NO. 325776

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION III

ROIL ENERGY, LLC, a Nevada Limited Liability Company, by and through the derivative claim of ALLAN HOLMS, a married man and a Washington resident; and ALLAN HOLMS, individually, a married man and a Washington resident,

Plaintiffs/Appellants,

v.

JOSEPH ("JAY") EDINGTON and JANE DOE EDINGTON, husband and wife and residents of Spokane County, Washington; TOLL RESERVE CONSORTIUM INC., a Nevada Corporation recently renamed as HOLMS ENERGY DEVELOPMENT CORPORATION, a Nevada Corporation; VAL and MARI HOLMS, husband and wife, and the marital community comprised thereof, residents of the State of Montana; HOLMS ENERGY, LLC, a Nevada Limited Liability Company; and BAKKEN RESOURCES, INC., a Nevada Corporation,

Defendants/Respondents/Cross Appellants.

REPLY BRIEF OF CROSS-APPELLANTS

Val and Mari Holms; Holms Energy, LLC; and Bakken Resources, Inc.

Respondents/Cross-Appellants

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I. Allan Failed To Prove Damages – An Essential Element Of Fraud

Cross-Appellants are likely not alone in having ignored a sentence appearing in one of two dissenting opinions in a 5-4 decision from 1953. The distinction that Justice Schwellenbach made in his dissenting opinion in *Gilmartin v. Stevens Investment Co.*, 43 Wn.2d 289, 261 P.2d 73 (1953) between the terms damage and damages did not take hold – at least as far as fraud is concerned -- since subsequent decisions of our appellate courts have not adopted that distinction. For example, in *Brummett v. Washington's Lottery*, 171 Wn. App. 664, ¶20, 288 P.3d 48 (2012), Division Two listed the nine elements of fraud, identifying the ninth element as: "(9) resulting damages." And in an opinion filed the same year, the Supreme Court also set forth the nine essential elements of fraud, identifying the ninth as: "(9) consequent damage." *Elcon Construction, Inc. v. Eastern Washington University,* 174 Wn.2d 157, ¶14, 273 P.3d 965 (2012). In Conclusion of Law No. 17, to which no challenge has been made, the court described the ninth element of a fraud cause of action as: "(9) resulting damages." CP 4436.

Any distinction between using the terms damage and damages as the ninth element of fraud is irrelevant, not only to this case but apparently to the Appellate courts of the state of Washington. The fact remains that

Allan Holms failed to prove the amount by which he claimed he was damaged. No amount of semantics can rescue him from that failure.

Allan's quotations from C.J.S. seem to suggest his belief that damages are to be presumed in an action for fraud – a clearly unsupportable proposition. Furthermore, that same treatise states that: "A fraud without damage or injury is not remedial . . .". 37 C.J.S Fraud §65, p. 250 (2008).

All nine elements of fraud, including damages must be proven by clear, cogent and convincing evidence.

> Proof by clear, cogent and convincing evidence means that the element must be proved by evidence that carries greater weight and is more convincing than a preponderance of evidence. Clear, cogent and convincing evidence exists when occurrence of the element has been shown by the evidence to be highly probable. WPI 160.02

"The trial court, not a reviewing court, determines whether evidence meets the 'clear, cogent, and convincing' standard of persuasion, which is met if the evidence makes the fact in issue 'highly probable'." *Proctor v. Huntington*, 146 Wn. App. 836, ¶17, 192 P.3d 958 (2008), affirmed 169 Wn.2d 491, 238 P.3d 1117 (2010), "On appeal, we view the evidence in light most favorable to the prevailing party and defer to the trial court regarding witness credibility and conflicting testimony". *Choi v. Sung*, 154 Wn. App. 303, ¶22, 225 P.3d 425 (2010).

Allan had ample opportunity over 8 days of trial to prove his damages, and he failed to do so. An appellate court is not the proper forum for a plaintiff to prove damages.

