very good opportunity for Ta Chi Orchard." Ex. 112. Ta Chi and Jong Seng signed a purchase agreement in March 2007. In the agreement, Jong Seng promised to transfer its real property, two forklifts, and 18,000 apple bins to Ta Chi for $2.5 million. One month before the May closing, a one-page amendment clarified that the entire $2.5 million purchase price was attributed to the real property and none to the personal property. The loan funded and the deal closed in late May. The 18,000 bins were not delivered to Ta Chi.

Ms. Wang began expanding the Jong Seng facility. Between October 2006 and October 2007, Lotus spent about $3.6 million building a waste water pond, expanding the facility to house the apple and cherry packing lines, and buying related equipment.

In May 2007, Lotus and Summer Fruit contracted for Lotus to pay over $1

million for Summer Fruit's assets. Ms. Wang continued to conceal her ownership of Summer Fruit prior to and following this transaction. Although the cherry line had been purchased by Summer Fruit two years prior for roughly $400,000, Summer Fruit charged Lotus over $688,000 for it in 2007. After the contract was signed and Lotus failed to pay the $1.1 million contract price, Ms. Wang pretended to convey demands from Summer Fruit. She had her attorney send a letter to Lotus, again concealing her ownership interest.

Ms. Wang attended Ta Chi's annual shareholder meeting in 2007. There, she continued to misrepresent that her loans were from third parties. Based on her representations, Ta Chi believed it owed third parties roughly $850,000.

Ms. Wang left Lotus and Ta Chi in late October 2007. Within a month, Summer Fruit had sued Lotus and in early 2008, Ms. Wang sued Ta Chi to recover amounts she had loaned. In January 2009, Ta Chi requested to amend its answer and add third party claims. One was a claim to rescind the contract between Ta Chi and Jong Seng.

The court consolidated the *Summer Fruit v. Lotus* and *Wang v. Ta Chi* lawsuits. In October 2009, Ta Chi unsuccessfully requested summary judgment that Ms. Wang's loan claims were barred by the statute of limitations.

Both sides designated deposition excerpts in December 2009 which were

submitted to the court prior to the bench trial. The court warned, "[I]f a witness testifies live and in person . . . I probably won't use or allow the depositions other than for impeachment purposes." Report of Proceedings (RP) (Jan. 4, 2010) at 18. The cases were tried together from January 4 to January 13, 2010. At the outset, Ms. Wang requested to exclude the designations of her individual testimony. The court reserved ruling on that portion of Ms. Wang's motion. On the last day of trial, the issue was addressed again. The court suggested, and the parties agreed, that instead of reading testimony into the record, Ta Chi and Lotus could cite the deposition designations they wanted the court to read in their post-trial brief, and Ms. Wang and her entities could object to those designations in writing. Ta Chi and Lotus attached a limited number of previously designated excerpts to their post-trial brief. Ms. Wang objected. At a post-trial hearing in April 2010, the trial court excluded these designations from evidence.

The court issued a memorandum opinion in March 2010. The parties presented competing findings and conclusions in April 2010, and later Ta Chi and Lotus requested reconsideration of several issues. Their motion was partially granted in early May 2010, and a final judgment was entered on May 20, 2010.

After making nearly 200 findings of fact, the court concluded Ta Chi was to repay Ms. Wang $765,000 in loans and that collection was not barred by the

statute of limitations. The court further concluded a fiduciary relationship existed between Ms. Wang and Ta Chi and Ms. Wang violated that fiduciary relationship relating to contracts with Summer Fruit; but, Ms. Wang did not violate her duty in regard to the Jong Seng facility. Thus, Ta Chi's request for rescission of that contract was denied.

Because Ms. Wang concealed her ownership interest and charged an unfair price, the trial court rescinded the Summer Fruit/Lotus contract and required Ms. Wang and Summer Fruit to pay Lotus for improvements to the line for which Lotus had paid. Ta Chi and Lotus also requested that Ms. Wang be forced to step into their shoes and essentially purchase the expanded and improved facility and the apple line at the prices that Ta Chi and Lotus paid for them. But, the court declined to rescind the entire Lotus Fruit transaction because it involved transactions with third parties and not just Ms. Wang. For her violation of fiduciary duties, the court ordered Ms. Wang to pay $146,296 to Ta Chi, part of this award pertained to fees Ta Chi incurred for litigation commenced by Highland Orchard (the facts relating to this transaction are set forth below under Ms. Wang's second cross appeal issue). The court did not order Ms. Wang to return her management fees. The court denied both parties' requests for attorney fees. Both Ta Chi and Ms. Wang appealed.

