73448-2

No. 73448-2-I

COURT OF APPEALS FOR THE STATE OF WASHINGTON,
DIVISION I

JAY FRIET, an individual,

Appellant/Plaintiff,

v.

KATHERINE GAISER, an individual; GUARDIANSHIP SERVICES OF SEATTLE, a non-profit organization; LANDON ENTERPRISES, LLC, a limited liability company; and CAROL GAISER, an individual for the purpose of petitioning to appoint a guardian,

Respondents/Defendants.

BRIEF OF RESPONDENTS CAROL GAISER, KATHERINE GAISER, AND GUARDIANSHIP SERVICES OF SEATTLE

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I. INTRODUCTION

This is a lawsuit between family members, a family LLC, and the court-appointed trustee of a family trust. Respondent Landon Enterprises, LLC ("the LLC") is a member-managed limited liability company. It was formed in 2006 by Respondent Carol Gaiser and her sister Marilyn Landon to hold and manage rental real estate. The original LLC members were Carol, Marilyn, and the Verah Landon Trust ("the Trust"), of which Carol and Marilyn were the only beneficiaries.

Appellant Jay Friet is Marilyn's son. After Marilyn's death in 2007, Mr. Friet inherited Marilyn's financial interest in the LLC, but not her membership interest. This gave Mr. Friet tax advantages based on a lack of control over the LLC, but it also meant he had *no right* to participate in the LLC governance. By law, the only way Mr. Friet could be involved in the LLC's governance was if the members, Respondents Carol Gaiser and the Trust, consented in writing to admitting him as a member, something they have not done.

On February 11, 2015 and in a separate action, a King County Superior Court Commissioner appointed Respondent Guardianship Services of Seattle ("GSS") to be the trustee to the Trust. Although Carol now has a form of dementia, she gave a durable power of attorney to her daughter, Respondent Katherine Gaiser, years ago. Since GSS's

appointment as trustee, GSS and Carol (who acts through Katherine as her power of attorney) operate the family LLC.

On March 3, 2015, not long after GSS's appointment as trustee, Mr. Friet initiated the present action. He sued Carol Gaiser, his now 78-year old aunt and the Trust's sole beneficiary; Katherine Gaiser, his cousin and Carol's daughter; GSS, the court-appointed trustee; and the LLC itself. With this lawsuit, Mr. Friet seeks to interfere with the LLC's governance, even though he is not a member. Mr Friet seeks declaratory and injunctive relief, not about his own financial interest as a non-member transferee, but about the members' governance interests in the LLC.

The interests of LLC members are not personal or direct for Mr. Friet, however, so he has no standing to question those interests or to ask the court to interpret them. Such claims are necessarily derivative claims regarding harm to the LLC, which he cannot assert as a non-member.

Mr. Friet also brought a cause of action for "guardianship" over Carol, seeking to have her dissociated as an LLC member. First, Mr. Friet never actually filed a guardianship petition nor did a guardianship petition ever go before the trial court. Second, "guardianship" is not a cause of action in Washington. More importantly, it is not a vehicle for gaining legal advantage over an alleged incapacitated person (as that term is used in the guardianship statute), which here is his elderly aunt. In any event,

Mr. Friet's Amended Complaint fails to meet the statutory requirements of a valid guardianship petition under RCW 11.88.030.

The trial court recognized these glaring legal deficiencies in Mr. Friet's claims and properly dismissed them on summary judgment. This court should affirm the trial court's order.

II. ISSUES PRESENTED

Carol, Katherine, and GSS assign no error to the trial court's proper decision to grant summary judgment in their favor. They also disagree with Mr. Friet's statement of issues. This appeal presents three issues, which are more properly stated as follows:

1. Whether the trial court correctly dismissed Mr. Friet's claims for injunctive and declaratory relief, where (1) he lacks standing to seek court interpretations of and adjudications about the interests of *LLC members* when he is *not an LLC member*, and (2) his Amended Complaint does not seek injunctive or declaratory relief as to his *own* rights as a non-member transferee.

2. Whether the trial court correctly dismissed Mr. Friet's "guardianship" cause of action, where (1) "guardianship" is not a cognizable cause of action in Washington, and (2) his Amended Complaint failed to meet the statutory requirements of a valid guardianship petition under RCW 11.88.030.

3. Whether the trial court correctly used its discretion to deny Mr. Friet's CR 56(f) motion for a continuance.

III. STATEMENT OF THE CASE

This appeal is based on the trial court's order granting summary judgment, so Carol, Katherine, and GSS present the alleged facts in the light most favorable to Mr. Friet. However, they do not concede or admit that these are the facts for any other purposes.

A. The Parties Involved in This Litigation.

Mr. Friet is the son of an original LLC member, Marilyn Landon. After Marilyn died in 2007, Mr. Friet inherited her financial interest in the LLC and also her half of the financial interest held by the Verah Landon Trust. Clerk's Papers (CP) 594, 656. He now owns a 50% financial interest in the LLC, but is not an LLC Member.[1] CP 594, 608-09, 656. As an assignee of his mother's interest, Mr. Friet is defined as a "Transferee" under the Operating Agreement of Landon Enterprises, LLC ("LLC Agreement"). CP 611. For a period of time, the LLC also employed Mr. Friet as a property manager. CP 565, 595.

The LLC was formed in 2006 by sisters, Marilyn Landon and Carol Gaiser, and the Verah Landon Trust, to own and operate certain

[1] Mr. Friet's membership status in the LLC is mixed question of fact and law.

commercial property in the Seattle area. CP 594. At that time, the LLC interests were as follows:

	Governance Units	Financial Units
Verah Landon Trust	45	4,455
Carol Gaiser	27.5	2,722.5
Marilyn Landon	27.5	2,722.5

CP 613-14. After Marilyn's death in 2007, she was dissociated as a member of the LLC, and the Trust distributed her half of its interest to Mr. Friet. CP 594, 607, 656, 658.

Carol Gaiser is now the sole beneficiary of the Trust. The LLC's current Members are Carol Gaiser and the Trust, and they jointly own all of the voting Governance Units and 50% of the Financial Units.

GSS is the court-appointed trustee for the Verah Landon Trust and therefore, a Member of the LLC. CP 770-71. Jeff Wilson was the original trustee and the original manager for the LLC, but he is no longer filling either role. CP 597, 726. The Trust owns 22.5 Governance Units and 2,227.5 Financial Units in the LLC. CP 755.

Carol Gaiser was an original Member of the LLC and remains a Member, along with GSS as trustee for the Trust. CP 594. She is Mr. Friet's aunt.

Carol has a form of dementia. On May 9, 2013, Carol appointed her daughter, Katherine Gaiser, as her attorney-in-fact to assist her with financial affairs and other matters. CP 868. The durable power of attorney granted Katherine broad authority to act on Carol's behalf. Under that authority, Katherine has participated in LLC affairs on Carol's behalf. CP 562. Although Mr. Friet contends his aunt is legally incapacitated (and therefore must be dissociated as an LLC member), no court has made this legal determination. And because Katherine assists Carol as necessary, there is no legal basis for imposing a guardianship. Carol continues to own 27.5 Governance Units and 2,722.5 Financial Units in the LLC, just as she has since she formed the LLC with her sister. CP 614.