Allan failed to prove there was a contract. It follows that therefore there could be no breach of contract, and necessarily no damages. Allan could not take advantage of the opportunity given to him to establish damages under a different theory – facilitation value – because he presented no testimony as to what that value might be. A plaintiff's failure to "introduce evidence from which the trial court could have determined the reasonable value of services rendered" requires dismissal of a claim. *DeBenedictis v. Hagen,* 77 Wn. App. 284, 293, 890 P.2d 529 (1995).

The trial court correctly determined that the ninth element of Allan's fraud cause of action had not been established. Conclusion of Law No. 21 reads as follows:

> The measure of damages proximately caused by the fraud in terms of 'benefit of the bargain' is not definable by the subsequent BRI capitalization plan, given significant differences and variables in the ultimate structures of Holms Energy, LLC and BRI. *In the absence of ascertainable damages, declaratory relief is provided below.* CP 4437 (Italics added)

'"Ascertain"' means: '''to make certain, clear or definitely known; find out with certainty; determine; insure as a certainty.'" *United States v. Forster*, 131 F.2d 3, 14 (8th Cir. 1942).

The court correctly found that the evidence was insufficient to determine with certainty what damages, or the amount thereof, Allan claims to have suffered.

Then, referencing the claims for conspiracy, breach of fiduciary duty and minority shareholder oppression, the trial court found that "Damages however are limited to declaratory relief, below." Conclusion of Law No. 25, CP 4437.

The declaratory relief that the trial court proposed to grant to the plaintiff is enunciated in Conclusion of Law No. 30: "The parties are invited to further brief and argue what, if any, facilitation value was lost by Allan by the fraudulent actions of Jay Edington and Val to exclude him." CP 4438.

Which brings us full circle to the court's inability to provide that declaratory relief to the plaintiffs due to a lack of proof as to what a facilitation value might have been. Allan never requested permission from the court to reopen the case to present evidence to support an award of a facilitation value.

II. The Trial Court Erred In Finding Defendants Liable For Civil Conspiracy

Val's Argument that the trial court should not have entered judgment in favor of Roil Energy for civil conspiracy is adequately set

forth in his Response Brief at pp. 57-60. Therefore, only three points will be briefly made here. First, Val had a right to walk away from the discussions about a proposed business arrangement. Conclusion of Law No. 18. CP 4436. *Pacific Cascade Corp. v. Nimmer,* 25 Wn. App. 552, 557, 608 P.2d 266 (1980).

Second, even if Allan could have proven that a contract had been formed, Val and Jay would not have been ". . precluded from communicating to each other their intention to repudiate or terminate their obligations thereunder." *Corbit v. J.I. Case Co.,* 70 Wn.2d 522, 529, 424 P.2d 290 (1967).

And third, Allan failed to prove by clear, cogent and convincing evidence that he was damaged, which is an essential element of civil conspiracy.

III. The Trial Court Erred In Finding Defendants Liable For Breach Of Fiduciary Duty And Oppression Of Minority Interest – But Rightfully Awarded No Damages

Val reiterates his statement that: "there is no Finding of Fact that Allan held a minority interest in Roil Energy, LLC." Response Brief at 60. At trial, the entire thrust of Allan's case was that he had a 40% interest as a member of Roil Energy, LLC. But his evidence failed to prove that. Even if he had by statute been admitted as an initial member of that limited liability company, he failed to prove what ownership percentage

he may have had. Thus, the foundation of a cause of action for oppression of minority interest is missing, i.e. proof that the plaintiff held a minority interest in the entity.

Perhaps of more significance is the fact that Allan failed to prove that he had been damaged by the actions of Val, and assuming for purposes of argument that he did prove such damage, he then failed to establish the amount of those damages, instead, inviting the court to speculate on what that amount might be.

The trial court found that Val had a right to walk away from the transaction under discussion and "further had the right to develop his mineral interests by means of another transaction." Conclusion of Law No. 18. CP 4436. This comports with Washington law, and is clearly inconsistent with the finding of breach of fiduciary duty or oppression of minority interest. *Pacific Cascade Corp.,* 25 Wn. App. at 557. Val had a right to walk away from the business opportunity being discussed, but that right was rendered meaningless by the court's finding of breach of fiduciary duty and/or oppression of minority interest.

