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Court of Appeals
Division I
Washington State

Appellate Case Number 65462-4-1
Appeal from Snohomish County Superior Court
Case # 09 2 07764 7

Appellant

Robert Grundstein Esq./WSBA 20389
1655 Cadys Falls Road
Morrisville VT 05661
802-851-1120/rgrunds@pshift.com

vs

Appellee

Leon Grundstein et al.
c/o Ronald J. Meltzer
1001 Fourth Avenue Plaza
Suite 2120
Seattle, WA 98154
RJM@sinsheimer-meltzer.com

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Statement of the Case

1

**Plaintiff Wanted The Money Value of a Real Estate Interest For
Himself and His Sisters**

**The Snohomish County Filing Was Not Frivolous
Counsel for Defense Acted Under a Large Conflict of Interest
He Is Not Allowed to Defend Parties Who Stand to Gain from
Plaintiff's Action**

This appeal has its origins in a combined Action in Partition and Breach of Fiduciary Duty against Trustee/Appellee Leon Grundstein. L Grundstein retained control over an asset in his mother's Living Trust known as "The Scriber Gardens One Half Share". Plaintiff wanted this share reduced to its money value by way of partition. This share is an investment in the "Scriber Gardens LLC" and is an interest in the Scriber Gardens Assisted Living Community located in Snohomish County. The interest was an investment made in 1995 by the father of Appellant and Appellee which passed to their mother's Living Trust after the departure of their benevolent father. After the demise of their generous mother on July 13, 2008, the Scriber Gardens asset passed to the four Trust beneficiaries.

Appellee always refused to give any information about the Scriber Gardens asset, did not file or reveal K-1 trust income tax forms and had

refused to give accountings for the trust since 2004. In addition, it was proven that Appellee had misappropriated close to One Hundred Thousand Dollars from his mother's trust during her lifetime and invested it in his own businesses, without knowledge or approval of a court or the beneficiaries. An action against Appellee Leon Grundstein was necessary to force disbursement of the trust corpus and an admission of approximate amounts. The Mercer Island police became involved.

When asked to perform meaningful, cash distribution of the Scriber Gardens one half share, Appellee simply declared that all Trust beneficiaries had a $\frac{1}{4}$ share. Appellee Leon Grundstein refused to disburse cash value, participate in an appraisal or to provide any information needed to value the One Half Share.

Counsel for Appellee sought to have the Partition Action dismissed pursuant to Civ. Rule 56. On March 17, 2010, the lower court (CP 17-18) granted defense motion for summary judgment and awarded attorney fees "in an amount to be determined". Appellant Grundstein made a timely Motion for Reconsideration which was denied on May 4, 2010.

The lower court found Grundstein's petition for partition was "frivolous and without legal precedent.". Judge Appel gave no opinion,

recitation of legal authority or other explanation in support of judgment.

A hearing for attorney fees was held on June 3, 2010 (CP p 1-2) at which \$11,235.00 was awarded to defendant counsel. The hearing was held by Judge Appel who said, "I didn't understand the Complaint in this case."

2

Procedural History

Commissioner Bedle Ordered Discovery/Judge Appel Gave Summary Judgment Prior to Discovery

Appellant filed a Complaint for Partition and for Breach of Fiduciary Duty on August 18, 2009. The Complaint was amended on December 7, 2009 (CP 28-34/ CP 52-53) to include a second count for Breach of Fiduciary duty and Constructive Fraud. Interrogatories were provided and Appellant refused to answer them. A Combined Motion to Compel and to Amend Complaint (Second Amendment) (CP 35-42, CP 28-34, CP 21-25) was heard on March 15, 2010 (RP/Bedle) before Commissioner Bedle. Commissioner Bedle granted the Motion to Compel but didn't rule on the Second Motion to Amend Complaint.(CP 19-20)

Appellant's Second Motion to Amend Complaint was to include a count for Judicial Dissolution under RCW 25.15.275 and 25.15.300,

breach of contract and to Pierce the Corporate Veil under RCW
25.15.060.

Commissioner Bedle would not allow Dissolution until AFTER
discovery was complete. C. Bedle granted a motion to compel discovery
(1st set of interrogatories/RFPs) (RP, pg 17, lines 18-25 and pg 18, lines 5-6
and last paragraph) because the terms of the operating agreement for the
LLC, which were never provided to plaintiff despite years of requests, had
to be provided to Plaintiff in order to establish LLC membership status or
not. So, Dissolution was provisionally granted or denied AFTER the
discovery ordered by C. Bedle. (CP 19-20) There was also no ruling by
Commissioner Bedle with respect to breach of contract or piercing the
corporate veil.

On March 17, 2010, Judge Appel of the lower court granted a
motion for summary judgment (CP 17-18) which seemed intended to
dispose of the entire action. Appellant filed a timely Motion for
Reconsideration which was denied on May 4, 2010. This was AFTER C.
Bedle ordered discovery.

3

Anomaly in the Record
There Are Two Court Orders Relevant to the Same Motion for

Summary Judgment

Subsequent to filing an answer, defendant moved for summary judgment based on res judicata. A hearing before J. Appel was had on March 3, 2010. Judgment was awarded with respect to Count I of Plaintiff's complaint and recorded by an undocketed minute order. There was no other content to this order prior to the hearing before C. Bedle.