As stated above, Katherine Gaiser is Carol's daughter and Mr. Friet's cousin. Katherine holds a durable power of attorney to assist her mother and act on her behalf with respect to financial matters, including protecting her mother's interests in the LLC. CP 562. Katherine personally holds no financial interest in the LLC but has voted on LLC matters as Carol Gaiser's proxy. CP 595, 565.

B. The Operating Agreement of Landon Enterprises, LLC.

Several sections of the LLC's Operating Agreement (or LLC Agreement) are pertinent to the issues raised in Mr. Friet's appeal.

The parties who signed the LLC Agreement were the Verah Landon Trust, Carol Gaiser, and Marilyn Landon. CP 603 (Section 1.01). They were the original LLC members. The dissociation of a member occurs upon either a member's death or "the entry of an order by a court of competent jurisdiction adjudicating such Member incapacitated...." CP 607 (Section 2.14).

A "Transferee" is a person who owns at least one Governance or Financial Unit but who has not been admitted to the Company as a Member. CP 611 (Section 2.42).

Under the LLC Agreement, "majority" means "the vote or consent of the Members who own ... more than fifty percent (50%) of the total Units then outstanding and entitled ... to vote...." CP 608 (Section 2.21). "Majority-in-Interest Consent" means "the vote or consent, in writing, of Unit Holders who own, in the aggregate, more than fifty percent of the total outstanding Units ...." CP 608 (Section 2.22). "For any meeting of the Members, a quorum consists of a Majority of the Governance Units." CP 629 (Section 10.08).

Section 12.05(a) of the LLC Agreement concerns admission of a Transferee as a Member, and provides in pertinent part:

> **No assignee or transferee shall become a Member unless and until all Members in writing consent to the admission of such assignee or transferee as a Member,**

> which consent may be unreasonably withheld in the absolute discretion of the Members. Provided that, if the Members do not then own at least fifty percent (50%) of the Units held by all unit holders other than the assignee or transferee, Majority-in-Interest Consent is required....

CP 632 (emphasis added).

Section 12.05(d) concerns the rights of a Transferee who is not admitted as a Member:

> Further, unless and until a Transferee has been admitted to the company as a Member, such Transferee shall not have any power to exercise any right or powers of a Member and shall not be entitled to vote with respect to such Governance and/or Financial Units, except to the extend provided in Sections 12.05(a), 13.03, where Majority-in-Interest Consent of all Unit Holders is required. A Transferee shall, however, be entitled to share in such profits and losses, to receive such distributions, and to receive such allocation of income, gain, loss, deduction, credit or other items to which the assignor was entitled with respect to the Units assigned.

CP 633.[2]

C. Mr. Friet Was Never Admitted as a Member of Landon Enterprises, LLC.

Although Mr. Friet repeatedly suggests that he is a member of the LLC, *see* Brief of Appellant at 2 n.2, 3-5, his legal status is a mixed question of fact and law governed by the Washington Limited Liability Company Act ("LLC Act"), chapter 25.15 RCW, and the LLC's Operating

[2] There is no claim made about, and no evidence of, an LLC action requiring Majority-in-Interest Consent under either of these two sections. Section 13.03 requires Majority-in-Interest Consent to dissolve the company within 90 days after Dissociation of a Member. CP 634.

Agreement. Mr. Friet has presented zero evidence that he satisfies these specific legal standards. Nor can there be any reasonable inference that he is a member of the LLC, even in the light most favorable to him.

For years, Mr. Friet has known there is no written consent admitting him as a Member. In an email dated August 29, 2013 discussing the transfer of Marilyn Landon's financial interest in the LLC to Mr. Friet, the LLC's attorney informed then-manager, Jeff Wilson, that the transfer document did not make Mr. Friet a member of the LLC. CP 846. The attorney further explained that listing Mr. Friet as a member on the annual license filed with the state also did not make him a member. *Id.* The attorney then prepared a "Consent to Admission" and sent it to Mr. Friet and Mr. Wilson. CP 851. When Mr. Wilson asked Katherine, acting as attorney-in-fact for Carol, to sign this "Consent to Admission," Katherine did not sign it. CP 562, 566-68.

Mr. Friet did not submit a declaration from either Mr. Wilson or Mr. Austin disputing these documents. Mr. Friet did not submit any document that could be construed by the trial court as Carol's written consent admitting him as a member of the LLC. Nor did he provide any written designation of the effective date of his alleged membership, which the LLC is required to provide to newly-admitted members pursuant to Section 12.05(e) of the LLC Agreement. CP 633.

In support of their motion for summary judgment, Respondents submitted a declaration from Katherine Gaiser. Katherine states that she is "not aware of any document signed by the Members of Landon Enterprises, LLC which admits Jay Friet as a Member of the company." CP 562-63. Carol and Katherine's attorney also submitted a declaration testifying that he had reviewed the records of the LLC, and that the records did not include any written consent by the members admitting Mr. Friet as a member. CP 842.

D. Procedural History.

On November 10, 2014, Carol, acting through Katherine under the durable power of attorney, initiated an action in King County Superior Court seeking relief under Washington's Trust and Estate Dispute Resolution Act ("TEDRA"), RCW 11.96A *et seq.* CP 763-76. That action is Case No. 14-4-06451-6 SEA ("the TEDRA action"), and it is separate from the present action. *Id.* The TEDRA petition was filed because, among other reasons, Mr. Wilson failed to take certain actions relating to the LLC when he was trustee of the Trust. *Id.* Mr. Friet unsuccessfully attempted to intervene in that action.

On December 17, 2014, Marilyn's interest in the LLC were transferred to her son, Mr. Friet. CP 158, 528.

On February 11, 2015, King County Superior Court Commissioner, Nancy Bradburn-Johnson, entered an order in the TEDRA action authorizing Mr. Wilson's resignation as trustee and appointed GSS as successor trustee. CP 300-01.

On March 3, Mr. Friet initiated the present action. CP 1-12. At first, he sued only Katherine seeking declaratory judgment and injunctive relief. CP 1-12.

On March 6, Mr. Friet unsuccessfully moved for a temporary restraining order, requesting that the trial court prevent Katherine from using Carol's financial power of attorney with regard to the LLC's affairs. CP 139, 150, 372-75.

On March 12, Mr. Friet filed an Amended Complaint for declaratory judgment, injunctive relief, and appointment of a guardian for Carol. CP 376-90. For the first cause of action, Mr. Friet claimed:

> The LLC, acting through Katherine's misuse of Carol's power of attorney and with the apparent consent of GSS, has in ways including those outlined above *failed to abide by its own Operating Agreement.*

CP 388 at ¶4.9 (emphasis added). Based on these claims, Mr. Friet then sought a declaratory judgment, declaring Katherine's durable power of attorney invalid as to LLC affairs:

> [Mr. Friet] seeks a declaratory judgment that Katherine cannot use Carol's power of attorney for financial matters

> to conduct LLC affairs including, *but not limited to*: (1) giving herself general proxies, or one or more rolling purportedly revocable proxies; (2) calling special meetings; (3) designating the purposes for such meetings; (4) removing the LLC Manager or appointing new Managers; (5) appointing or removing any property manager; and/or (6) dissolving the LLC.