Allan's citation to Nevada's Limited Liability Company Act is far from helpful to his cause. Allan claims he owned a membership interest in Roil Energy, LLC, but he never established to the satisfaction of the trial court just what his ownership percentage interest was. The trial court

noted not once, but several times, the absence of any proof of what that ownership percentage might have been, if any.

In unchallenged Findings of Fact, the trial court found that Val, Allan and Jay had discussed their potential percentage ownership interests in Roil Energy, LLC; but had "never reached agreement". Findings of Fact No. 38 and 39. CP 4428.

In unchallenged Conclusion of Law No. 8, the court noted in part that: "One of those essential terms upon which agreement had not been reached was the percentage ownership interests that Allan Holms, Val Holms and Jay Edington would each have in Roil Energy, LLC; the number of members that limited liability company would have; and the percentage ownership of those other members." CP 4434.

Conclusion of Law No. 31.a stating that the breach of fiduciary duties and majority shareholder oppression claims have been proven, is not supported by the Findings of Fact. CP 4530.

"A claim for breach of fiduciary duty under Nevada law requires a plaintiff to demonstrate a fiduciary duty exists, that duty was breached, and the breach proximately caused the damages." (emphasis added). *JPMorgan Chase Bank, N.A. v. KB Home*, 632 F. Supp.2d 1013, 1024 (D. Nev. 2009), which is a case cited by Allan on page 42 of his Reply Brief. This once again brings us full circle to the failure of Allan to prove an

essential element of a breach of fiduciary duty cause of action, namely, damages.

Allan's goal was to obtain control of his brother Val's mineral interests, which makes his claim to be an oppressed minority participant ring hollow.

What Allan is really arguing is that because of an alleged breach of fiduciary duty and/or oppression of an alleged minority interest, Val was duty bound to complete the transaction under discussion whereby Allan would obtain control over Val's North Dakota mineral interests.

Allan's reliance on the scope of a fiduciary duty enunciated in *Golden Nugget, Inc. v. Ham*, 95 Nev. 45, 589 P.2d 173 (1979) is misplaced. In that case, Ham was not only a director of the corporation, but was also its attorney and therefore "was under an additional duty to the corporation, ..." *Golden Nugget,* 589 P.2d at 175.

Roil Energy, LLC was formed by three individuals as part of a discussion they were having about using Val's mineral interests to accomplish a reverse merger transaction. However, that transaction was only under discussion and was never brought to fruition because of Val's justifiable fear that he would be losing control of his mineral interests to his brother Allan.

Allan refuses to accept the court's conclusion, supported by Washington case law, that since the transaction was only in the discussion stage, Val had "the right to withdraw from the negotiations". Conclusion of No. 18. CP 4436. Allan failed to prove that there was an enforceable contract formed for him to acquire what he claimed to be a 40% interest in Roil Energy, LLC, that would, unbeknownst to Val at the beginning, result in Allan having control of the corporation that would ultimately own Val's mineral interests. Allan then seeks to reach the same result through his other causes of action, but the court, while it erroneously found Val liable for breach of fiduciary duty and oppression of minority interests, rightfully found that no damages were attributable to those causes of action.

IV. The Trial Court Erred In Awarding Attorney Fees

The overwhelming majority of courts that have considered derivative action statutes similar to section 86.489 of the Nevada Revised Statutes has held those statutes to be fee sharing statutes, and not fee shifting statutes.

Allan relies on but one decision from Nebraska to support his contrary claim that NRS 86.489 is a fee shifting statute. *Fitzgerald v. Community Redevelopment Corp., 283 Neb. 428, 811 N.W. 2d 178 (2012).*

Arizona's statute regarding attorney fees in a derivative action brought on behalf of a limited liability company (ARS 29-833(A)) is virtually identical to Nevada's statute, NRS 86.489. In interpreting ARS 29-833(A), the Arizona Supreme Court said that: "Because the language of §29-833(A) is arguably susceptible to more than one interpretation, we look beyond the statute's language to construe its meaning . . ." *Cal X-TRA v. W.V.S.V. Holdings, LLC, 229 Ariz. 377,* 276 P.3d 11,¶75 (2012). Then, the Arizona Supreme Court embarked upon an analysis to determine the meaning of that statute.

