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.

BRIEF OF RESPONDENTS

Toll Reserve Consortium Inc., recently renamed as Holms Energy Development Corporation; Val and Mari Holms; Holms Energy, LLC; and Bakken Resources, Inc.

Respondents

BRIEF OF CROSS-APPELLANTS

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

Respondents/Cross-Appellants

Frank J. Gebhardt, WSBA #4854
Robert F. Greer, WSBA # 15619
FELTMAN, GEBHARDT, GREER & ZEIMANTZ, P.S.
W. 421 Riverside Avenue, Suite 1400
Spokane, WA 99201-0495
(509) 838-6800
Attorneys for Respondents/Cross-Appellants

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I. INTRODUCTION

This case is about Allan Holms' jealousy and greed. His jealousy because he did not share in the valuable mineral interests his half-brother Val received from their father, which propelled his greed to get even by getting control of Val's mineral interests.

Allan's scheme to seize control of Val's North Dakota mineral interests through a complicated reverse merger transaction unraveled when Val discovered that not he, but Allan, would have controlling interest in a venture that would own those mineral interests. Val had the good sense to terminate negotiations regarding a potential reverse merger, and used his mineral interests to complete a different transaction, which became Bakken Resources, Inc. When Allan learned that his plan to wrest control of the mineral interests from Val had not worked, Allan sued claiming a 40% interest in those mineral interests, even though the potential reverse merger had barely proceeded beyond the discussion stage. When the court found that no agreement had been reached among Allan, Val and a third party, Joseph ("Jay") Edington, and declined to award Allan the $5.8 million dollars he sought, Allan, at the court's invitation, took another bite at the apple and claimed he should be awarded a facilitation fee for introducing Jay Edington, the architect of the reverse merger concept, to

Val. This gambit failed as well, for lack of any evidence of what a facilitation, or finder's fee, would be.

The trial court correctly awarded no damages to the Plaintiffs. The court did award $412,933.08 in attorneys' fees and costs to Allan, based upon Nevada's limited liability company derivative action statute. This award of attorneys' fees is a subject of the cross-appeal.

II. STATEMENT OF THE CASE

A. Procedural Background.

On July 16, 2013, an Order was entered dismissing the Plaintiffs' claims for tortious interference of a prospective business opportunity. CP 2187. The remaining issues were tried before the Honorable Linda G. Tompkins, sitting without a jury, over eight days in November, 2013. Judge Tompkins entered Findings of Fact and Conclusions of Law on December 2, 2013 (CP 4420); Additional Findings of Fact and Conclusions of Law on February 4, 2014 (CP 4529); Second Additional Findings of Fact and Conclusions of Law Regarding Award of Attorney Fees, Etc. on May 19, 2014 (CP 5197); and First Amended Judgment for Plaintiffs on June 6, 2014 (CP5262). The First Amended Judgment is attached as Appendix A.

In summary: The Court dismissed the Plaintiffs' causes of action for breach of contract, constructive trust-unjust enrichment, breach of

covenant of good faith and fair dealing, and Roil Energy, LLC's claim of title to Val's mineral interests. The Court found in Plaintiff's favor on their claims of fraud, breach of fiduciary duties, civil conspiracy, and oppression of minority interest, but awarded Plaintiffs zero (-0-) damages. The Court did, however, award Plaintiffs $412,933.08 in attorney fees pursuant to Nevada's derivative action statute NRS 86.489, the text of which is set forth in Appendix B.

B. Facts.

Val Holms and Allan Holms are half-brothers, sharing the same father. RP867 For convenience, they are referred to in this brief as Val and Allan. Allan is 13 years older than Val. RP245. Upon his father's death, Val inherited certain mineral interests in McKenzie County, North Dakota, about 15 miles from Williston, in what is commonly referred to as the Bakken Oil Fields. RP1213-14. Those mineral interests had been passed down from Val's mother's side of the family. RP1214. Val's grandfather willed them to Val's grandmother; then his grandmother willed them to Val's mother. RP1214. Val inherited a third of those mineral interests; his sister Evenette inherited a third; and a cousin the final third. RP1215. Allan felt he had been slighted, thinking he should have shared in the mineral rights that Val inherited. RP 796, 1236.

Val had experienced some difficult times financially, precipitated by his long struggle with esophageal cancer, and the death of his son from brain cancer in 2009. RP1212, 1218, 1262. In 2009, Val wanted to start an auto body repair business, but due to the deterioration in his credit rating during his illness, he could not obtain conventional financing. RP1218-19. In December 2009, Val contacted his older brother Allan to request a loan for start up costs. RP1219. Allan turned Val down for the loan. RP1220.

Prior to Allan's discussion with Val regarding this loan, Allan had met Jay Edington, a financial consultant, in Spokane in the fall of 2009. RP 266, 528. Jay talked to Allan about the concept of a reverse merger; and although Allan did not fully understand the concept, he suggested to Val that it could be a vehicle for Val to utilize his mineral interests to generate income. RP 268; 271; 1222-23. Allan introduced Val to Jay with the suggestion that they discuss with Jay the prospects of a public entity, acquired through a reverse merger, as a vehicle for acquiring and leasing Val's mineral interests. RP1223-24.

During Christmas time in 2009, and on a few other occasions during January and February, 2010, Val and Allan met with Jay in Spokane to hear and discuss Jay's concepts for utilizing Val's mineral interests to generate income. RP 272, 299, 1225, 1235. The process

proposed by Jay would involve forming a private entity in which to place Val's mineral interests, and ultimately selling those mineral interests to a publicly traded shell corporation by means of a reverse merger, whereby after the public shell company had raised sufficient capital by sale of its shares, it would have the funds to purchase Val's minerals. CP 4423-24. Jay described a publicly traded shell as a company with no operating business. RP 542-43.

Neither Val nor Allan fully understood the reverse merger concept, and Allan described Jay's role in the transaction under discussion as "Jay was driving the bus". RP 315, 445, 450, 890, 1224. From approximately December 2009 through early March 2010, Allan, Val and Jay discussed the possibilities of a business arrangement designed by Jay which included: (a) a contribution of $200,000.00 by Allan to Roil Energy as start up funds; (b) transfer of Val's mineral interests to Roil Energy; (c) negotiation and execution of an option agreement whereby Roil Energy would grant APD an option to purchase the mineral interests for an agreed upon price; (d) Allan's acquisition of approximately $2,000,000.00 from private investors who would purchase APD stock to fund APD's exercise of the option and purchase of the mineral interests; and (e) the acquisition of a substantial number of shares of the target company, APD. Jay would provide the public shell corporation and bring his skill and experience in

capitalizing and marketing companies by means of such a reverse merger. RP 291, 292, 359, 522. The parties signed no written agreement(s). RP 827-31.

According to a timeline chart prepared by Jay on February 13, 2010, Allan Holms was, on or before March 1, 2010, to provide $200,000.00 in starting equity and in exchange, by March 8, 2010 Val would assign his mineral rights to Roil Energy, LLC, a limited liability company that was formed at Jay's recommendation on February 19, 2010, with each of the three individuals listed as members/managers. EX P-101 and 134. No operating agreement was ever signed, and there was no other document ever signed that set forth the respective membership interests in Roil Energy, LLC. RP 827, 454-55.

On February 1, 2010 Jay identified APD Antiquities, Inc. ("APD") as the target public shell corporation for the reverse merger under discussion. RP 563. About February 3, 2010, Jay communicated a plan, which Jay characterized as a "sweetheart deal", for Allan to purchase up to 2,500,000 shares of the common stock of the public shell corporation, APD. EX P-82 & P-67. The purchase price of those shares was intended to be 2 cents per share. EX P-67. The shares would be purchased from APD by Allan through certain nominees that he designated, so no single investor would exceed the ten percent ownership limitations imposed by

the SEC. EX P-67, CP 4426. Allan was to loan the money to these designees to buy these shares. RP 805. The $50,000 was to be used by APD to complete an audit and pay fees, etc. needed to do a reverse merger transaction. EX P-67, RP 563, 585. The shares would then be sold at a profit, and Allan would get his money back.[1] RP 583-85.

In addition to the proposal for Allan to purchase shares from APD, Jay made arrangements with certain shareholders of APD to sell their shares of stock to Allan. RP 822, EX D-687. The number of shares Allan was to purchase from those APD shareholders was approximately 1,300,000 shares, at a purchase price ranging from 2 cents to .045 cents per share. EX D-687. Jay suggested that these 1,300,000 shares also be purchased by Allan through designated nominees. CP 4425. Allan would retain beneficial ownership and control of all shares purchased through the use of nominees. CP 4426.

Allan never purchased the 2,500,000 shares from APD, which would have put capital into the target company. RP 805. Allan did, however, purchase 1,356,654 shares from certain shareholders of APD, the money for which went to those shareholders, and not to APD. RP 481, 822-23.

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[1] Defendants contended at trial that purchase of these shares from APD constituted insider trading. Since the court found there was no contract formed by Val, Jay and Allan, the issue of illegality was never determined.

Had Jay's plan been fulfilled, by Allan's purchase of 2,500,000 shares from APD and 1,300,000 shares from APD shareholders, Allan would control 3,800,000 of the 5,100,000 APD shares outstanding – a substantial majority. EX D-687.

On February 19, 2010, Val met Allan in Butte Montana. RP 366, 1237-38. Val had prepared and signed two mineral deeds for the McKenzie County mineral interests, naming as grantee Roil Energy, LLC. EX P-130. Val brought copies of the deeds to the meeting in Butte. RP 1238. Val was expecting to receive $200,000.00 from Allan, the amount Allan needed to provide as start-up capital. RP 1231, 1238-39. It was Val's intent to record the deeds and transfer title to Roil Energy only upon his receipt of the $200,000.00 start-up money from Allan. RP 1239

Instead of $200,000.00, Allan gave Val only $10,000.00, and promised Val that the remaining $190,000.00 would be delivered the next day. RP 1239, 1243. Subsequent events proved the wisdom of Val's not having recorded the mineral deeds. EX P-130. Allan never delivered the $190,000.00. CP 4427. Furthermore, Allan had positioned himself to be the controlling shareholder of APD, and through that ownership, would have acquired a majority interest in Val's minerals had the reverse merger under discussion been completed. RP 820-21, CP 3634-35. The $10,000.00 was returned to Allan. RP 902.

Deeding of the minerals to Roil on February 19, 2010 would have been premature, as Jay testified that the transfer of the mineral interests was to occur farther down the road based upon "completion and closing" of the transaction under discussion. RP 790-91, CP 3627. Allan's attempt to get Val to deed the minerals earlier in the process, and in exchange for only $10,000.00 and a broken promise for an additional $190,000.00 of seed capital, was one more step in Allan's plan to wrest from Val controlling interest in his minerals. Even though part of the plan under discussion was for Allan to obtain $2,000,000.00 in equity financing, during the entire time of discussions among the three parties Allan only contacted one unidentified person at Morgan Stanley; and never acquired any promise of equity funding. RP 1167; CP 4004.

The reverse merger transaction that was designed by Jay and under consideration by Val and Allan, was a complex transaction which involved reaching agreement on many important issues, and the drafting and approval of multiple documents. Although Jay prepared and circulated a draft of an operating agreement for Roil Energy, LLC, which contained blanks to be filled in to show the percentage ownership interests of the three members, that critical document was never finalized or signed because Val, Allan and Jay never reached agreement as to what their respective percentage ownership interests in Roil Energy, LLC would be,

or even upon how many members there would be in that limited liability company. EX P-171& P-217, RP 826-27, 1139. Numbers were discussed, but the percentage ownership was still up in the air on February 17, 2010 (CP 3504); still undefined on February 23, 2010 (CP 3530); and not decided by February 28, 2010 when Jay sent the Roil Energy operating agreement for review with ownership interests and the number of members left blank. EX P-171. However, at all times Val stated that he intended that he would have the controlling interest in both Roil Energy, LLC and in the public shell corporation (APD). RP 1231.