CP 389 at ¶4.11 (emphasis in original).

Although Mr. Friet does not plead a separate cause of action for injunctive relief, his prayer for relief requests preliminary and permanent injunctions, specifically "enjoining Defendant [Katherine Gaiser] from interfering with the affairs of Landon Enterprises LLC until, if at all, she acquires any actual ownership interest in it." CP 390.

On April 2, Carol and Katherine moved for summary judgment; GSS joined the motion. CP 548-60, 1025-29.

On April 16, Mr. Friet served notice of his intent to take a videotaped deposition of 78-year old Carol. CP 808-09. On April 24, Carol and Katherine moved for a protective order postponing the deposition of Carol pending findings in the separate TEDRA action. CP 856-63.

On April 29, GSS answered Mr. Friet written discovery propounded on GSS. Contrary to Mr. Friet's assertion, GSS, Carol, and Katherine did not "evade" discovery. Brief of Appellant at 2 n.2, 21, 41,

44-45. Nor did GSS ever "agree to a discovery schedule." Brief of Appellant at 44-45; CP 968-69, 975, 1002-03.

On April 30, the trial court held oral argument on the motion for summary judgment. Report of Proceeding for April, 30, 2015 (RP) 1. After carefully considering the arguments of counsel, the trial court entered an order granting summary judgment, dismissing all of Mr. Friet's claims. CP 1008-09.

Mr. Friet now appeals that dismissal.

IV. ARGUMENT

A. The Standard of Review Is De Novo, and the Record Supports Summary Judgment of Dismissal as a Matter of Law.

This Court reviews de novo a trial court's order granting summary judgment. *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 350, 144 P.3d 276 (2006). Evidence is viewed in the light most favorable to the nonmoving party. *Id.*

Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A genuine issue is one upon which reasonable people may disagree. *Youker v. Douglas Cnty.*, 178 Wn. App. 793, 796, 327 P.3d 1243 (2014). Factual disputes must be material to survive summary judgment. A "material fact" is one on which the outcome of the litigation

depends. *Morgan v. Kingen*, 166 Wn.2d 526, 533, 210 P.3d 995 (2009); *Owen v. Burlington N. & Santa Fe R.R. Co.*, 153 Wn.2d 780, 789, 108 P.3d 1220 (2005).

If the moving party shows the absence of a genuine issue of material fact, then the burden shifts to the nonmoving party to set forth specific facts that would raise a genuine issue of material fact for trial. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989); *see, also,* CR 56(c). If the nonmoving party fails to show an issue of material fact as to any element of a claim, then summary judgment is appropriate. *Young*, 112 Wn.2d at 225. "The nonmoving party may not rely on speculation or argumentative assertions that unresolved factual issues remain." *Marshall v. Bally's Pacwest, Inc.*, 94 Wn. App. 372, 377, 972 P.2d 475 (1999).

Mr. Friet takes issue with specific language in the trial court's order granting summary judgment. Brief of Appellant at 22, 28 n.10. But this Court engages in a de novo review on summary judgment, so the trial court's findings or explanation in support of its ruling make no difference on appeal. *Chelan Cnty. Deputy Sheriffs' Ass'n v. Chelan Cnty.*, 109 Wn.2d 282, 294 n.6, 745 P.2d 1 (1987); *Duckworth v. City of Bonney Lake*, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978); *Thongchoom v. Graco*

Children's Prods., Inc., 117 Wn. App. 299, 309, 71 P.3d 214 (2003), *review denied*, 151 Wn.2d 1002, 87 P.3d 1185 (2004).

This Court may affirm the trial court on any theory or basis that the record supports. *Coppernoll v. Reed*, 155 Wn.2d 290, 296, 119 P.3d 318 (2005); *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 493, 933 P.2d 1036 (1997). The record on review here clearly supports the trial court's order granting summary judgment as to all of Mr. Friet's claims.

B. Mr. Friet Is Not a Member of the LLC, So He Lacks Standing to Seek a Declaratory Judgment as to Its Governance Rights.

This Court should affirm the trial court's ruling that Mr. Friet lacks standing to seek declaratory relief concerning the LLC governance because he is not a member.

1. Mr. Friet Was Not Admitted as a Member of the LLC.

Mr. Friet is not a member of the LLC. Under the LLC Act, a "member" is "a person who has been **admitted** to a limited liability company as a member as provided in RCW 25.15.115 and who has not been dissociated from the limited liability company." RCW 25.15.005(8) (emphasis added). In turn, RCW 25.15.115(2)(b) provides that, as an assignee of an LLC interest, Mr. Friet can become a member only if the conditions of RCW 25.15.260(1) are met. Under that statute, an assignee of an LLC interest may become a member upon:

(1) "**The approval of all of the members** of the limited liability company other than the member assigning his or her limited liability company interest," or

(2) "**Compliance with any procedure** provided for in the limited liability company agreement."

RCW 25.15.260(1)(a)-(b) (emphasis added).

Here, the LLC Agreement specifically provides what type of "approval" is necessary to make an assignee a member. Under section 12.05(a), no assignee or transferee shall become a member "unless and until **all Members in writing consent to the admission** of such assignee or transferee as a Member, which consent may be unreasonably withheld in the absolute discretion of the Members." CP 632 (emphasis added). The only way Mr. Friet could have become a Member was by the written consent of the members, Carol Gaiser and the trustee of the Verah Landon Trust.

That written consent does not exist. Katherine Gaiser filed a declaration that she is "not aware of any document signed by the Members of Landon Enterprises, LLC which admits Mr. Friet as a Member of the company," even though she is attorney in fact for her mother, Carol Gaiser, and is "intimately involved" in her mother's financial affairs. CP 562-63. The Respondents also submitted counsel's declaration that he had reviewed the records of Landon Enterprises, LLC, and that the records did

not include any written consent by the members admitting Mr. Friet as a member. CP 842.

Mr. Friet has known since 2013 that no written consent admitting him as a Member exists. In an email dated August 29, 2013 discussing the transfer of Marilyn Landon's financial interest in the LLC to Mr. Friet, then LLC attorney, Timothy Austin, informed then manager, Jeff Wilson, that the transfer document did not make Mr. Friet a member of the LLC. CP 846. The attorney further explained that listing Mr. Friet as a member on the annual license filed with the state also did not make him a member. CP 846.

Mr. Austin subsequently prepared a "Consent to Admission" that he sent to both Mr. Friet and Jeff Wilson to review. CP 851. Mr. Wilson asked Katherine, acting as Carol's attorney-in-fact, to sign this "Consent to Admission" to make Mr. Friet a member of the LLC. **Katherine refused to do so**. CP 562, 566-68.

Once the Respondents met their initial showing on summary judgment that Mr. Friet was not a member, the burden then shifted to him to produce evidence of written consent by each of the existing members to his admission. Mr. Friet failed to meet this burden. Mr. Friet did not submit any document stating that the members consented to his admission as a member. Nor did he provide any written designation of the effective

date of his alleged membership, which the LLC managers are required to provide pursuant to Section 12.05(e) of the LLC Agreement. CP 633.