ANALYSIS

A. Deposition Designations

The issue is whether the trial court erred in excluding portions of Ms. Wang's deposition attached to Ta Chi's post-trial brief. Ta Chi contends deposition testimony may be used for any purpose under CR 32(a)(2).

"We review a trial court's decision to admit or exclude evidence for an abuse of discretion." *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668, 230 P.3d 583 (2010). "A trial court abuses its discretion when its decision 'is manifestly unreasonable or based upon untenable grounds or reasons.'" *Id.* at 668-69 (quoting *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)).

CR 32(a) states, "At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Rules of Evidence . . . may be used against any party who was present or represented at the taking of the deposition." Additionally, "[t]he deposition of a party . . . may be used by an adverse party for any purpose." CR 32(a)(2). In *Young v. Liddington*, 50 Wn.2d 78, 80, 309 P.2d 761 (1957), the court affirmed a trial court's decision to admit a party's deposition testimony, holding that the deposition of a party may be used by an adverse party for any purpose. But, that case does not require a different result here.

The use of a deposition at trial is governed not only by CR 32, but also by ER 403. ER 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed . . . by considerations of . . . waste of time, or needless presentation of cumulative evidence." Ms. Wang testified at length during trial about the parties' transactions. Ta Chi had the opportunity to cross-examine her further and the opportunity to use her lengthy deposition for impeachment purposes. *Young* does not support the proposition that a trial court abuses its discretion by refusing to admit an otherwise admissible deposition after finding the probative value of the evidence outweighed by considerations of time or cumulative evidence. The trial court's exclusion of the deposition was consistent with ER 403, and well within its discretion.

B. Duty of Loyalty

The next issue is whether, considering Ms. Wang's breach of loyalty, substantial evidence supports the trial court's finding that she was not required to reimburse Ta Chi for its payment of management fees.

When the trial court has weighed the evidence, we review the trial court's factual findings for substantial evidence. "Unchallenged findings [of fact] are verities on appeal." *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002). We then determine if the findings of fact support the conclusions of law

and judgment. *Brin v. Stutzman*, 89 Wn. App. 809, 824, 951 P.2d 291 (1998). "'Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise.'" *Id.* (quoting *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992)). We presume the trial court's findings are correct, 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). We defer 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). And, we may not substitute our evaluation of the evidence for that made by the trier of fact. *Goodman v. Boeing Co.*, 75 Wn. App. 60, 82, 877 P.2d 703 (1994).

In finding of fact 179, the court found, "[T]here is not a factual basis for Ta Chi or Lotus to recover for any amounts that were paid to Wang as a result of work that she performed, such as management fees, packing charges, and other fees." Clerk's Papers (CP) at 1884.

"'[T]he law creates a special status for fiduciaries, imposing duties of loyalty, care, and full disclosure upon them.'" *Van Noy v. State Farm Mut. Auto Ins. Co.*, 142 Wn.2d 784, 798, 16 P.3d 574 (2001) (Talmadge, J., concurring)

(quoting J. Dennis Hynes, *Freedom of Contract, Fiduciary Duties, and Partnerships: The Bargain Principle and the Law of Agency*, 54 Wash. & Lee L. Rev. 439, 441-42 (1997) (footnotes omitted)). But, an employer is obligated to pay its employee. *Zimmerman v. W8LESS Prods., LLC*, 160 Wn. App. 678, 694, 248 P.3d 601 (2011) (citing RCW 49.52.050). Here, the unchallenged findings of fact show Ms. Wang used her best efforts to create a profitable orchard. She increased the size of the orchard, secured and preserved water rights, arranged for the sale of the produce, and increased the value of the orchard. And, her fee appeared to be reasonable to the trial court. Therefore, Ms. Wang earned her management fee irrespective of other dealings she was involved in. Accordingly, substantial evidence supports finding of fact 179.

C. Ms. Wang's Loans to Ta Chi

The issue is whether the trial court erred in concluding Ms. Wang was entitled to repayment of the loans she advanced to Ta Chi. Ta Chi contends her claim was barred by the statute of limitations.

