

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION TWO

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**Washington State Court of Appeals**  
DIVISION TWO

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COLIN F. YOUNG,  
Appellant,

vs.

David Ellis et all  
respondent,

# 40796-5-II

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Appellant's Opening Brief  
amended

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## Assignments of Error <sup>1</sup>

The trial court erred in:

1. Its oral decision on 8/8/08 denying plaintiff's pretrial motions
2. Its summary denial of the Motion to Reconsider the 8/8/08 decisions
3. Its denial of the plaintiff's Motion to Leave Amended Complaint
4. Its partial denial of the plaintiff's Motion for Revaluation
5. Its summary denial of the plaintiff's Motion for Reconsideration of Judgment..
6. The Trail Court erred in entry of the following Findings of Fact (FF):

Finding of Fact #1 CP 1512

Finding of Fact #2 CP 1512

Finding of Fact #10 CP 1514

Finding of Fact #11 CP 1515

Finding of Fact #15 CP 1516

Finding of Fact #23 CP 1517

7. The Trail Court erred in entry of the following Conclusions of Law (CL):

Conclusions of Law #1 CP 1518

Conclusions of Law #2 CP 1518

Conclusions of Law #3 CP 1518

Conclusions of Law #5 CP 1518

Conclusions of Law #6 CP 1519

Conclusions of Law #7 CP 1519

Conclusions of Law #8 CP 1519

Conclusions of Law #9 CP 1519

Conclusions of Law #12 CP 1521

Conclusions of Law #13 CP 1521

Conclusions of Law #15 CP 1522

Conclusions of Law #16 CP 1522

- 7 The trail court erred when it failed to award appellant injunctive relief of specific performance of the Yank A Part LLC operating agreement or in the alternative

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<sup>1</sup> Copies of challenged Findings of Fact and Conclusions of Law are set forth with challenged portions in bold type, and if improperly designated or containing a combination of findings and conclusions they are noted accordingly. Abbreviations of FF indicates Finding of Fact, CL indicates Conclusion of Law, CP indicates Clerk's Papers, RP indicates Report of Proceedings of trial, "rp mm/dd/yy" indicates Report of Proceeding for pre-trial or post trial hearing, "Ex" indicates exhibit number

order the disassociation of the defendant/partners from the LLCs under partnership statutes RCW 25.05 or Dissolution's of the LLCs.

8 The trial court erred when it failed to reach the merits of a "ultimate facts" issue of an implied but superior partnership, despite the substantial evidence that just such an implied partnership was formed prior to the LLCs and continues to exist.

9 The trial court erred when it ruled as matter of law that defendants had the authority and "cause" to remove Young from his express Member-Manager position without exercising the unanimous consent requirement to amend the contract known as the Yank A Part LLC Operating Agreement.

10 The trial court erred when it failed to account that the defendants acted in bad faith or with malice such that they pierced the corporate veil as members under RCW 25.15.155 (1) and that these malicious acts or bad faith by defendants constituted a breach of contract, operating agreement, or fiduciary duty, which substantially damaged the plaintiff or the LLCs.

11 The trial court erred when it failed to compensate the appellant under the doctrine of quantum meruit for his year of partnership work prior to the start of Yank A Part business operations and award front pay

12 The trial court erred when it failed to award the appellant the full \$4380 in unpaid wages evidenced at trial, and failed to find statutory double damages were due plaintiff under Washington's wage statutes and as well as mandatory, attorney fees, and costs in consideration of the defendants willful withholding Young's wages.

13 The trial court failed to consider the defendants' bad faith and malice and order disgorgement of ill gotten gains from personal enrichment, self dealing, and breach of contract

14 The trial court erred when it awarded the respondents statutory attorney fees and costs, and did not award Appellant fees and costs.

15 The trial court erred when it dissociated plaintiff and awarded one fourth share of LLC assets but left plaintiff with LLC loan liabilities

### **Issues Pertaining to Assignments of Error**

Errors 1, 2, 5, 6, 7, 15.

Issue 1) Did the courts err in determining defendants properly removed LLC Manager Member with just cause and in compliance with LLC Operating Agreement?

Error 3.

Issue 2) Did the motion court err in denying plaintiff's motion to leave amended complaint and was plaintiff thereby prejudiced ?

Errors 4, 5, 6, 7

Issue 3) Did the trial court abuse its discretion in denying plaintiffs motion for revaluation following the trial court setting the valuation date for LLCs as 19 days after the close of trial.

Errors 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15

Issue 4) Did the trial court err when it crafted member expulsion or dissociation outside the legislated provisions of Washington Limited Liability Company statutes and provisions of the members' Limited Liability Company Operating Agreements and Certificate of formation?

## STATEMENT OF THE CASE

This is an appeal from a bench trial for respondents' breach of contract under two separate LLC operating agreements resulting in the forced exclusion of the appellant from the partnerships' wrecking yard LLCs. Three months after start of operations respondents seized the business and its bank accounts (rp 1561), isolated appellant from all financial records, withheld his wages (rp 1545:11 - 1546:1), and converted his LLC assets to themselves with two separate forgeries recorded with the Secretary of State. (rp 2512-13) (ex 163). Appellant sued for breach of contract, general and special damages, injunctive relief, and dissociation of defendants under partnership statutes. (supl cp 1-23) Respondents crossclaimed for breach of fiduciary duty, damages, and dissolution of the two LLCs. (supl cp 35-47)

In initial judgment, the trial court found no breach of fiduciary duty, awarded appellant damages of withheld wages, selected the appellant as most "commercially reasonable" to expel, formulated a valuation for the LLCs for the 2/23/10 decision date, then awarded appellant one fourth that valuation. (sup cp 129-141 84-87) Post trial order for financial statements revealed over \$44,000 in concealed LLC funds at 1st Security Bank (cp 1387 & 1390 on 2/23/10), accounts which were revealed by trial subpoena for LLC bank resolutions. (rp 1527) (ex 148) The trial court then amended its judgment increasing its LLC valuation and appellant's award. (cp 1510-22 1493 -1496) However, the court unfairly left appellant individually responsible for over \$110,000 in Westsound Bank loan liabilities, (cp 1392) and subject to the continuing risks of respondents' LLC management. (rp 694-96, 2398-99) Appellant

appeals on various grounds. Both parties appeal on issues of attorney fees. (sup. cp 188-115)

## INTRODUCTION

In early 2006 appellant/plaintiff Colin Young and respondent/defendant Brad Johnson (Brad) entered into a verbal agreement and informal partnership specifically to purchase, convert, and operate Jims Auto Wrecking as a self help “Pick A Part” style of wrecking yard.<sup>1</sup> (rp 1706 - 1712)

In early 2007 Young further agreed to perform all the necessary financial analysis, develop the business model, establish operational systems, draft a formal business plan, develop wrecking yard budgets and project business costs and profits. Brad further agreed to arrange all wrecking yard venture financing and assist with environmental certification required by the bank. (rp 2136-137, 2591, 61:22 - 63:4) In March 2007, Brad’s bother Mike Johnson (Mike) was brought in as a third partner and “safety expert.” (rp 77,195) (rp 65:22 - 66:10) Shortly thereafter Brad began lobbying Young to include Brad’s long time friend David Ellis (Ellis) as a fourth partner.<sup>2</sup> Prior to LLC formation, Young worked full time for approximately one year in furtherance of wrecking yard venture and for the benefit of the partnership.

