

Sep 16, 2016, 3:32 pm

RECEIVED ELECTRONICALLY

No. 93607-2

SUPREME COURT FOR THE STATE OF WASHINGTON

KATHERINE GAISER, an individual, and CAROL GAISER, an
individual,

Petitioners,

v.

JAY FRIET, an individual,

Respondent.

PETITION FOR REVIEW

David C. Tingstad, WSBA No. 26152
Jonathan P. McQuade, WSBA No. 37214
BERESFORD BOOTH PLLC
145 3rd Avenue South
Edmonds, WA 98020
(425) 776-4100
Attorneys for Respondents Carol and
Katherine Gaiser

 ORIGINAL

I.	IDENTITY OF PETITIONERS.....	1
II.	COURT OF APPEALS DECISION.....	1
III.	ISSUES PRESENTED FOR REVIEW.....	1
IV.	STATEMENT OF THE CASE.....	2
	A. Synopsis of Case.....	2
	B. The Parties.....	2
	1. Landon Enterprises, LLC.....	2
	2. Petitioners.....	3
	3. Respondent Jay Friet.....	3
	C. The Terms of the LLC Agreement.....	4
	D. Friet Files for Declaratory and Injunctive Relief.....	5
V.	ARGUMENT.....	6
	A. The Court of Appeals' Decision Conflicts With the LLC Act.....	6
	B. Declaratory Judgment Actions Cannot Circumvent the Strict Requirements of RCW 25.15 <i>et seq.</i>	9

1. A Party Without Standing to Bring a Derivative Action Should Not Have Standing to Bring a Declaratory Action Concerning the LLC Governance.....	10
2. Respondent Claims the LLC Agreement was Breached and Seeks to Reform the LLC Agreement.	14
VI. CONCLUSION.....	16
VII. APPENDIX.....	16

CASES

Carey v. Howard, 950 So.2d 1131, 1136 (Ala. 2006) 13

Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 814–15, 514 P.2d 137 (1973)
..... 11

Hawk v. Mayer, 36 Wn.2d 858, 866, 220 P.2d 885 (1950) 9

Jacobsen v. King County Med. Serv. Corp., 23 Wn.2d 324, 327, 160 P.2d 1019
(1945)..... 15

Mulhausen v. Bates, 9 Wn.2d 264, 270, 114 P.2d 995 (1941)..... 9

Nw. Wholesale, Inc. v. Pac Organic Fruit, LLC, 184 Wn.2d 176, 357 P.3d 650
(2015)..... 7

Peoples Park & Amusement Ass'n v. Anrooney, 200 Wash. 51, 57–58, 93 P.2d 362
(1939)..... 15

Shoenwald v. Diamond K. Packing Co., 192 Wash. 409, 420, 73 P.2d 748 (1937).. 15

Spokane Entrepreneurial Ctr. V. Spokane Moves to Amend Constitution, 185 Wn.2d
97, 103, 369 P.3d 140 (2016)..... 10

Superior Asphalt & Concrete Co. Inc. v. Washington Dep't of Labor & Indus., 121
Wn. App. 601, 606, 89 P.3d 316 (2004) 11

To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001)..... 11

STATUTES

RCW 25.15.375 6, 11,14

RCW 7.24.020..... 9

OTHER AUTHORITIES

Carey v. Howard, 950 So.2d 1131, 1135 (Ala. 2006) 13, 14
Weinstein v. Schwartz, 422 F.3d 476, 478 (7th Cir. Ct. App. 2005) 14

RULES

RAP 13.4(b) 6

I. IDENTITY OF PETITIONERS

Petitioners, Katherine and Carol Gaiser, and Landon Enterprises, LLC, were defendants in a King County Superior Court action commenced by Respondent, Jay Friet. Friet sought a declaratory judgment that Katherine, the attorney-in-fact for her mother, Carol Gaiser, could not act on her mother's behalf concerning Landon Enterprises, LLC.

II. COURT OF APPEALS DECISION

The trial court dismissed Friet's declaratory judgment on summary judgment. The Court of Appeals, Division 1, reversed the trial court's summary judgment dismissal. The Court of Appeals' Opinion in Case #73448-2-1 is attached to the appendix as Exhibit A.

III. ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals' decision conflict with this Court's and the Courts of Appeals' prior decisions defining standing necessary to bring derivative actions?
2. Does the Court of Appeals' decision create a conflict between the Declaratory Judgment Act and the LLC Act?