Instead, Mr. Friet relies on:

(1) the annual license forms filed with the State, which mistakenly list him as a member, even though the LLC attorney informed the then-LLC manager, Jeff Wilson, that these forms did not make Mr. Friet a member under the LLC agreement (CP 664-65);

(2) two emails from Graham Gaiser, whom was Carol's husband and not an LLC member, suggesting that the LLC's annual meeting be held at a time when Mr. Friet, whom was then employed as the LLC's property manager for its rental properties, could attend (CP 660, 662); and

(3) a 2010 email from Carol stating that she had received an inquiry whether the LLC's apartments were for sale and that she had responded that they were not. CP 251.

These documents do not create an issue of fact whether all members consented in writing to admit Mr. Friet as an LLC member. The emails do not even mention the topic of admission to membership. The state license forms were signed by Jeff Wilson in his capacity as LLC manager, not in his "member" capacity as trustee of the Trust. Notably, Mr. Friet did not submit Mr. Wilson's sworn statement that Mr. Wilson intended these forms act as the Trust's written consent to admitting Mr.

Friet as an LLC member. Similarly, there is no evidence that Carol Gaiser, the only other member, reviewed these filings and intended them to act as her written consent to admitting Mr. Friet as a member.

Mr. Friet also claims that he has standing to challenge LLC governance because he lost his property management job for the LLC (along with his salary and health insurance). Brief of Appellant at 25. To be clear, that job had nothing to do with his status as a non-voting unit-holder in the LLC. And Mr. Friet cites no authority that a terminated employee somehow obtains standing to seek a declaratory judgment against his or her former bosses when "financial interests are at stake." *See id.*

Even with all of the evidence viewed in the light most favorable to Mr. Friet, he still failed to raise a *genuine* issue of material fact as to his membership status. The trial court correctly determined that he was not a member of the LLC.

2. As a Non-Member, Mr. Friet Has No Personal or Direct Interest in How LLC Members Govern the LLC.

Under the Uniform Declaratory Judgment Act ("UDJA"), Washington courts may "declare rights, status and other legal relations," including "any question of construction or validity arising under ... contract." RCW 7.24.010 -.020. But not just anyone can seek a court

declaration about contractual interests; the plaintiff must have standing to do so. "The standing doctrine prohibits a litigant from raising another's legal rights." *Walker v. Munro*, 124 Wn.2d 402, 419, 879 P.2d 920 (1994); *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake,* 150 Wn.2d 791, 802, 83 P.3d 419 (2004). In order to have standing, a plaintiff must show, among other things, "a **personal injury** fairly traceable to the challenged conduct and likely to be redressed by the requested relief." *High Tide Seafoods v. State,* 106 Wn.2d 695, 702, 725 P.2d 411 (1986) (emphasis added).

"Inherent in the justiciability determination is the traditional limiting doctrine of standing." *Branson v. Port of Seattle*, 152 Wn.2d 862, 877, 101 P.3d 67 (2004). The *Branson* Court explained:

> [T]he UDJA allows for an interested person to have any question arising under the validity of a contract determined, so long as the UDJA's underlying requirements are met. In order to have standing to seek declaratory judgment under the act, a person must present a justiciable controversy:
>
> "(1) ... **an actual**, present and existing **dispute**, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) **which involves interests that must be direct and substantial**, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive."

Id. (emphasis added and citation omitted). Similarly, in *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 83 P.3d 419 (2004), the court held:

> To establish harm under the UDJA, a party must present a justiciable controversy based on allegations of harm **personal to the party** that are substantial rather than speculative or abstract. This statutory right is clarified by the common law doctrine of standing, which prohibits a litigant from raising another's legal right.

Grant Cnty., 150 Wn.2d at 802 (emphasis added and citations omitted).

Mr. Friet's amended complaint did not ask the trial court to declare what ***his*** rights were as a non-member transferee under the LLC Operating Agreement.[3] CP 389. Instead, Mr. Friet sought a declaration that Katherine Gaiser "cannot use Carol Gaiser's financial power of attorney to interfere with the affairs of Landon Enterprises, LLC." CP 389; *see* Brief of Appellant at 25-26, 39 ("Through this action, Appellant sought to adjudicate whether Katherine's conduct violates the Agreement.") Mr. Friet has no standing to have a court decide Carol's rights or the validity of Katherine's power of attorney to exercise Carol's rights **because those rights are not personal to Mr. Friet**. *See Grant Cnty.*, 150 Wn.2d at

[3] In his opening brief, Mr. Friet now asserts that he may also seek declaratory relief as to other topics regarding the LLC Agreement and LLC governance—topics that are nowhere to be found in his Amended Complaint. *Compare, e.g.*, Brief of Appellant at 25-26, 32 *with* CP 389-90. Those new "issues" significantly exceed the scope of review on appeal and should not support a reversal of the trial court's order granting summary judgment. RAP 2.5(a).

802; *High Tide Seafoods,* 106 Wn.2d at 702. Put another way, those rights are not "direct and substantial" *for him*, no matter how much he contests them. *Branson*, 152 Wn.2d at 877.

Nevertheless, Mr. Friet argues that his declaratory claim about Carol's rights and Katherine's power of attorney is "direct" because he has a 50% ownership in the LLC. *See* Brief of Appellant at 26, n.9. He is mistaken. While Mr. Friet has every right to resolve questions about his *own* interests, Mr. Friet does not do so in this case. CP 389.

Because Mr. Friet is not an LLC member, he has no rights of governance, and he cannot impede LLC members who do have those rights. Here, it is Mr. Friet - not Katherine or Carol - who is interfering with the affairs of the LLC. The trial court correctly dismissed his claim for declaratory relief for lack of standing.

3. As a Non-Member, Mr. Friet Cannot Bring Claims Concerning the Governance of an LLC.

When someone other than the LLC brings claims concerning governance of an LLC, mismanagement of the LLC, breaches of fiduciary duties to the LLC, or failure to follow LLC policies by LLC managers and members, such claims are all necessarily derivative claims brought *on behalf of the LLC*. It is inherently the right of the LLC, as an entity, to have its policies followed and to be properly managed. **However, only**

members can bring derivative suits on behalf of an LLC. RCW 25.15.370; RCW 25.15.375; *see Nw. Wholesale, Inc. v. Pac Organic Fruit, LLC*, 183 Wn. App. 459, 477, 334 P.3d 63 (2014), *aff'd*, 184 Wn.2d 176, 357 P.3d 650 (2015) ("To bring a derivative claim on behalf of a limited liability company, the plaintiff must be a member at the time of bringing the action.")

Courts have repeatedly recognized that these types of claims are derivative. For example, in *Nw. Wholesale*, , claims brought by a minority member of an LLC alleging mismanagement by other members were derivative:

> Shirley and Harold Ostenson also bring a derivative action, on behalf of Pac Organic against Greg Holzman and his companies, GHI, and Total Organic Fruit, LLC (Total Organic). The derivative action alleges Holzman and his companies mismanaged Pac Organic.

Nw Wholesale, 183 Wn. App. at 464. The court describes the derivative claim as one "for mismanagement of the limited liability company." *Id.* at 477.