This order and the extent of its effect was cited by Commissioner Bedle during a March 15, (RP, pg 7, line 8-9) hearing on Plaintiff's motion to compel discovery and amend complaint. Commissioner Bedle granted Plaintiff's motion to compel and ordered compliance and answers to plaintiff's first set of interrogatories and RPs. (RP, pg 17, lines 18-25 and pg 18, lines 5-6 and last paragraph)

Subsequent to that March 15th hearing, Judge Appel sent an email to all parties on March 17, 2010. This email gave notice that summary judgment was expanded to include Count II of Plaintiff's complaint and to award attorney fees. Attorney fees were awarded at a hearing on June 3, 2010. (CP 1-2)

Summary Judgment prior to discovery is not favored practice. If Partial Summary Judgment was granted, that order can't be expanded later.

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Arguments At Law

1

In General, Summary Judgment Prior to Discovery is Disfavored and Commissioner Bedle Found Issues of Fact Remained

a

Judge Appel awarded summary judgment prior to discovery. (CP p. 17-18)
This was premature because issues of fact exist.

Summary judgment is an exceptional ruling and must conform to a high standard, “Lindsey v. SLT L.A., LLC”, 447 F.3d 1138, 1148, 1153 (9th Cir. 2006). It is also not allowed if a material issue of fact exists, “Summary judgment is not warranted if a material issue of fact exists for trial.”, “Warren v. City of Carlsbad”, 58 F.3d 439, 441 (9th Cir. 1995). ...“*we generally disfavor summary judgment if relevant evidence remains to be discovered*”, “Paul Wright, Plaintiff-appellant, v. Jim Evans, et al.”, Defendants-appellees , United States Court of Appeals, Ninth Circuit. - 967 F.2d 597, May 26, 1992.Dec. June 2, 1992.

See also “Simulab v Synbone”,... "In reaching its conclusions, the Court has also considered the timing of defendant’s motion for summary judgment, which was filed more than two months before the close of discovery, and which was the basis for the Court’s subsequent stay of

discovery." ..."*further briefing from defendant would simply demonstrate an issue of material fact precluding summary judgment*", "Simulab Corporation v Synbone AG" No. CV 07-1416 TSZ U.S. District Court, Western Division, Seattle. See Order by J. Zilly, February 2008.

"Sandra Birmingham v. H&H Home Consultants and Designs, Inc.", 189 NC App, 435, No. Co. A07-630, North Carolina, 2008, 1 April 2008....."*ordinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending.*"

b

**Commissioner Bedle Ordered Answers to Interrogatories/Requests for Production AFTER Defense Motion for Summary Judgment (RP, pg 17, lines 18-25/pg 18, lines 5-6 and last paragraph)(CP 19)
This Confirms Issues of Fact and Law Existed
Summary Judgment Was Awarded In Violation of The Standards for Civ. Rule 56**

Commissioner Bedle ordered answers to Plaintiff's First set of Interrogatories and Requests for Production while defendant motion for summary judgment was pending before J. Appel. This confirms the need for discovery by an independent member of the judiciary. He also recognized the legitimacy of Dissolution as a cause of action/remedy and

ordered discovery in pursuit of it. His order recognized the need for Defendant L. Grundstein to give information about the interest nature held by the 4 Trust Beneficiaries in Sciber Gardens LLC.

It must be remembered that prior to suit Defendant refused to give ANY information about Sciber Gardens LLC ½ share.

2

**Lower Court J. Appel Misapplied the Law for Summary Judgment
Issues of Law are Patent on Plaintiff's Complaint and His Requested Amendments
LLC Statutes Are Subject to Equitable Supplementation**

a

Count II of Plaintiff's Original Complaint is supported by law.

Failure of a fiduciary to account is a breach. The case citation ("Flohr v Flohr", below) supports the legitimacy of an action against a fiduciary.

This is an important issue of law.

Count II of Plaintiff's Complaint reads as follows:

"8. Defendant had a duty to provide tax forms for the living trust of Dorothy Grundstein as part

of the final accounting;

9. These tax forms necessarily include the 1041 K-1 forms for

Trust Income;

10. Defendant refused and still refuses to release or provide Trust income forms;

11. Plaintiff and all beneficiaries under the Living Trust of D. Grundstein want to see the Trust Income Tax forms. They are important to ascertain Trust income and the management of the Scriber Gardens investment;

12. Defendant failure to provide required tax forms is a breach of fiduciary duty under “Flohr v Flohr”, Washington App. Div 1, No. 47734-0-I (2002) in which the Court confirmed a duty to “accurately respond to beneficiary reasonable requests for trust information.”

13. Defendant failure to provide the K-1 forms violates the Court order for Trust tax accountings.”

Defendant Grundstein has NEVER provided income tax forms or any other accounting as required for the Scriber Gardens share. This is a current obligation.

b

Statutory Citations Create Legal Obligations
Issue of Law Exist

Count II of Plaintiff's Petition is supported by statutory citations. The missing information includes annual tax returns, income statements and other items required under RCW 23B.16.010 through .16.200.

Defendant L. Grundstein behavior also breaches RCW 25.15.155(1) (“Gross Negligence”, Intentional Misconduct”, “Knowing violations of law”) Defendant L. Grundstein behavior breaches RCW 25.15.155(2), (“Duty of loyalty to members”). These are all clearly articulated standards at law which should be applied against defendant L. Grundstein.

c

Equity Will Find a Remedy/L. Grundstein Estopped from Denying Shareholder Rights
Plaintiff Wanted Money Valuation of LLC Asset for Himself and Sisters

“Equity will not suffer a wrong without affording a remedy”,
“Eisenberg v Nichols”, 57 Wn 560, Supreme Court, March 8, 1910.