IV. STATEMENT OF THE CASE

A. Synopsis of Case.

Respondent Jay Friet, an economic interest holder in Landon Enterprises LLC, filed for declaratory and injunctive relief on behalf of himself and the LLC. The LLC moved for summary judgment, arguing Friet's claims were derivative and therefore, Friet lacked standing to bring derivative claims on behalf of the LLC. The trial court granted the LLC's motion and dismissed Mr. Friet's lawsuit.

The Court of Appeals reversed. The Court of Appeals reasoned that the characterization of Mr. Friet's claims – whether direct or derivative – is irrelevant. Instead, the Court of Appeals held Mr. Friet had standing under the Uniform Declaratory Judgment Act to obtain a declaration of rights and status concerning the LLC and its operation, even if Mr. Friet's claims were wholly derivative.

B. The Parties.

1. Landon Enterprises, LLC.

Landon Enterprises, LLC is a Washington limited liability company formed to own and operate certain commercial properties in Seattle. CP 594. The LLC's operating agreement states that the members have "**sole authority** to manage the Company and are authorized to make any contracts, enter into any transactions, and

make and obtain any commitments on behalf of the Company to conduct or further the Company's business." CP 75 (emphasis added).

2. Petitioners.

At all pertinent times, Petitioner Carol Gaiser and the Verah Landon Trust (the "Trust") were the only members of the LLC. Carol Gaiser and the Trust owned all of the Governance Units and 50% of the Financial Units. CP 67. Respondent Jay Friet owns the other 50% of the Financial Units. *Id.* The LLC never admitted Friet as a member. CP 563 ¶ 5, 567-68.

On May 9, 2013, Carol appointed her daughter, Petitioner Katherine Gaiser, as her attorney-in-fact to assist Carol with all financial affairs and other matters. CP 343. This includes, among other things, acting on Carol's behalf concerning governance of the LLC. CP 562.

3. Respondent Jay Friet.

Respondent Jay Friet is Marilyn Gaiser's son and Carol Gaiser's nephew. CP 158. Carol's sister, Marilyn Landon, was a member of the LLC until her death in 2007.¹ *Id.*

Marilyn Landon's 50% financial interest transferred to Jay Friet upon her death. CP 67, 84 ¶ 12.02.

¹ Death is an event of disassociation under the LLC Agreement. CP 60 ¶ 2.14(i).

C. The Terms of the LLC Agreement.

As a result of the transfer of Marilyn's financial interest, Friet became a "Transferee" in the LLC. CP 64. A Transferee owns LLC Units "but has not been admitted to the Company as a Member pursuant to the provisions of [the LLC] Agreement." CP 64.

A Transferee's powers are limited:

[U]nless and until a Transferee has been admitted to the Company as a Member, **such Transferee shall not have any power to exercise any right or powers of a Member and shall not be entitled to vote** with respect to such Governance and/or Financial Units.

CP 86 at ¶12.05(d) (emphasis added). Rather, the Transferee is only entitled to share in profits or losses, receive distributions, and receive allocations of income, gain, or loss with respect to his or her LLC units. Id.

As stated above, only the LLC Members can act on behalf of the LLC. The LLC "Unit Holders" – whether a member or not – expressly recognize that Members have sole authority to act on behalf of the LLC, "regardless of whether such Unit Holder has approved such...action." CP 80 §8.09.

The LLC Agreement further provides that no Transferee can become a member "unless and until all Members in writing consent to the admission of such assignee or transferee... which consent may be

unreasonably withheld in the absolute discretion of the Members.” CP 85.

The members never consented to admitting Mr. Friet as a member. CP 563, 567-68. Accordingly, and as set forth in the LLC Operating Agreement, Jay Friet was never a member of the LLC, and has no power to act on behalf of the LLC. CP 75-76.

D. Friet Files for Declaratory and Injunctive Relief.

Jay Friet filed for declaratory relief claiming that “[t]he LLC, acting through Katherine’s misuse of Carol’s power of attorney...failed to abide by its own Operating Agreement.” CP 388 at ¶4.9 (emphasis added). Friet sought a declaratory judgment that the durable power of attorney did not authorize Katherine to vote Carol’s interest in LLC, and sought to enjoin Katherine “from interfering with the affairs of Landon Enterprises LLC.” CP 389 - 90.

The trial court dismissed Friet’s claims on summary judgment, determining that Friet’s claims were claims of the LLC and therefore, derivative. CP 1008-09. The Court of Appeals reversed, holding that regardless of the derivative nature of the claim, a person “interested in” or “affected by” a written contract – in this case, the LLC Agreement – has standing to bring a declaratory action and “may obtain a declaration of rights or status” under that LLC Agreement. Appendix A at 7.