Similarly, in *Sound Infiniti, Inc. v. Snyder*, 145 Wn. App. 333, 186 P.3d 1107 (2008), a minority shareholder in closely-held corporations sued the majority shareholders "in both his individual capacity and derivatively as a shareholder of the corporations" alleging that the majority shareholders "'engaged in oppression' of him as a minority

shareholder, converted corporate assets, otherwise breached their fiduciary duties." 145 Wn. App. at 339-40. Among other things, the minority shareholder claimed as damages his loss of perquisites. This Court ruled that these claims were derivative, and that loss of perquisites incident to shareholder status did not give rise to independent personal claims:

> We also affirm the trial court's ruling that most of Pisheyar's other stated claims were derivative of his shareholder status and that Pisheyar thus **lost standing to pursue those claims when he ceased to be shareholder**. Because the trial court erred, however, by ruling that Pisheyar could maintain independent, personal claims arising out of the loss of in kind "perquisites" to which he asserted an entitlement as an incident of his status as a shareholder, we reverse that ruling.

145 Wn. App. at 337 (emphasis added).

In *Donlin*, one of two shareholders of a corporation brought certain claims that this Court characterized as derivative:

> "[Defendant shareholder] has breached his fiduciary duties to [the corporation] and its Shareholders, including Plaintiff Donlin, by engaging in self-dealing, by usurping a corporate opportunity, by exposing [the corporation] to liability, and by acting oppressively and in bad faith in the ways alleged in the amended complaint."

Donlin v. Murphy, 174 Wn. App. 288, 292, n.4, 300 P.3d 424 (2013).

Mr. Friet also cites *In re F5 Networks, Inc.*, 166 Wn.2d 229, 207 P.3d 433 (2009), a shareholder derivative suit brought against "current and former officers and directors of F5." The minority shareholder asserted

securities violations and also "violations of the corporation's own policies." 166 Wn.2d at 233-34. While the issue in that case concerned whether a demand for corporate action must precede the filing of a derivative action, the court did not question that the claims made were derivative in nature.

Only (1) an LLC, or (2) a member bringing a derivative action on behalf of the LLC, has standing to seek declaratory relief relating to the LLC's rights. This was the Alabama Supreme Court's holding in *Carey v. Howard,* 950 So.2d 1131 (Ala. 2006).[4] In *Carey*, members of an LLC brought a declaratory judgment action challenging the validity of an option contract entered into by the LLC. The court ruled that because the members had no interest in the property of the LLC, they lacked standing to bring a declaratory judgment action. Instead, the LLC itself could bring a declaratory judgment action to interpret the contract, or the members could pursue a *derivative* action on behalf of the LLC:

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

[4] A copy of this out-of-state case was properly submitted to the trial court below. CP 837.

> (b) and § 10–12–18 of the Alabama Limited Liability Company Act.

Carey, 950 So.2d at 1136 (emphasis added and citation omitted).[5]

In the corporate context, a shareholder may only bring a direct claim "where the shareholder suffered an injury separate and distinct from that suffered by other shareholders." *Sabey v. Howard Johnson & Co.*, 101 Wn. App. 575, 584-85, 5 P.3d 730 (2000). A shareholder may

> maintain an action in his own right against a third party (although the corporation may likewise have a cause of action for the same wrong) when the injury to the individual resulted from violation of some special duty owed to the stockholder *but only when that special duty had its origin in circumstances independent of the stockholder's status as a stockholder.*

Sabey, 101 Wn. App. at 585 (emphasis added) (quoting *Hunter v. Knight, Vale & Gregory,* 18 Wn. App. 640, 646, 571 P.2d 212 (1977)). Similarly, Washington's limited partnership statute provides:

> [A] partner commencing a direct action under this section is required to plead and prove actual or threatened injury that is *not solely the result of an injury suffered or threatened to be suffered by the limited partnership.*

RCW 25.10.701(2) (emphasis added).

In *Woods View II, LLC v. Kitsap Cnty.*, 188 Wn. App. 1, 24, 352 P.3d 807 (2015), Division II recently applied these tests to claims by an LLC member:

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[5] Like Washington, Alabama has adopted the Uniform Declaratory Judgment Act. *See, e.g., Ex parte Rush*, 419 So.2d 1388, 1389 (Ala. 1982).

> Shareholders are usually not allowed to bring an individual direct cause of action for an injury inflicted upon the corporation or its property by a third party.... The exception to this rule occurs where the shareholder's claim arises from "something other than his shareholder Status."

Woods View II, 188 Wn. App. at 22-23 (quoting *Sound Infiniti, Inc.*, 145 Wn. App. at 352 (emphasis omitted), *aff'd*, 169 Wn.2d 199, 237 P.3d 241 (2010)). The *Woods View* court further noted that the alleged "direct" injury had to be distinct from an injury suffered by similarly situated members, something that the claimant, as the LLC's sole member, could not show:

> The fact that Piper was the sole shareholder of WVII does not change our analysis: *a sole shareholder, by necessity, cannot show* "an injury distinct from that to other shareholders."

Woods View II, LLC, 188 Wn. App. at 24 (emphasis added) (quoting *Sparling v. Hoffman Const. Co., Inc.*, 864 F.2d 635, 641 (9th Cir. 1988)).

> This Court recently explained the purpose of derivative suits:
>
> Ordinarily, a shareholder cannot sue for wrongs done to a corporation, because the corporation is viewed as a separate entity, and the shareholder's interest is too remote to meet the standing requirements. However, because of the possibility of abuse by the officers and directors of a corporation, a narrow exception has been created for shareholders to bring derivative suits on behalf of the corporation.

Donlin, 174 Wn. App. at 297 (quoting *Gustafson v. Gustafson*, 47 Wn. App. 272, 276, 734 P.2d 949 (1987)).

> Shareholders have long had the power to assert a corporation's rights on its behalf when its officers and directors have failed to do so *or have done so improperly.*

Id. (emphasis added) (quoting *F5 Networks Inc.,* 166 Wn.2d at 236).

Mr. Friet urges this Court to follow Delaware law. In the Delaware case of *Zimmerman v. Crothall*, 62 A.3d 676 (Del. Ch. 2013), a minority member of an LLC brought a derivative suit against other members alleging, among other things, that they failed to follow the procedures required by the LLC Agreement.

> Zimmerman also claims that Defendants breached the Company's Operating Agreement when they engaged in four financing transactions without obtaining the consent of the Common members.

62 A.3d at 690. The Delaware court determined the claim was derivative: "This is an appropriate derivative action because Plaintiff seeks relief for injuries done to the LLC." 62 A.3d at 689, n.83.

In his appellate brief, Mr. Friet makes new and additional claims for declaratory relief, like whether the members of the LLC complied with LLC policies concerning what constitutes a "Quorum" and a "Majority." Brief of Appellant at 25-26. Mr. Friet did not raise those claims in his Amended Complaint or his response to summary judgment below.[6] He

[6] In his response to summary judgment, Mr. Friet plainly stated: "By this action, Jay asks this Court to make a determination that the LLC Operating Agreement (the "Agreement") does not authorize non-owners to use powers of attorney to exercise Member rights." CP 570.

cannot raise them for the first time on appeal. *See* RAP 2.5(a); *Roberson v. Perez*, 156 Wn.2d 33, 39, 123 P.3d 844 (2005) ("In general, issues not raised in the trial court may not be raised on appeal.")