Although Jay thought the geologist's estimate of a $3,000,000 valuation for Val's mineral interests was a "low ball", the value that Val would bring to the transaction under discussion was substantially greater than the value proposed to be brought by either Allan or Jay whose interests were dependent on their ability to raise money. RP 824, 1236. Val said he was always going to have control – at least 51%. RP 1231, 1236, 1246. Tom Greenfield, a nephew who got along with both of his uncles Allan and Val, and who was present with Allan and Val at the meeting in Butte on February 19, 2010, testified that he understood that Val was to have the majority interest, but he did not know the exact percentage split in Val's favor. RP 963, 971-72.

Jay testified that it did not matter what percentage Allan would own in Roil Energy – even if he had only a 30 percent interest – because Jay's plan for Allan to purchase 3,800,000 shares of APD stock would put Allan in control. RP 820-21, CP 3634-35.

Between late February and early March, 2010, Val came to the belief that his brother Allan intended to gain control of Val's mineral interests. RP 1242-43, 1245-46. Val had heard that Allan was "running all over Montana telling everybody" that he has control of Val's minerals. RP 645. This belief was confirmed by Jay in an e-mail to Val dated February 24, 2010, wherein Jay explained that under the plan that was being discussed, Allan would have control of Val's mineral interests. EX D-687. In a February 24, 2010 phone conversation Jay confirmed to Val that if the deal under discussion went together, Val would not have control, since Allan would control 3.8 million shares of APD out of a total of 5.1 million shares outstanding. RP 818-19, 1242, EX D-687. In addition, in a March 4, 2010 e-mail, Jay told Val that: "I did some checking with a few people in Billings and Missoula, you were correct; he has been in plenty of lawsuits and screwed almost everyone he has done business with. Allan makes money from people, not with people." EX P-194. Jay thought Allan was a "tricky guy." RP 725.

None of the steps of a reverse merger were completed, and Jay drafted only a few documents for discussion. RP 829, 831-33, 842, 848. According to Jay, Mike Espy, a Seattle attorney for whom Jay had tremendous respect, had to bless any documents Jay generated having to do with a public company. RP 856. Jay said he, Val and Allan "didn't have a deal defined well enough to even get [Mr. Espy] involved in the process". RP 857, CP3738.

No agreement having been reached on the essential terms of a reverse merger; and with Val becoming very concerned that Allan was scheming to acquire a majority interest in the target company and therefore in Val's mineral interests; coupled with Jay's own concerns about Allan's integrity and intentions, Val ceased discussions regarding the APD reverse merger and declared that he did not want to do business with Allan. RP 649. Val said there never was a deal reached and he was ending negotiations. RP 1248.

Ultimately, Val and Jay entered into a different transaction using Val's mineral interests. This transaction involved a shell company named Multisys ("MLS"). There were some similarities, but it was a different transaction than had been under discussion by Jay, Val and Allan and contained several features that were not in the APD transaction the three had discussed. RP 751. For example, the transaction between MLS and

Holms Energy, LLC (to which Val's minerals had been transferred), included a $100,000 up front payment and a ten year override royalty payment to Holms Energy; the minerals were optioned by and sold directly to the shell company; the Greenfield mineral interests were included; and about $375,000 was contributed to Val's company, Holms Energy, LLC. RP 751-54, 825, 845.

No documents were ever signed. CP 4430. Allan was returned his $10,000.00. RP 902. Jay paid Allan back for the money Allan had spent for the shares he purchased from APD shareholders. RP 713, 737-738.

III. RESPONDENTS' CROSS APPEAL

A. Assignments of Error on Cross Appeal.

1. This trial court erred in entering Conclusion of Law No. 19, which is set forth in Appendix No. C.

2. The trial court erred in entering Conclusion of Law No. 20, which is set forth in Appendix No. D.

3. The trial court erred in entering that portion of Conclusion of Law No. 23, which reads:

> "Here, the fraud claim is the tort which could form a basis for their conspiracy causes of action."

4. The trial court erred in entering Conclusion of Law No. 24 which is set forth in Appendix No. E.

5. The trial court erred in entering that portion of Conclusion of Law No. 25 which reads:

> "Conclusion of Law 24 also supports liability for breach of fiduciary duties by Jay Edington and Val Holms and minority shareholder oppression."

6. The trial court erred in entering Conclusion of Law No. 28 which is set forth in Appendix No. F.

7. The trial court erred in entering that portion of Conclusion of Law No. 31 which reads:

> "Plaintiffs' prevailing on fraud and conspiracy theories was only accomplished by incurring attorney's fees and costs. Counsel is invited to brief and argue authority and reasonableness of an award of this nature."

8. The trial court erred in entering Conclusion of Law No. 31a.

9. The trial court erred in entering Conclusion of Law No. 31b.

10. The trial court erred in entering Conclusion of Law No. 31c.

11. The trial court erred in entering Second Additional Conclusion of Law No. 5.

12. The trial court erred in entering Second Additional Conclusion of Law No. 11.

13. The trial court erred in entering Second Additional Conclusion of Law No. 12.

14. The trial court erred in entering Second Additional Conclusion of Law No. 13.

15. The trial court erred in entering Second Additional Conclusion of Law No. 14.

The full text of the Conclusions of Law referenced in Assignments of Error No. 8 through 15 are set forth in Appendixes No. G through N.

16. The trial court erred in entering that portion of Additional Finding of Fact No. 4 which reads:

> ". . . rendering the shareholder derivative action successful in part, supporting a claim for attorney fees under Nevada Revised Statute, NRS §86.489."

B. Issues Related to Assignments of Error on Cross Appeal

Issue No. 1: Assignments of Error No. 1 and 2. Whether the trial court erred in concluding that Appellants had committed fraud, and awarding Allan Holms and Roil Energy, LLC judgment for fraud, when all nine elements of fraud were not proven by clear, cogent and convincing evidence.

Issue No. 2: Assignments of Error No. 3 and 4. Whether the trial court erred in finding liability for civil conspiracy, and awarding judgment in favor of Roil Energy, LLC and Allan Holms for civil conspiracy, when the fraud upon which the civil conspiracy claim was based was not proven.

Issue No. 3: Assignment of Error No. 5. Whether the trial court erred in finding breach of fiduciary duties and minority shareholder

oppression when there was no proof that Allan Holms would have held a minority position in Roil Energy, LLC and/or the target corporation.

Issue No. 4: Assignment of Error No. 6. Whether the trial court erred in concluding that there was a direct loss suffered by Allan Holms when he failed to prove any damages.

Issue No. 5: Assignments of Error No. 7 through 16. Whether the trial court erred in awarding attorney's fees and costs to Plaintiffs when the trial court misconstrued Nevada's derivative action statute section 86.489 as a "fee shifting" statute rather than as the "fee sharing" statute that it is.

IV. PRELIMINARY MATTERS

A. Appellants' Improper References to the Record.

In their Statement of the Case, many of Appellants' citations to the record do not support the factual assertions for which they are cited. Val cannot afford to devote the pages it would take to point out all of these discrepancies. Val will rely upon his Statement of Facts to provide a more accurate portrayal of the evidence produced at trial. One matter, however, does deserve special attention. On page 7 of their brief Appellants quote from CP3967, which is page 104 of the Deposition of Allan Holms taken December 4, 2012. The deposition language quoted or referenced was never read or otherwise introduced at trial, and therefore is not evidence.

"When we review a trial court's decision *de novo*, we review the facts in front of the trial court; we do not consider evidence outside the record." *State v. Monfort,* 179 Wn.2d 122, 129 ¶12, 312 P.3d 637 (2013).

Furthermore, the Statement of Facts contains argument, in violation of RAP 10.3(a)(5).

B. Appellant's Decision Not to Assign Error to Any Finding of Fact Makes All of The Trial Court's Findings of Fact Verities on Appeal.

Rule of Appellate Procedure (RAP) 10.3(g) requires a separate assignment of error for each finding of fact a party contends was improperly made, with reference to the finding by number. In addition, RAP 10.4(c) requires that the brief contain the text of the findings of fact to which error has been assigned, set forth verbatim, either in the body of the brief or in an appendix.

Appellant has not assigned error in compliance with these Appellate Rules to any of the Findings of Fact entered in this case. An appellate court reviews solely findings to which the parties assign error. *Standing Rock Homeowners Assn. v. Mizich,* 106 Wn. App. 231, 238, 23 P.3d 520 (2001). Since "unchallenged findings of fact become verities on appeal", *Davis v. Department of Labor & Industries,* 94 Wn.2d 119, 123, 615 P.2d 1279 (1980), all of the Trial Court's Findings of Fact are verities in this appeal. "As such, it is unnecessary for [this appellate court] to

search the record to determine whether there is substantial evidence to support [the unchallenged Findings of Fact]. They are the facts of the case." *Davis*, 94 Wn.2d at 123.

C. **Unchallenged Conclusions of Law Become the Law of the Case.**

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).

D. **Appellant's Decision Not To Plead And Prove North Dakota Law At Trial Precludes Consideration Of North Dakota Law On This Appeal.**

Civil Rule (CR) 9(k)(1) requires that a party who intends to rely upon the law of a state other than Washington must give the opposing party notice thereof. Then, CR 44.1 specifies how the law of that other state is to be determined. In the instant case, the North Dakota court decisions and statutes relied upon by Appellants regarding the two mineral deeds were never pled, raised, discussed or argued at the trial level. The only mention of North Dakota law by the Appellants at the trial level was the reference in their trial brief to North Dakota statute NDCC 47-10-05.1 regarding Val Holms' authority to sign the deeds on behalf of Toll Reserve Consortium. (CP 3164). Appellants' failure to have pled and

proved, or even to have raised the issue of the application of North Dakota law, precludes them from relying on North Dakota law in this appeal.

"When neither party argues foreign law at the trial level, the court will not hear an argument based upon foreign law at the appellate level." Vol. 1, Washington Civil Procedure Deskbook, p. 9-27 – 9-28 (2d Ed. 2006). citing *Kadoranian v. Bellingham Police Dep't,* 119 Wn. 2d 178, 186-87, 829 P.2d 1061 (1992). ". . . [W]here the law of the sister state is not pleaded and proved, it will be presumed that it is the same as the law of the forum". *Nissen v. Gatlin,* 60 Wn.2d 259, 261, 373 P.2d 491 (1962).

V. ARGUMENT

A. At Trial, Allan's Entire Case Was Based Upon His Claim Of A 40/40/20 Split Among Himself, Val and Jay. Now, Allan Wants To Retry His Case On A Claim Of A 50/50 Agreement Between Himself And Val.

In this appeal, Allan wants to try a different case than what he presented to the trial court in November 2013. Consistent with the Second Amended Complaint, and Allan's testimony at trial, his claim was always that there was a 40/40/20 deal. CP 2200. Having failed to prove he had any enforceable agreement, Allan now argues that he and Val agreed to a 50/50 share in Val's minerals, with hardly a passing glance to Jay Edington, the architect of the reverse merger under discussion.

Allan pins his hope for a new angle for his case on Val's email of February 26, 2010, wherein Val said "sounds good to me." EX P-165. But Val testified that he was responding to Allan's statement that: "It helps to discuss questions rather than make assumptions and then try to pick a fight." Val testified that he wanted to have such a discussion. RP 955-56. That is a far cry from Val agreeing to a 50/50 deal. The trial court believed Val and found there was no deal. The credibility of witnesses is for the trial court to determine. *In Re Estate of Cordero,* 127 Wn. App. 783, 787 ¶11, 113 P.3d 16 (2005).

Allan's position is that if he says there was an agreement enough times, it will be so. Allan's argument that he had an agreement with Val rings hollow. The unchallenged findings of the court show there remained unresolved numerous essential terms of any alleged agreement, and therefore none of the parties had reached a meeting of the minds on all of the essential terms of an agreement.