Since its review of the legislative history provided "no clear direction as to the proper interpretation of §29-833, which has yet to be interpreted by a published decision in this state", the court then looked "to cases from other states involving similarly worded statutes for assistance in interpretation." *Cal X-TRA*, 276 P.3d at ¶79-80. The court noted that: "The reported cases from other states generally interpret those statutes to hold that where a plaintiff has successfully sued derivatively on behalf of the entity, the court may require the successful entity to help shoulder the burden of the legal expenses incurred by the plaintiff on the entity's behalf." *Cal X-TRA*, 276 P.3d at ¶80. The opinion cited decisions from Virginia, New York, and Alaska, noting that these decisions ". . . treat the applicable statutes as fee-sharing statutes, and reject the proposition that

such statutes authorize a fee award against the opposing party." *Cal X-TRA,* 276 P.3d at ¶80. Following those cases as well as an analysis of an earlier Arizona case interpreting a somewhat similar limited partnership statute, the court held that: ". . . A.R.S. §29-833(A) is most appropriately interpreted as a fee-sharing statute that allows a successful plaintiff suing derivatively on behalf of an entity to be reimbursed by the entity, rather than a fee-shifting statute that authorizes an award of attorneys' fees against an opposing party, . . ." *Cal X-TRA*, 276 P.3d at ¶82.

Virginia has a derivative action statute for limited partnerships, the pertinent part of which is almost identical to Nevada's limited liability company statute. The Virginia statute reads in pertinent part as follows:

> If a derivative action is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise or settlement of an action or claim, except as hereinafter provided, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct him to remit to the limited partnership the remainder of those proceeds received by him. Virginia Code Section 50-73.65.[1]

While the Arizona Supreme court found its state's statute ambiguous, the Supreme Court of Virginia found Virginia's "statute to be clear and unambiguous"; and that they therefore must "give the statute its

[1] The balance of that statute provides for an award of attorney's fees to a defendant who successfully defends an action where the court finds that the action was commenced without reasonable cause or the plaintiff did not fairly represent the interests of the limited partners.

plain meaning." *Little v. Cooke,* 274 Va. 697, 652 S.E.2d 129, 143 (2007). The "plain meaning" was that Virginia's statute is a fee sharing statute, which is the same result reached by the Arizona Court. *Little,* 652 S.E. 2d at 143.

The Virginia court said that: "The operative language of Code §50-73.65 is found in the first sentence directing a successful plaintiff who has received an award of reasonable attorneys' fees and expenses 'to remit to the limited partnership the remainder of those proceeds received by him.'" *Little,* 652 S.E. 2d at 143. This language is essentially the same as Nevada's NRS 86.489.

The court continued: "The General Assembly's use of the word 'remainder' indicates its intent for the award of reasonable attorney's fees and expenses to be subtracted from the total amount 'received by the plaintiff as a result of a judgment, compromise or settlement of an action or claim,' with the 'remainder' being remitted to the limited partnership." *Little,* 652 S.E.2d at 143.

The court said that: "Our view of the statute is consistent with what is known as the 'common fund' exception to the 'American Rule' prohibiting the shifting of attorneys' fees to the losing party." (citation omitted). *Little,* 652 S.E.2d at 143.

In interpreting statutes essentially the same as Nevada's, the Arizona Supreme Court found the statute ambiguous while the Virginia Supreme Court found it unambiguous. However, both of those courts reached the same conclusion – the statutes are fee sharing and not fee shifting statutes.

New York is another state which has a statute similar to Nevada's, namely Business Corporation Law, §626(e), which was attached to Val's opening brief as Appendix O and is attached hereto as Appendix A. In the case of *Glenn v. Hoteltron Systems, Inc.,* 74 N.Y.2d 386, 547 N.Y.S. 2d 816. 547 N.E.2d 71(1989), the New York Court of Appeals, after stating that New York followed the American Rule regarding the award of attorney's fees, concluded that: "Although Business Corporation Law §626(e) provides that a successful plaintiff in a shareholders' derivative action may recoup legal expenses and attorneys' fees from the proceeds of a judgment, compromise or settlement in favor of the corporation, it does not authorize the imposition of such expenses on the losing party." (emphasis added). *Glenn,* 547 N.E.2d at 75.