We review conclusions of law de novo. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). We review whether the findings of fact support the court's conclusions of law. *Brin*, 89 Wn. App. at 824.

In conclusion of law 197, the trial court concluded, "Because Ta Chi was to

repay the Wang loans when Ta Chi had sufficient funds to do so, collection is not barred by the statute of limitations." CP at 1887. The court concluded in conclusions of law 198 and 199 that Ta Chi accepted the benefit of the loans thus it was estopped from denying the loans and Ta Chi ratified the loans by accepting the benefit.

An action based on a written contract must be filed within six years of its accrual under RCW 4.16.040(1), whereas an action based on an oral contract must be filed within three years. RCW 4.16.080(3). Generally, "a cause of action accrues when the party has the right to apply to a court for relief." *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 575, 146 P.3d 423 (2006). Compare the situation where a subcontractor completes work on a project before substantial completion; claims against that subcontractor accrue as of the completion date. *See Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 143 Wn. App. 345, 354, 177 P.3d 755 (2008) (statute of limitations ran from date subcontractor stopped work) (citing 16 David K. DeWolf & Keller W. Allen, Washington Practice: Tort Law and Practice § 9.13, at 289 (3d ed. 2006) ("A claim that accrues before substantial completion of the improvement starts the running of the statute of limitations.").

In 2002, Ms. Wang began loaning money to Ta Chi. The loans were not

evidenced by a promissory note or other written agreement. Substantial evidence in the record shows the parties agreed the loans would be repaid as the orchard developed and became profitable and funds became available. Ms. Wang's development plans envisioned that Ta Chi would not make regular profits until after the orchards came into full production, which would be several years from the initial plantings. Thus, a three year statute of limitations would apply but it would not begin to run until funds became available. The evidence in the record shows Ta Chi was still struggling to raise capital up until Ms. Wang's commencement of her lawsuit for repayment of the loans. In this sense, the statute of limitations had not expired because the claim had not accrued. Accordingly, the trial court correctly concluded Ms. Wang's claim for repayment was not barred by the statute of limitations.

Additionally, the trial court correctly concluded Ta Chi was estopped from not paying back the loans because it accepted the benefits of the loans. Equitable estoppel is based on the view that "'a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.'" *Lybbert v. Grant County*, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000) (quoting *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863

P.2d 535 (1993)). Equitable estoppel requires three elements: (1) an act inconsistent with a claim afterwards asserted, (2) action by another in reasonable reliance upon that act, and (3) injury to the relying party. *Lybbert*, 141 Wn.2d at 35. The party asserting the defense must have clean hands (i.e., be free from fault in the transaction at issue). *Kramarevcky*, 122 Wn.2d at 743 n.1.

Here, Ta Chi promised to repay the loans, its orchards benefitted from the money, and Ms. Wang relied on Ta Chi's promise to repay. While Ms. Wang may have failed to disclose her identity as the source of the loans, this does not render her hands unclean to pursue repayment since the source of the funds was not a significant factor. Ta Chi was primarily concerned with securing funds to maintain and grow its orchards. "A corporation may not accept the benefit of a transaction and at the same time attempt to escape the consequences thereof on the ground that the transaction was not authorized." *Pierce v. Astoria Fish Factors*, *Inc.*, 31 Wn. App. 214, 218, 640 P.2d 40 (1982) (citing 2 W. Fletcher, Private Corporations § 773 (perm. rev. ed.1969)).

Further, the trial court correctly concluded Ta Chi ratified the loans. "If a corporation . . . retains and uses money paid to it by the other party, it thereby ratifies the transaction." *Pierce*, 31 Wn. App. at 218. "Whether or not affirmance should be inferred from a failure to repudiate a transaction is a question of fact."

Nichols Hills Bank v. McCool, 104 Wn.2d 78, 85, 701 P.2d 1114 (1985). The evidence in the record shows Ms. Wang reported the existence of the loans, the amount of the loans, and the use being made of the loan funds, at least annually. Ta Chi directors knew Ms. Wang was using loaned funds to expand the orchard. Ta Chi argues it could not ratify the loans from Ms. Wang because she never disclosed her identity as a lender. But, as discussed above, who made the loans was immaterial to Ta Chi and it fails to explain how the source of the funds would have made a difference in Ta Chi's acceptance of the benefits or ratification of the loans.