By the summer of 2007, Brad had made preliminary arrangements with Westsound Bank for the principal loan of \$475k to purchase the land and structures

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<sup>1</sup> Under the terms and promises of this partnership agreement the two partners would share ownership and profits, any costs and losses, and Young would manage the business while Brad’s involvement would be limited due to his management of Grandview Development. Young would perform all investigation and research required to plan and purchase the yard. Partners also agreed to storage of personal vehicles and equipment at the yard. (rp 86:23)

<sup>2</sup> Ellis was added as partner in late June of 2007. Brad asserted that inclusion of Ellis as a partner was necessary for financing, as Ellis had sufficient home equity to carry one large loan for the balance of the wrecking yard purchase, saving the fees of individual loans.

where the wrecking yard was located, (ex 14) (rp 1471:4-12) The remaining \$240k required to complete the wrecking yard purchase would come from each partners' home equity. While Ellis and Young each had sufficient home equity for their share of the balance, neither Brad nor Mike had available home equity sufficient to secure financing for their share of the \$240k. (rp 1448:20-1450:7)

By December of 2007 the Johnsons were defaulting on interest payments for their \$1.12 million in construction loans at Brown Lee (rp 320:3-10, 321:9-28, 816) and both these homes were in foreclosure by early 2008 and subject to "short sale" by the bank (ex 4) (rp 1872 - 1876:7, 812-832 gen.) The Johnsons lost \$200k on each of Johnson's two Brown Lee homes under Brad Johnsons management, to which Johnsons were still "negotiating" their unpaid debt with the FDIC at the time of trial. (rp 88:22 -189:16)

Partners' wrecking yard purchase was finalized on 11/30/07. Yank A Part (YAP) opened for business the next day, but without shutting down for business preparation as planned, (rp 351: 3-16, 1518:7 - 1526) and seriously impacting the project schedule. (rp 1572) (ex 45) Under YAP Operating Agreement Section 5.1.1, Young was designated Member-Manager of all operations and financial matters. (ex 2) For the first six weeks of operation all defendants honored the terms of the YAP agreement and Young's express management responsibilities. Young managed YAP to a \$6208 profit in its second month of operation.<sup>3</sup> (cp 784) (rp 1984, 1490:11-1491:1 ) With Johnsons' Brown Lee project out of money, by early January 2008,

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<sup>3</sup> From the outset partners agreed to dedicate all profits to loan payoff until the Westsound and Ellis-Chase loans were paid off, with profits first going to payoff the Ellis-Chase loan of \$242k within two years. After two years of Brad's management quickbooks records show only \$48,600 in interest paid to Ellis and no reduction in principal on the Ellis loan. (cp 1393)

Brad was at the wrecking yard almost exclusively. Grandview Development had no income to pay Brad his salary (ex 157) (rp 1430-31) By mid January 2008 defendants were interfering with Young's management of YAP.

When Young was called away to California for a family funeral 2/21/08, the defendants seized control of YAP and Olympic Holdings LLCs, emptied, then closed LLC bank accounts, and opened new accounts excluding Young as owner. (rp 1486:20-1489:6) Following Young's return late afternoon 2/28/08, defendants locked Young out of YAP (rp 1446:7-10), impounded his two vehicles stored at the yard, and threatened Young to stay away from the facility.<sup>4</sup> (rp ) Brad took over as manager, taking Young's contract wages without amendment of the YAP agreement as required by Section 10. Young hired an attorney who contacted the defendants for clarification of the situation. Five weeks later, in early April 2008, defendants finally noticed Young with their "*Minutes of Special Meeting of Members February 26, 2008*" (hereinafter "Resolution"), drafted by Ellis' attorney, (cp 758-9) and alleging justification for replacement of Young as manager in late February 2008. (ex 15)

## ARGUMENT

**A. Standard of Review:** Standard of review for all questions and conclusions of law is De Novo. Standard of review for all Findings of Fact is Substantial Evidence.

Standard of Review for all other issues in this pleading is Abuse of Discretion.

An issue of equity is reviewed for an abuse of discretion. In re Marriage of Konzen, 103 Wn.2d 470, 478, 693 P.2d 97 (1985). This court will "review the trial court's findings of fact for substantial evidence in the record and conclusions of law to see if the findings support them." Roeder Co. v K&E Moving & Storage Co., 102 Wn.App 49, 52, 4 P.3d 839 (2000). rev. denied, 142 Wn.2d 1017 (2001). Furthermore, when findings of fact are in reality conclusions of law, this court will treat them as conclusions of law. Fine v. Laband, 35 Wn.App 368,

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<sup>4</sup> Defendants continued to omit Young's name from all LLC bank resolutions

374, 667 P.2d 101 (1983). Conclusions of law are reviewed De Novo. Soltero v. Wimer, 159 Wn.2d 428, 433, 150 P.3d 552 (2007). “A party may refer to the trial court’s memorandum opinion to explain or clarify the formal findings, so long as they do not contradict such findings.” Ferree v. Doric Co., 62 Wn.2d 561 567, 383 P.2d 900 (1963). Unchallenged findings of fact are verities on appeal. Rivers v. Wash. State Conference of Mason Contractors, 145 Wn.2d 674, 692, 41 P.3d 1175 (2002).

**B. The trial court has committed an obvious mistake of law in its judgment of dissociation.**

Neither facts of the case nor precedent support the court’s judgment of dissociation of Young. CL #6,7, and 8 (cp 1516) are each erroneous and unsupported by substantial evidence in the record. Standard of review for CL #6,7, and 8 is de novo, and any findings of fact therein are reviewed for substantial evidence. The issue of the court’s claimed authority and decision to dissociate Young is a question of law.

While the fashioning of the remedy may be reviewed for abuse of discretion, the question of whether equitable relief is appropriate is a question of law. *See Puget Sound Nat’l Bank of Tacoma v. Easterday*, 56 Wash.2d 937, 943, 350 P.2d 444 (1960) (finding that the question of whether the trial court exceeded its authority in applying cy pres to be a question of law); *cf. Townsend v. Charles Schalkenbach Home for Boys, Inc.*, 33 Wash.2d 255, 205 P.2d 345 (1949).