V. ARGUMENT

A petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court;
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

Here, the Court of Appeals' decision creates a conflict between the terms of the Uniform Declaratory Judgment Act (UDJA) and Washington's LLC Act, RCW 25.15 *et seq.*, when determining what parties have standing to raise issues concerning LLC governance. This conflict should be resolved by the Supreme Court.

A. The Court of Appeals' Decision Conflicts With the LLC Act.

The Court of Appeals' decision conflicts with the LLC Act by giving non-LLC members declaratory rights otherwise prohibited by the LLC Act. Specifically, the Court of Appeals held that Friet's ownership interest in the LLC – regardless of whether he is a member

– allows him to challenge the governance and decisions of the LLC.

This contradicts the express provisions and purpose of RCW

25.15.375.²

A derivative action is a suit by one or more members of an LLC to enforce the *entity's right or duty* against officers, directors, managers, or third parties, or to prevent or remedy a wrong to the entity. Goodwin v. Casleton, 19 Wn.2d 748, 761, 144 P.2d 725 (1944).

Under the former RCW 25.15.375, only members can bring derivative suits on behalf of an LLC. If the person is not a member, that person lacks standing to bring an action on behalf of the LLC. See RCW 25.15.375; Nw. Wholesale, Inc. v. Pac Organic Fruit, LLC, 184 Wn.2d 176, 357 P.3d 650 (2015) (a dissociated LLC member lacks standing to bring a derivative suit).

In Nw. Wholesale, Inc. v. Pac Organic Fruit, LLC, Northwest Wholesale brought suit against Pac Organic Fruit, LLC, a limited liability company comprised of the Ostensons and Greg Holzman. In response, the Ostensons, among other claims, filed derivative cross-claims against Holzman and his companies on behalf of Pac Organic.

Prior to filing the cross claims on behalf of Pac Organic, however, Howard Ostenson had filed for Chapter 11 bankruptcy protection. Under Pac Organic's operating agreement, filing for

² Repealed and recodified as RCW 25.15.391.

bankruptcy was considered an event of dissociation. Accordingly, this Court held that Ostenson lacked standing to bring a derivative suit on behalf of the LLC. Specifically, this Court held:

RCW 25.15.375 provides: In a derivative action, the plaintiff must be a member at the time of bringing the action and: 1) At the time of the transaction of which the plaintiff complains; or (2) The plaintiff's status as a member had devolved upon him or her by operation of law or pursuant to the terms of a limited liability company agreement from a person who was a member at the time of the transaction. (Emphasis added.) Under RCW 25.15.130(1)(d)(ii), a member of a limited liability company loses his or her membership upon the filing of bankruptcy... *Thus, under Washington law, Ostenson forfeited any right to bring a derivative action on behalf of Pac-O when he petitioned for bankruptcy... As an assignee, the dissociated member retains rights to share in profits but loses any management rights.*"

Nw. Wholesale, Inc. v. Pac Organic Fruit, LLC, 184 Wn.2d 176, 184-85, 357 P.3d 650 (2015) (emphasis added).

Here, Respondent Jay Friet's claims were derivative; any injuries claimed were to the LLC, not Mr. Friet personally. Like Nw. Wholesale, the trial court properly dismissed the case because Friet did not pursue direct claims and he lacked standing to bring derivative claims.

The Court of Appeals, however, determined that whether the claims were direct or derivative is irrelevant, and accordingly, RCW 25.15.375 did not govern. Instead, the only issue was whether Mr.

Friet had standing under the Uniform Declaratory Judgment Act (UDJA).

B. Declaratory Judgment Actions Cannot Circumvent the Strict Requirements of RCW 25.15 et seq.

A declaratory judgment action has typically been limited to cases “where there is no satisfactory remedy at law available.” Hawk v. Mayer, 36 Wn.2d 858, 866, 220 P.2d 885 (1950).

Under the UDJA,

A person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

RCW 7.24.020. *A UDJA action is not allowed* when a special statutory method has been provided. Mulhausen v. Bates, 9 Wn.2d 264, 270, 114 P.2d 995 (1941) (refusing to consider a petition for declaratory judgment arising under the Unemployment Compensation Act).

Here, the Legislature has created a specific statutory scheme for those interested in a LLC to bring actions on behalf of the LLC. The Legislature formed a framework for derivative actions, as well as actions on behalf of or against a limited liability company in RCW 25.15 et seq. This statutory scheme provides the basis to bring actions involving an LLC, including derivative actions on behalf of an LLC.