Leon Grundstein has sole control over the LLC property/Scriber Gardens share. Equity will estop him from saying he has no obligations to shareholder/co-owners/creditors. He has a fiduciary duty to provide information to co-owners and he refused to do so. The co-owners are “creditors” and this case must continue to allow Plaintiff and his sisters access to the value of their investment. See in particular the “alter ego” means to pierce the corporate veil and hold Defendant L Grundstein liable; paragraph “3” below.

d

LLC Statutes are Supplemented by Equitable Principles

The LLC is a relatively new creation. Although it is controlled by statute, the statutes are evolving and still don't have the detail necessary to protect third parties and minority/non-controlling interests. In contrast to conventional "C" corporations which are subject to a very developed and historically tested statutory provision, the LLC is much more ambiguous and reliant on equitable principles to protect and define shareholder/member rights. There is little case law pertaining to LLCs which means that each litigation helps define and shape the rights and character of those entities. Since LLCs act as closed corporations, they need a special body of law to protect investment values and against oppression by managing members. Equity will find a remedy. "Equity will not suffer a wrong without affording a remedy", "Eisenberg v Nichols", 57 Wn 560, Supreme Court, March 8, 1910.

e
Bills of Accounting Are Equitable Remedies to Ascertain
Investor/Interested Party Rights.

Appellant's Complaint could easily have been converted, amended or interpreted to be a request for an Accounting. "Equity will find a remedy", "Eisenberg" op cit.

The right to seek an accounting has long been recognized by U.S.

courts as an equitable remedy with origins in England's Chancery Courts. 1 Dan B. Dobbs, *Law of Remedies* 609-14 (2d ed. 1993). An accounting is generally available when there is a claim of breach of fiduciary duty or other wrongdoing, and is often used in partnership dissolution cases.

The three opinions handed down this year in New York ("Gottlieb v Northriver Trading Co. LLC", 2009 NY Slip Op 00432 {58 AD3d 550}) Indiana ("Perkins, Kessler Advisor LLC v James Brown" No. 49A02-0806-CV-569) and South Carolina "Historic Holdings LLC v Mallon" Opinion No.26601 S. Carolina Supreme Court, Feb. 2009, (the South Carolina Supreme Court recognized that its courts have "broad judicial discretion in fashioning remedies in actions by a member of an LLC against the LLC and/or other members," including the remedy of an accounting), all recognized that on request of a member of an LLC, an accounting may be ordered in appropriate situations. In none of the three was an accounting to be automatically granted – the analysis is fact-specific and will likely depend on whether there was fraud, breach of fiduciary duty or other wrongdoing, and whether the facts are complex enough to warrant the accounting process. The courts find the authority either in their LLC statute (explicitly or implicitly), by analogy to partnership and corporate law, or under general principles of equity.

These three opinions seem to reflect an unspoken reluctance to rule out the accounting remedy unless the applicable LLC Act expressly bars it, and I'm not aware of any LLC Act that does so. It seems likely that in the absence of such a statutory prohibition, most courts, when first presented with the issue and on request of a member of an LLC, will order an accounting in appropriate situations.

3

**Equity Allows Realization of "Reasonable Expectations"
The Court Should Have Pierced the Corporate Veil
Plaintiff Wanted His Share Reduced to Money Value for
Himself and Sister Defendants**

**The LLC/Scriber Gardens Share Was Administered by A Closely
Held Corporation
It Was Dominated by Defendant L. Grundstein to the Complete Exclusion
of All Other Interested Parties
Lower Court J. Appel Should Have Applied the "Reasonable Expectation
Doctrine"
and
A Fiduciary Standard**

Closely held corporations present unique problems in comparison to publicly held corporations. For example, in closely held corporations, there are more intimate relationships, a lack of share marketability, and greater reliance placed on the corporation by its stockholders than in publicly held corporations. It is necessary to determine how to deal with the rights of a minority shareholder, while not destroying the corporation,

and still respect the rights of the majority or controlling shareholder.

The focus of this case should be on the oppression of minority shareholders by the majority and how the “reasonable expectations doctrine” should be considered to choose an appropriate remedy for the facts of this case.

Courts and commentators have compared oppression law’s reasonable expectations inquiry to an implied-in-fact contract analysis. The New York decision of “In re Kemp & Beatley, Inc.” 64 N.Y.2d 63, has been particularly influential in giving some context to the reasonable expectations framework. In “Kemp”, the Court of Appeals stated that “oppressive actions..... refer to conduct that substantially defeats the ‘reasonable expectations’ held by minority shareholders in committing their capital to the particular enterprise.”

Defendant L. Grundstein's behavior meets several of the following criteria under Washington law. If one reads “Carroll v Elzey” King County Superior Ct. # 04-2-21613-3 , one would see an application of the equitable principle that if you get the box (an LLC in the Real Estate business) you get the contents (the value of the Real Estate by way of Partition or other equitable device. If one reads pages 1, 2, 3, 11, 17 and 18

in the appellate version of “Carroll”, WA App. No. 59891-1-1 (filed 2008) (Unpublished) it can be seen that an LLC was the object of a partition action and the Attorney who refused to cooperate in discovery was sanctioned. :