1. There Was Never Agreement Reached Upon The Terms Of Any Joint Venture Between Val Holms And Allan Holms, As The Trial Court, Based Upon The Evidence, Rightfully Found.

Respondents, together with the trial court, agree upon the four (4) essential elements that Allan needed to prove to establish a joint venture. Conclusion of Law No. 3. CP 4433. Appellants set forth some basic principles of contract law, but neglect to recite many principles that apply

to this case, and upon which principles the trial court relied in reaching its conclusion that:

> ". . . no enforceable agreement or contract was made by and between Allan Holms and Val Holms by which Allan Holms was to contribute seed capital and private equity funding and Val Holms was to contribute his mineral interests." Conclusion of Law No. 10. CP 4434.

The burden of proving the existence of a valid contract is upon Allan, the party asserting the existence of a joint venture contract. *Saluteen-Maschersky v. Countywide Funding Corp.,* 105 Wn. App. 846, 851, 22 P.3d 804 (2001). To meet this burden, Allan was required to prove each essential element of the alleged joint venture contract. *Johnson v. Nasi,* 50 Wn.2d 87, 91, 309 P.2d 380 (1957). The trial court so held in Conclusion of Law No. 2, to which no error has been assigned. CP 4433.

The terms of a contract must be sufficiently definite. A contract cannot be enforced if it lacks definite material terms. *16th St. Investors, LLC v. Morrison,* 153 Wn. App. 44, 55, ¶27, 223 P.3d 513 (2009). Conclusion of Law No. 4. CP 4433.

The trial court correctly reached the following Conclusions of Law, to which no error has been assigned:

> "5. An agreement to agree is an agreement to do something which requires a further meeting of the minds of the parties, and without which it would not be complete. Agreements to agree are unenforceable." Conclusion of Law No. 5. CP 4433. See *P.E.Sys., LLC v. CPI Corp,* 176 Wn.2d 198, 208 ¶23, 289 P.3d 638 (2012).

and:

> "6. It is essential to the formation of a contract that the parties manifest to each other their mutual assent to the same bargain at the same time. An intention to do a thing is not a promise to do it." Conclusion of Law No. 6. CP 4433. See *Pacific Cascade Corp. v. Nimmer*, 25 Wn. App. 552, 555-56, 608 P.2d 266 (1980).

Simply stated, for an agreement to be finally settled, it must comprise all the terms which the parties intend to become a part of the agreement, and ". . . until the terms of a proposal are settled, the proposer it at liberty to retire from the bargain." *Pacific Cascade Corp.,* 25 Wn. App. at 557 quoting *Coleman v. St. Paul and Tacoma Lumber Company,* 110 Wash. 259, 272, 188 P.532 (1920).

Val had the legal right to retire from the prospective bargain for which there was no meeting of the minds and no mutual assent, and he exercised that right. The trial court so found in Conclusion of Law No. 18:

> "18. Since no enforceable contract had been entered into between Allan Holms and Val Holms regarding the joint venture and/or reverse merger, *Val Holms had the right to withdraw from the negotiations,* and further had the right to develop his mineral interests by means of another transaction." (Italics added). CP4436.

Allan ignores the fact that the joint venture that was being discussed involved at least three (3) individuals – Allan, Val and Jay – and not just Allan and Val. Allan focuses on the alleged 50/50 deal with his brother, but pushes aside and ignores the many faceted and complex

reverse merger concept that was actually under discussion by the three (3) individuals. True, Allan really did not understand the reverse merger process, but he surely knew that there were many steps to be negotiated, agreed upon and accomplished, some of them rather complex.

With these legal principles in mind, attention is turned to some of the material terms of the alleged joint venture which, although they may have been discussed by Allan, Val and Jay, were never agreed upon.

2. There Was Never Agreement Reached As To The Percentage Ownership Interests Each Member of Roil Energy, LLC Would Have, Nor the Number Of Members There Would Be.

At trial Allan's evidence failed to convince the judge that he and Val had agreed to a 50/50 split of the minerals. Allan now tries to convince this Court that the alleged equal split of the mineral interests was the beginning and end of an alleged joint venture agreement. This totally ignores the complexity of the reverse merger transaction that Jay Edington had orchestrated. That reverse merger strategy contemplated a multitude of steps to be accomplished, some of them quite complex. First and foremost, there was never an agreement among Allan, Val and Jay as to the percentage each would own in Roil Energy, LLC. EX P-171.

In unchallenged Finding of Fact No. 39, the court held that: "Val Holms, Allan Holms and Jay Edington never reached agreement about their respective percentage ownership interests in Roil Energy, LLC." CP

4428. There was not even agreement on how many members there would be in that limited liability company. EX P-171. One thing is for certain: At all times Val Holms intended that he would hold the majority interest in any entity that owned his mineral interests. RP 1231, 1236, 1246. Val's testimony in this regard was verified by the independent testimony of Tom Greenfield, who was present at the meeting between Val and Allan in Butte on February 19, 2010. RP 963, 971-72.

Jay Edington testified that a critical element of the reverse merger transaction under discussion was the execution by the members of Roil Energy, LLC of an operating agreement. EX P-217. However, based upon the evidence at trial, the court found the following in unchallenged Finding of Fact No. 40:

> "40. Jay Edington drafted an operating agreement for Roil Energy, LLC and sent a copy of the draft operating agreement to Val Holms and Allan Holms. The draft operating agreement contained blanks where the respective ownership interests of the members of Roil Energy, LLC were to be inserted. No percentage ownership interests were inserted, and although Jay Edington characterized the operating agreement as critical, no operating agreement was ever finalized or signed regarding Roil Energy, LLC." CP 4428-29.

In another unchallenged Finding of Fact, the court found that:

> "41. Jay Edington's reverse merger plan contemplated that he, Val Holms and Allan Holms would not be the only members of Roil Energy, LLC, but that an additional member or members would participate to the extent of an

> undetermined percentage ownership interest in that limited liability company. Neither Val nor Allan Holms knew the identity of the additional member or members, and no percentage membership interest was ever assigned to those unidentified members." Finding of Fact No. 41. CP4429.

Therefore, based upon the above Findings of Fact No. 40 and 41, which are verities on this appeal, Allan's claim that he and Val were to split everything 50/50, and later that the split was a 40/40/20 split with a 20 percent ownership in Roil Energy going to Jay Edington, is directly contrary to the facts. The fiction of an agreed 40/40/20 split, which was Allan's mantra throughout trial is further dispelled by the court's Conclusion of Law No. 8, to which no error has been assigned.

> "8. Several material terms of the proposed joint enterprise among Allan Holms, Val Holms and Jay Edington had not been agreed upon by those parties. 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 that limited liability company would have; and the percentage ownership interests of those other members. The percentage ownership interests in Roil Energy, LLC were an essential element of the contract that Plaintiffs allege was formed." CP 4434

3. There Was Never Agreement Reached On Other Essential Terms of the Reverse Merger Under Discussion.

In addition to the failure to agree upon the respective ownership interests of Val, Allan, Jay and other potential member(s), several other steps in the reverse merger under discussion, had not been agreed upon.

In order for the shell corporation to attract investors – the approximately $2,000,000.00 in investor financing that Allan was to arrange – the shell company had to show potential investors that it had a right to acquire Val's mineral interests. RP 830. This could be done through an option to purchase those mineral interests and then an actual purchase and sale agreement. RP 829. The terms of such an option to purchase where never negotiated and agreed upon. CP 829.

In unchallenged Finding of Fact No. 50, the court found:

> "50. Jay Edington testified that in a reverse-merger situation using an asset purchase as the strategy, a two-step process is followed. First, an option to purchase is prepared and executed, and then an asset purchase agreement is prepared and executed. An option is necessary to show to investors that the public shell has a binding option to acquire assets. No option agreement or asset purchase agreement was ever finalized or executed." CP 4430.

Since the shell corporation was subject to reporting pursuant to the Federal Securities and Exchange Commission Acts, various detailed and comprehensive documents needed to be drafted and filed with the Securities and Exchange Commission, such as a private placement memorandum, proxy statements, and the form 8-K disclosures. RP 830-33, 839.

A multitude of steps and agreements were necessary to complete the performance of an alleged joint venture agreement for a reverse

merger. In turn, each of those documents would require that their terms be negotiated and agreed upon by at least Val, Allan and Jay, steps which were never accomplished.

There had been no valuation of Val's mineral interests. The trial court made the following unchallenged Finding of Fact:

> "44. A valuation of Val Holms' mineral interests was a necessary component of the reverse merger. Boyd Hennimen, the petroleum geologist who was a friend of Allan Holms, and from whom Val Holms, Allan Holms and Jay Edington sought advice and an opinion regarding a valuation of Val's mineral interests, would not provide a valuation of those mineral interests because there had been no actual drilling, and stated he was not a proponent of public companies." CP4429.

In Conclusion of Law No. 4, to which no error has been assigned, the trial court held:

> "4. A contract cannot be enforced if it lacks definite material terms. In addition to other items listed below, the material terms of valuation of the minerals, timing, amount and form of the provision of seed capital and subsequent equity investment, and percent of ownership between two and later three joint venturers were never sufficiently definite and fixed before Allan Holms acquiesced to Val's communication and termination of the joint activities between the two of them." CP 4433.

In unchallenged Conclusion of Law No. 7, the trial court held:

> "7. The parties' contemplation that several written agreements and other documents needed to be drafted and filed with state and federal agencies is evidence that they did not intend their discussions and negotiations to amount to a binding agreement." CP 4433-34.

And in unchallenged Conclusion of Law No. 9, the trial court found that:

> "9. Other terms of the proposed joint venture, and of the contemplated reverse merger, which were not agreed upon by Allan Holms, Jay Edington and Val Holms, included: completion and execution of an operating agreement for the limited liability company (which would have listed the percentage ownerships of each of the members of Roil Energy, LLC); a valuation of Val Holms' mineral interests; the amount of the capital contribution made by Allan Holms, if any, to Roil Energy, LLC and to the merger target, APD; an option to purchase the mineral interests; and an asset purchase agreement for APD to acquire Val Holms' mineral interests."

In sum, the trial court found that the components of an agreement, that is, the material terms, simply did not exist.

4. Allan's Reference to Partnership Law Adds Nothing of Relevance.

Allan purchased shares of APD from existing APD shareholders. RP 822-23. Nothing in the record supports the assertion by Allan that the shares were purchased with partnership assets.

Allan says he contributed $40,000 or $50,000 to seed capital. But in fact, Allan purchased the 1,356,654 shares of APD from existing APD shareholders, not from APD. The purchase price was paid to those shareholders, not to APD, and was not available as seed capital. RP 481, EX P-120.

B. Trial Court Properly Found That The Two Mineral Deeds Did Not Satisfy The Statute of Frauds. Therefore Any Claimed Oral Agreement to Transfer Mineral Rights Is Unenforceable.

Val gave Allan copies of two mineral deeds, which Allan claims vested title to Val's minerals in Roil Energy, LLC. Allan focuses on the delivery aspect and completely ignores an issue which was framed by Plaintiffs' Second Amended Complaint, wherein Plaintiffs claimed, and argued at the trial that Toll Reserve Consortium, Inc. had breached its oral contract with Roil Energy, LLC by not deeding the McKenzie County mineral interests to Roil Energy. CP 2230-31.

Allan Holms alleged there was an oral contract between Val Holms (through his company Toll Reserve Consortium, Inc.) and Roil Energy, LLC, to transfer Val's mineral interests to Roil Energy. Allan claimed this alleged oral agreement was breached. Such an alleged oral agreement is squarely within the statute of frauds, and must be in writing.

The statute of frauds pertaining to the conveyance of an interest in real property is set forth in RCW 64.04.010. This statute requires that every conveyance of real estate or an interest in real property be in writing. The statute of frauds operates in this case to bar any claim that the McKenzie County mineral interests were transferred from Toll Reserve Consortium, Inc. to Roil Energy, LLC. ". . .[T]he purpose behind the statute is to prevent the fraud that may arise from the

uncertainty inherent in oral contractual undertakings." *Richardson v. Cox*, 108 Wn. App. 881, 890, 26 P.3d 970 (2001). This purpose aligns perfectly with the trial court's determination that no contract existed for transfer of the minerals.