The Court of Appeals' ruling allows litigants that are merely *interested* in a particular LLC to bring a declaratory judgment action involving the specific governance of the LLC, something that party could never do under the LLC Act.

1. A Party Without Standing to Bring a Derivative Action Should Not Have Standing to Bring a Declaratory Action Concerning LLC Governance.

The Court of Appeal's ruling is too broad, and further muddies the issue of standing. To have standing under the UDJA, the "interest sought to be protected must be 'arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" Spokane Entrepreneurial Ctr. V. Spokane Moves to Amend Constitution, 185 Wn.2d 97, 103, 369 P.3d 140 (2016) (citation omitted). Further, the challenged action must have caused injury in fact to the party seeking standing. Id. Ultimately, "[t]he standing doctrine prohibits a litigant from raising another's legal rights." Id. (emphasis added).

Before the jurisdiction of a court may be invoked under the UDJA, a justiciable controversy must exist. Diversified Indus. Dev. Corp. v. Ripley, 82 Wn.2d 811, 814–15, 514 P.2d 137 (1973). A justiciable controversy is an actual, present, and existing dispute, or the mature seeds of one, which is distinguishable from a possible,

dormant, hypothetical, speculative, or moot disagreement. To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001).

To be justiciable, a dispute must be between parties that have genuine and opposing interests, which are direct and substantial and not merely potential, theoretical, abstract, or academic; and a judicial determination of the dispute must be final and conclusive. Superior Asphalt & Concrete Co. Inc. v. Washington Dep't of Labor & Indus., 121 Wn. App. 601, 606, 89 P.3d 316 (2004).

Under the Court of Appeals' ruling, a party lacking standing to bring a derivative action under RCW 25.15.375 could instead, file a declaratory action to circumvent the strict requirements for derivative claims under RCW 25.15.375. In other words, a non-member or non-shareholder could bring a *de facto* derivative action under the guise of a declaratory judgment claim, just as Mr. Friet has done.

Instead, the UDJA should work with LLC Act to determine whether an action is appropriate. Under a derivative analysis, the court must first determine whether a claim is direct or derivative. If the claim is derivative, the injury is to the LLC. In other words, the "justiciable controversy is an actual, present, and existing dispute" *between the LLC and the offending manager or member*. This is why the claim is brought on behalf of the LLC. Accordingly, derivative claims

brought under the UDJA or the LLC Act would be proper if, and only if, such claims were asserted on behalf of the LLC.

The converse would also be true. A litigant could bring a declaratory judgment action or claim under the LLC Act on behalf of himself if the injury is direct – i.e., primarily to the individual and not the LLC. In such cases, there is also justiciable controversy between the two individuals that can be properly resolved by the Court.

It cannot be, however, that a party can bring a declaratory action concerning LLC governance and rights of the LLC when that same party would be barred from bringing a lawsuit under the LLC Act. If this inconsistency is not resolved, Respondent and other similar non- LLC members will use declaratory judgment actions as *de facto* derivative claims and require the courts to rule on LLC management issues.

The Washington Legislature has already established a statutory scheme for filing claims on behalf of or against the LLC. A litigant should not be allowed to circumvent the LLC Act through a UDJA action. This would effectively gut the LLC Act and derivative action statutes.

Faced with a similar issue, the Alabama Supreme Court determined that LLC members may not bring declaratory judgment actions when a derivative action is otherwise procedurally barred. The

Alabama Supreme Court held that such an action would “eviscerate” Alabama’s LLC act. See Carey v. Howard, 950 So.2d 1131, 1135 (Ala. 2006). In Carey, the court reviewed Alabama’s Declaratory Judgment Act – an act with identical terms to Washington’s act – and held:

Although we recognize that the provisions of the Declaratory Judgment Act are to be ‘liberally construed and administered,’ ..., *we cannot construe them so broadly as to find that the Carey litigants have standing to sue for declaratory relief as individuals for an alleged injury to property owned by the LLC, of which they are members. To do so would effectively eviscerate § 10–12–23(a) and (b) and § 10–12–18 of the Alabama Limited Liability Company Act.*

Carey v. Howard, 950 So.2d 1131, 1136 (Ala. 2006) (emphasis added).

Similarly, in Weinstein v. Schwartz, the 7th Circuit Court of Appeals was faced with the question of whether a Delaware shareholder must bring a derivative suit concerning another shareholder’s ownership of shares. The 7th Circuit determined that the shareholder was not barred from bringing a declaratory judgment only because the claimed injury was direct, not derivative. Weinstein v. Schwartz, 422 F.3d 476, 478 (7th Cir. Ct. App. 2005). If the claim had been derivative, however, the declaratory action would have been barred because it was really a derivative claim. Id. (“Because Cutis’s claim is not a derivative claim, we have...jurisdiction to consider it.”)