Even if considered, these new claims still concern the rights of the LLC as an entity to have its internal policies followed. Mr. Friet's alleged "interest in his governance Units being counted toward the Quorum and Majority requirements" and "interest in ensuring the other Unit Holders do not exceed the scope of their authority," Brief of Appellant at 32, are interests derived from his unit holder status. These interests are shared with *all* unit holders and derive from the LLC entity's interest in having its policies, as spelled out in the Agreement, adhered to. It does not matter whether Mr. Friet owns 50% of the units or that he is the only other unit holder besides Respondents. As this Court noted in *Sabey*, "[e]ven a shareholder who owns all or most of the stock, but who suffers damages only indirectly as a shareholder, cannot sue as an individual." 101 Wn. App. at 584; s*ee, also, Woods View II, LLC,* 188 Wn. App. at 24 ("The fact that Piper was the sole shareholder of WVII does not change our analysis...."). As a non-member, Mr. Friet has no legal interest in LLC governance, so his request that the court interpret the LLC members' interests is necessarily derivative.

Mr. Friet's reliance on *Casey v Chapman*, 123 Wn. App. 670, 98 P.3d 1246 (2004) is misplaced. There, the court held that a creditor selling a limited partnership interest at a UCC foreclosure sale had standing to seek declaratory relief concerning the effect and validity of that sale. Nothing in that case suggests that an assignee of a financial interest in a limited liability company has standing to seek declaratory relief on derivative claims that he is barred from bringing under RCW 25.15.375.

Mr. Friet presents no authority for his argument that claims concerning governance of an LLC are "direct, not derivative." No authority was presented to the trial court, and the cases he cites do not so hold.

Guenther v. Fariss, 66 Wn. App, 691, 833 P.2d 417 (1992), relied upon extensively by Mr. Friet, did not involve claims that members of an LLC failed to comply with company policies. Rather, it involved a dispute between partners in a limited partnership about the effect of an agreement between them concerning the percentage of their ownership interests. The court held that this dispute between the partners did not involve the interests of the partnership as an entity. This case does not even discuss the entity's interest in its own governance, much less hold that claims concerning governance are individual and not derivative.

Mr. Friet also cites *Polak v. Kobayashi*, 2008 WL 4905519 (D. Del. 2008), an unreported opinion from the U.S. District Court for the District of Delaware. Brief of Appellant at 32, 37. *Polak* concerned whether a partnership entity's citizenship (or residency) should be considered in determining whether the federal court could assert diversity jurisdiction. The court held that claims for dissolution of the partnership and for breach of contractual promises made by one partner to the other were direct and not derivative and therefore, the entity's citizenship did not defeat diversity for those claims. The court held there was no diversity jurisdiction over "plaintiff's claims for breach of fiduciary duty, declaratory judgment, and unjust enrichment," however, because those claims were derivative. *Id.* at *8.

In *Dragt v. Dragt/DeTray LLC*, 139 Wn. App. 560, 161 P.3d 473 (2007), the LLC agreement purported to grant the LLC an option to purchase land owned by non-managing members. The members entered a contract to sell the land to a third party. The members then brought a declaratory judgment action seeking to have the option declared unenforceable and thereby clear title. The members named the LLC as a party, along with its managing member, because the option, if valid, belonged to the LLC itself. The managing member brought counterclaims

on behalf of both himself and the LLC. A derivative suit was not needed, as the LLC through its manager asserted its own rights.

Ultimately, these cases do not hold that the claims of an unadmitted assignee of an LLC economic interest concerning the LLC's governance are considered direct. Rather, those claims are derivative.

Here, Mr. Friet requested that the court enter "a declaratory judgment that Katherine cannot use Carol's power of attorney for financial matters to conduct LLC affairs." CP 389. That concerns the right of the LLC to be managed according to its own policies, and not any individual interest of Mr. Friet as a non-member unit-holder in the LLC. By seeking to protect the LLC from Katherine (who participates on behalf of Carol), Mr. Friet's claim for declaratory relief is in the nature of a derivative suit. *See id.* Because he is not a member, he cannot bring such claims. *See* RCW 25.15.370; RCW 25.15.375; *Nw. Wholesale, Inc.*, 183 Wn. App. at 477.

This Court should affirm the trial court's order granting summary judgment on Mr. Friet's claim for declaratory relief.

C. Mr. Friet Is Not an LLC Member and Lacks Standing to Seek an Injunction over the Members' Governance Rights.

This Court should also affirm the trial court's dismissal of his request for injunctive relief. He cites no case law holding that the doctrine

of standing does not apply to claims for injunctive relief, or that a party can seek an injunction to enforce claims he has no standing to bring.

The cases cited by Mr. Friet concerning parties to an agreement are not relevant, because he is not a party to the LLC agreement. *See* Brief of Appellant at 37-38. In *Wimberly v. Carvello*, 136 Wn. App. 327, 149 P.3d 402 (2006), the court held that members of a homeowner's association could seek relief against other members based on express provisions of the association by-laws. "This Association's bylaws and covenants provide that individuals may invoke the jurisdiction of the court to resolve covenant disputes." 136 Wn. App. at 335. Mr. Friet cites no provision of the LLC Agreement that gives him the right to bring his current claims. To the contrary, the LLC Agreement states that as a Transferee, Mr. Friet does not have membership rights. CP 611.

In *Day v. Inland Empire Optical, Inc.*, 76 Wn.2d 407, 456 P.2d 1011 (1969), the court held that "one lawfully engaged in the practice of a licensed profession has a legal and equitable right to insist that others practicing ... comply with the laws governing the practice." 76 Wn.2d at 417. Mr. Friet is not engaged in a licensed profession; this case does not apply.

Nothing in these cases holds that a non-member transferee of an LLC interest can bring derivative claims contrary to the express provisions

of the LLC Act. The trial court properly dismissed Mr. Friet's request for injunctive relief for lack of standing.

D. The Trial Court Properly Dismissed Mr. Friet's Cause of Action for "Guardianship."

Washington's guardianship statute, chapter 11.88 RCW, clearly sets forth the procedure for petitioning to establish guardianships for allegedly incapacitated persons. *In re Guardianship of Cornelius*, 181 Wn. App. 513, 523, 326 P.3d 718 (2014). Certain factual information must be included in a petition in order to initiate a guardianship action.[7]

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[7] Under RCW 11.88.030(1), a petition for guardianship "shall" state:

> (a) The name, age, residence, and post office address of the alleged incapacitated person;
>
> (b) The nature of the alleged incapacity in accordance with RCW 11.88.010;
>
> (c) The approximate value and description of property, including any compensation, pension, insurance, or allowance, to which the alleged incapacitated person may be entitled;
>
> (d) Whether there is, in any state, a guardian or limited guardian, or pending guardianship action for the person or estate of the alleged incapacitated person;
>
> (e) The residence and post office address of the person whom petitioner asks to be appointed guardian or limited guardian;
>
> (f) The names and addresses, and nature of the relationship, so far as known or can be reasonably ascertained, of the persons most closely related by blood, marriage, or state registered domestic partnership to the alleged incapacitated person;
>
> (g) The name and address of the person or facility having the care and custody of the alleged incapacitated person;