D. Summer Fruit Expense Reimbursements

The next issue is whether the trial court erred by not awarding additional damages to Lotus beyond rescinding its contract with Summer Fruit. Ta Chi contends the court should have required Ms. Wang to reimburse Lotus for the other assets purchased in following her advice to enter the packing business. Lotus originally asked for approximately $3 million in reimbursement; it now limits its request to $280,000 for such expenses as piping work, waste water pumping, and purchasing a drencher.

"It has long been recognized in a rescission action, the parties, insofar as practicable, are to be restored to the same position they were in before the

contract was made." *Hackney v. Sunset Beach Invs.*, 31 Wn. App. 596, 601, 644 P.2d 138 (1982) (citing *Yount v. Indianola Beach Estates*, *Inc.*, 63 Wn.2d 519, 524-25, 387 P.2d 975 (1964)). The trial court rescinded the Summer Fruit/Lotus contract and required Ms. Wang and Summer Fruit to pay Lotus for improvements to the line because Ms. Wang concealed her ownership interest and charged an unfair price. Lotus requested Ms. Wang be forced to step into its shoes.

Here, the trial court practicably placed the parties back in the position they held prior to the contract. The court considered the practicable effect on innocent third parties who had provided services and equipment, deciding it would not be practicable to rescind all business dealings. Lotus was placed back in a similar position after the contract was rescinded. Accordingly, the trial court did not err in declining to order additional damages relating to the rescission of the Summer Fruit/Lotus contract.[1]

[1] Ta Chi appealed the trial court's denial of its request to rescind the Jong Seng/Ta Chi contract. On May 20, 2011 before argument, Ta Chi moved to withdraw this appeal issue based on a partial settlement (Ms. Wang and Summer Fruits' Assignment of Error number one). Ms. Wang does not object. We grant this request. Ta Chi still requests damages relating to the 18,000 apple bins that it contends were part of the contract. The evidence in the record, however, shows the bins had no value because the bins actually belonged to Fugachee and in exchange for their use, Ta Chi agreed to provide bins to Fugachee at no rental charge. RP (Jan. 6, 2010) at 732-36. Thus, the trial court properly denied damages relating to the Jong Seng/Ta Chi contract.

E. Alleged Lotus Profit Diversions

The issue is whether the trial court erred in finding no profits were diverted from Lotus to Summer Fruit. We review the trial court's factual findings for substantial evidence. *Brin*, 89 Wn. App. at 824.

Finding of fact 190 states: "Ta Chi and Lotus also suggest that Summer Fruit received payments that should have been made to Lotus. The Court does not believe that Ta Chi and Lotus have proven this and finds that Exhibit 43 supports the position of Wang that the work was actually done by Summer Fruit." CP at 1886.

Exhibit 43 is a memo from Lotus to Summer Fruit stating, "Lotus . . . is not responsible for these charges as all the fruit movement have occurred through Summer Fruit Packers or Fugachee Orchard Partnership." This memo supports Ms. Wang's position that Lotus actually seeks payment for work performed by Summer Fruit. Ms. Wang testified that, after her employment with Lotus terminated, fruit remained in storage that required packing and shipping. However, Summer Fruit remained responsible for seeing that the fruit was properly sold and proceeds delivered to the growers. Summer Fruit provided the fruit handling services that were then invoiced to the purchasers. Summer Fruit

received payments and distributed those to the growers. Ta Chi argues Lotus' forensic accountant's testimony showed it incurred handling expenses in 2007 but received no revenue for shipments. Despite Ta Chi's arguments about the evidence, we defer 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.*, 147 Wn.2d at 87. Given all, we find no error.

F. Lotus/Summer Fruit Profits

Ta Chi's final issue is whether the trial court erred in not extending Ms. Wang and Summer Fruit's liability to require Ms. Wang to reimburse Ta Chi for any benefit received from the Lotus/Summer Fruit contract. Ta Chi contends Ms. Wang must reimburse Ta Chi for profits received.

In finding of fact 179, the court found, "There is not a factual basis for Ta Chi or Lotus to recover for any amounts that were paid to Wang as a result of work that she performed, such as management fees, packing charges, and other fees." CP at 1884.