The Supreme Court of Alaska, in *Jerue v. Millett,* 66 P.3d 736 (Alaska 2003), provides an example of the difference between a fee sharing and a fee shifting statute. In that shareholder derivative lawsuit,

the trial court awarded the prevailing defendants attorney's fees against the plaintiff shareholders pursuant to Alaska Civil Rule 82(a), which says:

> "Rule 82. Attorney's Fees.
>
> (a) Allowance to prevailing party. Except as otherwise provided by law or agreed to by the parties, the prevailing party in a civil case shall be awarded attorney's fees calculated under this rule."

That rule provides for an award of attorney's fees to "the prevailing party." The court properly characterized this rule as a "fee-shifting rule". *Jerue,* 66 P.3d at 742.

In contrast, the court determined that Alaska Civil Rule 23.1(j) is a "fee-sharing rule". *Jerue,* 66 P.3d at 741. That rule, which is very similar to Nevada's statute, provides as follows:

> (j) If the derivative action is successful, in whole or in part, or if anything is received as a result of the judgment, compromise, or settlement of that action, the court may award to the plaintiff or plaintiffs reasonable expenses, including reasonable attorney fees, and shall direct an accounting to the corporation for the remainder of the proceeds. This subsection does not apply to a judgment rendered only for the benefit of injured shareholders and limited to a recovery of the loss or damage sustained by them.

In its analysis, the Alaska court said that: "Because [Civil Rule 23.1(j)] is a fee-sharing rule, Rule 23.1(j) does not give the corporation itself a claim for fees or provide for an award against individual defendants." *Jerue,* 66 P.3d at 741.

The Alaska court noted that its Civil Rule 23.1(j) is modeled after New York Business Corporation Law §626(e), noted above. The Alaska court then appropriately looked to the New York court's interpretation of that provision, finding that: "The New York courts have interpreted this provision to provide for fee-sharing, but not fee-shifting." *Jerue,* 66 P.3d at 741.

In a shareholder derivative action, under Federal Civil Rule 23.1, the Fifth Circuit Court of Appeals held that: ". . . attorney's fees are not recoverable in a derivative action if the effect of such an award is to shift the liability for those fees to the defendant." *Junker v. Crory,* 650 F.2d 1349, 1363 (5th Cir. 1981).

Allan characterizes Val's reliance upon *Interlake Porsche & Audi, Inc. v. Blackburn,* 45 Wn. App. 502, 728 P.2d 597 (1986) as egregious. However, that case is illustrative of the application of the common fund theory in a derivative action, which common law theory is codified in the statutes from other states that are discussed above, including Nevada's.

The Washington court noted that the common fund doctrine is an exception to Washington's general rule that there is no attorney fee recovery in litigation, that is, Washington follows the American Rule. In explanation of the common fund doctrine, the court concluded that: "The obligation to reimburse a shareholder who brings a successful derivative

action is an obligation of the corporation, not the losing party to the action, and attorney fees are to be recouped out of the common fund, if any, created by the action, not from an increased judgment against the defendant." (emphasis added). *Interlake,* 45 Wn. App. at 522.

This *Interlake* case is an illustration of the Washington court's application of the common fund doctrine under the common law. That doctrine has been incorporated into the statutes under discussion, which leads to the inescapable conclusion that Nevada's statute, like the statutes from the other states noted above, is a fee sharing statute. "It is a general rule of [statutory] interpretation to assume that the legislature was aware of the established common-law rules applicable to the subject matter of [a] statute when it was enacted. In ascertaining the legislative intent in the enactment of a statute, the state of the law prior to its adoption must be given consideration." (Citations omitted). *State of Washington v. PUD No. 1,* 83 Wn.2d 219, 222, 517 P.2d 585, 587 (1973).

Val reiterates the statement in his opening brief on this cross-appeal regarding the Nebraska Supreme Court case cited by Allan that ". . . the Nebraska court made no analysis of whether the Nebraska statute was a fee-shifting or fee-sharing statute." Resp. Brief, p. 68.