**Challenged CL #6** The relationship between these parties is irretrievably broken and cannot be reconciled or remedied. Consequently, one side has to be expelled and compensated for their membership share in both companies. (cp 1519)

The first sentence of CL #6 is a finding of fact not supported by substantial evidence in the record and any conclusions based this finding (including the second sentence in CL #6) are also not supported by substantial evidence in the record and erroneous. Standard of review is de novo. Neither Young nor the defendants testified at trial the “relationship” was irrevocably broken or that it could not be reconciled or reconciled. Young provided undisputed testimony that he could still operate YAP

under terms of the operating agreement, provided the defendants were restrained from interfering (rp zzz ) In the complete absence of witness testimony in the trial record supporting “The relationship between these parties is irretrievably broken and cannot be reconciled or remedied” the trial court appears to have based this finding of fact on the trial statement by the defendants’ attorney Mr. Broughton, who suggested that the LLCs were irretrievably broken. (cp 1504) However Mr. Broughton was not a witness at trial, his statement is not evidence, and CL #6 is without foundation. Thus the court’s conclusion of law in CL #6 that “one side has to be expelled and compensated for their membership” is outside the terms of the contract, erroneous, and unsupported by substantial evidence the trial record. As CL #7,8 rely on CL # 6, they are therefore also erroneous.

**Challenged CL #7** Since both sides asked the court for the same relief, the court will accede to that implied grant of authority and exercise it in a commercially reasonable manner. Further, the language the operating agreements at section 9.1.4 particularly addresses this situation: expulsion of a member results in dissolution unless the remaining members unanimously agree to continue the business within 120 days of the expulsion. This is also consistent with the paragraph Four in the Certificate of Formation. Both sides have asked for expulsion of the other and stated the intent to continue the business. Dissociation is the better result all around than dissolution. (cp 1519)

Findings of fact and conclusions of law in CL #7 are erroneous and not supported by substantial evidence in the record, and any conclusions based on CL #7 are also not supported by substantial evidence in the record and erroneous. Standard of review is de novo. In crafting its decision in “a commercially reasonable manner” (CL #7), the defendants’ interests have apparently have tipped the trial court’s scales of justice away from the plain language of the LLC operating agreements and empowering RCW 25.15 statutes. The unambiguous terms of the partner’s LLC

agreements do not permit the trial court's solution, and its "implied grant of authority" (CL #7) is invalid, erroneous, and unsupported by substantial evidence in the record.

The trial court was without authority to "dissociate" or "expel" Young under the terms of the partners' LLC agreements, or under any other statute. In CL #7 the trial court appears to suggest the authority and mechanism for expulsion is found in the oblique mention of "expulsion" in YAP Section 9.1.4 as well as "paragraph Four" of the YAP Certificate of Formation. (ex 2) The trial court erroneously concludes in CL #7 that "the language of Section 9.1.4 particularly addresses this situation." However, Section 9 simply describes the events and procedures of "Dissolution." Neither LLC's Section 9.1.4 nor "paragraph Four" (ex 2,3) stand as an original grant of authority to dissociate or expel a LLC member or manager.

9.1.4 The death, incompetence, expulsion, or bankruptcy of a Member, or the occurrence of any event that terminates the continued membership of a Member in the Company, unless there are then remaining at least the minimum number of Members required by law and all of the remaining Members, within 120 days after the date of the event, elect to continue the business of the Company. (exhibits 2,3 -YAP and OH operating agreements at Section 9)

In a similar New York case, where a LLC member was forced out, the 2010 decision from the Supreme Court of New York, Appellate Division, decided that regardless of passing mention of "expulsion" in the act, expulsion of a LLC member is not permitted without a statutory mechanism or an express process for "expulsion" within the operating agreement. Here, this same reasoning applies to defendants' last minute and unsupported request for Young's "expulsion" or "dissociation." In CL #7, the trial court erroneously places weight on the incidental inclusion of the word

“expulsion” in YAP operating agreement at 9.1.4 without acknowledging the complete absence of an express mechanism in statute and contract for “expulsion.”

“The Supreme Court properly granted that branch of the defendant’s motion which was to dismiss the second cause of action seeking his expulsion as a member of the plaintiff 45-52 Northern Blvd., LLC (hereinafter the LLC). It is undisputed that the default provisions of the Limited Liability Company Law apply, as neither the articles of organization nor the alleged operating agreement of the LLC contain a provision concerning expulsion of members (see *Manitaras v. Beusman*, 56 A.D.3d 735, 868 N.Y.S.2d 121; *Ross v. Nelson*, 54 A.D.3d 258, 861 N.Y.S.2d 670). Although Limited Liability Company Law § 701 mentions expulsion of members, there is no statutory provision authorizing the courts to impose such a remedy. Rather, the reference to expulsion of members contemplates the inclusion of such a provision in an operating agreement. As the LLC did not have an operating agreement setting forth a mechanism for the expulsion of members, the plaintiff failed to state a cause of action for this relief.” (emphasis added)  
[*Man Choi Chiu v. Chiu* 896 N.Y.S.2d 131, 2010 N.Y. Slip Op. 01768 (2010)]

Like *Chiu*, no mechanism is set forth for “expulsion” in either the RCW 25.15 statutes or LLC agreements. Even the trial court’s bootstrapping defendants’ request for Young’s “dissociation”<sup>5</sup> to passing mention of “expulsion” in Section 9.1.4 fails to provides mechanism or authority to remove Young as member or manager.

“In the present case, the language upon which Defendants rely to argue expulsion authority speaks obliquely of the event of expulsion. Strictly construed, this language is not an affirmative grant of power. Furthermore, even if the parties intended to implement the power to expel members, the language does not enumerate the causes for which a member may be expelled. Absent these specifications, the power to expel a member, if present at all, would have no enumerations and would be invalid. Even the Missouri Limited Liability Company Act states that members of LLCs may only be expelled “in accordance with the operating agreement.” Mo.Rev.Stat. s 347.123(3). This appears to be a codification of the common law that, absent express authority in the articles, a corporation does not have an inherent, unspecified power to expel members. Under applicable Missouri law, the Court concludes that the language in the Supervising/Managing Member Agreement is not an affirmative grant of expulsion authority and, even if it were intended to be, it does not enumerate the causes for which a member may be expelled”. (emphasis added)  
[*Brazil v. Rickerson* 268 F.Supp2d 1091 (2003)]

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<sup>5</sup> Excepting RCW 25.15.130 “Events of dissociation.”- Facts here preclude its application.

enumerates the causes for which a member or manager may be removed, expelled, or dissociated. Clearly no cause of action, relief, remedy or authority for judgment can be found in the lone and incidental inclusion of the word “expulsion” in the LLC operating agreements and therefor the courts judgment is erroneous and unsupported by the trial record.

In CL #7 the trial court erroneously finds “both sides asked this court for the same relief, this court will accedes to an implied grant of authority” and “both sides have asked for expulsion of the other.” These findings of fact are not supported by substantial evidence in the record and any conclusions of law in CL #7 or based thereon are erroneous. Nothing in the record shows Young requested “expulsion.” The two parties’ requests for “dissociation” were as different as night and day. Unlike the defendants’ vacuous request for “dissociation”, Young’s request and theory for “dissociation” is based in statute, remains as found in his original complaint. The defendants’ request for “dissociation” had no legal basis, no supporting facts, no theory, and no demonstrated mechanism. (rp ). “Court cannot predicate a decision on a mere theory which is devoid of supporting facts in the record.” *State ex rel. Piper v. Pratt* 331 Wa.2d 725 (1948) Yet, this is exactly what the court did, and the trial court has therefore committed an obvious mistake of law.