To satisfy the statute of frauds, the documents "... must embody all the essential and material parts of the [agreement] with sufficient clarity and certainty to show that the minds of the parties have met on all material terms with no material matters left for future agreement or negotiation." *Friedl v. Benson,* 25 Wn. App. 381, 387, 609 P.2d 449 (1980). If oral testimony is necessary for purposes of establishing any essential term of the contract, the contract is considered to be oral and within the statute. *Howell v. Inland Empire Paper,* 28 Wn. App. 494, 624 P.2d 739 (1981).

Allan claims that the mineral deeds themselves are sufficient to satisfy the writing requirements of the statute of frauds. That is erroneous, for those mineral deeds do not contain, or even allude to, the terms upon which the mineral interests were purportedly to be transferred.

Allan has assigned no error to the following portion of Conclusion of Law No. 14, in which the trial court accurately set forth the applicability of the statute of frauds to these mineral deeds:

> "The Statute of Frauds provides that contracts for the purchase and sale of an interest in realty are unenforceable against either the purchaser or the seller, absent a sufficient memorandum signed by the party to be charged. The writing must identify the subject matter of the contract, be sufficient to indicate that a contract between the parties had been made, and state with reasonable certainty the essential terms of the performance promises in the contract. To satisfy the Statute of Frauds, the writing must contain all terms of the contract." Conclusion of Law No. 14. CP 4435.

The two mineral deeds contain none of the terms of the alleged contract by which Allan claims Toll Reserve was to deed minerals to Roil Energy. The deed was prepared during the course of negotiations, but a contract to transfer the mineral rights was never legally formed. The trial court said it well in the following portion of Conclusion of Law No. 15:

> "The mineral deeds themselves contain no language setting forth the terms upon which the transfer of the mineral interests were to be made . . . ." CP 4435.

Plaintiffs' cause of action for breach of an agreement to transfer those mineral rights was not established, and was properly dismissed.

In *McLain v. Healy,* 98 Wash. 489, 161 P. 1 (1917), parties who had entered into an oral agreement to exchange certain lands executed and delivered deeds into escrow. When one party refused to go through with the exchange, litigation ensued and the court framed the issue as follows: "All of these agreements being oral, the question now is: Can they be enforced?" *McLain,* 98 Wash. at 491. The Supreme Court held the oral

contract unenforceable, noting that: "The only writing subscribed by the respondents is the deed deposited [in escrow], but that deed does not contain the contract which appellants must prove before they can recover." *McLain,* 98 Wash. at 491. Likewise, the copies of the mineral deeds obtained by Allan Holms do not contain any agreement concerning either deed.

1. Parole Evidence Was Properly Admitted Because The Deeds Did Not Reflect An Integrated Agreement And Also to Show That Val's Recording Of The Mineral Deeds Was Conditional Upon The Receipt Of Consideration From Allan.

a. There Was No Agreement For Transfer Of The Mineral Interests.

Even if the court had found an agreement whereby Toll Reserve was to deed the minerals to Roil; and even if the trial court had found the deeds complied with the statute of frauds, any transfer of title to the minerals was still conditioned upon receipt of consideration from Allan. The trial court admitted testimony from Val Holms regarding the conditions upon which he gave the copies of the mineral deeds to Allan, namely, the receipt of the $200,000.00 in capital contribution promised by Allan during negotiations, but never delivered. This Division has held in *Lopez v. Reynoso,* 129 Wn. App. 165, ¶11, 170-71, 118 P.3d 398 (2005) that:

> ". . . the parole evidence rule is only applied to writings intended as the final expression of the terms of the agreement. Extrinsic evidence may be used to ascertain the intent of the parties, to properly construe the writing, and to determine whether the writing is actually intended to be the final expression of the agreement." (citations omitted).

Allan claims it was error for the trial judge to rely upon the testimony of Val Holms to the effect that delivery of the deeds was conditioned on receiving the $200,000.00. But before deciding whether such evidence should have been considered, the court must first determine whether these two mineral deeds were "intended to be the final expression of the agreement." *Lopez,* 129 Wn. App. ¶11, 170-71. The answer is a resounding no.

The trial court held in Conclusion of law No. 15 that:

> ". . .there was no enforceable agreement between Roil Energy, LLC and Toll Reserve upon essential terms of any such transfer of mineral interests." CP 4435.

The mineral deeds could not have been a final expression of the terms of any agreement, because there was no agreement. Therefore, parole evidence was properly admitted.

Discussions about the potential transfer of these mineral interests was part and parcel, and only one of, the many steps in the reverse merger process. In fact, Jay Edington said that the transfer of the mineral interests would not occur until well down the road. RP 790-91.

Allan induced Val to prepare deeds to the minerals on the promise of a contribution by Allan of $200,000.00. But Allan only delivered $10,000.00, with a promise to contribute the remaining $190,000.00 the next day. RP 1243. Those funds were never delivered. RP 1243, Finding of Fact 35, CP 4427. Val was smart enough, and suspicious enough of his brother, to not fall into the trap which would have taken his minerals from him for a scant $10,000.00 and an unknown percentage interest in Roil Energy.

In Finding of Fact No. 35, to which no proper assignment of error has been made, the trial court found that:

> "35. It was Val Holms' intent to record these mineral deeds and transfer title to Roil Energy only upon receipt of the $200,000.00 seed money and the performance of other commitments from Allan Holms...Because Val Holms never received from Allan Holms the $200,000.00 seed money to be deposited into Roil Energy, LLC, Val Holms did not record the mineral deeds conveying the McKenzie County mineral interests to Roil Energy, LLC; . . ." CP 4427.

Finding of Fact No. 35 is a verity on appeal, and is based upon the testimony of Val Holms. For example:

Q. And what was the purpose of your trip to Butte?
A. Allan called me and told me to come get my money.

Q. Okay. And how much money were you expecting that Allan was to bring with him to the meeting at Butte?
A. $200,000.

Q. And you said you brought copies of the deeds. Any reason why you brought copies and not the originals?

A. Yes, sir, because there wasn't going to be any grease distributed until I had all the money I thought we needed to operate on my leases and everything else.

Q. When you use the term "grease," maybe you can explain to the Court what you mean by "grease"?

A. Well, just an oil terminology for oil.

Q. And when you got there, what did Allan Holms do?

A. Oh, we talked for a couple minutes, then he handed me a check for $10,000.

Q. Okay. Now I just want to go back. You mentioned in your earlier testimony you said you were expecting Allan Holms to bring $200,000 to the meeting in Butte, but he only gave you $10,000.

Did Allan say he would get you the other $190,000?

A. Yes, sir.

MR. GIESA: Well, I'm going to object to the leading, Your Honor. It is a leading question.

Mr. GREER: Let me rephrase it, Your Honor.

BY MR. GREER:

Q. Was Allan Holms – what did Allan Holms tell you with respect to the remainder of the money?

A. He said he had to move some money around and he's get the rest of it to me the next day. RP 1238-39; 1243.

If this court were to rule that delivery of a copy of two mineral deeds to Allan constituted the conveyance to Roil Energy of those mineral interests, then Allan would have accomplished his purpose of seizing control of Val's mineral interests. Even though the prospective ownership interests in Roil Energy were never determined, Allan would have been

able to claim that his ownership interests in the target corporation constituted a majority interest because of the number of shares – up to 3,800,000 - he would have acquired in APD. EX D-687; Finding of Fact No. 48, CP 4430 and Finding of Fact No. 52, CP 4431-32.

The trial court found in unchallenged Finding of Fact No. 36:

> "36. Jay Edington later stated that under his reverse merger plan, the transfer of the mineral interests to Roil Energy, LLC was not scheduled to happen until five or six steps down the road, and was based upon the completion of a deal and closing. There were contingent obligations and responsibilities to raise money, provide seed capital, and do a private placement." CP 4427.

In spite of that testimony from Jay, who was the architect of the reverse merger concept, Allan in his attempt to gain controlling interest in Val's mineral interests, tried to get the minerals deeded to Roil Energy early in the plan under discussion, but in exchange for only $10,000.00 rather than the $200,000.00 that Allan had agreed to contribute.

The parole evidence rule does not apply in this case to exclude Val's evidence regarding the conditions upon which he would have recorded the mineral deeds. The intent of the parties cannot be gleaned from the mineral deeds themselves. Val's intent in giving copies of the deeds cannot be determined from the language of the deed itself. When Allan did not pay the $200,000.00 the next day, as he promised, Val

wisely did not record the deeds. If he had, Allan's plan to seize control of Val's minerals would have been that much closer to succeeding.

b. Parole Evidence Was Admissible To Show a Condition Precedent.

Parole evidence is admissible to show an external condition precedent, i.e., a condition that must occur before a contract becomes effective. The conditional delivery exception to the parole evidence rule was recited in *Matter of Prior Bros., Inc.,* 29 Wash. App. 905, 909, 632 P.2d 522 (1981), wherein Division III stated that:

> ". . . parole evidence may be admitted to determine the issue of the validity of a contract or to impeach its creation. Thus, parole evidence may be admitted to show there was a condition precedent to the contract coming into existence." (Citations omitted).

And in *Kapetan v. Kelso,* 4 Wn. App. 312, 314, 481 P.2d 24 (1971), Division I held that:

> "[W]e have many times held that parole evidence is admissible to show that a written instrument is not to become a binding obligation except upon the happening of a certain event. Such evidence does not vary or contradict the terms of the written instrument. It merely shows what must occur before the agreement is to take effect. Citing *Fleming v. August,* 48 Wn.2d 131, 134, 291 P.2d 639 (1955).

Clearly, Val's testimony that "there wasn't going to be any grease [oil] distributed until I had all the money I thought we needed to operate . .

." was rightly relied upon by the trial court to establish one of the conditions precedent to the effectiveness of any mineral deeds. RP 1239.

The trial court's determination that the delivery of copies of the mineral deeds was ineffective to transfer title to those minerals from Toll Reserve to Roil Energy was correct. First, those mineral deeds violated the statute of frauds and therefore were ineffective. Second, there was no agreement between Roil Energy and Toll Reserve for any transfer of mineral interests. And third, based upon the testimony of Val Holms, delivery and recording of the deeds were contingent upon the happening of certain events, none of which occurred.

2. A Recital Of Consideration In A Deed Is A Recital Of Fact And Can Be Contradicted By Parole Evidence.

Allan claims that the following language in the mineral deeds confirms Val's mineral interests were transferred to Roil Energy: "For and in consideration of the sum of Ten and no/100 Dollars ($10.00), cash in hand paid and other good and valuable considerations, the receipt of which is hereby acknowledged." Appellate Brief at 34. However, a recital of consideration is treated like any other recital of fact and may be contradicted. "Parole evidence has been held to be admissible to show what the true consideration is where the contract contains a mere recital of consideration (e.g., 'one dollar and other valuable consideration') as

contrasted to contracts in which the stated consideration is a 'contractual element' of the contract." *Shelton v. Fowler,* 69 Wn.2d 85, 93, 417 P.2d 350 (1966), quoting *Kinne v. Lampson,* 58 Wn.2d 563, 567, 364 P.2d 510 (1961).

In *Malacky v. Scheppler,* 69 Wn.2d 422, 419 P.2d 147 (1966), a mother conveyed her seller's interest in certain real estate contracts to her three children. The documents of conveyance recited the consideration as "for value received". Shortly thereafter, the mother became totally incapacitated, her daughter was appointed guardian, and used the payments from the real estate contracts to support her mother until her mother passed away. The guardian's two siblings sued to recover from the guardian their share of those real estate contract payments on the theory that: "They are grantees named in documents which on their face appear to convey absolute title. The recitals of consideration cannot be contradicted by oral evidence, for the parole evidence rule . . . would be violated." *Malacky*, 69 Wn.2d at 425.