A pronouncement that a statute means a certain thing is not an analysis. The Nebraska Supreme Court devoted a scant three paragraphs in

a 20 page opinion to discuss whether its state's statute, which is similar to Nevada's, was a fee sharing or fee shifting statute. *Fitzgerald*, 811 N.W.2d at 202-03. In response to the defendant's position that the Nebraska statute is a fee sharing statute, the Nebraska Supreme Court simply said "We disagree with this interpretation." 811 N.W.2d at 202. No legislative history was offered or discussed. No cases from other jurisdictions that have similar statutes were cited. There was no discussion of the pros and cons of a fee shifting versus a fee sharing statute; or about the common fund doctrine which is codified in these types of statutes. Just a pronouncement that the court disagrees with the defendant's fee sharing interpretation.

Certainly, that was the prerogative of the Supreme Court of Nebraska, to interpret the statute as it deemed fit, without any discussion of the analysis, if any, that may have been made to reach that decision. However, this lack of analysis – especially since it is contrary to the overwhelming majority of those cases which have found these types of statutes to be fee sharing statutes – diminishes any precedential value this Nebraska case might have in interpreting the Nevada statute which is before this court.

The detailed analysis made by the Arizona Supreme Court of its state's statute, which is virtually identical to NRS 86.489, as well as the

detailed analyses of similar statutes made by the appellate courts in Virginia, New York and Alaska, cited above, stand in stark contrast to the lack of analysis by the Nebraska court in the *Fitzgerald* case.

Far from being a "novel" argument, Val's position that the Nevada statute should be construed as a fee sharing statute is supported by the overwhelming majority of courts which have interpreted identical or similar statutes, such as Arizona, Alaska, Virginia and New York, and is consistent with the common fund exception to the American Rule which has been interpreted by the courts of the state of Washington to be a fee sharing common law doctrine. Any novel argument was made in the Nebraska case relied upon by Allan, which stands alone in its interpretation – nay, misinterpretation – of Nebraska's derivative action attorney's fee statute. This court has ample precedent for finding the Nevada statute to be a fee sharing statute, not only from the decisions of other appellate courts, but also from Washington's own interpretation of the common fund exception to the American Rule, upon which these various statutes are based.

To say that the Nebraska court followed a decidedly minority view would give more credit to that court than is due, for no decision was cited in the Nebraska court's opinion, nor has Allan cited any other opinion, supporting the conclusion reached by the Nebraska court.

The normal expectation would be that Allan would have cited in his response brief court decisions in addition to the Nebraska case supporting his position that the Nevada statute is a fee shifting statute. But no such cases were cited. That cannot be attributed to a lack of effort on Allan's part, for he is represented by competent counsel. But it is a clear indication that the Nebraska case stands alone – an anomaly – in clear contradiction to those cases cited by Val which have, after some rather extensive analysis, construed these statutes as fee sharing statutes.

Allan claims that the language of NRS 86.489 is "plain and unambiguous." Reply Brief at 47. Yet the parties to this appeal reach two diametrically opposed conclusions concerning the meaning of that statute. The conclusion reached by Val is supported by an array of case law. The view championed by Allan finds support in only one decision which offers no insight to the reasoning upon which the Nebraska court reached its conclusion.

The *Consumer's League of Nevada* case cited by Allan, as "binding Nevada precedent" is anything but. *Consumers League of Nevada v. Southwest Gas Corp.,* 94 Nev. 153, 576 P.2d 737 (1978). The "complete and comprehensive statutory scheme" created by the Nevada legislature is "for the regulation of utility rates, . . ." *Consumers,* 576 P.2d

at 739. The Nevada Supreme Court held that "in the absence of legislation specifically providing for attorney's fees, such fees cannot be awarded to an intervenor in a proceeding before the [Nevada Public Service] Commission under either the 'common fund' or the 'substantial benefit' theory." *Consumers,* 576 P.2d at 740.