Here, the Court of Appeals’ decision allows a party to improperly allege derivative claims under the guise of a declaratory

judgment action. This, as the Alabama Supreme Court in Carey states, “effectively eviscerates” Washington’s LLC Act.

Further, such a decision allows non-LLC members to challenge the actions of the LLC and its managers regardless of the express provisions of RCW 25.15.375. Non-members can bring declaratory actions challenging the governance of the LLC and the actions of the members. This creates a hole in the LLC statute.

The LLC Act bars Mr. Friet from bringing a derivative claim on behalf of the LLC because he is not a member. To get around this, Mr. Friet brought a declaratory judgment action questioning the actions of the LLC members. Mr. Friet’s actions, for all intents and purposes, is a derivative action and was properly dismissed by the trial court.

Moreover, Mr. Friet did not allege any direct claims. Accordingly, he had no present, justiciable controversy because the claims were held by the LLC. Therefore, the trial court properly dismissed Mr. Friet’s claims because he lacks standing to bring them on behalf of the LLC. This court should accept review to resolve the conflict between the Declaratory Judgment Act and the LLC Act.

2. Respondent Claims the LLC Agreement was Breached and Seeks to Reform the LLC Agreement.

The UDJA also cannot be applied when an alleged breach of contract has occurred; a breach of contract action, alone, is sufficient. Jacobsen v. King County Med. Serv. Corp., 23 Wn.2d 324, 327, 160 P.2d 1019 (1945). The UDJA also cannot be applied so as to result in a new contract for the parties. Shoenwald v. Diamond K. Packing Co., 192 Wash. 409, 420, 73 P.2d 748 (1937). The Court should declare the rights of parties to a contract, where it appears that the acts have already been committed and for the redress of which there exists an action at law. Peoples Park & Amusement Ass'n v. Anrooney, 200 Wash. 51, 57–58, 93 P.2d 362 (1939).

Under the Court of Appeals' decision, a member or non-member can effectively file a breach of contract action but call it a declaratory judgment action. Friet, whom is otherwise bound by the decisions and actions of the LLC members under the LLC Agreement, seeks a judicial declaration that the members acted improperly per the terms of the LLC Agreement. Accordingly, Mr. Friet is really filing a breach of contract action or at the minimum, is seeking to reform the terms of the LLC Agreement to address his perceived claims.

This cannot be the intended consequence of the Court of Appeals under the Court of Appeals' analysis. Financial Interest

Holders, non-members, and potentially even creditors can challenge the actions of the LLC and the members through a well-timed declaratory judgment action. Limited liability companies, previously not subject to significant judicial scrutiny, would have to defend their actions in open court, provided such litigation was filed under the UDJA.

VI. CONCLUSION

The Court of Appeals' ruling improperly allows a non-member to bring a declaratory judgment action to contest LLC governance when the proper way for such person to proceed is by a derivative action. The Court of Appeals gives standing to a party that would otherwise not have standing under the LLC Act. It also allows non-LLC members to bring *de facto* derivative actions, when such actions would otherwise be barred by the LLC Act or the LLC agreement. In short, the Court of Appeals' ruling exposes a hole in the LLC Act.

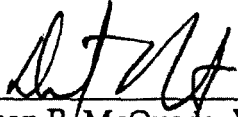
This Court should resolve the inconsistency between the LLC Act and the UDJA so non-members, like Respondent Jay Friet, cannot use the UDJA to challenge LLC governance when such claims would otherwise be dismissed as derivative.

VII. APPENDIX

The Court of Appeals' decision is attached.

RESPECTFULLY SUBMITTED this 16 day of September, 2016.

BERESFORD BOOTH PLLC

By 
Jonathan P. McQuade, WSBA No. 37214
David C. Tingstad, WSBA No. 26152
Attorneys for Respondents Carol and Katherine
Gaiser

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on September 16, 2016, a copy of the Petition for Review and referenced attachment was served by electronic mail to:

Peter M. Vial
Jehiel I. Baer
McNaul Ebel Nawrot & Helgren PLLC
One Union Square
600 University Street, Suite 2700
Seattle, WA 98101
pvial@mcnaul.com
jbaer@mcnaul.com
Attorneys for Appellant

Timothy L. Austin
Betts Austin Johnson
11120 NE 2nd Street, Suite 200
Bellevue, WA 98004-8337
taustin@nwtaxlaw.com
Registered Agent for Landon Enterprises, LLC