As to the court’s claimed “implied grant of authority” in CL #7, the legal basis of this authority is not recognized in case law nor supported by substantial evidence in the record, as such, any conclusions of law based thereon are also erroneous and unsupported by the record. The phrase “implied grant of authority” was not found in

defendants prior to their alleged vote for Young's removal 2/26/08. No evidence in the trial record establishes this knowledge.

The trial court states "an employment contract was embedded in the Operating Agreement and, consistent with common law, requires that the other member have just cause to fire Colin Young" (cp 1504) In CL #4, the court concludes that defendants had "just cause" to remove Young. In CL #3 the court separately finds Young's removal "justified because of his unorthodox methods of record keeping" Neither CL #3 nor CL #4 are supported by substantial evidence in the record and they are therefor both erroneous. The trial court failed to specifically identify this "just cause," and "just cause" is not substantially evidenced in the trial record. As demonstrated above, the claim of "unorthodox" and "disarray" of books or records is not supported by substantial evidence in the trial record.

Wages expressly dedicated to Young were taken unlawfully by Brad Johnson. These wages were bargained for and promised to Young in consideration for his year of work preparing and purchasing the business. Young also provided YAP \$2500 in as initial consideration in support of his express "perpetual" position as manager.

A contract for permanent employment is binding and enforceable where the employee has given a good consideration in addition to his services [See Am Jur POF.2d 34-259 p.276 ref: Note, 25 Stan L. Rev. 335, 331-352, Annotation: 60 ALR.3d 226, 5]

Young's position as member-manager of YAP was "perpetual", by way of paragraph one of the inter-referenced YAP Certificate of Formation. (ex 2) Because of the weight of Young's total consideration, the partners' employment contract is

binding. Moreover, Young's 2006 bargain and promise for future wages are firmly established by three months performance under the YAP agreement

**1. Defendants' "Resolution" does not provide "just cause" to remove Young.**

The trial court found all but one of defendants fifteen "Resolution" based justifications for removing Young to be "unproved", "of minimal consequence" or "not his duty as manager". (cp 1515-16, FF 11 - 14). The one exception, FF #11 allegation #4 is a curious anomaly in that the author was not identified at trial and it appeared only in the final draft of the "Resolution" Allegation #4 "Bookkeeper indicates books are in disarray" was considered only "superficially persuasive" by the trial court in FF #15 which conflicts with CL #3. However before all else justification item # 4 remains unsupported hearsay not confirmed by the bookkeeper or anyone else at trial.

FF # 11 is challenged in its entirety including all 15 justifications following on the basis that it is not supported by substantial evidence in the record, and any conclusions of law based on FF #11 are not supported by substantial evidence and are therefor erroneous. Moreover FF # 12-15 render moot FF # 11 allegation items 1-3 and 5-15. As to allegation item #4 specifically, it is not supported by substantial evidence and any findings of fact or conclusions of law based on allegation item #4 are erroneous. Justification item #4 is not found in any of the three versions of Meeting Minutes of 2/26/08 (ex 141) as claimed in the first sentence of FF #11 No place in the record of trial testimony is there a statement supporting the bookkeeper indicating "books in disarray" FF #15 is therefore also not supported by substantial

evidence in the trial record and any conclusion of law base thereon is erroneous. Young's excel spread sheet check register, sales database,(ex 30) and payroll ledger (ex 95 - last 3 pages) clearly demonstrate a simple but functioning record keeping system, (rp 1537:19 - 1538:16) and no "confusion" can be found there. (ex 192) (rp 1286-89) In discovery Defendants failed to produce all check stubs and carbons, bank statements, deposit slips, and receipts required to further demonstrate the effectiveness of Young's interim record keeping system and management.

Undisputed testimony by Young establishes the LLC books, files, and financial records were secretly removed from the YAP office files by Brad in early February 2008, and then delivered to bookkeeper Silva in "boxes". (rp 1435) Once the YAP records left Young's organized files, Young is clearly not responsible for their scattered condition on arrival at Silva's office.<sup>8</sup> The trial court found Silva to be of "Diminished credibility" (cp 1504 -footnote 5)

Furthermore, nothing in the trial record confirms Silva was the actual source is of FF #11 allegation item # 4. Neither Silva nor any other trial witness testified to finding "disarray" in Young's YAP books. No trial witness testified to Young's books as "confusing" or "unorthodox". No defendant testified to having reviewed the YAP books at prior to the alleged 2/26/08 vote, but all defendants denied knowledge of Young's book and record keeping systems. In sum, no testimony or evidence in the

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<sup>8</sup> Brad testified at trial to knowing nothing about bookkeeping; never done a budget projection; never having examined Young's books or YAP income and expenses reports, and knowing nothing about an of Young's YAP record keeping systems. Accordingly there was no reason to assume that keeping LLC financial records organized meant anything to Brad Johnson.

record to substantiates the court's finding of "disarray" "confusing" or "unorthodox" as relates to Young's YAP books and records.

In FF #15 the court finds "no specific requirement" by operating agreement or statute for "paper work and bookkeeping" but alludes to application of a "certain minimum standard." which is neither identified nor supported by any evidence in the record.<sup>9</sup> and any conclusions of law base thereon are erroneous. It is telling that Silva never contacted Young for clarification or to investigate missing records which speaks to her collusion with Brad toward the objective of Young's removal.<sup>10</sup>

**Challenged CL #3** The three other members were justified in removing Colin Young as manager because of his unorthodox methods of record keeping and the resultant confusion. No member violated his fiduciary duties.(cp 1518)

The Court's first conclusion of law in CL #3 "The three other members were justified in removing Colin Young as manager because of his unorthodox methods of record keeping and the resultant confusion" is based on two findings of fact contained therein. The first finding of fact being "his unorthodox methods of record keeping", and the second being "resultant confusion" As described above neither of these two findings of fact are supported by substantial evidence in the record and any conclusions of law based thereon are erroneous.

Like most all the justifications found in "Resolution," item # 4 was hearsay without testimony of ownership evidenced in the record. Under common law

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<sup>9</sup> Findings that "no requirement exists" for LLC book and record keeping, and Young did not breach his fiduciary duty, undermines the courts ruling that removal of Young was "justified."

<sup>10</sup> Young testified that Silva never queried him to explain any of the financial records indicating her conspiracy with defendants. Silva testified that she had read section 5 of the YAP operating agreement and knew Young was Member-Manager and in charge of all financial matters, yet she testified that Brad hired her, and she refused to work with Young. (rp 584-88)

defendants suffered the burden of proving at trial their personal knowledge as to the specific basis for 'just cause' prior to voting 2/26.08. Here the trial record does not evidence that the defendants met this burden.<sup>11</sup> Bald claims, deliberate falsehoods, and hearsay in 2/26/08 "Resolution" do not constitute "just cause". In sum, "just cause" not supported by substantial evidence in the record and therefore breach of employment contract and breach of operating agreement applies to all defendants for their 2/26/08 removal of Young.