In that case, the Nevada Public Service Commission ordered Southwest Gas to refund approximately $2,000,000.00 to its customers. Kermit L. Walters sued Southwest Gas claiming that he, on behalf of the Consumer's League of Nevada, brought the administrative proceedings against Southwest Gas that resulted in the Nevada Public Service Commission ordering Southwest Gas to make the refund; and that "he was entitled to an attorney's fee from the 'common fund' thus created." *Consumers,* 576 P.2d at 738. The Nevada Supreme Court rejected Mr. Walters' contention.

Since the statutory scheme for utility rates created by the Nevada legislature did not include an attorney's fees provision, the Nevada Supreme Court determined that it would not intrude upon that statutory scheme by awarding attorney's fees under the common law common fund theory.

Consideration of the *Consumers League of Nevada* case adds nothing to the proper interpretation of Nevada statute 86.489. Clearly,

Nevada, like most other states, has created a comprehensive statutory scheme for the regulation of limited liability companies. Those statutes include an award of attorney's fees under certain circumstances. The issue is whether the trial court in the instant case properly applied that statute. The *Consumer's League of Nevada* case sheds no light on that question.

It was error for the trial court to interpret Nevada's statute as a fee shifting statute, contrary to all the cases research has disclosed which have interpreted identical or very similar statutes.

V. Procedural Matters

A. Appellants' Improper References To The Record.

Once again, Respondents must raise the issues of (1) Allan quoting testimony that is not part of the trial record; and (2) Allan's citations to the record which do not support the factual assertions for which they are cited. Although similar violations were pointed out in Respondents' Brief at page 16, Allan has doubled down and repeated those transgressions. This time, on page 4 of his Reply Brief, Allan quotes from CP 3634, which is page 386 of the Deposition of Jay Edington taken January 9, 2013. The deposition language quoted by Allan does not appear on that page, which is irrelevant because it was never read or otherwise introduced at trial, and therefore is not part of the trial record.

An example of the second issue is found on page 7 of the Reply Brief. No testimony is recorded at RP 862, only a colloquy between Mr. Greer and Judge Tompkins concerning the need to serve Jay Edington with a second subpoena for his testimony later in the trial.

B. Allan's Attempt to Assign Error to Findings and Conclusions in His Reply Brief Does Not Cure the Prejudice to Val Caused by Allan's Failure to Assign Error in His Opening Brief.

Val agrees with Allan's statement at page 36 of his Response Brief that: "Unchallenged findings are verities on appeal. . ." However, Val does not agree that Allan can remedy his failure to properly assign error to Findings of Fact in his opening brief by attaching a number of Findings of Fact and Conclusions of Law as appendixes to his Reply Brief. Whether Allan's failure to properly assign error was the result of a failure to read or to understand the Rules on Appeal, or was gamesmanship, either way that failure has deprived Val of the opportunity to direct this Court to evidence supporting the Findings of Fact that now, belatedly, Allan has included as appendixes. However, it is still far from clear which of those Findings Allan is at this late date attempting to challenge.

The long history of the Appellate Courts of this state holding that unchallenged Findings of Fact are verities on appeal makes sense. The propriety of that history is evidenced in this case because even after over 110 pages of briefing from Allan Holms, it is still a mystery just which of

the Findings of Fact Allan claims were erroneously entered by the Court. Judge Roe, after noting that "[appellant] Breen has not assigned error to any of the findings of fact, so they will be considered verities on appeal" said in *Smith v. Breen,* 26 Wn. App. 802, 803, 614 P.2d 671 (1980), that: "It is not the function or duty of this court to search the record for errors, but only to rule on the errors specifically alleged."

RAP 10.3(g) is not a mere suggestion. It states that a brief must contain a separate assignment of error for each finding of fact a party contends was improperly made, with reference to the finding by number. RAP 10.4(c) states that the brief should contain the text of the findings in question, verbatim, either in the body of the brief or in an appendix. RAP 1.2(b) provides that the word "should" as used in those rules means that a party is under an obligation to perform. The word "should" in RAP 10.4(c) "is a word of command, not merely a suggestion." *Thomas v. French*, 99 Wn.2d 95, 99, 659 P.2d 1097 (1983).