Leah Bartoces, Paralegal

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAY FRIET, an individual,)	No. 73448-2-I
)	
Appellant,)	DIVISION ONE
)	
v.)	
)	
KATHERINE GAISER, an individual;)	UNPUBLISHED
GUARDIANSHIP SERVICES OF)	
SEATTLE, a non-profit organization;)	FILED: <u>July 5, 2016</u>
LONDON ENTERPRISES, LLC, a)	
limited liability company; and CAROL)	
GAISER, an individual for the purposes)	
of petitioning to appoint a guardian,)	
)	
Respondents.)	
)	

Cox, J. — Jay Friet appeals the summary judgment order dismissing this declaratory judgment action. Because he has standing to seek declaratory relief, we reverse and remand for further proceedings.

This is a dispute arising out of the operating agreement of Landon Enterprises LLC. The agreement was effective as of November 30, 2006. The original parties to the agreement were the Verah Landon Trust, Carol L. Gaiser, and Marilyn Landon.

The Verah Landon Trust originally owned 45 of the total 100 governance units described in the agreement and 4,455 of the total 9,900 of the financial units. Carol Gaiser then owned 27.5 of the total governance units and 2,722.5 of the total financial units. Marilyn Landon owned the remaining 27.5 of the total governance units and the remaining 2,722.5 of the total financial units.

No. 73448-2-1/2

By written assignment dated September 6, 2008, Friet acquired all of Marilyn Landon's 27.5 governance units and all 2,722.5 of her financial units. Thereafter, a written assignment dated December 17, 2014 vested in him 22.5 of the Verah Landon Trust's 45 governance units and 2,722.5 of this trust's 4,455 financial units. It is undisputed that Friet "now owns a 50% financial interest" in the LLC.¹

The LLC manages real property that has been in the Landon family for generations.

Carol² has "a form of dementia."³ In May 2013, she appointed her daughter, Katherine, as her attorney in fact. As Carol's attorney in fact, Katherine has participated in LLC affairs on Carol's behalf.⁴ Among other things, she attempted to dissolve the LLC, remove its manager, and terminate Friet as an LLC employee.

In March 2015, Friet commenced this declaratory judgment action against Katherine, Guardianship Services of Seattle (GSS), the LLC, and Carol. Friet sought a determination that Katherine could not use her authority as Carol's attorney in fact to conduct LLC affairs under the terms and conditions of the

¹ Brief of Respondents Carol Gaiser, Katherine Gaiser, and Guardianship Services of Seattle at 4.

² We adopt the parties' naming conventions, using Carol and Katherine to distinguish between mother and daughter.

³ Brief of Respondents Carol Gaiser, Katherine Gaiser, and Guardianship Services of Seattle at 6.

⁴ Id.

No. 73448-2-1/3

operating agreement. He also sought injunctive relief to enjoin Katherine from using that authority to interfere with LLC affairs. Friet further claims that GSS, the trustee for the Verah Landon Trust, has failed to abide by the terms of the operating agreement. He makes similar claims against the LLC and Carol.

Katherine and Carol moved for summary judgment. GSS joined in that motion. The trial court granted their motion. It did so on the basis that Friet's "claims are derivative inasmuch as [he] is not a member" of the LLC under RCW 25.15.375 and the operating agreement.

Friet appeals.

DECLARATORY JUDGMENT ACTION

Friet argues that he has standing to bring this action under the Declaratory Judgment Act. We agree.

Summary judgment is proper "only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law."⁵ There is a genuine issue of material fact if reasonable minds could differ on the facts controlling the litigation outcome.⁶ We consider "the evidence and all reasonable inferences from [such] evidence in the light most favorable to the nonmoving party."⁷

⁵ Scrivener v. Clark Coll., 181 Wn.2d 439, 444, 334 P.3d 541 (2014); accord CR 56(c).

⁶ Knight v. Dep't of Labor & Indus., 181 Wn. App. 788, 795, 321 P.3d 1275 (quoting Ranger Ins. Co. v. Pierce County, 164 Wn.2d 545, 552, 192 P.3d 886 (2008)), review denied, 339 P.3d 635 (2014).

⁷ Keck v. Collins, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015).

We review de novo a trial court's grant of summary judgment.⁸ We also apply the de novo review standard to interpret contracts.⁹

"Washington continues to follow the objective manifestation theory of contracts."¹⁰ When interpreting an agreement, this court attempts "to determine the parties' intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties."¹¹

We give words "their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent."¹² And we interpret only what was written in the agreement, not what the parties intended to write.¹³ Additionally, "[a] contract provision is not ambiguous merely because the parties to the contract suggest opposing meanings."¹⁴ We do "not read ambiguity into a contract 'where it can reasonably be avoided.'"¹⁵

⁸ Id.