In addition to requiring substantial "cause" to terminate an employee, common law requires consideration of mitigating circumstances. Here the record shows Young was forced by defendants to immediately develop interim book and record keeping systems following partners' 3-1 vote 11/30/07 to eliminate the 6 week shut down and preparation period. (rp 351-353:16 ).

## **2. Substantial evidence does not support a majority vote removed Young.**

Even under the trial court's flawed interpretation of the YAP operating agreement where the "majority" ignores Section 10 and has authority to remove Young, substantial evidence does not support that a majority was present to vote 2/26/08, as asserted in hand written meeting minutes and "Resolution" Here the trial record is replete with conflicting evidence. When it came to specific details testified to concerning the critical meeting any vote that removed Young in late February 2008, substantial evidence does not support a "majority of the members" was present, or that the meeting and vote occurred as accurately represented by any of the three

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<sup>11</sup> Defendants admitted no "audit" ever occurred. (rp 1976-1983) Silva testified that the "Resolution" claimed audit never occurred (rp 653).

versions of 2/26/08 minutes the defendants produced in discovery. Young examined

Mike as to when the meeting and vote to remove Young occurred. Mike testified:

A. I'll be honest. I was out of town at the time so I was not directly involved

Q. And which time was that?

A. When you were removed during the week I was -- I was gone.

Q. So you were not there for the vote ?

A. I was there for the vote, you bet.

Q. What day was that?

A. I don't know.

Q. But it was during the week ?

A. No.

Q. It was on the weekend ?

A. It was on the weekend. Because I was gone. (rp 170:24 - 171)

Brad later testified the critical meeting and vote happened the evening of Thursday, February 28th. However evidence in the record shows before noon on the 28th Brad had removed LLC funds, closed the LLC bank accounts without authority and bought new locks. (ex 167) Mike testified to the defendants collusion. (rp 130, 132:24-133:3) Dave Ellis actually admitted at trial to acting in "Bad Faith" as to Young's removal. (rp 2047) Implications, argument, and pleadings relating to defendants' acts of "Bad Faith" are detailed in Plaintiff's Trial Brief. (cp 1192) Brad Johnson admitted to making false statements found in his 8/7/08 Declaration and the 2/26/08 "Resolution" removing Young (rp 1977-1983) Substantial evidence is not present for finding that any vote ever occurred or that a majority was ever present or that it was in good faith. FF #10 is not supported by substantial evidence and any conclusions of law based there on are erroneous.

**3. Defendants were without authority to remove member-manager, and default provisions for "majority" decisions do not apply if they conflict with section 10.**

Young cannot be removed as YAP the contract designated manager-manager the except by unanimous consent amendment of the YAP Operating Agreement .

10.3 “No modification or amendment of any provision of this Agreement will be binding on any Member unless in writing and signed by all the Members”

10.1 “A proposed amendment will be adopted and become effective as an amendment only on the written approval of all of the Members.” (ex 2 -YAP)

At the first pretrial hearing in this matter on 8/8/08 Judge Spearman erroneously concluded that the defendants, as the majority, can do what ever they want:

“My clerk, in looking at the status. It appears that the other folks that did what they did have authority under the statute to do what they did” (cp 281:4-7)

“My understanding of the limited liability corporation is the majority of the members have the right to make decisions regarding anything that occurs” (cp 287:2-4)

This simplistic oral ruling erroneously preempted all YAP operating agreement provisions and expressions, ignored RCW 25.15.800 and Section 10 of the YAP agreement,<sup>12</sup> and ignored Brad’s 4/8/08 criminal false filing before it of the forged YAP Initial Report illegally removing Young and a member and owner from YAP (cp 21-229). As described in Young’s 9/12/08 Motion for Reconsideration, (cp 239-275) the 8/8/08 pretrial ruling by Judge Spearman constituted a manifest injustice, abuse of discretion based on untenable grounds, and mistake of law. Young was prejudiced by the court’s bias and interruptions during the 8/8/08 hearing (see: cp 278-289)

**RCW 25.15.800** - Construction and application of chapter and limited liability agreement. ... (2) “It is the policy of this chapter to give the maximum effect to the principle of freedom to contract and to the enforceability of the limited liability company agreements.” (emphasis added)

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<sup>12</sup> Error is been assigned to this 8/8/08 oral ruling denying Young motions to Restore Status Quo and for Protection, (cp 149- 229) the delayed entry 9/4/08 of formal order denying Young’s 8/8/08 motions (cp 236-238), and denial of Young’s Motion for Reconsideration filed 9/12/08 (cp 239-275) by order filed 9/25/08 (cp 293)

Judge Spearman's summary denial of Young's Motion to Reconsider the 8/8/08 ruling was also an abuse of discretion as it provided no reasoning for denial<sup>13</sup> with a mistake of law being the ultimate result (cp 293) Like the Spearman court, the trial court's decision that the "majority" has authority to remove Young makes the same mistake of law: YAP operating agreement specifics are not preempted by default provisions within RCW 25.15, the Act.

Just like the trial court, the 8/8/08 motion court erred in deciding while acting in the majority, the defendants had authority to remove Young as member-manager while ignoring express Section 10 provisions requiring written unanimous consent.

**CL #1 The three LLC members had the ability to remove Young as manager. Section 5.1.1,33 of the Yank A Part agreement gave Young "complete power and authority" over the daily affairs of the business, excepting a few types of actions. Young argues that this authority cannot be rescinded except by a modification of the agreement that requires unanimous consent. His argument is defeated by the actual language of the agreement which limits his status as member-manager to "the authority granted by the Act and the terms of this Agreement"**

**Challenged CL #2** Section 5.2 expressly provides for decision making by a majority of the members. That section is consistent also with the terms of the state governing Limited Liability Companies (presumably the "Act" referenced in the Operating Agreement) at RCW 25.15. 120(1) Thus a majority of the members have the ability to remove Colin Young.

The CL #2 and those portions of CL: #1 in bold type are challenged as not supported by valid findings of fact and substantial evidence in the trial record, are therefore erroneous, and any conclusions of law based thereon are also erroneous.

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<sup>13</sup> The reviewing court is also directed to the underlying 8/8/08 transcript, Motion to Restore Status Quo, Motion for Order of Protection, defendant's responses to motions, the 8/7/08 Declaration of Brad Johnson, and Young's pretrial Motion to Reconsider in order to accomplish review of arguments presented in opposition to the pretrial rulings by Judge Spearman

Standard of review is de novo. CL #1 and #2 contravene RCW 25.15.800 (above), as a primary empowering statute of the Act, and are erroneous as a matter of law.