Our review standard requires us to look for substantial evidence supporting this finding. *Brin*, 89 Wn. App. at 824. The evidence in the record shows that prior to 2005, Ms. Wang arranged for Ta Chi fruit to be packed through local companies providing fruit packing services. Then, in 2005, Ms. Wang packed

some of Ta Chi's fruit herself through Summer Fruit. Summer Fruit charged industry standard packing charges. Ms. Wang testified she established Summer Fruit to provide a level of service for exporting quality fruit. "'[A]n agent will not be allowed to assume any position which is inconsistent with his duty to be loyal to his principal, or to place himself in an attitude of antagonism to the interests of his principal.'" *Johns v. Ariz. Fire Ins. Co.*, 76 Wash. 349, 361, 136 P. 120 (1913) (quoting 1 Clark & Skyles on the Law of Agency, §§ 404, 405).

Ms. Wang testified she established Summer Fruit because she felt it could provide better packing services than could be provided by other packing facilities. Ms. Wang believed she could achieve a higher return for Ta Chi by increasing quality and by taking advantage of her connections in the export market. Her decision to use Summer Fruit was partially made in keeping with her obligation to act in the best interests of Ta Chi, not in violation of any duty.

Ta Chi also seeks to recover additional funds for crop returns that it believes were less than should have been paid. The court heard testimony explaining why differences exist between returns from one packing facility and another. The court heard testimony on how preliminary grower settlement statements differ from final grower statements. The preliminary grower statements for Ta Chi, in some instances, show a higher return than the final

statement, and in some instances, show a lower return.

Given all, substantial evidence supports the trial court's findings regarding the Summer Fruit packing charges and grower returns. The trial court did not err.

G. Ms. Wang's Breach of Fiduciary Duty

Ms. Wang's cross appeal issue is whether the trial court erred in concluding she violated her fiduciary duty to Ta Chi when she used Ta Chi funds to defend a lawsuit commenced by Highland Orchard. Ms. Wang contends she is shielded from liability under the business judgment rule.

In April 2002, Ms. Wang leased a 30-acre orchard from the Highland Partnership in Ta Chi's name and opened a bank account for the orchard's expenses and revenues without Ta Chi's knowledge. The Highland Orchard produced over 300 bins of Fuji apples in 2002, which Ms. Wang did not report to Ta Chi. Instead, she sold the apples using her entities and deposited the revenue into the Highland account.

The Highland Partnership sued Ta Chi in September 2003, claiming its trees had been damaged during the lease term. Ms. Wang concealed the lawsuit from Ta Chi, but used Ta Chi funds to defend against the lawsuit. The trial court concluded Ms. Wang breached her fiduciary duty with respect to the Highland lease and lawsuit, and awarded Ta Chi the litigation costs that it incurred in the

lawsuit and the profit that Ms. Wang made from the lease.

Under the "'business judgment rule,'" corporate management is immunized from liability in a corporate transaction where (1) the decision to undertake the transaction is within the power of the corporation and the authority of management, and (2) a reasonable basis exists to indicate the transaction was made in good faith. *Scott v. Trans-Sys., Inc.*, 148 Wn.2d 701, 709, 64 P.3d 1 (2003) (quoting *Nursing Home Bldg. Corp. v. DeHart*, 13 Wn. App. 489, 498, 535 P.2d 137 (1975)). The rule prevents a court from substituting its judgment for that of a corporation's directors when they act in good faith. *Spokane Concrete Prods., Inc. v. U.S. Bank of Wash.*, 126 Wn.2d 269, 279, 892 P.2d 98 (1995).

The business judgment rule does not apply here because Ms. Wang entered into the transaction without Ta Chi's knowledge and, thus, breached her fiduciary duty to Ta Chi. "In Washington . . . if directors breach the duty of care intentionally, knowingly, or in bad faith, the director protection statutes will not shield them from personal liability." *Grassmueck v. Barnett*, 281 F. Supp. 2d 1227, 1232 (W.D. Wash. 2003) (citations omitted); *see also CDX Liquidating Trust v. Venrock Assocs.*, 640 F.3d 209, 215 (7th Cir. 2011) (presumption of immunity "can be overcome by proof that the director breached his fiduciary duty to the corporation").