⁹ Kim v. Moffett, 156 Wn. App. 689, 697, 234 P.3d 279 (2010).

¹⁰ Hearst Commc'ns, Inc. v. Seattle Times Co., 154 Wn.2d 493, 503, 115 P.3d 262 (2005).

¹¹ Id.

¹² Id. at 504.

¹³ Id.

¹⁴ GMAC v. Everett Chevrolet, Inc., 179 Wn. App. 126, 135, 317 P.3d 1074, review denied, 181 Wn.2d 1008 (2014).

¹⁵ Id. (internal quotation marks omitted) (quoting Mayer v. Pierce County Med. Bureau, Inc., 80 Wn. App. 416, 421, 909 P.2d 1323 (1995)).

Contract interpretation is a question of law “only when (1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence.”¹⁶

Standing

In Washington, the Uniform Declaratory Judgment Act (UDJA) governs declaratory judgments.¹⁷ RCW 7.24.020 provides that “[a] person interested” under a written contract, or whose rights or status are affected by a contract, may have construction or validity questions arising under the instrument determined and may obtain a declaration of rights or status.

The UDJA is “remedial” and “its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.”¹⁸

A claimant must present a justiciable controversy to obtain a declaratory judgment under the UDJA.¹⁹ The claimant must show:

“(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential,

¹⁶ Tanner Elec. Coop. v. Puget Sound Power & Light Co., 128 Wn.2d 656, 674, 911 P.2d 1301 (1996).

¹⁷ Branson v. Port of Seattle, 152 Wn.2d 862, 877, 101 P.3d 67 (2004).

¹⁸ RCW 7.24.120.

¹⁹ Branson, 152 Wn.2d at 877.

theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.”²⁰

“Inherent in the justiciability determination is the traditional limiting doctrine of standing.”²¹ We apply a two-part test to determine standing under the UDJA, and the party seeking standing must meet both parts.²² To have standing, “(1) the interest asserted must be ‘arguably within the zone of interests to be protected or regulated by the [contract] in question,’ and (2) the challenged action must have ‘caused injury in fact, economic or otherwise, to the party seeking standing.’”²³

We review de novo whether a party has standing.²⁴

Here, the agreement defines a “Transferee” as any person owning at least one governance or financial unit “but who has not been admitted to the Company as a Member pursuant to the [agreement provisions].”²⁵ Transferees are entitled to share in profits, receive such distributions, and receive income.

²⁰ League of Educ. Voters v. State, 176 Wn.2d 808, 816, 295 P.3d 743 (2013) (alteration in original) (quoting To-Ro Trade Shows v. Collins, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001)).

²¹ Branson, 152 Wn.2d at 877.

²² Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake, 150 Wn.2d 791, 802, 83 P.3d 419 (2004).

²³ Five Corners Family Farmers v. State, 173 Wn.2d 296, 302-03, 268 P.3d 892 (2011) (internal quotation marks omitted) (quoting Grant County Fire Prot. Dist. No. 5, 150 Wn.2d at 802).

²⁴ In re Estate of Becker, 177 Wn.2d 242, 246, 298 P.3d 720 (2013).

²⁵ Clerk’s Papers at 64.

The agreement also defines rights of the owners of governance units. Governance unit owners “have one vote on all matters subject to a vote,” while financial units do not carry voting rights, except in certain circumstances.²⁶ But a Transferee “shall not be entitled to vote” its governance or financial units, except as provided, and “shall not” have any power to exercise any Member rights or powers.²⁷

Based on these provisions of the operating agreement, Friet has standing to sue in this declaratory judgment action. It is undisputed that he owns 50 percent of the LLC based on his ownership of governance and financial units. These units are evidence of his financial interests because they entitle him to share in profits and receive income. Because the LLC agreement specifically provides for these financial interests, they fall within the “zone of interests” protected by this agreement.²⁸

It is also clear that Katherine’s continuous participation in the LLC’s affairs may negatively affect Friet’s financial interests in the LLC. Specifically, if she succeeds in her attempts to dissolve the LLC, Friet will lose these interests and an “invaluable family legacy.” He may also sustain unfavorable tax consequences due to a forced sale of the LLC property.

²⁶ Id. at 66.

²⁷ Id. at 86.

²⁸ Five Corners Family Farmers, 173 Wn.2d at 303 (internal quotation marks omitted) (quoting Grant County Fire Prot. Dist. No. 5, 150 Wn.2d at 802).