1. **Knowing participation in fraud, deceit or other breach.** See “Johnson v. Harrigan Peach”, 79 Wn. 2d 745, 489 P.2d 923 (1971). Misrepresentations and breaches of warranties regarding a residential real estate development lead to personal liability for the owner/officer of company. An officer who takes no part in a tort committed by a corporation, is not liable, unless he “knowingly participated in, cooperated in the doing of, or directed that the acts be done.” Johnson, at 753. “Close control” over the direction and management of the company, can be a basis for inferring that the officer had knowledge of fraudulent conduct: “if they exercise such close control, direction and management of the corporation that the law as a matter of elemental justice ought to charge them with the knowledge of such fraud.” Johnson, at 754. See also, “State of Washington v. Ralph Williams NW Chrysler”, 87 Wn. 2d 298, 553 P.2d 423 (1976); and “Grayson v. Nordic Construction”, 92 Wn. 2d 548, 599 P.2d 1271 (1979).
2. **Intentional use of the LLC to violate or avoid a duty.** See “Meisel v. M&N Modern Hydraulic Press Company”, 97 Wn. 2d 403, 410, 645 P.2d 689 (1982). **The first step** typically involves “fraud, misrepresentation, or some form of manipulation of the corporation to the stockholder’s benefit and creditor’s detriment.” Id., at 410. **The second step** requires the establishment of a causal link between the intentional misconduct and the harm which the disregard seeks to relieve. Id. In other words, the “wrongful corporate activities must actually harm the party seeking relief so that disregard [of the corporate form] is necessary.” Id., at 410
3. **Alter Ego.** See “Burns v. Norwesco Marine, Inc.”, 13 Wn. App. 414, 535 P.2d (1975). Owners of company (father

– son, where father was an attorney) held assets of corporation in their own name and “conducted the affairs as a personal enterprise.” Where corporate entity has been disregarded by principals “so that there is such unity of ownership and interest that the separateness of the corporation has ceased to exist” the court found a basis for imposing personal liability. *Id.*, at 418 (citations omitted).

The fiduciary standard between interested parties in an LLC is articulated in the case of “Bishop of Victoria Corporation Sole v Corporate Business Park, LLC”, No. No. 33579-4-II, Washington App., Div. II,

“While a member’s obligation to contribute to the LLC arises from the parties’ contractual agreements, a member’s fiduciary duty arises by virtue of the parties trust relationship. *Van Noy v. State Farm*, 142 Wn.2d 784, 797-98, 16 P.3d 574 (2001) (citing J. Dennis Hynes, *Freedom of Contract, Fiduciary Duties, and Partnerships: The Bargain Principle and the Law of Agency*, 54 Wash. & Lee L. Rev. 439, 441-42 (1997). An LLC manager is entitled to rely in good faith on other managers. *Dickens v. Alliance Analytical Labs., LLC*, 127 Wn. App. 433, 440, 111 P.3d 889 (2005) (citing RCW 25.15.175). The role of members in a member-managed LLC is analogous to that of partners in a general partnership, and partners are held accountable to each other and the partnership as fiduciaries. John Morey Maurice, *Operational Overview of the Washington Limited Liability Company Act*, 30 Gonz. L. Rev. 183, 200 (1995).

Partners owe each other fiduciary duties and are obligated to deal with each other with candor and the utmost good faith. *Bovy v. Graham*, 17 Wn. App. 567, 570, 564 P.2d 1175 (1977). A partner owes a fiduciary duty of loyalty and care to both the partnership and to other partners. RCW 25.05.165. A partner owes a duty of loyalty to avoid secret profits, self-dealing, and conflicts of interest. RCW 25.05.165(2)(a)-(c). A partner must avoid self-dealing by refraining from dealing with the partnership on behalf of a party having an interest adverse to the partnership. RCW 25.05.165(2)(b). And a partner must avoid conflicts of interest...”

Note that this case involved an LLC, the business of which was

investing in real estate for profit. The lower court did not feel the need to make a threshold determination if whether or not an LLC is subject to suit. Nor did it distinguish the LLC from the object of its creation, income from real estate.

See also RCW 25.15.155; "Liability of managers and members"

Unless otherwise provided in the limited liability company agreement:

(1) A member or manager shall not be liable, responsible, or accountable in damages or otherwise to the limited liability company or to the members of the limited liability company for any action taken or failure to act on behalf of the limited liability company unless such act or omission constitutes gross negligence, intentional misconduct, or a knowing violation of law.

(2) Every member and manager must account to the limited liability company and hold as trustee for it any profit or benefit derived by him or her without the consent of a majority of the disinterested managers or members, or other persons participating in the management of the business or affairs of the limited liability company from (a) any transaction connected with the conduct or winding up of the limited liability company or (b) any use by him or her of its property, including, but not limited to, confidential or proprietary information of the limited liability company or other matters entrusted to him or her as a result of his or her status as manager or member.[1994 c 211 § 402.]

Section (2) creates a trustee/fiduciary duty by which a manager is financially accountable to members. A manager must hold and distribute profits earned by the LLC . The term Trustee establishes a fiduciary standard.

See also RCW 25.15.135 for LLC member rights to fundamental

information; none of which has been supplied by Defendant Leon Grundstein.

4

**The Lower Court Cannot Sua Sponte Modify it's
Minute Order for Summary Judgment Against Partition Then
Later Extend it to Include
Counts for Breach of Fiduciary Duty and Requested
Amendments**

Lower Court Judge Appel's undocketed Minute Order only pertained to Count I and cannot be revised to include Count II of Plaintiff Complaint and Requested Amendments.

Prior to the 3-15 hearing before Commissioner Bedle, Lower Court J. Appel issued an undocketed order granting summary judgment with respect to Count I of Plaintiff Complaint. C. Bedle cited the existence of this minute order (Bedle, 3-15 RP, pg 7, line 8-9) and effect at the hearing on March 15, 2010. Plaintiff had been checking the docket for orders subsequent to the J. Appel hearing and found none.

A minute order is dispositive to the issues it addresses and curtails further jurisdiction over the matters under scrutiny at the time. J. Appel's order only pertained to Count I. It was not docketed or publicized. C. Bedle revealed it's content during the hearing on March 15. This order

curtails jurisdiction for further rulings and precludes expansion of the minute order to include Appellant Plaintiff's count II of the original Complaint and his requested amendments

In addition, C. Bedle ruled in favor of Plaintiff and ordered discovery with respect to Count II and other considerations prior to the time J. Appel expanded his minute order.