In forming the YAP Operating Agreement, the parties exercised this freedom to contract, setting express designations, terms, and conditions of operation. Under this same freedom to contract the parties clearly restricted modification of LLC express operation and structure to written unanimous consent under Section 10 of the YAP agreement/ The trial court's conclusions of law CL #1 and 2 erroneously infringe on those contract conditions and expressions and are without foundation.

The conclusion "the majority of the members have the ability to remove Colin Young" in CL #2 is unsupported by substantial evidence in the record, erroneous, and an obvious mistake of law. CL #1 "The three LLC members had the ability to remove Young as manager" and CL #2 first sentence: "Section 5.2 expressly provides for decision making by a majority of the members." are erroneous conclusions of law not supported by the substantial evidence in the record. As described below, Section 5.2 of the YAP agreement operates only on specific contract provisions referenced within the four corners of "**this Agreement.**" In its proper context section 5.2 reads:

5.2 Decisions by Members. "Whenever in this Agreement reference is made to the decision, consent, approval, judgment or action of the Members, unless otherwise expressly provided in this Agreement, such decision, consent, approval, judgment or action shall mean a Majority of the Members." [YAP operating agreement]

.In construing YAP Section 5.2 for the purpose of supporting CL #2, the trial courts' analysis is flawed. Here the court mistakenly concludes as if 5.2 operates on non specified "decisions" under this Agreement, as compared to the actual limiting language in 5.2 of "in this Agreement." However the phrase "under this Agreement"

IS NOT USED. Had the phrase “under this Agreement” been used in Section 5.2, then non specified decisions originating outside the four corners of “this Agreement” (such as defendants’ 2/26/08 vote) could be operated on by 5.2, but only subject to limitations of other provisions “in this Agreement.” Several such limiting provisions in Section 10 arise when express designations relating to Young in Section 5 and 6 of the YAP agreement are modified by defendants vote and “Resolution.” Clearly the defendants “Resolution” is a de facto amendment of the YAP operating agreement which directly violates Section 10.3 and 10.5 integration clauses.

Moreover, to support CL #2 the trial court misconstrues YAP agreement by quoting sentence segments out of context and selectively paraphrasing the clear language of 5.2. Such strained interpretation is improper, conflicts with the overall intent of YAP agreement, and leads to the absurd consequences fashioned by the court, and most egregiously conflicts with Section 10 mandates.

“Courts should not find an ambiguity in order to construe the contract, and an ambiguity will not be read into a contract where it can reasonably be avoided by reading the contract as a whole.” Hering v. St. Paul-Mercury Indem. Co., 50 Wn.2d 321, 311 P.2d 673 (1957); Hastings v. Continental Food Sales, Inc., supra. “Accordingly, even though some of the words used in the contract may be said to be ambiguous, if the terms of the contract taken as a whole are plain and unambiguous, the meaning should be deduced from the language alone without resort to extrinsic evidence.”

The language of 5.2 is clear and unambiguous. The initial condition “Whenever in this Agreement reference is made to the decision” must first be satisfied for 5.2 to apply. The “decision” (or vote) to remove the member-manager, or any member in any capacity, is not referenced in “*in this Agreement*” - meaning the referenced decision must actually be written within the four corners of the

Operating Agreement. Defendants did not provide any evidence of any such “reference” at trial or in their “Resolution” to authorize their alleged 2/26/08 removal of Young, and no such “reference” exists within the four corners of the YAP agreement. CL # 1, #2, and the court’s ruling in Amended Judgment that the defendants had the authority to remove Young are each erroneous.

The trial court’s CL #2 is erroneous because the court is trying to apply 5.2 to the defendant’s vote, which is outside the four corners of the contract, and not “*in this Agreement*”, and not “*referenced*” in the agreement. This analysis can stop here because neither the defendants nor the court have identified the qualified “reference” target of “voting to remove member-manager” within the four corners of this Agreement. Application of contract clause 5.2 to defendants vote fails as a result. (Note: by the same logic applying 5.2 to a provision of the “Act” will also fail)

In CL #2 is the court erroneously finds that Section 5.2 is consistent with of RCW 25.15.120(1) in that they both provide for a majority vote for removal of Young. This conclusion of law and any contusion of law based on this finding of fact or conclusion of law are not supported by substantial evidence and is also erroneous. RCW 25.15.120(1) is expressly limited as “subject to RCW 25.15.120(2)”:

**RCW 25.15.120 (2):**

“Except as provided in the limited liability company operating agreement,<sup>14</sup> the affirmative vote, approval, or consent of all the members are required to: (b) Authorize a manager, member, or other person to do any act that on behalf of the limited liability company that contravenes the limited liability company agreements”

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<sup>14</sup> Operating Agreement paragraph 10.1 is consistent with this statute and applies as a operating provision here. “Amendments to this Agreement may be proposed by any Member. A proposed amendment will be adopted and become effective as an amendment only on the written approval of all of the Members.”

Even under this default provision consent of “all the members” did not happen. In replacing Young with Brad, the defendants in fact contravened the YAP Operating Agreement’s designations of manager and salary, the direct designations of Young were no longer current. Without a shadow of doubt, the defendants have breached the YAP contract.

In challenged CL #1 the last sentence reads: “His argument is defeated by the actual language of the agreement which ‘limits’ his status as member- manager to the authority granted by the Act and the terms of this agreement.” Here the court once again misconstrues the contract by improperly quoting out of context sentence segments, this time from the contract clause at paragraph 5.1.1 which in proper context paragraph 5.1.1 reads:

5.1.1 The Member-Manager, *within the authority granted by the Act and the terms of this Agreement* shall have the complete power and authority to manage and operate the Company and make all decisions affecting the Company’s day to day business, banking, and affairs, excepting matters of company benefit programs, company safety policy, acquiring professional services, insurance, and capital acquisitions in excess of \$8,000, all of which shall be subject to Majority Vote of the Members.

The language of 5.1.1 is clear. Young’s “power and authority” is limited by “**this Agreement**” and not by the majority defendants as erroneously proposed in CL #1. The “limits” factor of CL #2, as raised and labeled by the court in CL #1, is actually expressed in 5.1.1 as “*within the authority granted by the Act and the terms of this Agreement*” Review of 5.1.1 shows that contrary to the court’s finding, this “limits” factor does not operate on or “limit” Mr. Young’s “*status as Member-Manager*”, but rather it “limits” the Member-Manager’s “*power and authority to manage and operate the Company ..etc.*” to within the four corners of the operating

agreement and the Act.<sup>15</sup> Once again the trial court erroneously uses sentence segments from two distinct contract clauses (5.1.1 and 5.2) to assemble a non-existent hybrid contract condition in order to support CL #1,2 conclusions that defendants were authorized to vote and remove Young. On its face, the courts basis for construing section 5 in CL #1 is clearly an error of contract law and any conclusions based thereon are also erroneous.