The Supreme Court disagreed and held as follows:

> "Plaintiffs' first contention is not well-taken. Proof of the real consideration, or lack of it, is an exception to the general rule that oral or extrinsic evidence cannot be asserted to vary the terms of a written instrument. Recitals of consideration in a written instrument are not conclusive. It is competent to inquire into the consideration and show, by parole evidence, the real or true

consideration."(Citations omitted) *Malacky*, 69 Wn.2d at 425.

3. Respondents Do Not Address North Dakota Law. Appellants Failed to Give Notice That They Claim North Dakota Law Applies.

As noted in the introduction, Appellants failed to give Respondents any notice of their claim that North Dakota law has application to the issue of the delivery of the mineral deeds. North Dakota law was not considered by the trial court, because, save for one statute regarding Val Holms' authority to sign the deeds, the Plaintiffs never proffered any North Dakota law for consideration, nor gave Defendants any notice that the law of North Dakota would be relied upon. CP 3164. Accordingly, North Dakota law is not applicable on those issues, and therefore Val has not responded to the North Dakota law cited by Appellants in their brief.

C. Allan Failed To Prove That He Suffered Damage, An Essential Element of His Causes of Action.

Allan begins this section of his brief by quoting the two-step process on review. However, this court need not engage in the first step – determining whether the Findings of Fact are supported by substantial evidence – because Allan has chosen not to assign error to any of the trial court's Findings of Fact. Therefore those Findings of Fact are verities on appeal.

1. No Contract. No Breach. No Damages.

One of the claims made in the Second Amended Complaint was that Allan, Val and Jay had entered into a contract to form a joint enterprise to develop Val's mineral interests; that contract was breached; and Allan prayed for damages caused by that alleged breach of contract. CP 2232. The first portion of Allan's argument regarding damages essentially asserts that the trial court erred in finding that there was no contract so Allan should be entitled to benefit of the bargain damages. However, as shown earlier in this brief, the trial court was correct in determining that there was no enforceable joint venture agreement since too many terms were undecided.

Allan claimed $5.8 million dollars in damages, based upon his theory that he was entitled to 40% of the transaction under discussion among he, Val and Jay. Allan's damage expert, Dan Harper, based his testimony on the assumption that Allan "should have been a 40 percent member of Roil Energy". RP 1059. But Allan was not entitled to 40% or any ascertainable percent of anything. The court so found. CP 4435. Before benefit of the bargain damages can be awarded to Allan for breach of contract, there had to be a contract. And there was no contract to be breached.

2. Credibility of Witnesses is Determined By the Trial Court.

William Ross' testimony that Plan B employed "exactly the same format" as the reverse merger plan first created by Jay, does not square with the reality of what occurred. The business transaction that Val and Jay ultimately completed, included the Greenfield mineral interests, an override royalty, an initial upfront payment, a contribution to Val's LLC, and the minerals were optioned by and sold directly to the shell company, none of which were contemplated in the original structure under discussion. RP 751-54, 825, 845. At trial, Jay first said the Multisys structure was a little different than the strategy with APD. RP 751. But on cross-examination, Jay admitted there were some major areas where the two reverse merger plans differed. RP 753, 845, 855-56. The court chose to believe Jay on this matter and found that there were "significant differences and variables" between the reverse merger discussed with Allan and the transaction Val and Jay completed. Conclusion of Law No. 21. CP 4437.

The credibility of witnesses is for the trial court, and not the Appellate Court. *Cordero,* 127 Wn. App. at 787 ¶11.

Allan claims that he proved "clearly calculable damages", but the court correctly determined that there was an "absence of ascertainable damages." Conclusion of Law No. 21. CP 4437. Allan's alleged clearly calculable damages were based solely on his claim throughout the trial

that the parties had agreed he would receive 40%. Without that 40% figure, upon which agreement had never been reached, no damages could be calculated.

3. Allan Produced No Evidence To Support An Award Of Facilitation Damages.

The court could award Allan no facilitation damages because there was no evidence as to what that value might be.

Allan claims that he was the "architect" who had originally conceived the reverse merger capitalization plan. (Appellant's brief, page 46). That is wishful thinking, for Allan did not understand the reverse merger concept. What Allan did was make an introduction. He introduced Val to Jay Edington who had knowledge and experience regarding reverse mergers. Allan's lack of understanding of the reverse merger concept belies his taking on the mantel of the architect. RP 444-45.

When asked by his counsel about Jay Edington's January 7, 2010 e-mail to Val and Allan regarding the reverse merger concept, Allan replied: "I didn't totally understand what he [Jay] was talking about." RP 296, line 25 – 297 lines 1-2.

And, again in responding to questions from his attorney, Allan testified:

A. All I know is that APD was a target for Roil Energy, and other than that, it's sort of his [Jay's] deal. I didn't . . .

Q. What do you mean, "his deal"?
A. Well, it was his – that was his job. He was – he was driving the bus here. Now, this is what we should be doing to get this public company up to speed.

Q. When you say "driving the bus," I guess if you could explain a little more when you say he's driving the bus?
A. Well, this is his area of expertise. This is what he does and this is stuff that he was suggesting. And, quite frankly, I read it today and really totally don't understand it.

Q. You still don't understand it even when you read this today?

A. Well, not totally. Conceptually, but not totally.

RP 315, lines 13-25, RP 316, lines 1-6.

Under cross-examination Allan responded to the following question from Val's counsel, Rob Greer:

Q. Okay. And one of the things you were going to bring to this project or concept would be your business experience, in addition to your money?
A. I would recast it. I think that my initial was the capital and Edington was bringing the technology, because *it was an arena that I didn't know anything about.* And Val was bringing the minerals. (Italics added). RP 444, lines 19-25.

The examples noted above put to rest any thoughts that Allan was the "architect who had originally conceived" the reverse merger plan that

these three individuals were discussing. As Jay said in his February 20, 2010 email to Allan: "I am pretty certain that until you met me, you did not even understand the reverse merger concept." EX P-88 at Bates 0429.

Since Allan could not establish that there had been an enforceable joint venture agreement, or any agreement, among himself, Jay and Val, the trial court gave Allan another opportunity to establish some loss by inviting the parties to "brief and argue what, if any, facilitation value was lost to Allan by the fraudulent actions of Jay Edington and Val to exclude him." Conclusion of Law No. 30. CP 4438.

The trial court explained Conclusion of Law No. 30 on December 5, 2013 stating that she "recognized a potential for damages based on the facilitation value of Allan's placing Val and Jay and Allan together." RP 1436. What Allan did was to make an introduction. If he lost anything because of the actions of Val or Jay, Allan's loss is limited to what is commonly referred to as a "finder's fee".

Facilitation value means the value of Allan's introduction of Val to Jay, not what Allan lost by not participating in the APD reverse merger, because Allan had no enforceable agreement to participate in that transaction, which never occurred. Allan claims that the trial court's failure to award him facilitation value damages was inexplicable. To the contrary, Allan's failure to receive a facilitation damage award is easily

explained – he did not present any evidence to establish what the dollar amount of such facilitation value might be.

Allan makes much of the testimony of his expert, William Ross, who testified that Allan had brought value to "this enterprise". The problem is, Mr. Ross was never asked to place a dollar value on what he claims Allan's contributions were, nor was any value ever placed on those alleged contributions by any other witness.

Val does not dispute that Allan was not required to prove the exact amount of facilitation damages. However, "...the fact that the amount of damages need not be proved with precision does not allow a claimant to present *no* evidence regarding the amount." *Mutual of Enumclaw v. Gregg Roofing, Inc.,* 178 Wn. App. 702, 715, ¶22, 315 P.3d 1143, (2013). "The amount of damages generally is a question of fact." *Mutual of Enumclaw*, 178 Wn. App. at 716, ¶23.

Allan failed to present even a scintilla of evidence as to what a reasonable facilitation or finder fee would be. William Ross gave absolutely no indication of what value to place on what he claimed Allan brought to the APD reverse merger under discussion.

"Damages must be proved with reasonable certainty or supported by competent evidence in the record." *Hyde v. Wellpinit School District No. 49*, 32 Wn. App. 465, 470, 648 P.2d 892 (1982). Although damages

do not have to be proven with exactness, a damage award cannot be made from whole cloth. There must be some evidence upon which to support a damage award. In this case, the record is completely devoid of any testimony that would support awarding any amount as a facilitator's fee to Allan. In fact, Allan made no attempt to present evidence as to what a reasonable facilitation fee might be. The amount of any loss that Allan may have incurred remains speculative; and would be based upon pure guesswork.

Allan's failure to present any evidence at trial regarding what a reasonable facilitation fee might be is not surprising, since he argued exclusively during the trial that he was entitled to 40%, based upon his 40/40/20 mantra. Recognizing the abject failure of proof of a facilitation value, Allan then says that he should have received what Jay Edington received in the transaction that he and Val ultimately put together. To make this argument, Allan misconstrues the basis for Jay's demand for a 20% share of the transaction the three of them were discussing. In his February 7, 2010 e-mail to Allan (EX P-88, Bates 0429), Jay recited the many responsibilities he would undertake, not only to complete the reverse merger under discussion, but on behalf of the public company if such a merger was completed.

Neither in this communication, nor in any of his testimony at trial, did Jay use the words facilitation fee or finder's fees. Rather, he compared the ownership interest he was requesting – 20% -- to the fee that agents and managers receive from professional athlete clients. Jay said: "In the case of a professional athlete, they pay their agents and managers up to 20% of their income to get these services." EXP-88.

The trial court recognized that Allan's introduction of Val to Jay was not comparable to Jay's efforts:

> "30.a. However the contributions and share of earnings are not sufficiently comparable between Allan Holms and Jay Edington to form a fair basis for damages." Conclusion of Law 30.a., CP 4530.

Allan says in his brief that "he had earned at a minimum a facilitation fee" (Appellants' brief at page 49). But Allan produced no evidence upon which the trial court could determine what a facilitation fee would be. Allan made the tactical decision at trial that he wanted 40 percent or nothing. No in between. When he failed to prove his case, he then claimed that he was entitled to a fee of 20 percent. RP 1453. Then his attorneys at the January 24, 2014 hearing urged the court to award Allan "anywhere from 20% down to whatever below that you want to." RP 1457. So finally, in his brief, and by his attorneys at the January 24, 2014 hearing, Allan claims he is entitled to "something". RP 1456. But

that something is nowhere to be found in the evidence presented at trial. Allan, through his counsel, invited the trial court to speculate on what a facilitation value might be. RP 1456-1457. The trial court rightfully refused to engage in such speculation in the absence of any evidence of a dollar amount to be placed upon an alleged facilitation value.

D. The Trial Court Properly Dismissed Allan's Constructive Trust Claim.

Allan's argument for imposition of a constructive trust is founded upon the canard that Allan proved damages at trial.

The APD reverse merger that was being discussed by Val, Allan and Jay is markedly different from the MLS/BRI/Holms Energy transaction that actually occurred. The two transactions had substantially different elements, and the court correctly found that:

> "26. . . . any income of BRI/Holms Energy, LLC is based on a completely different corporate structure than that developed with Allan Holms as a joint venturer." Conclusion of Law No. 26, CP 4437-38.

In this section of his brief, Allan abandons his claim for 40 percent, abandons his claim for 20 percent facilitation value, and abandons his claim for the court to award him "something", and seems to suggest that everything that Val received for his mineral interests should have been placed in a constructive trust for Allan's benefit. That would fit precisely within Allan's plan to steal his brother's minerals.