The trial court could reason that by concealing the lawsuit, Ms. Wang continued to cover up corporate opportunities she diverted from Ta Chi, minimizing her risk of possible termination if Ta Chi discovered the transaction. Thus, her handling of the lease was an interested transaction. Ms. Wang could be viewed as not acting in good faith toward Ta Chi. When an agent breaches her fiduciary duty of loyalty, her principal can recover both the agent's profit and the principal's loss caused by the breach. *Cogan v. Kidder*, *Mathews & Segner*, *Inc.*, 97 Wn.2d 658, 667, 648 P.2d 875 (1982). Accordingly, the trial court properly concluded Ms. Wang violated her fiduciary duty in the transaction with Highland Orchard and in using Ta Chi funds to defend against a lawsuit Ta Chi was unaware had been filed; the court properly ordered reimbursement.[2]

H. Attorney Fees

Both parties contend the trial court erred in denying their requests for attorney fees below.

We review the legal basis for an award of attorney fees de novo and the reasonableness of the amount of an award for abuse of discretion. *Scott Fetzer Co. v. Weeks*, 122 Wn.2d 141, 147, 859 P.2d 1210 (1993); *Tradewell Group, Inc.*

[2] Ms. Wang appealed the trial court's rescission of the Summer Fruit/Lotus contract. On June 6, 2011, she filed a motion to withdraw that issue based on a partial settlement reached by the parties. We grant her motion to withdraw the issue.

v. Mavis, 71 Wn. App. 120, 126, 857 P.2d 1053 (1993). A court abuses its discretion if its decision is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. *Council House*, *Inc. v. Hawk*, 136 Wn. App. 153, 159, 147 P.3d 1305 (2006).

Ta Chi's attorney fee request is equity based. "Under the American rule, the parties are responsible for their own attorney fees unless an award of fees is authorized by a private agreement, statute, or a recognized ground of equity." *Bentzen v. Demmons*, 68 Wn. App. 339, 349, 842 P.2d 1015 (1993). When an agent breaches her duty of loyaty, she commits constructive fraud, which is an equitable basis for awarding attorney fees. *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 797-98, 557 P.2d 342 (1976). In *Tang*, one partner of an apartment management business filed suit against the only other partner. The court discussed the conduct of the partnership manager, Mr. Tang, which gave rise to the controversy:

> [H]e kept no records of the names of the tenants nor the amount of rentals collected. He deposited the partnership's funds in the same bank account in which he held his personal funds. Out of this same bank account he disbursed the partnership's expenses and his personal expenses. He kept no records of which disbursements were for partnership expenses. When petitioner requested an accounting, respondent failed to produce an accounting, because he had kept no records and had commingled the funds and disbursements.

Id. at 799-800. The court deemed this conduct a breach of fiduciary duty tantamount to constructive fraud that warranted sharing the expense of the lawsuit with the plaintiff. *Id.* at 801. Here, both parties were found liable. Subsequent cases have interpreted *Tang* as basing the fee award on the prevailing party. *See ASARCO Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 716, 601 P.2d 501 (1979); *see also Perez v. Pappas*, 98 Wn.2d 835, 845, 659 P.2d 475 (1983). We have no clear prevailing party. Both parties were liable for their actions or inactions. Thus, the trial court did not err in denying Ta Chi's request for fees.

Ta Chi requests attorney fees on appeal based on the same theory discussed above. For the same reasons, its request is denied.

Ms. Wang's attorney fee request is based on Ta Chi's bylaws stating it will indemnify "any person made a Party to any Proceeding . . . by reason of the fact that he/she is or was an officer, agent or employee." Exhibit 12(4) at 9. But, the bylaws also state, "Nothing contained in this paragraph . . . shall be deemed to entitle an officer, employee or agent of the corporation to indemnification . . . if it shall be determined that the person seeking indemnification . . . (i) improperly derived personal benefit . . . or (ii) acted negligently or engaged in willful misconduct." *Id.* Clearly, Ms. Wang's misconduct exempts her from

indemnification.

Ms. Wang requests fees on appeal in the last sentence of her brief before the conclusion; such a request is insufficient for an award of attorney fees. As our courts have recognized, a request for fees on appeal requires more than "a bald request." *Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 705, 915 P.2d 1146 (1996); *Thweatt v. Hommel*, 67 Wn. App. 135, 148, 834 P.2d 1058 (1992). Rather, as required by RAP 18.1(b), to receive a request of an award of attorney fees on appeal a party must devote a section of the brief to the fee request and include argument and citation of authority. Accordingly, Ms. Wang's request for fees on appeal is denied.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

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Sweeney, J.

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Siddoway, J.