5

It Was Error for Judge Appel to Prevent the Case of "Carroll v Elzey" WA App. No. 59891-1-1 (filed 2008) (Unpublished) from Being Cited "Carroll" Affirmed Lower Court Ruling # 04-2-21613-3 (2007) (Same Parties and Cause of Action) Which COULD Be Cited Unpublished Decisions Are Now Allowed in the Ninth Circuit The State Rule Against Unpublished Decisions Can be Declared Unconstitutional by a State Judge

The appellate case "Carroll v Elzey" was not permitted by the lower Court. This should not have been dispositive of the applicability and admissibility of the case content. Although the appellate version was unpublished, it merely affirmed the Court of First Resort. The King County version of this case, # 04-2-21613-3 (2007) was admissible as precedent and provides authority that the real estate investment assets of an LLC , the business of which is real estate, are subject to partition.

An unpublished appellate opinion which merely confirms the

decision of a lower court does not eliminate the original case as precedential authority.

If an appellate case reversed a lower court holding against my position, that would have left Plaintiff Grundstein at a disadvantage, but that wasn't the case here.

“Carroll” is an unpublished case in which a Washington LLC involved in the business of real estate was subject to a suit in partition to distribute the value of its assets. The “Carroll” court allowed an action in partition against an LLC. The rule of “Carroll” is, if you get the box (interest in an LLC which owns real estate) you get the contents (access to the value of the real estate by way of partition). If one reads pages 1, 2, 3, 11, 17 and 18 of “Carroll”, it can be seen that an LLC was the object of a partition action and the Attorney who refused to cooperate in discovery was sanctioned.

The law of unpublished cases is changing in the 9th district and they are now allowed. The ninth circuit has changed its rules and now likes unpublished opinions. See FRAP 32.1.

The Ninth Circuit has unequivocally stated a willingness to use unpublished opinions to assess whether the law was clearly established. The Ninth Circuit follows an expansive approach to determining clearly

established law, which include reference to “all decisional law” including unpublished circuit and district court opinions. This approach gives maximum guidance to parties and courts about what the law is and allows a reviewing court to make a fully informed determination about what the law was at the time of the alleged conduct. The Ninth Circuit in “Prison Legal News v. Cook”, the court reviewed two unpublished district court opinions in determining whether a prison regulation violated clearly established law.

In addition, it is unconstitutional to deny them as a violation of Article III of the Constitution. The judiciary cannot act as a legislature and change the principles of jurisprudence which existed and applied at the time the Constitution was drafted. There cannot be a body of secret law or a body of law on which the judges don't spend as much time or care since they will not have precedential effect. The exclusion of unpublished cases is plainly wrong.

Even if they are not citable in Washington as binding precedent, they are still citeable as evidence of the law. “Unpublished opinions are not inherently non-precedential, and *even if treated as nonprecedential, they are by definition evidence of clearly established law.* Whether unpublished opinions have precedent, as some argue, they are undeniably

evidence of clearly established law given the publication standards in place in the circuits.” See e.g., Fourth Circuit L.R. 36; Fifth Circuit L.R. 47.5.1; Fifth Circuit L.R. 47.5.2; Sixth Cir. R. 206(a); Sixth Cir. R. 206; Ninth Cir. L.R. 36-2; see also Standards for Publication at 22-23 (proposing the model rule on which these circuit rules are patterned)

Unpublished cases are also said to be strong evidence of established law. “*First, unpublished opinions are supposed to be the easy cases— the cases that are mere applications of well-settled law to new facts.*”⁸⁷ *The whole notion of an unpublished opinion is based on the idea that some cases make new law (and should be published) and others merely apply the existing law to new facts so similar to the old that it does not expand or contract the law.*” Standards for Publication, at 2-3; see also David R. Cleveland, *Overturing the Last Stone: The Final Step in Returning Precedential Status to All Opinions*, 10 Journal of Appellate Practice and Process 61, 110-11 (2009).

6

The Lower Court Should Have Allowed The Second Complaint
Amendment Under Civ. Rule 15
Which Would Have Included Counts for Breach of Contract,
Dissolution and an Accomodation to Pierce the Corporate Veil
of the

LLC Which Controlled the Scriber Gardens One Half Share;

Washington Civ. Rule 15(a) reads:

“(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise, a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and *Leaves shall be given freely when justice so requires*” ; (Italics, mine)

The lower court should have allowed Appellant's request to amend his complaint a second time to include another count for Breach of Fiduciary Duty, Breach of Contract, Dissolution and to allow the corporate veil to be pierced.

7

**This Case Was Not Frivolous
The Lower Court Should Not Have Awarded Attorney Fees
J. Appel Has Did Not Provide Authority for Their Application
Nor an Opinion Explaining Their Imposition
and
Admitted He Did Not Understand the Original Complaint**

a

**Sanctions Were Levied Without Articulated Authority
(CP 1-2)**

Sanctions are not forthcoming. Other than name-calling, defense has not articulated a decisive legal criteria for sanctions. It is hard to

understand J. Appel's ruling since it is not accompanied by findings of law and fact. This case is legitimate although confusing. The problem with this case is its equitable nature and application of a developing body of law pertinent to LLCs. The economic interest in this case has fallen between some cracks in the statutory provisions, but equity will find a remedy. There have been very few LLC litigations and they need to be examined, not discouraged by misplaced sanctions. This case IS grounded in Law and Fact.