Similar to *Brazil* above, the defendants here are without any statutory or contract language which enumerates the causes for which Young can be removed as Member-Manager. Furthermore, like *Chui* above there is no provision or mechanism for Member-Manager removal. It is clear from the foregoing that neither YAP section 5.2. or 5.1.1 is relevant to the issue of authorizing the majority of the members to remove Young as member-manager. Therefore under the precedent of *Chui* and *Brazil* above as defendants were without mechanism or authority to remove Young as manager and each defendant breached the YAP contract when they forced Young's removal without a valid Section 10 amendment of the YAP operating agreement.

**D. Defendants breach and criminal acts following Young's exclusion are material, clearly demonstrate bad faith, and constitute gross negligence.**

Brad Johnson removed Young as member and owner of Yank A Part and Olympic Holdings LLC and converted all Young's LLC assets by his 1/31/08 forgery and then 4/8/08 false filing of the OH LLC Initial Report, and his 1/31/08 forgery and then 4/8/08 false filing of the YAP LLC. These two separate reports and four separate

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<sup>15</sup> As per RCW 25.15.800 (2), the numerous default provisions within chapter RCW 25.15 are subordinate to operating agreement provisions. If an Agreement provision is present, then the default provisions of the Act ride back seat to the operating agreement..

acts stand as incontrovertible evidence of defendants' theft, forgery, and false filing. Substantial evidence in the record show that these criminal acts were done with the knowledge and the consent of the other two defendants.

As each defendant was complicate in the forgoing "bad acts" each defendant breached the operating agreements as well as their fiduciary duty to Young as an OH member. Acting as manager Brad breached his Manager's fiduciary duty to Young as member. Moreover, each defendant equally benefited from Young's exclusion and conversion (theft) of his LLC assets, and the quantum of evidence in the record shows each defendant took full advantage of Young's exclusion to personally enrich themselves through self dealing. Within finding of fact #10, the court noted defendants' **intended** these foregoing offenses:

**FF #10** This action was later characterized as a 'firing' of Colin Young as manager, but the contemporaneous actions of the remaining members show that they **intended** to exclude him as member as well. ... his (Young's) name was taken off the official filings for Yank A Part and Olympic Holdings at the Secretary of State's Office". (emphasis added) (cp 1514)

It is well established that a finding of 'intent,' as in FF #10, precludes raising any excuse of "mistake" in defense of wrongful, malicious or criminal acts. Here the trial court found defendants willfully planned to do what that they in fact did, in completely removing Young (FF #10) (rp 130-132) To accomplish the complete exclusion of Young from both LLCs, the defendants' April 8, 2008 recording of forged Initial Reports removed Young from each YAP and OH and amounted to forgery and theft of his LLC assets. As such the following crimes and misdemeanors apply to defendants bad acts surrounding Young's forced exclusion.:

**RCW 9A.60.020 Forgery.**

**RCW 40.16.030 Offering false instrument for filing or record.**  
**RCW 9.38.020 False representation concerning title.**  
**RCW 49.52.050 Rebates of wages -- False records**

By state statute, any criminal act constitutes a “gross negligence”, and attaches civil liability for damages to the actor. These offenses are material to defendants piercing the corporate veil under RCW 25.15.060 and 25.15.155 (1) and disposition of the case on its merits. In any event "a statute not addressed below but pertinent to the substantive issues which were raised below may be considered for the first time on appeal." Bennett v. Hay; 113 Wn.2d 912, 918, 784 P.2d 1258 (1990). Here the above statutes and forged 4/8/08 “Initial Annual Report” in the record serve to demonstrate material issues of gross negligence and bad faith which the trial court reasonably should have found in judgment.

**E. Implied partnership preexisted LLC formation**

The partnership of Brad and Young began at the start of their wrecking yard venture in early 2006 with initial plans, promises, and agreements were made as to duties, the sharing of costs and loses, and the distribution of profits under long term plans. Over the next year and a half, all manner of investigation, analysis, budgeting and financial projection was completed by Young and related documents were drafted in furtherance of the partnership. (rp p. 52-67)

The trial record and undisputed testimony demonstrate partners’ early agreements, commitments, and cost sharing, as well as the work that was accomplished during the year and half preceding LLC formation. (rp 52-67, 100-103 gen) (cp 1204-1213)

It is well established that it is not the label that makes a partnership. In absence of written agreement it is the sharing of work, resources, and agreement to share losses and profits that determines a partnership. The partners sharing of partnership losses (or costs) from the summer of 2007 were documented by Brad's accounting of partnership expenses "Cost Breakdown -Jims" which stands as incontrovertible evidence of partnership. (ex 5) This accounting demonstrates cost sharing - or sharing of losses - among the partners. in late 2007 and prior to LLC formation. (rp 118-119)

As to sharing of profits, none were expected or realized until \$6,208 in Young's second month of YAP operations.<sup>16</sup> (rp 1984) Months prior LLC Formation all partners had agreed with the business plan submitted for financing as well as the restructuring the yard during an initial shut down and conversion period. (ex 13)

Young provided undisputed testimony as to the partnership meetings late 2007 with partners' CPA and an attorney where recommendations for the two LLC structure were made (rp p.53-67).

On the stand defendants repeatedly proposed that after March 1, 2008 major LLC decisions were made using group "discussions" rather than holding "LLC meetings". (rp 181,182) These defendant proposals indicate that a superior partnership still exists. Clearly the defendants used this superior partnership to make all LLC decisions, including Young's removal and exclusion from both LLCs.

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<sup>16</sup> Partners had much earlier agreed to dedicate all profits to loan payoff until the OH loan and Ellis-Chase loan was paid off, with profits first going to payoff the Ellis-Chase loan within two years. After two years under Johnsons' mismanagement quickbooks records show no reduction in principal for the Ellis loan.

Despite the issue of partnership being material to many of the issues and claims in this case, the trial court has left the parties without clear findings and conclusions as to the existence of an early informal partnership.

**F. Materiality of partnership to issues at trial**

The trial court abused its discretion when it did not clearly rule on the material issue that an informal or implied partnership pre-existed formation of the LLCs and whether this partnership continued to function and control the wrecking yard venture beyond LLC formation. Resolving the issue of early partnership formation is pivotal to Young's complaint, issues, and later claims. Included among these claims and issues are breach operating agreement and employment contract, breach of promise of management position, breach of duty to good faith and fair dealing, claim for front pay, quantum meruit, and authority of the court to dissociate under partnership statutes. Each of these issues was before the trial court and fundamental to the ultimate disposition of this case and resolving the issues on the merits.

Because the trial court has not sufficiently addressed most of the forgoing issues, the trial court did not considered most of Young's claims in its finding of fact and conclusions of law, and disposition of the case is deficient in its Amended Judgment. This, despite the fact that Young specifically addressed these critical issues in Plaintiff's Proposed Findings of Fact (cp 1333-1356 ) and Plaintiff's Objections to Proposed Findings of Fact and Conclusions of Law (cp 1300-1328).