Allan, Val and Jay were discussing a possible reverse merger transaction, but "no enforceable agreement or contract was made . . .". Conclusion of Law No. 10, CP 4434. Therefore, ". . . Val Holms had the right to withdraw from the negotiations, and further had the right to develop his minerals interests by means of another transaction." Conclusion of Law No. 18, CP 4436. Since Allan did not prove that a contract existed giving him an ownership interest in the reverse merger under discussion, and since Val had the right to withdraw from the negotiations, Val did not gain something for himself which he should not be permitted to hold, nor has Val been unjustly enriched. There was no deal, and Allan lost nothing. To be sure, the court did find that there was "sufficient evidence of a direct loss suffered by Allan Holms" Conclusion of Law No. 28, CP 4438. But because there was no agreement reached by the parties, the trial court believed that loss was in the form of a facilitation value. As noted above, there was no proof as to that value, if any, and therefore the court could not make an award of damages to Allan.

E. The Trial Court Properly Dismissed The Tortious Interference Claims.

1. Standard Of Review For Summary Judgment Orders.

When reviewing a summary judgment order, the Appellate Court engages in the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). Under RAP 9.12, the Appellate

Court considers only the evidence and issues called to the attention of the trial court. *Mielke v. Yellowstone Pipeline Company*, 73 Wn. App. 621, 870 P.2d 1005 (review denied) 124 Wn.2d 1030, 883 P.2d 326 (1994). In this regard, the Appellate Court will not consider an issue not raised below, including attempts to raise factual allegations at the appellate level that were not before the trial court in granting summary judgment. *Washington Federation of State Employees*, 121 Wn.2d 152, 163, 849 P.2d 1201 (1993).

2. Appellants' Allan Holms And Allan Holms Derivatively On Behalf Of Roil Energy Cannot, As A Matter Of Law, Prevail On Any Cause Of Action For Tortious Interference Of A Business Expectancy Against Val Holms Because A Party To A Contract Or A Party To An Alleged Business Relationship Or Expectancy Cannot Be Held Liable For Tortious Interference Of Such Contract Or Business Expectancy Or Relationship.

In the First Amended Complaint, Plaintiffs' allege that Defendants' Val Holms and Jay Edington and Plaintiff Allan Holms orally agreed to form a joint venture or enterprise to capitalize and market Val Holms' mineral interests. CP 1075. Plaintiffs' claimed that this joint venture or enterprise involved the transfer of Val's mineral interests into a limited liability company, Allan's contribution of seed capital in the approximate amount of $200,000.00-$250,000.00, Allan raising operating capital through private investors, and Jay contributing his expertise in putting together reverse mergers. CP 1076. Because Val, Allan, Jay, Roil

Energy, and APD (the target public shell corporation) were all parties to this proposed joint enterprise or joint venture and not strangers to the proposed transaction, plaintiffs' causes of action for tortious interference of a business expectancy are legally and factually unfounded and were properly dismissed by the trial court. CP 2187-2191.

Allan explained the proposed joint enterprise and reverse merger in his deposition and stated that Roil Energy and eventually Bakken Resources were not separate entities but instead were considered to be one and that Roil was never intended to be operating as everything was going into APD, the public shell corporation. CP2181, 2182, 2185.

The elements of a claim for tortious interference with a business relationship are: 1) The existence of a valid contractual relationship or business expectancy; 2) That defendants had knowledge of that relationship; 3) An intentional interference inducing or causing a breach or termination of the relationship or expectancy; 4) That the defendant interfered for an improper purpose or used improper means; and 5) resultant damages. *Commodore v. University Mechanical Contractors, Inc.*, 120 Wn.2d 120, 137, 839 P.2d 314 (1992).

In order to establish liability for tortious interference of a business relationship, the plaintiff must prove that the interferer was an inter-meddling third party. *Vasquez v. State of Washington*, 94 Wn. App. 976,

989, 974 P.2d 348 (1999). A party to the relationship cannot be held liable for tortious interference. *Houser v. City of Redmond*, 91 Wn.2d 36, 39, 586 P.2d 482 (1978).

Washington case law is in accordance with other jurisdictions which follow the established legal principle that a party to a business relationship or contract cannot maintain a claim against another party to that transaction or business relationship for tortious interference. *Kasparian v. County of Los Angeles*, 38 Cal. App. 4th 242, 45 Cal. Rptr.2d 90 (1995). (Defendants cannot be held liable for tortious interference with their own economic relations. This tort can only be asserted against a stranger to the relationship); *Cantwell v. City of Boise*, 146 Idaho 127, 191 P.3d 205 (2008); *Genet v. Anheuser-Busch*, 498 So.2d 683 (Fla. App. 1986). (A cause of action for tortious interference does not exist against one who is himself a party to the business relationship allegedly interfered with").

A case illustrative of this established legal principle is the Alabama Supreme Court case *Bell South Mobility, Inc. v. Cellulink*, 814 So.2d 203 (Ala. 2001). In that case, Cellulink entered into an agreement with Bell South to market cellular telephone services to customers on behalf of Bell South. This agreement provided that Cellulink would market the cell phone services at a kiosk leased from a Walmart store. About a year and a

half after this arrangement was put in place, Bell South entered into an agreement with another company, Alltel, to market Bell South's cellular service through Walmart stores. Walmart then cancelled the kiosk lease with Cellulink, which resulted in Cellulink's lawsuit against Bell South for tortious interference.

Cellulink claimed that Bell South, by causing the cancellation of the kiosk lease, tortiously interfered with its lease with Walmart. Bell South appealed a multimillion dollar jury verdict against it on this claim to the Alabama Supreme Court. On appeal, Cellulink contended that Bell South had "tricked" Walmart into helping Bell South remove Cellulink from the Walmart store. In rejecting this argument, and reversing the verdict, the Court found that Bell South was a party to the Walmart/Cellulink lease, and therefore, since Bell South was not a stranger to that business relationship, as a matter of law Bell South could not be liable for tortious interference.

There is no dispute that Allan, Val, Jay, and Roil Energy, were all parties to the proposed plan or proposed transaction. Since Val, Allan, Jay, and Roil Energy were all parties to this proposed business relationship there can be no tortious interference claims between them as a matter of law.

Allan argues that Roil Energy is a separate and distinct entity, and thus cannot be considered a party to the alleged or proposed business relationship between Val, Allan, and Jay[2]. As set forth above, in order to prevail on the tortious interference claim, Allan must establish that Val was an inter-meddling third party i.e. a stranger to the business relationship involving Roil Energy.

Allan, Val, Jay, and Roil Energy were not strangers to the proposed joint venture or proposed reverse merger. Any business expectancy of Allan, Val, and Jay necessarily involved Roil Energy and were bound together as an integral part of the proposed reverse merger plan being discussed amongst the parties. In the record before the trial court on defendants' motion for partial summary judgment on the tortious interference claim, Alan Holms testified in his deposition that Roil Energy, APD, and Bakken were one. CP 2181, 2182, 2185. Allan went on to explain in his deposition that Roil Energy was never intended to be an operating company as evidenced by the fact that no operating agreement was ever executed by Allan, Jay, and Val with respect to Roil Energy. CP 2182.

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[2] In their brief, appellants make no argument that Bakken Resources, Inc. or Holms Energy, LLC tortiously interfered with any business expectancies. An argument or issue not raised in appellant's opening brief will not be considered. *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

In this case, the only alleged business expectancy was the one resulting from the business relationship of all the parties, Allan, Val, and Jay. Allan alleged that the proposed joint venture or joint enterprise involved the parties forming, as members, a limited liability company, Roil Energy, which then would be used to immediately merge into the public shell corporation, in this case APD. CP 2182, 2185. There was simply no separate business expectancies involving Roil Energy. Neither Roil Energy nor Val were strangers to the proposed business relationship or proposed reverse merger. They were integral parts of this plan being discussed, which never came to fruition. Accordingly, there simply cannot be any claim as a matter of law to support a tortious interference claim because neither Val nor Roil Energy were strangers to the proposed transaction. The trial court properly dismissed the tortious interference claims as a matter of law.

VI. RESPONDENTS'/CROSS APPELLANTS' ARGUMENT ON THEIR CROSS-APPEAL

A. The Trial Court Erred in Finding Val and Mari Holms, Holms Energy, LLC and Bakken Resources, Inc. Liable for Fraud. Allan Failed to Prove Damages, an Essential Element of Fraud.

It is horn book law that: "There are nine essential elements of fraud, all of which must be established by clear, cogent, and convincing evidence." *See* 16A David K. Dewolf & Keller W. Allen, Washington

Practice: Tort Law and Practice, §19:2 (4th ed. 2013). A claim for fraud fails as a matter of law if the plaintiff fails to prove all nine elements. *Brummett v. Washington's Lottery,* 171 Wn. App. 664, 675, P20, 288 P.3d 48 (2012). "The absence of any one of [the elements of fraud] is fatal to recovery". *Puget Sound Nat'l Bank v. McMahon*, 53 Wn.2d 51, 54, 330 P.2d 559 (1958).

The ninth and last element of fraud that Allan was required to prove was "resulting damages". *Brummett,* 171 Wn. App. at 675, ¶20. As noted above, Allan failed to prove that he suffered any damages, whether benefit of the bargain or the value of any facilitation he may have provided. Without conceding that Allan proved any elements of fraud, even if he had proven eight of the nine elements, his cause of action should have been dismissed. By not doing so, the trial court committed error and the findings and judgment on the fraud claim should be reversed.

B. Trial Court Erred In Finding Val And Mari Holms, Holms Energy, LLC and Bakken Resources, Inc. Liable For Civil Conspiracy.

The trial court entered Judgment in favor of Roil Energy, LLC against defendants Val and Mari Holms, Holms Energy, LLC, and Bakken Resources, for civil conspiracy to commit the alleged tort of fraud and for breach of fiduciary duties. The court also awarded Allan Holms judgment against the same defendants for civil conspiracy to commit fraud, breach

of fiduciary duties and oppression of minority interest. CP 5265. Entry of those judgments was error. However, the trial court correctly refused to find that any damages were proximately caused by such alleged conspiracy, and therefore correctly declined to award any damages to either of the plaintiffs.

"To establish a civil conspiracy, [the plaintiff] must prove by clear, cogent and convincing evidence that (1) two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the conspiracy." *All Star Gas, Inc. v. Bechard*, 100 Wn. App. 732, 740, 998 P.2d 367 (2000). A third requirement is that "damage must be shown in a civil action based on a conspiracy. . .". *Platts v. Platts,* 73 Wn.2d 434, 438, 438 P.2d 867 (1968) quoting from *16 Am. Jur.* 2d *Conspiracy* §44 (1964).

Allan and Roil Energy failed to meet the burden of proving their civil conspiracy case, their evidence utterly failing to measure up to the clear, cogent and convincing test. "The test of the sufficiency of the evidence to prove a conspiracy is that the circumstances must be inconsistent with a lawful or honest purpose and reasonably consistent *only* with the existence of the conspiracy." *Corbit v. J.I. Case Co.,* 70

Wn.2d 522, 529, 424 P.2d 290 (1967). The Supreme Court in that case continued:

> "Again, assuming arguendo the existence of a valid over-all contract or individual contracts between the defendants and the plaintiffs, the defendants are not thereby precluded from communicating to each other their intention to repudiate or terminate their obligations thereunder."
> *Corbit,* 70 Wn.2d at 529.

In the present case, there was no need to assume that there was a contract, because there was none. Because the discussions among the three parties were simply that – discussions - any of the parties could walk away from the negotiations at any time.

Val decided not to continue negotiations with Allan, but chose to do a different deal with Jay. His actions were consistent with a lawful purpose. Val learned that Allan would have a majority interest in the entity being discussed. Jay learned and reminded Val about Allan's unsavory past business dealings. Val escaped the clutches of Allan before discussions went any farther by withdrawing from the negotiations before any binding agreement was made, and pursuing another avenue for utilizing his mineral interests.

And Allan failed to prove an essential element of civil conspiracy, as well as any tort, that he was damaged by the alleged civil conspiracy. The court so found by failing to award any damages to Allan or Roil

Energy. "In order to establish liability under a tort theory, the plaintiff must prove duty, breach, causation and *damages.*" (emphasis added). *Alexander v. Sanford,* 181 Wn. App. 135, 170, ¶72, 325 P.3d 341 (2014).