RCW 11.88.030(1). A valid petition must also include specific notice language, which advises the allegedly incapacitated person about, among other things, his or her legal rights that may be restricted or transferred, the right to a jury trial, and the right to be present in court.[8] RCW

> (h) The reason why the appointment of a guardian or limited guardian is sought and the interest of the petitioner in the appointment, and whether the appointment is sought as guardian or limited guardian of the person, the estate, or both;
>
> (i) A description of any alternate arrangements previously made by the alleged incapacitated person, such as trusts or powers of attorney, including identifying any guardianship nominations contained in a power of attorney, and why a guardianship is nevertheless necessary;
>
> (j) The nature and degree of the alleged incapacity and the specific areas of protection and assistance requested and the limitation of rights requested to be included in the court's order of appointment;
>
> (k) The requested term of the limited guardianship to be included in the court's order of appointment; and
>
> (l) Whether the petitioner is proposing a specific individual to act as guardian ad litem and, if so, the individual's knowledge of or relationship to any of the parties, and why the individual is proposed.

[8] RCW 11.88.030(5)(b) also requires that a guardianship petition contain the following "notice" language:

> IMPORTANT NOTICE PLEASE READ CAREFULLY
>
> A PETITION TO HAVE A GUARDIAN APPOINTED FOR YOU HAS BEEN FILED IN THE [KING] COUNTY SUPERIOR COURT BY [PETITIONER/APPELLANT JAY FRIET]. IF A GUARDIAN IS APPOINTED, YOU COULD LOSE ONE OR MORE OF THE FOLLOWING RIGHTS:
>
> (1) TO MARRY, DIVORCE, OR ENTER INTO OR END A STATE REGISTERED DOMESTIC PARTNERSHIP;
>
> (2) TO VOTE OR HOLD AN ELECTED OFFICE;

11.88.030(5)(b). By specifying the requirements for these petitions, the Legislature sought to guarantee that the liberty and autonomy of incapacitated persons "should be restricted through the guardianship process only to the minimum extent necessary to adequately provide for their own health or safety, or to manage their financial affairs." RCW

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(3) TO ENTER INTO A CONTRACT OR MAKE OR REVOKE A WILL;

(4) TO APPOINT SOMEONE TO ACT ON YOUR BEHALF;

(5) TO SUE AND BE SUED OTHER THAN THROUGH A GUARDIAN;

(6) TO POSSESS A LICENSE TO DRIVE;

(7) TO BUY, SELL, OWN, MORTGAGE, OR LEASE PROPERTY;

(8) TO CONSENT TO OR REFUSE MEDICAL TREATMENT;

(9) TO DECIDE WHO SHALL PROVIDE CARE AND ASSISTANCE;

(10) TO MAKE DECISIONS REGARDING SOCIAL ASPECTS OF YOUR LIFE.

UNDER THE LAW, YOU HAVE CERTAIN RIGHTS.

YOU HAVE THE RIGHT TO BE REPRESENTED BY A LAWYER OF YOUR OWN CHOOSING. THE COURT WILL APPOINT A LAWYER TO REPRESENT YOU IF YOU ARE UNABLE TO PAY OR PAYMENT WOULD RESULT IN A SUBSTANTIAL HARDSHIP TO YOU.

YOU HAVE THE RIGHT TO ASK FOR A JURY TO DECIDE WHETHER OR NOT YOU NEED A GUARDIAN TO HELP YOU.

YOU HAVE THE RIGHT TO BE PRESENT IN COURT AND TESTIFY WHEN THE HEARING IS HELD TO DECIDE WHETHER OR NOT YOU NEED A GUARDIAN. IF A GUARDIAN AD LITEM IS APPOINTED, YOU HAVE THE RIGHT TO REQUEST THE COURT TO REPLACE THAT PERSON.

11.88.005; *see In re Marriage of Blakely*, 111 Wn. App. 351, 357, 44 P.3d 924 (2002).

Guardianship is not a cause of action. "The primary reason to establish a guardianship is to preserve the ward's property for his or her own use. **It is not for the benefit of others.**" *In re Guardianship of Karan*, 110 Wn. App. 76, 85, 38 P.3d 396 (2002) (emphasis added); *see In re Guardianship of Michelson*, 8 Wn.2d 327, 335, 111 P.2d 1011 (1941). "A guardianship petitioner's duties and responsibilities in these proceedings are extremely limited." *In re Guardianship of Matthews*, 156 Wn. App. 201, 209, 232 P.3d 1140 (2010). "The guardianship petitioner's role is essentially to alert the trial court of the potential need and reasons for a guardianship of an incapacitated person and to respond to any inquiries from the trial court. Once a trial court accepts a guardianship petition for review, the petitioner's role in the process essentially ends." *Matthews*, 156 Wn. App. at 209-10 (citation omitted).

By contrast, Mr. Friet sought to establish a guardianship over Carol in order to dissociate her as a member of the LLC (pursuant to its Operating Agreement) and thereby gain majority voting power over the family company. CP 389-90; Brief of Appellant at 39-40. In his words, "her Member rights would end." Brief of Appellant at 40. That is why he brought this purported "cause of action" in his Amended Complaint along

with other claims for relief about what Katharine—Carol's daughter who exercises her mother's durable power of attorney—can and cannot do with respect to the LLC. CP 389.

On appeal, Mr. Friet reaffirms that his intent was and is to subject his elderly aunt to a video deposition or a CR 35 examination, in order to establish that she is incapacitated. Brief of Appellant at 40; *see* CP 888 ("A short video deposition of Carol ... will provide the Court sad but ample evidence to issue the necessary adjudication...."). (In fact, by the time the trial court entered its order granting summary judgment, Mr. Friet had already served a notice scheduling Carol's video deposition, which was set for May 8, 2015. CP 808-09.)

This is a completely improper petition for guardianship, and the trial court properly dismissed the guardianship "cause of action." On its face, the Amended Complaint fails to include nearly all of the facts about Carol that are required to petition for a guardianship. *Compare* RCW 11.88.030(1) *with* CP 376-90. And Mr. Friet failed to include any of RCW 11.88.030(5)(b)'s necessary notice language. *Compare* RCW 11.88.030(5)(b) *with* CP 376-90.

For example, a valid guardianship petition would have expressly warned Carol that she had, among other rights, the "RIGHT TO ASK FOR A JURY TO DECIDE WHETHER OR NOT YOU NEED A GUARDIAN

TO HELP YOU." RCW 11.88.030(5)(b). Mr. Friet's Amended Complaint contains no such warning. CP 376-90. Even beyond the petition's failure to provide this statutory notice, he actually did plan to have the trial court adjudicate Carol's capacity based on a video deposition or CR 35 examination without a jury trial—which would not have worked. Brief of Appellant at 40. Impairment of liberty interests is a matter of fundamental constitutional rights, and Carol would have been **entitled to a jury trial** to determine her capacity. RCW 11.88.030(5)(b); RCW 11.88.045(3); *In re Guardianship of Way*, 79 Wn. App. 184, 186, 901 P.2d 349 (1995).