The amounts of sanctions are also hard to understand. Meltzer claims fees in excess of \$11,000.00. The American Rule states all parties are responsible for their own legal fees. Opposing counsel has offered and admitted a minimal value of \$6,500.00 for $\frac{1}{4}$ of the $\frac{1}{2}$ Scriber Gardens share, it's value when it was created in the late 90s. Real estate doubles or triples every 10-15 years. The share value should be closer to \$50,000.00 or \$75,000.00.

Judge Appel admitted that he didn't understand the original Complaint.

It seems as if attorney fees were levied in a mechanistic way, without reference to a clear understanding of the original filing and it's conduct. The lower court seemed to think that if a party loses a motion,

then attorney fees are necessarily awarded. This erodes the presumption of the American Rule and creates a culture where people will be afraid to file legitimate suits for fear of badly assigned sanctions. Sanctions should be the rare exception, not an over-available first response.

b

Judge Appel Found A Charge for Attorney Fees In Excess of \$11,000.00 Did Not "Shock the Conscience"

Attorney fees do shock the conscience if they are levied against the intent of the American Rule and to penalize a legitimate action which is healthy for the legal system. The LLC is a new entity which needs scrutiny in court. This suit was to develop the practice around them in the state of Washington and to show how equitable principles should be applied to LLCs in addition to statutory provisions.

A charge of attorney fees against a well conceived suit which contributes to local jurisprudence, DOES shock the conscience.

8

Absent Fraud or Mistake A Frivolous Case Would Have Been Dismissed At It's Inception

If this case was so patently frivolous and without basis in fact or law, why wasn't it dismissed at it's inception rather than after surviving motions to dismiss, motion practice, orders to compel discovery and other activities that allowed legal fees to balloon?

If two other commissioners found reason to allow Complaint amendments, (CP 54-56, CP 52-53) and refuse defendant motion to dismiss (CP 52-53) and order answers to interrogatories/Request for production (CP 19 and RP, pg 17, lines 18-25 and pg 18, lines 5-6 and last paragraph), why should Plaintiff have to pay legal fees for ALL activity in the case? Why should plaintiff have to pay any legal fees? Just because someone wins or loses doesn't mean the case is without merit.

The lower Court at least, should have apportioned legal fees in a more careful and informed manner.

9

**The Application of Partition, Res Judicata and Collateral Estoppel Were Already Raised by Defendant Counsel
Commissioner Tinney Ruled in Favor of Plaintiff on December 7, 2009 (CP 75-Grundstein Response Against M to Dismiss, CP 52, 53-Tinney Order to Deny Dismissal)
These Issues Were Res Judicata and Not Subject to Another Review on Summary Judgment**

Defendant/Appellee already tried to dismiss this case by objecting to Partition, and by claiming res judicata and collateral estoppel pertinent to the prior TEDRA action in which Defendant/Appellee was forced to disburse Trust assets. (CP 61,, Meltzer Answer) (Tinney RP 12-9-09, pg 2, lines 1-10). NOTE, Tinney hearing date and order were on December 7, 2009, not December 9, 2009.

The three issues above were already litigated in Appellant's favor prior to defense motion for summary judgment. The ruling by Commissioner Tinney was in favor of Plaintiff Grundstein. The Motion for Summary Judgment is res judicata to the extent it sought to relitigate the appropriateness of Partition in the lower court.

See "Reply to Defense Answer/Motion to Dismiss", enclosed.

10

The Lower Court Did Not Understand How Equity Supplements Statutory Provisions

Equity Supplements Statutes and Is Not Displaced by Them
J. Appel Admitted that He Did Not Understand the Complaint

The lower court acted as if the Washington partition statute is plenary with respect to the remedies available against an LLC. Appellant also believes the lower court felt he submitted a cause of action which may or may not have been apt under the Washington partition statute and for this reason, is subject to summary judgment and sanctions.

Grundstein believes sanctions and summary judgment are not appropriate for this reason. The purpose of this presentation is to describe how equity supplements statutory provisions and is antecedent and concurrent with them. Just because a statute exists doesn't mean it is the exclusive legal means and application in a given scenario.

Under this circumstance, a Washington LLC will be subject to case law and equitable and legal principles of fiduciary relations in addition to statutory provisions.

Lower Court J. Appel admitted that he “did not understand the Complaint”. This statement was made at the June 3, 2010 hearing to determine attorney fees.

a

The Relations Between Equity and Code Provisions are Not the Same As Those Between Legal Principles and a Statute

“The relations between general equitable principles and Code provisions are quite unlike the relations between general legal principles and code provisions. One primary function of the corpus of code sections is generally to displace prior legal principles. But it is not a primary function of these sections to displace prior equitable principles....Code sections do not “occupy the equity field”. Rather, general equitable principles remain largely intact, for they are only rarely displaced. In a sense, they are the main occupants of the relevant field. This follows from their basic character. Unlike general legal principles, they do not merely supplement code sections, their function is also to carve exceptions from them....”. “J.B. Slater, “Statutory Violations and Equitable Discretion, 70 Cal. Law Review, 524 (1982).

This idea means summary judgment is not appropriate here.

Grundstein has cited several other equitable and legal causes of action which are legitimate and which are not mutually exclusive with respect to the partition statute.

In addition, the partition statute is not limited to a narrow

interpretation in violation of fair principles. Appellant has cited Washington authority in favor of partition concerning an LLC which was in the business of real estate. Equity supplements a statute to do justice.

b

Case Law Confirms Equity Has Priority Over Statutory Provision Unless Statute Specifically Claims Plenary Powers Over a Subject Matter

“Hecht Co. v Bowles” 321 U.S. 321 (1944) U.S. Supr. Ct., found “equity practice with a background of several hundred years of history militated in favor of a more flexible judicial role; only an “unequivocal statement of legislative purpose” would suffice to establish that congress had meant to override that tradition.” “Hecht” has spawned a “clear statement” rule by which it is presumed equity supplements statutes unless clearly stated otherwise.