C. The Trial Court Erred in Finding Val and Mari Holms, Holms Energy, LLC and Bakken Resources, Inc. Liable for Breach of Fiduciary Duties and Oppression of Minority Interest.

In sections 5 and 6 of the First Amended Judgment for Plaintiffs, the court awarded judgment to Roil Energy, LLC and Allan Holms against Val, et. al., for breach of fiduciary duties and oppression of minority interests. CP 5265-66. The entry of these portions of the judgment was error, for the following reasons:

First, there is no Finding of Fact that Allan held a minority interest in Roil Energy, LLC. If Allan held any interest in Roil Energy, his percentage interest, if any, was never determined. Therefore, by the very definition of oppression of a "minority" interest, no judgment should have been entered on this claim.

Second, an essential element of breach of fiduciary duty was absent in this case. That necessary element is proof of damages proximately caused by the alleged breach of fiduciary duty. *Interlake Porsche & Audi, Inc. v. Bucholz,* 45 Wn. App. 502, 509, 728 P.2d 597 (1986). No damages were proven. This is borne out by the court's refusal

to award any damage amount for the claimed breach of fiduciary duty and/or oppression of minority interest.

And finally, this case involves three businessmen discussing a potential transaction. When Val got wind of what Allan was trying to do – gain control of Val's mineral interests – Val ceased negotiations and walked away from the transaction under discussion. This Val had a right to do, and cannot constitute "oppression" of Allan who never had any firm commitments that the terms of the proposed transaction would be agreed upon, or fulfilled. *Pacific Cascade Corp.*, 25 Wn. App. at 557.

D. The Trial Court's Award of Attorneys' Fees and Costs to the Plaintiffs Was Not Authorized by Nevada Revised Statute 86.489, Since That Statute is a Fee Sharing Statute, and the Court Erroneously Construed it as a Fee Shifting Statute.

Nevada Revised Statute (NSR) Section 86.489, which is one of Nevada's limited liability company's statutes, provides as follows:

> **"NRS 86.489 Expenses.** 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, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct the plaintiff to remit to the limited-liability company the remainder of those proceeds received by the plaintiff."

An analysis of this Nevada Statute, together with other identical or similar statutes from other jurisdictions, leads to the inescapable conclusion that no attorney's fees should have been awarded to the

plaintiffs. The Nevada Statute is a "fee sharing" statute, and not a "fee shifting" statute; and nothing in that statute authorizes a court to order an unsuccessful defendant to pay attorney's fees to a plaintiff in a derivative action.

No attorney's fees should have been awarded to the Plaintiffs. Therefore, this discussion will focus exclusively upon the inappropriateness of awarding those fees. The amount of those fees will not be addressed.

1. Standard of Review.

"Whether a party is entitled to an award of attorney fees is a question of law that we review *de novo*." *Bloor v. Fritz,* 143 Wn. App. 718, 746, ¶70, 180 P.3d 805 (2008).

2. No Award Of Attorney's Fees Should Have Been Made In Favor Of Allan Holms.

There are two plaintiffs in this case. The first is "Roil Energy, LLC, a Nevada limited liability company, by and through the derivative claim of Allan Holms. . ." CP 2200. In that derivative action, the plaintiff is Roil Energy, LLC, not Allan Holms. Allan Holms claims to be bringing the action on behalf of Roil Energy, LLC. CP 2201. This conforms with Nevada statute NRS 86.483 which provides in part:

> "The [derivative] action is brought in the right of the limited liability company to recover a judgment for that

> limited liability company, not in the right of the member bringing the action."

The second plaintiff is Allan Holms, individually. CP 2200.

The plaintiffs' claim for attorney's fees is based exclusively on Nevada statute NRS 86.489 quoted on the previous page. That statute, however, applies only to derivative actions brought on behalf of Nevada limited liability companies. Washington follows the American Rule which authorizes the award of attorney's fees only when expressly authorized by statute or by contract, or a recognized ground in equity. *Cosmopolitan Eng. Group v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 296 ¶8, 149 P.3d 666 (2006). None of those exceptions to the American Rule apply to Allan Holms individually.

The Nevada statutes are applicable only to the derivative action portion of this litigation, in which the plaintiff is Roil Energy, LLC, not Allan Holms. Since none of the exceptions to the American Rule apply to Allan Holms individually, it was error for the trial court to award attorney's fees and costs to Allan Holms.

3. Courts Have Interpreted Statutes Identical or Similar to Nevada's As Fee Sharing Statutes and Not as Fee Shifting Statutes.

An award of attorney fees against an unsuccessful defendant in a derivative lawsuit is not authorized. No Nevada case law has been found interpreting that state's derivative action attorney's fees statute. However,

Nevada is not the only jurisdiction with such a legislative enactment. Several other states have statutes virtually identical, or very similar, to NRS §86.489.

The essence of the judicial interpretations of statutes like Nevada's is that it is a "fee sharing" statute allowing a successful plaintiff suing derivatively on behalf of an entity to be reimbursed by the entity, and not a "fee shifting" statute authorizing an award of attorney's fees against an opposing party. Nothing in the Nevada statute authorizes a court to order an unsuccessful defendant to pay attorney's fees to a plaintiff in a derivative action.

The analysis of similar statutes begins with Arizona, which state's statute is virtually identical to NRS 86.489, and reads as follows:

> "A. 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, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct the plaintiff to remit to the limited liability company the remainder of those proceeds received by him." ARS 29-833(A).

In *Cal X-TRA, Et Al, Derivately on Behalf of and for the Benefit of 10K, LLC v. W.V.S.V. Holdings, LLC,* 229 Ariz. 377, 276 P.3d 11 (Ariz. 2012), the Arizona Supreme Court, noting that the above statute had yet to be interpreted by an Arizona appellate court, looked to cases from other

states involving similarly worded statutes for assistance in interpretation. The court concluded 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 73, ¶80. After referencing cases from other jurisdictions, the Arizona court concluded: "In other words, these cases treat the applicable statutes as fee-sharing statutes, and reject the proposition that such statutes authorize a fee award against the opposing party." (emphasis added). *Id.* Accordingly, the Arizona Supreme Court held that the trial court erred in awarding attorney's fees to the plaintiff pursuant to ARS §29-833(A). *Cal X-TRA,* 276 P.3d at 77, ¶83.

This concept is also enunciated in the New York decision of *Glenn v. Hoteltron Systems, Inc.*, 74 N.Y. 2d 386, 547 N.E. 2d 71, 74 (Ct. App. N.Y. 1989), wherein the court, in deciding a shareholder derivative lawsuit, stated that: "It is the general rule that, because a shareholders' derivative suit seeks to vindicate a wrong done to the corporation through enforcement of a corporate cause of action, any recovery obtained is for the benefit of the injured corporation." (Citations omitted).

The New York Business Corporation Law §626(e), in language very similar to the Nevada statute, provides that a successful plaintiff in a shareholder's derivative action may recoup legal expenses and attorney's fees from the proceeds of the judgment. That statute is set forth in full in Appendix O.

The New York court concluded that its statute ". . . does not authorize the imposition of such expenses on the losing party." Glenn, *547 NE.2d.* at 75. The court continued: "The basis for an award of attorneys' fees in a shareholders' derivative suit is to reimburse the plaintiff for expenses incurred on the corporation's behalf. Those costs should be paid by the corporation, which has benefited from the plaintiff's efforts and which would have borne the costs had it sued in its own right." (Citation omitted) *Id.*

Alaska is another state that has a derivative action statute, and a Civil Rule, similar to Nevada's regarding attorneys' fees. Alaska Statute 10.06.435(j) reads 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.

Alaska Civil Rule 23.1(j) is identical.

In *Jerue v. Millett*, 66 P.3d 736 (Alaska 2003), a shareholder derivative action, the Alaska court held that: "Civil Rule 23.1(j) is a fee-sharing rule. It requires the corporation benefited by a derivative suit to share the expense incurred by the plaintiff shareholders in achieving the benefit for the corporation. It reaches this result by requiring the corporation to reimburse the plaintiff shareholders." *Jerue,* 66 P.3d at 741. And further: "Because it 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." *Id.*

Washington courts have applied the same principle that if in a derivative action the court is authorized to award attorneys fees, those fees are not awarded against the defendant. In *Interlake Porsche & Audi, Inc. v Blackburn*, 45 Wn. App. 502, 522, 728 P.2d 597, 610 (1986), 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).

Therefore, following the reasoning of the courts of Washington, as well as the decisions from Arizona, New York and Alaska as noted above, the trial court's award of attorney's fees in this derivative action was not authorized against the defendants, Val Holms, et al. Such fees are only to be reimbursed to the partially successful plaintiff (Allan Holms) from the entity (Roil Energy, LLC) on whose behalf the derivative action was brought. The fact that Roil Energy has no assets with which to reimburse Allan Holms is of no consequence, because the derivative action brought by Allan conferred no benefit upon Roil Energy, LLC, and no benefit upon any of its members.

At the trial court level, Val presented to the court the analysis noted above whereby courts from several states have interpreted statutes virtually identical to Nevada's as being a fee-sharing and not a fee-shifting statute. CP 4826-32. In response, Allan offered only one case that took a contrary view, namely a decision from the Nebraska Supreme Court. CP 4986-89. Not only is that decision truly an outlier, but the Nebraska court made no analysis of whether the Nebraska statute was a fee-shifting or fee-sharing statute. The trial court, however, chose to ignore the well reasoned majority opinion as evidenced by the cases from Alaska, Arizona and New York, as well as Washington, and chose to apply the ruling in the Nebraska case without analysis. This is not the proper interpretation of

that Nevada statute and the award of attorney's fees made by the trial court was an error of law.

The trial court's erroneous interpretation of this Nevada statute completely ignored that portion of the statute which said that the court "shall direct the plaintiff to remit to the limited-liability company the remainder of those proceeds received by the plaintiff." The only logical interpretation of that sentence, as borne out by the cases cited above, is that there first must be "proceeds" from which attorney's fees could be paid, and the remainder remitted to the limited liability company. In the absence of such "proceeds", no attorney's fees can be awarded. By awarding the fees, the court negated a portion of the statute. "'Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.'" (Citation omitted). *State v. Roggenkamp,* 153 Wn.2d 614, 624 ¶16, 106 P.3d 196 (2005).

VII. CONCLUSION

Respondents Val and Mari Holms, Holms Energy, LLC, Toll Reserve Consortium, Inc. and Bakken Resources, Inc. respectfully request that this Court AFFIRM the Trial Court's: (1) dismissal of plaintiffs' claims for tortious interference of a prospective business opportunity; (2) dismissal of Roil Energy, LLC's cause of action against Toll Reserve

Consortium, Inc. for breach of contract; (3) dismissal of Allan Holms' causes of action against Val and Mari Holms, Holms Energy, LLC and Bakken Resources, Inc. for constructive trust-unjust enrichment; (4) dismissal of Allan Holms' causes of action against Val and Mari Holms, Holms Energy, LLC and Bakken Resources, Inc. for breach of contract and breach of the covenant of good and fair dealing; (5) dismissal of plaintiffs' causes of action for declaratory relief regarding the ownership of the McKenzie County mineral interests and the purported delivery of deeds thereto; and (6) decision not to award any damages to Roil Energy, LLC or Allan Holms.

Respondents/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; (2) paragraphs 7 and 8 which awarded Allan Holms attorney fees and

expenses; Provided, however, that as noted above, this court is requested to affirm the award of no damages ($0) in paragraphs 5 and 6.

RESPECTFULLY SUBMITTED this 22nd day of June, 2015.