In addition, Mr. Friet improperly named Carol as a defendant to an amended complaint, not as an allegedly incapacitated respondent to a petition. CP 376. This deficiency is about more than just semantics. The terms "petition," "petitioner," and "respondent" are used in 11.88 RCW for good reason—guardianships are not vehicles for gaining legal advantage over an allegedly incapacitated person, and certainly not for stripping an elderly woman of her rights to participate in an LLC, as Mr. Friet seeks do in his lawsuit. *See Karan*, 110 Wn. App. at 85. And normally, the party petitioning for a guardianship would have asked the trial court to appoint a guardian ad litem. Mr. Friet did not do so; instead,

he sought to depose Carol on videotape—a situation which her doctor stated would be detrimental to her health. CP 808-09, 868.

If Mr. Friet is arguing that a Washington court determine someone is incapacitated as to her financial affairs *without complying* with the requirements of RCW 11.88, then he has cited no case law or other authority to support that argument. To the contrary, "RCW 11.88.030 and .040 dictate the procedures to be followed in petitioning for a determination of incapacity and the initial appointment of a guardian." *Cornelius*, 181 Wn. App. at 523. "A guardianship proceeding is statutory, and a substantial compliance with the statute is necessary to the appointment of a legally constituted guardian." *In re Teeters*, 173 Wash. 138, 142, 21 P.2d 1032 (1933). And no provision of the LLC Agreement suggests that LLC members agreed to have a court determine incapacity for the purposes of determining dissociation without turning to the guardianship statute and its procedural safeguards.

This Court should affirm the trial court's dismissal of Mr. Friet's "guardianship" cause of action.

E. Mr. Friet's Status as a Non-Member Does Not Turn on Carol Gaiser's Membership in the LLC.

Mr. Friet contends that there is an issue of fact regarding whether Carol Gaiser is a member, but he fails to explain how *her* status as a

member has any relationship to whether *he* has standing to bring his claims. *See* Brief of Appellant at 38. In any case, the undisputed facts show that Carol is a member. As Mr. Friet admits in his brief, an Event of Dissociation with respect to a Member only occurs when the LLC receives notice of "the entry of an order by a court of competent jurisdiction adjudicating such Member incapacitated...." CP 187; *see* Brief of Appellant at 42. It is undisputed that no such order has been entered. The fact that Mr. Friet may wish to seek such an adjudication (through an improper guardianship petition) does not alter Carol's status as a member.

Besides, Mr. Friet lacks standing to contest her right to participate as an LLC member, since, as discussed above, the right to have its policies followed by its members belongs to the LLC and can only be enforced by members through a derivative action. Mr. Friet is not a party to the LLC Agreement and is not a member of the LLC and therefore has no standing to bring claims concerning the governance of the LLC.

F. The Trial Court Properly Denied Mr. Friet's Request for a Continuance Pursuant to CR 56(f).

The trial court had ample discretion to deny a CR 56(f) continuance for Mr. Friet, and this Court should affirm that ruling. Mr. Friet failed to show that evidence of material facts exists that he would be able to obtain through such a continuance. CR 56(f) provides:

> When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that for reasons stated, the party cannot present by affidavit **facts essential to justify the party's opposition**, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

CR 56(f) (emphasis added). This rule provides a remedy for a party who "*shows good reason why* he cannot obtain" evidence of material facts in time for the summary judgment proceeding. *Lewis v. Bell*, 45 Wn. App. 192, 196, 724 P.2d 425 (1986) (emphasis added). This good cause showing requires three elements:

> The trial court may, however, deny a motion for continuance where: (1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.

Turner v. Kohler, 54 Wn. App. 688, 693, 775 P.2d 474 (1989). "Only one of the qualifying grounds is needed for denial." *Gross v. Sunding*, 139 Wn.

App. 54, 68, 161 P.3d 380 (2007). The trial court's denial of a CR 56(f) motion for continuance is reviewed for a "manifest abuse of discretion." *Turner*, 54 Wn. App. at 688; *Schmitt v. Langenour*, 162 Wn. App. 397, 408, 256 P.3d 1235 (2011); *In re Estate of Fitzgerald*, 172 Wn. App. 437, 448, 294 P.3d 720 (2012).

Here, Mr. Friet has failed to establish the second and third elements. He has failed to identify any known, or even suspected, material fact that a continuance would have revealed. For Mr. Friet to have standing to bring claims as to LLC governance, he must show that he is a *member* of the LLC. He can become a member only if the current members consent in writing to making him a member. To meet the requirements of CR 56(f), Mr. Friet would need to show that such a written consent exists and that he was unable to obtain a copy of it before the hearing. However, Mr. Friet failed to present any sworn statement from former LLC manager Jeff Wilson, former LLC attorney Mr. Austin, *or even from himself* attesting that such a document exists, even though all three would have known if such a document truly existed.

Further, even if Carol Gaiser's status as a member were relevant to the issue of Mr. Friet's standing to assert his claims, he failed to file an affidavit by anyone stating that there exists a court order somewhere adjudicating Carol to be incompetent, which is required for her

membership in the LLC to be terminated by dissociation. A CR 56(f) motion is appropriately denied when the moving party fails to identify the facts and evidence it needs more time to establish, or when the party fails to show that these facts would raise a genuine issue of material fact. *See Fitzgerald*, 172 Wn. App. at 449 ("As the commissioner noted, Mountain–West's request for discovery was 'mere speculation and a fishing expedition.' In these circumstances, the superior court correctly determined that Mountain–West was not entitled to a continuance."); *Manteufel v. Safeco Ins. Co. of America*, 117 Wn. App. 168, 175, 68 P.3d 1093 (2003).

Finally, Mr. Friet's argument that the trial court could not rule on respondents' motion for summary judgment before discovery had finished taking place is not supported by any citation to case law or court rule. Brief of Appellant at 44-45. Summary judgment was proper because he did not have *standing* to bring his claims for declaratory or injunctive relief. Dispositive motions can be granted *even before an Answer is filed. See* CR 12(b). And if matters outside the pleadings are considered, a CR 12(b) motion "should be treated as one for summary judgment and disposed of as provided in rule 56." CR 12(b)(7). Accordingly, respondents' dispositive motion could have been brought even before they filed their Answer, and certainly before discovery had taken place.

The trial court did not abuse its discretion in denying Mr. Friet's request for a continuance under CR 56(f).

V. CONCLUSION

It is not Katherine Gaiser who is interfering with the governance of Landon Enterprises, LLC; it is Jay Friet. The trial court recognized the glaring deficiencies in his claims and properly dismissed them on summary judgment, even before party depositions were scheduled to occur.

This Court should affirm the trial court's order. The trial court correctly ruled that Mr. Friet, a non-member, lacked standing to bring his claims for declaratory and injunctive relief about LLC governance by LLC members. The trial court also properly dismissed his "guardianship" cause of action as wholly improper. Finally, the trial court did not abuse its discretion in denying his request for a CR 56(f) continuance.

RESPECTFULLY SUBMITTED this 25th day of November, 2015.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on November 25, 2015, a copy of the Brief of Respondents was served by electronic mail to:

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