On this record, there is no genuine dispute that the other parts of the test are also satisfied.

Membership

Carol, Katherine, and GSS argue that Friet lacks standing to seek a declaratory judgment because he is not an LLC member. They are mistaken.

Assuming, without deciding, that Friet is not a member (an allegation he disputes), that does not bar the claims that he asserts in this action.

It is telling that these parties cite no authority in their joint briefing to support the proposition that membership status in this LLC is required to bring this declaratory judgment action. On this basis alone, we would be entitled to reject this unsupported argument.²⁹

More importantly, we have already discussed why Friet's 50 percent ownership interest in the LLC gives him a right to be heard in this action. That is because determining whether a claimant has a direct interest to satisfy one of the declaratory judgment elements is not required to determine whether the claimant has *standing* to bring a declaratory judgment action.³⁰ Courts determine whether a claimant has standing *before* determining whether the claimant satisfies the four declaratory judgment elements.³¹ Membership is simply not dispositive.

²⁹ See Darkenwald v. Emp't Sec. Dep't, 183 Wn.2d 237, 248, 350 P.3d 647 (2015); RAP 10.3(a)(6).

³⁰ See Five Corners Family Farmers, 173 Wn.2d at 302-03.

³¹ See id.

Carol, Katherine, and GSS base their standing argument on Friet's alleged lack of membership status. To the extent Friet's status as a member is in dispute, which it appears to be, there is a genuine issue of material fact for trial. That also precludes summary judgment.

Personal or Direct Interest in Governance

Carol, Katherine, and GSS next argue that Friet, who they contend is not a member of the LLC, cannot challenge the LLC members' governance of the LLC.³² We disagree.

There are, at least, two problems with this argument. First, Katherine does not appear to have the rights of a member under the agreement. She fails to point to anything in this record to show compliance with the terms and conditions for membership under the agreement. While she contends she is acting solely on behalf of her mother, it is unclear to this court whether that is true from some of the matters in this record.

Second, as we already explained earlier in this opinion, Friet's 50 percent ownership of the LLC gives him the right to be heard in this action. That is a sufficient personal interest under the UDJA to support the commencement of this action. Whether and to what extent his claims affect members of the LLC will abide the final judgment of the trial court.

³² Brief of Respondents Carol Gaiser, Katherine Gaiser, and Guardianship Services of Seattle at 19-22.

Derivative Claim

Carol, Katherine, and GSS also characterize Friet's request for declaratory relief as a derivative claim. They argue that because he is not a member of the LLC, statutory and case law bar this action. The trial court agreed. We do not.

Under the Washington Limited Liability Act (WLLA), a claimant may bring a derivative action to enforce the LLC's rights but it must be an LLC member.³³ Although the WLLA does not specify the difference between a derivative action and a direct action, a derivative suit does not benefit the individual member, and both the cause of action and judgment belong to the company.³⁴ For example, if stockholders are directly injured and that injury is distinct from an injury to a corporation, the stockholders' claims are direct, and any recovery flows to the stockholders.³⁵

Here, the summary judgment order states that the dismissal of this action is based on characterizing the claims here as derivative. But this mischaracterizes the nature of this action.

Rather, RCW 7.24.020 provides that "[a] person interested" under a written contract, or whose rights or status are affected by a contract, may have construction or validity questions arising under the instrument determined and

³³ RCW 25.15.391; see also CR 23.1.

³⁴ Tooley v. Donaldson, Lufkin & Jenrette, Inc., 845 A.2d 1031, 1036 (Del. 2004); see also Donlin v. Murphy, 174 Wn. App. 288, 297, 300 P.3d 424 (2013).

³⁵ Tooley, 845 A.2d at 1036.

may "obtain a declaration of rights or status." Nothing in this statute bars such an action based on characterizing it as derivative.

OTHER MATTERS

Friet also argues that the trial court erred by dismissing his injunctive relief claim due to lack of standing. We need not reach that question. Whether and to what extent injunctive relief is proper will be determined by the trial court in due course.

Friet also argues that the trial court erred by concluding that he lacked standing to request an adjudication of Carol's incapacity in this action. We need not decide this question. The parties are free to ask the trial court to revisit this question on remand, given our reversal of the summary judgment order.

Lastly, Friet argues that the trial court abused its discretion by not granting a CR 56(f) continuance prior to the hearing on summary judgment. This argument is now moot.

We reverse and remand for further proceedings.

COX, J.

WE CONCUR:

Trickey, AcJ

Appelbaum, J.