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

BY: Frank J. Gebhardt

FRANK J. GEBHARDT, WSBA #4854
ROBERT F. GREER, WSBA #15619
Attorneys for Respondents Val and Mari Holms, Holms Energy, LLC, Toll Reserve Consortium, Inc., and Bakken Resources, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of June, 2015, I caused to be served a true and correct copy of the foregoing document to the following:

Carl Oreskovich Courtney Garcea Etter, McMahon, Lamberson, Clary & Oreskovich 618 W. Riverside, Ste. 210 Spokane, WA 99201	[ ] U.S. Mail [✓] 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 [✓] Hand Delivery [ ] Overnight Mail [ ] Facsimile [ ] Email

Suzanne Booth

FILED

JUN - 6 2014

SPOKANE COUNTY CLERK

SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

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,
vs.

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.

CAUSE NO. 12-2-01039-5

FIRST AMENDED AGT
JUDGMENT FOR PLAINTIFFS
1490378656 KB of

FINAL JUDGMENT SUMMARY

Pursuant to RCW 4.64.030, the following information should be entered in the Clerk's Execution Docket:

1. Judgment Creditors: **Allan Holms**

APPENDIX A

		Roil Energy, LLC, a Nevada limited liability company
2.	Money Judgment Debtors:	**Val and Mari Holms**, husband and wife, **Holms Energy, LLC**, a Nevada limited liability company, **Bakken Resources, Inc.**, a Nevada corporation
3.	Non-monetary Relief Awarded:	The Court grants declaratory relief and judgment declaring that the attempted dissolution of Roil Energy, LLC by Val Holms and Jay Edington was unlawful and was an integral part of their conspiracy to defraud Roil Energy, LLC. In additional the Court grants declaratory relief and judgment declaring that Allan Holms has proven his claims of fraud, breach of fiduciary duty, oppression of minority interest, and civil conspiracy, and that Roil Energy, LLC has proven its claims of fraud, breach of fiduciary duties, and civil conspiracy, thus rendering its derivative action successful, in part.
4.	Non-monetary Judgment Debtors:	**Val and Mari Holms**, husband and wife, **Holms Energy, LLC**, a Nevada limited liability company, **Bakken Resources, Inc.**, a Nevada corporation
5.	Total of Taxable Costs and Attorney Fees:	Expenses $13,362.58 Attorney Fees $399,570.50

6.	Judgment Creditor's Attorneys:	D. Roger Reed and Timothy J. Giesa of Reed & Giesa, P.S.
7.	Judgment Debtor's Attorneys:	Robert F. Greer and Frank J. Gebhardt of Feltman, Gebhardt, Greer & Zeimantz, P.S. and Wesley Paul of Paul Law Group

JUDGMENT

This matter was tried by the Court without a jury from November 4, 2013 to November 18, 2013, the Honorable Linda G. Tompkins presiding. Plaintiffs, Roil Energy, LLC, a Nevada limited liability company, by and through the derivative claim of its member, Allan Holms, and Allan Holms, individually, were represented by D. Roger Reed and Timothy, J. Giesa of Reed & Giesa, P.S. Defendants Toll Reserve Consortium, Inc., a Nevada corporation, renamed Holms Energy Development Corporation, a Nevada corporation, Val and Mari Holms, husband and wife, Holms Energy, LLC, a Nevada limited liability company, and Bakken Resources, Inc., a Nevada corporation, were represented by Robert F. Greer and Frank J. Gebhardt of Feltman, Gebhardt, Greer & Zeimantz, P.S., and Wesley Paul of Paul Law Group. Defendant Joseph ("Jay") Edington, who was represented by Carl Oreskovich of Etter, McMahon, Lamberson, Clary & Oreskovich, PC, was dismissed by Order entered by this Court on October 4, 2013.

The Court received the written exhibits and testimony offered by the parties, considered the pleadings filed in the action, and heard the argument of counsel. The Court entered Findings of Fact and Conclusions of Law on December 2, 2013, February 4, 2014 and May 16, 2014. Consistent with the Court's Findings of Fact and Conclusions of Law entered on December 2, 2013, February 4, 2014 and May 16, 2014, and in response to

subsequent motions, objections and proposed final judgments, the Court pursuant to CR 59(h) enters ~~the~~ this First Amended Judgment for Plaintiffs as follows:

1. Plaintiff Roil Energy, LLC's cause of action against defendant Toll Reserve Consortium, Inc. for breach of contract is dismissed with prejudice.

2. Plaintiff Allan Holms' causes of action against defendants Val and Mari Holms, Holms Energy, LLC, and Bakken Resources, Inc. for constructive trust-unjust enrichment are dismissed with prejudice.

3. Plaintiff Allan Holms' causes of action against defendants Val and Mari Holms, Holms Energy, LLC, and Bakken Resources, Inc. for breach of contract and breach of covenant of good faith and fair dealing are dismissed with prejudice.

4. Plaintiffs' causes of action for declaratory judgment declaring that neither Holms Energy, LLC nor Bakken Resources, Inc. can be or are bonafide purchasers for value without notice of Roil Energy, LLC's claim to title of the McKenzie County Mineral Interests, and declaring that defendant Toll Reserve Consortium, Inc. executed and delivered to Roil Energy, LLC for valuable consideration a deed for the McKenzie County Mineral Interests are dismissed with prejudice.

5. Plaintiff, Roil Energy, LLC, is awarded judgment against Defendants, Val and Mari Holms, husband and wife, Holms Energy, LLC, and Bakken Resources, Inc., for fraud, breach of fiduciary duties and civil conspiracy to commit those torts against Roil Energy, LLC, in the in the amount of $ 0 .

6. Plaintiff, Allan Holms, is awarded judgment against Defendants, Val and Mari Holms, husband and wife, Holms Energy, LLC, and Bakken Resources, Inc., for fraud,

breach of fiduciary duties, oppression of minority interest and civil conspiracy to commit those torts against Allan Holms, in the in the amount of $ 0 .

7. **Non-monetary Relief:** The Court hereby grants declaratory judgment declaring that the attempted dissolution of Roil Energy, LLC by Val Holms and Jay Edington was unlawful ineffective under Nevada law and was an integral part of their conspiracy to defraud Roil Energy, LLC. In additional the Court grants declaratory relief and judgment declaring that Allan Holms has proven his claims of fraud, breach of fiduciary duty, oppression of minority interest, and civil conspiracy, and that Roil Energy, LLC has proven its claims of fraud, breach of fiduciary duties, and civil conspiracy, thus rendering its derivative action successful, in part.

8. **Attorney Fees and Expenses:** Pursuant to the Findings of Fact and Conclusions of Law and Order entered by the Court on May16, 2014, derivative Plaintiff, Allan Holms, is hereby awarded reasonable expenses, including reasonable attorney fees, against the jointly and severally liable defendants, Val Holms, Holms Energy, LLC, and Bakken Resources, Inc., in the total amount of $ 412,933.08 consisting of $ 399,570.50 attorney fees and $ 13,362.50 expenses. This award shall be entered against Defendants Val Holms, Holms Energy, LLC and Bakken Resources, Inc., as a separate component of any judgment entered in this case. Derivative Plaintiff, Allan Holms, shall be entitled to the monetary amount of this award included in any judgment entered in this case. Any other proceeds awarded to Roil Energy, LLC by way of judgment shall be remitted by Plaintiff Allan Holms to Roil Energy, LLC.

9. Defendants' counterclaims are hereby dismissed with prejudice.

DATED this 6th day of JUNE, 2014.

THE HONORABLE LINDA G. TOMPKINS

NEVADA REVISED STATUTE 86.489

NRS 86.489 Expenses. 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, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct the plaintiff to remit to the limited-liability company the remainder of those proceeds received by the plaintiff.

(Added to NRS by 2001, 1386; A 2001, 3199)

APPENDIX B

FRAUD -- CONCLUSION OF LAW NO. 19:

In carefully worded communications, Val Holms made material representations of fact to Allan Holms, which were false – that Val was going to terminate his involvement in the Roil project and keep his minerals for his family rather than risking the uncertainties of the reverse merger. Val's purported retention of the minerals was material to Allan's interest. In truth, Val was intending to continue participating in a reverse merger with Jay Edington involving a different shell, ("Plan B") and Val Holms knew his representation to Allan was false. In order to be able to move forward with Plan B without Allan's interference, Val intended that Allan act on the representation and walk away from the project.

APPENDIX C

FRAUD - CONCLUSION OF LAW NO. 20

Ignorant of the falsity, Allan relied on Val's stated intentions and communicated his understanding that the efforts were ended. Although a close question given Allan's veiled admonishment to Val not to utilize proprietary information from the project and Val's heated rebuke, sufficient evidence supports Allan's right to rely, particularly given the joint communications from Val and Jay to Allan. Finally, as a result, Allan lost the opportunity to participate in the project as it was then initially configured.

APPENDIX D

CIVIL CONSPIRACY – CONCLUSION OF LAW NO. 24

The ruse perpetrated by Val Holms and Jay Edington on Allan Holms to cause him to abandon his participation in the capitalization program involving Roil Energy, LLC, as well as the attempted dissolution of Roil Energy, LLC, and transfer to Holms Energy LLC of the minerals originally deeded to Roil but not recorded are, combined, sufficient evidence of an agreement by Val Holms and the remaining defendants to accomplish the conspiracy.

APPENDIX E

DECLARATORY RELIEF – CONCLUSION OF LAW NO. 28

Nonetheless a justiciable controversy exists, between real parties, adversarial in nature with sufficient evidence of a direct loss suffered by Allan Holms.

APPENDIX F

CONCLUSION OF LAW NO. 31.a.

The fraud, civil conspiracy, breach of fiduciary duties and minority shareholder oppression by unlawful attempted dissolution and corporate asset misrepresentation claims have been proven, rendering the shareholder derivative action successful in part.

APPENDIX G

CONCLUSION OF LAW NO. 31.b.

As co-conspirators, Val Holms, Holms Energy, LLC, and Bakken Resources are each jointly and severally liable for the tortious acts of Val Holms and Jay Edington for fraud, breach of fiduciary duties and oppression of minority interest.

APPENDIX H

CONCLUSION OF LAW NO. 31.c.

Under Nevada Revised Statutes 86.489, plaintiffs are entitled to "reasonable expenses, including reasonable attorney's fees".

APPENDIX I

SECOND ADDITIONAL CONCLUSION OF LAW NO. 5

Plaintiff Allan Holms, who brought the derivative action on behalf of the Nevada LLC, Roil Energy, in which action he was partly successful, is entitled to recover attorney fees and expenses against Defendants, Val Holms, Holms Energy, LLC, and Bakken Resources, Inc. jointly and severally, based upon NRS §86.489.

APPENDIX J

SECOND ADDITIONAL CONCLUSION OF LAW NO. 11

Plaintiffs were partially successful on the derivative action, which is a relevant consideration in determining the amount of a reasonable attorney fee that can be recovered under NRS §86.489.

APPENDIX K

SECOND ADDITIONAL CONCLUSION OF LAW NO. 12

Compensable fees of $399,570.50 and expenses of $13,362.58 are reasonable in number of hours expended and in scope of work related to successful claims in the derivative action.

APPENDIX L

SECOND ADDITIONAL CONCLUSION OF LAW NO. 13

NRS §86.489 allows attorney fees even where nothing is "received by Plaintiff as a result of a judgment, compromise or settlement."

APPENDIX M

SECOND ADDITIONAL CONCLUSION OF LAW NO. 14

Here, the Plaintiff was not successful on damages claims, but was successful through declaratory relief relative to fraud, civil conspiracy, breach of fiduciary duties and minority shareholder oppression by unlawful attempted dissolution and corporate asset misrepresentation.

The Court concludes, based upon the Nevada Statute, the facts and circumstances of this case, including Plaintiffs' partial success in the derivative action, Plaintiff is entitled to recover attorney fees pursuant to NRS §86.489 in the amount of $399,570.50 and litigation expenses in the amount of $13,362.58 against Defendants, Val Holms, Holms Energy, LLC, and Bakken Resources, Inc., jointly and severally.

APPENDIX N

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 O