Val recognizes RAP 1.2(a), but this is a situation where the clear requirements of RAP 10.4(c) have been ignored. Assigning error for the first time in a reply brief does not remedy the prejudice that Val has experienced due to Allan's failure to comply with the Appellate Rules by his failure to assign error to specific findings of fact in his opening Brief.

Val is not asking that this appeal be dismissed or that this court not decide the case on the merits due to Allan's failure to follow the rules. But Val is asking that this court adhere to its long tradition of accepting unchallenged findings of fact, or improperly challenged findings of fact, as verities on appeal, as all parties to this appeal agree is the proper standard. This is a case where Allan's failure to follow the Rules has prejudiced Val, by Allan's hiding the ball on just what findings he wants to challenge, and then attaching 32 findings of fact and 17 conclusions of law as appendixes to the Reply Brief, without telling Val or this court which of those findings or conclusions, are actually being challenged. A painstaking review of Allan's opening brief, giving Allan the benefit of the doubt, discloses that only 19 findings of fact are mentioned in that brief, 11 of those in footnote 10 on page 29 claiming they were conclusions of law, and several of the remaining ten were only by reference to a page of the Clerk's Papers, each page of which contains several findings or conclusions. Clearly, it will be to the extreme prejudice of Val if this Court refuses to enforce the long standing position of the courts of this state that unless findings are properly challenged, they are verities on appeal.

Furthermore, any of the Trial Court's Conclusions of Law to which neither the Appellant nor the Respondents in their cross appeal has

assigned error become the law of the case. *State v. Slanaker,* 58 Wn. App. 161, 165, 791 P.2d 575 (1990).

VI. Conclusion

Cross Appellants Val and Mari Holms, Holms Energy, LLC and Bakken Resources, Inc. respectfully request that this Court REVERSE the following parts of the First Amended Judgment: (1) paragraph 5 which awarded judgment to Roil Energy, LLC against Val and Mari Holms, Holms Energy, LLC and Bakken Resources, Inc. for fraud, breach of fiduciary duties and civil conspiracy; (2) paragraph 6 which awarded judgment to Allan Holms against Val and Mari Holms, Holms Energy, LLC and Bakken Resources, Inc. for fraud, breach of fiduciary duties, oppression of minority interest and civil conspiracy; (3) paragraphs 7 and 8 which awarded Allan Holms attorney fees and expenses; Provided, however, this court is requested to affirm the award of no damages ($0) in paragraphs 5 and 6.

RESPECTFULLY SUBMITTED this 30th day of September, 2015.

FELTMAN, GEBHARDT, GREER & ZEIMANTZ, P.S.

BY: Frank J. Gebhardt

FRANK J. GEBHARDT, WSBA #4854
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Attorneys for Cross-Appellants Val and Mari Holms, Holms Energy, LLC, and Bakken Resources, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 30th day of September, 2015, I caused to be served a true and correct copy of the foregoing document on the following by the method indicated.

Carl Oreskovich Courtney Garcea Etter, McMahon, Lamberson, Clary & Oreskovich 618 W. Riverside, Ste. 210 Spokane, WA 99201	[ ] U.S. Mail [X] Hand Delivery [ ] Overnight Mail [ ] Facsimile [ ] Email
Robert A. Dunn Bil Childress Dunn Black & Roberts, P.S. 111 N. Post St., Ste 300 Spokane, WA 99201	[ ] U.S. Mail [X] Hand Delivery [ ] Overnight Mail [ ] Facsimile [ ] Email

Suzanne Booth

NEW YORK BUSINESS CORPORATION LAW §626(e)

(e) If the action on behalf of the corporation was successful, in whole or in part, or if anything was received by the plaintiff or plaintiffs or a claimant or claimants as the result of a judgment, compromise or settlement of an action or claim, the court may award the plaintiff or plaintiffs, claimant or claimants, reasonable expenses, including reasonable attorney's fees, and shall direct him or them to account to the corporation for the remainder of the proceeds so received by him or them. This paragraph shall not apply to any judgment rendered for the benefit of injured shareholders only and limited to a recovery of the loss or damage sustained by them.

APPENDIX A