See also “Miller v French” 530 U.S. 327 (2000); the court stated that “we should not construe a statute to displace courts' traditional equitable authority absent the clearest command or an “inescapable inference” to the contrary.

c

Equity Precedes Legislation

“U.S. v. Detroit Timber and Lumber Co., 200 U.S. 321 (1906).

“The principles of equity exist independently of, and anterior to, all congressional legislation....we must bear in mind the general principles of equity and determine rights upon those principles, except as they are limited by special statutory provisions.”

11

**Counsel for Defense Acted in Conflict of Interest and Should Not Get Attorney Fees
Conflict of Interest is Reversible Error When the Lower Court Should Notice Conflict and Fails to Inquire**

**Defense Counsel Violated Washington Ethical Canons by Representing Defendant Trustee and Co-Defendants Levin/M. Grundstein
Co-Defendants Levin and M. Grundstein Were Really Plaintiffs and Should Have Been Realigned**

**Defendants Levin and M. Grundstein Stood to Benefit from Valuation and Distribution of Real Estate Share
Conflict of Interest Denies Compensation**

There has always been a conflict of interest in this case. Defendants Levin and M. Grundstein were joined temporarily as defendants just for purposes of service. They should have been realigned as plaintiffs at the outset of the case. Plaintiff raised this issue in his brief prior to the June 3, 2010 hearing and in his Motion to Reconsider (CP 26-27 and CP 10). Levin and M. Grundstein are beneficiaries under the Trust and owned a ¼ share in the Scriber Gardens investment. They had a right to know and

receive the money value of the Scriber Gardens ½ share.

Meltzer cannot claim ethical violations against Plaintiff while he commits them against the people he charges. See “Eriks v. Denver” 118 Wn 2d 451 (1992) and “Cotton v Kronenberg”, 111 Wn. App. 258 (2002)

Meltzer cannot defend Defendant/Trustee while acknowledging his fiduciary obligations to the beneficiaries of the Trust asset (Scriber Gardens share) who include Plaintiff and his two sisters, named as defendants. See also Case No. 06-4-04282-1SEA “In re: The Estate of Dorothy Grundstein: Robert Grundstein/Beneficiary v. Leon Grundstein/Trustee”, for the same type of violations.

“Eriks”, supra is a case in which the Supreme Court, upon a finding that an attorney had breached his fiduciary duty to two groups of clients with conflicting interests in a case, quoted from “Woods v City Nat’l Bank & Trust Co.” 312 U.S. 262, as follows; “Where an attorney was serving more than one master or was subject to conflicting interests, he should be denied compensation. It is no answer to say that fraud or unfairness were not shown to have resulted....

“A fiduciary who represents (multiple parties)... may not perfect his claim to compensation by insisting that, although he had conflicting interests, he served his several masters equally well... Only strict

adherence the these equitable principles can keep the standard of conduct for fiduciaries “at a level higher than that trodden by the crowd.”

The Court of appeals reiterated this view in “Cotton v. Kronenberg”, 111 Wn. App. 258 (2002) by affirming the complete forfeiture of a lawyer’s fee in the face of a conflict and an accompanying breach of fiduciary duty. “Eriks”, supra, allows the Rules of Professional Conduct to be considered directly in assessing whether a lawyer has breached a fiduciary duty to a client.

“The failure of the trial court to inquire into a possible conflict of interest between the defendant and defense counsel is reversible error and prejudice is presumed. “ “In re Personal Restraint of Richardson”, 100 Wash.2d 669, 677, 675 P.2d 209 (1983). In “Richardson”, defense counsel had also represented a defense witness whose testimony created a self-incrimination issue. We adopted two rules. *First, a trial court commits reversible error if it knows or reasonably should know of a particular conflict and fails to inquire. Second, reversal is always necessary where a defendant shows an actual conflict of interest adversely affecting counsel's performance. These rules apply to any situation where defense counsel represents conflicting interests. “Richardson”, 100 Wash.2d at 677, 675 P.2d 209*

12

**Under RCW 4.84.010, .080 and .185 Attorney Fees are Limited
to \$200.00 per hour
The Lower Court Awarded Excessive Fees**

Opposing counsel was awarded attorney fees at the rate of \$325.00 per hour. If one reads RCW 4.84.185, 010 and .080 together, it is clear sanctions in the form of attorney fees are statutorily limited to \$200.00 per hour.

13

**The Lower Court Made No Factual Findings and Did Not Refer
to Statutory or Case law Controlling Sanctions When It
Awarded Attorney Fees for “Frivolous Conduct” (CP 1-2)
The Award is Arbitrary**

The lower court did not cite a statute, civil rule or case law when it applied sanctions against Grundstein. It is hard to know the criteria it applied. J. Appel did not make findings of fact, but only concluded that the original case was “Frivolous”.

RCW 4.84.185 states: (First Sentence)

“In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the non prevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense.”

There were no findings. J. Appel only provided a conclusion of law

unreferenced to any specific law. It is arbitrary.

14

**Sanctions Were Inappropriate
Grundstein's Case Had "Reasonable Cause" and Presented
"Debatable Issues"
Just Because He Did Not Win Does Not Mean He Gets
Punished**

See "Bayha v Lampson" 2009 Wash. App. LEXIS 2197, September 1, 2009 (Div. III), in which the Court found just because a party loses a motion for Summary Judgment, doesn't mean the winner is entitled to sanctions and attorney fees:

Reference to Sanctions authority:

P 62 "A trial court has discretion under RCW 4.84.185 both to impose sanctions for frivolous litigation and to determine the amount of reasonable attorney fees. "Fluke Capital & Mgmt. Servs. Co. v. Richmond", 106 Wn.2d 614, 625, 724 P.2d 356 (1986); "Zink v. City of Mesa", 137 Wn. App. 271, 277, 152 P.3d 1044 (2007), review denied, 162 Wn.2d 1014 (2008). A trial judge likewise has discretion under CR 11 both to impose sanctions and the amount of any sanction that is imposed. "Skimming v. Boxer", 119 Wn. App. 748, 754, 82 P.3d 707, review denied, 152 Wn.2d 1016 (2004). Discretion is abused when it is exercised on untenable grounds or for untenable reasons. "State ex rel. Carroll v. Junker", 79 Wn.2d 12, 26, 482 P.2d 775 (1971)....

Summary Judgment does NOT entitle sanctions:

Action must be "frivolous", "advanced without reasonable cause"
AND "present no debatable issues".

"P 63...they point to the fact that summary judgment was granted to each as an indication that the claims were frivolous. They essentially equate "frivolous" to "without merit." Under such reasoning, every grant

of summary judgment would also require payment of attorney fees under the frivolous litigation standard. ***However, the statute requires more than that the action was without merit. It must be frivolous and also “advanced without reasonable cause.” RCW 4.84.185. A frivolous action is one that presents no debatable issues and is totally devoid of merit.*** “Lutz Tile, Inc. v. Krech”, 136 Wn. App. 899, 906, 151 P.3d 219 (2007), review denied, 162 Wn.2d 1009 (2008). While we agree with the trial court that the case was without merit, we are not in a position to say that there were no debatable issues. There also is no basis for finding that the case was advanced without reasonable cause. The trial court did not err in rejecting the claim for attorney fees under the statute.”

Criteria for Application of Civ. Rule 11: Advancing Litigation Without Adequate Investigation or Legal/Factual Basis:

“P64 Similarly, CR 11 [*27] permits sanctions, including attorney fees, when an attorney advances litigation lacking a legal or factual basis without adequate investigation of the legal and factual bases for a case. “Roeber v. Dowty Aerospace Yakima”, 116 Wn. App. 127, 141, 64 P.3d 691, review denied, 150 Wn.2d 1016 (2003). Here, trial counsel relied on historic facts (and his client's view of those facts) in crafting his pleadings. While the complaint lacked merit, we agree with the trial court that it was not inadequately investigated. Accordingly, the court did not err in denying CR 11 sanctions”

Grundstein's arguments and facts were well investigated. He provided legal authority for the application of statutory provisions such as Partition and equitable remedies (“reasonable expectations” doctrine, veil piercing) which didn't depend on statutory interpretation or application. He also used his right to plead alternatively and hypothetically and to amend his complaint under Civ. Rule 15. Grundstein presented a Washington Case in which partition was granted to interest holders of an

LLC that invested in Real Estate and reasons why the case should have been admitted as precedent. (“Carroll v Elzey” King County Superior Ct. # 04-2-21613-3)

Conclusion Requested Relief

**The Law Is Evidence of a Culture of Fairness and Social Policy
The Lower Court Should Have Simply Applied the “Reasonable
Expectations” Doctrine
LLCs Are a New Creation Subject to Much Needed Litigation**

The culture of ethical thought precedes the law. Equity is the expression of this culture and is antecedent to codes and legal principle.

For this reason it would be wrong to regard the Washington partition statute as plenary and unsupplemented by equity in this case. Appellant also presented legitimate alternative causes of action which stand on their own.

Appellant Grundstein does not understand the application of sanctions, summary judgment and the annihilation of this action. It does not make sense under this set of legal principles and the habitual theft, embezzlement and misappropriation defendant Leon Grundstein habitually commits against those he felt would not hold him accountable, or in the case of our mother, the elderly, significantly impaired and devoted to family.

The lower court should have applied the “reasonable expectations” doctrine to the case. It didn’t even require an amendment to the Complaint.

The LLC is a new creation, prematurely inflicted on the world by the Wyoming legislature during the 1990s. It has the personal protections of a "C" corporation with the flexibility and adaptable character of a partnership. As of 2006 (the only statistic I have) there were only SIX cases on a national basis litigated to determine the rights of third parties with respect to them.

The state LLC statutes primarily control relations between the members/shareholders/ but tend to say very little about relations and obligations with third parties.

This suit was necessary to participate in the process by which LLCs are forced to recognize their duties to all people with a financial interest in them.

THEREFORE: Grundstein asks for the following relief:

1. A ruling by which the order for attorney fees levied in the lower court is reversed and vacated;
2. A ruling by which opposing counsel is sanctioned for conflict of interest and his attorney fees are disgorged;
3. A remand of this case for conduct consistent with the principles of the "reasonable expectations" doctrine and other equitable principles;
4. For other legal and equitable relief this Court finds appropriate.



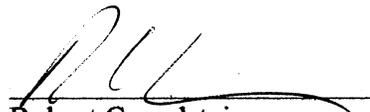
R. Grundstein Esq./WSBA 20389

1655 Cadys Falls Road
Morrisville VT 05661
802-851-1120/rgrunds@pshift.com

Certificate of Mailing:

I certify that a copy of this Appellant's Brief was sent to attorney for appellant, R. Meltzer by USPS and email on October 13 , 2010 at the following addresses

Ronald J. Meltzer
1001 Fourth Avenue Plaza
Suite 2120
Seattle, WA 98154
RJM@sinsheimer-meltzer.com


Robert Grundstein

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