"Findings need only address all ultimate facts and material issues." *Wold v. Wold*, 7 Wn.App 872 875, 503 P.2d 118 (1972). "Material facts are those which carry influence or effect, or are necessary, and must be found, or are essential to the conclusions." *Id.* at 875. "Ultimate facts are the essential and determining facts upon which the conclusion rests and without which the judgment would lack support in an

essential particular." Id. at 875. "They must be found in order for the court to apply the law. [622 State v. Mewes Jan. 1997 84 Wn. App. 620, 929 P.2d 505]

Here the court findings have failed to "address all ultimate facts and material issues" in Young's complaint. Material issues such as partnership were pled at trial but were overlooked in the trial court's findings and conclusions. Young has been prejudiced by this failure of the court to properly rule on the material issues of bad faith, breach of contract, and preexisting partnership and this failure to rule is an manifest abuse of discretion. In FF #2 the court provided limited findings of fact and/or conclusions of law on partnership. (cp 1512 ) An ambiguous mix of finding of fact and conclusions of law, FF #2 only addresses "partners" and not "partnership" Further, conclusions of law within FF #2 apply only to a time after spring of 2007.

**Challenged portion of FF #2:** In the spring or summer of 2007 Colin Young generated the concept for these businesses and approached Brad Johnson about joining forces to purchase an existing wrecking yard Jim's Auto Wrecking. Brad Johnson in turn approached his brother, Michael Johnson about joining the enterprises.

The challenged portion of Finding of Fact #2 is not substantially supported by evidence in the record and conclusions of law based thereon are unsupported by substantial evidence and erroneous. Undisputed evidence, as identified above, demonstrates Young approached Brad in early 2006 (not 2007) with a proposal that they buy Jims Auto Wrecking as "partners" and convert it to a low cost self help format. (rp zzz ) FF #2 is insufficient to resolve the issue of early partnership in that it is time frame limited. The trial court has erroneously limited its perspective to events starting after the "spring or summer of 2007."

**FF #1 Four partners entered into an ill-fated arrangement in November of 2007 (footnote : The term partners is used only in the very generic sense for ease of reference. The parties ultimately became members in Limited**

**Liability Companies which is the proper legal label.** The arrangement was memorialized by two “Certificates of Formation” and two “Operating Agreements”, one for a real estate holding company (Olympic Holdings) and another for the operation of a wrecking yard business (Yank A Part) located on that real property. (emphasis added)

Challenged portions of FF # 1 in bold type are not supported by substantial evidence in the record, and conclusions of law based the bold portion of FF #1 are erroneous. Standard of review is de novo for conclusions of law.

First, substantial evidence does not support the finding of fact that “*Four partners entered into an ill fated arrangement in November 2007*” Testimony clearly establishes that two partners first entered into a partnership in early 2006, and that two further partners joined in 2007 and said partnership was equally ill fated. Reading FF # 1 as a whole, FF #1 suggests a conclusion of law that a “partnership” of the “partners” never existed. Any such a conclusion of law not supported by substantial evidence in the record and is therefor erroneous.

The second footnote sentence of FF #1 “The parties ultimately became members in Limited Liability Companies which is the proper legal label” contains a conclusion of law “(member) is the proper legal label” and suggests the application of this “proper legal label” to all times and all intentions of the parties’ business venture. Such a conclusion of law excludes any existence of a “partnership”, and is not substantially supported by evidence in the trial record and is therefor erroneous and any conclusions of law based thereon are also erroneous.

**G. The trial court erroneously valued LLC assets and liabilities in judgment.**

Numerous deficiencies in the courts judgment and LLC valuation were presented and argued in Young's Motion for Revaluation and Motion for Reconsideration of Judgment, and error is assigned to ruling on each of these motions.

As demonstrated in the 4/9/10 report of proceedings the trial court abused its discretion when it partially denied of the Motion for Revaluation, then summarily denied Young's Motion for Reconsideration. Standard of review for the two aforementioned denied motions is abuse of discretion. The reviewing court is directed to arguments presented in those motions as part of this review.<sup>17</sup>

CL # 11, 12, 13 (cp 1521) are not supported by substantial evidence in the record and as such they are erroneous and any conclusions of law based thereon are also erroneous. Evidence of court errors in concept and calculation that are the underpinnings of these conclusion are detailed below.

The trial court committed an obvious error in its valuation of the LLCs as it failed to properly consider evidence in the record of the substantial increase in value of the YAP vehicle inventory. It also failed to account for ALL LLC bank accounts evidenced at trial, and it failed to verify defendants' alleged "loans" prior to establishing LLC loan liabilities. Substantial assets the court failed to properly consider include the gross value of 750 vehicles the yard, including the value of their catalytic converters and radiators, the net value of YAP's owned tow truck, the double

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<sup>17</sup> The trial court should review Young's post trial motions with the understanding that present pleadings control any differences.

wide mobile, capitol improvements to the OH buildings, and the sum total of 27 months of principal paid on the Ellis loan but not accounted for in LLC records.<sup>18</sup>

Due to the high value of the “net increase” in YAP inventory over 27 months of ownership, the court erred in not valuing inventory separately from its general assessment of YAP’s 10% per annum growth. (cp 1521 - CL #12) The trial court’s inclusion of the YAP yard inventory in a generalized 10% per year increase in business value is neither fair nor equitable. Clearly inventory is not measured by growth - but growth is the proper method to value goodwill.. The trial record establishes that YAP’s vehicle inventory had nearly tripled to 750 from the time of purchase, that scrap was twice the value from time of partners yard purchase 11/30/07, and catalytic converter value had tripled in the same period, (ex 34) (rp 792-93,13108-13) these factors were not reasonably accounted for in valuation.

The information required for a reasonable valuation of the YAP yard inventory was available to the trial court in judgment. To approximate the net increase in the value of the of inventory since purchase, YAP’s original 11/30/07 two-thirds depleted inventory of vehicles must be valued with “time of purchase” pricing of metals, and catalytic values, which is then is subtracted from “time of trial” inventory value. with All of the necessary elements to accomplish this valuation were evidenced at trial.

Current YAP employee Doug Smith testified to the “time of trial” yard inventory being 750 vehicles (rp 1132) and to this inventory being comprised of

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<sup>18</sup> Not on the tax roles or considered are over \$40k in capital improvements for the LLCs (ex 189) - paid to Grandview since time of purchase - and approximately \$19,000 spent on the double wide mobile, and contraction materials paid for separately. (rp 1658:12, 1693-94) Young is entitled 1/4 of all evidenced capital improvements not on the tax roles for valuation.

“higher value” vehicles than the initial inventory. (rp 1156) Smith also testified to the price of scrap metal being \$80/ton at time of yard purchase in 2007 (rp 1138). Young testified to actual scrap prices reflected on Summary Reports (ex 170A). Brad testified at trial that scrap metal was last at \$185 a ton and going up to \$200, and that they were crushing during trial (rp 1773). John Miles testified the yard was just over one third full at time of purchase (rp 799:20) and to the price and volatility of catalytic converters (rp 792:15 - 793) Young testified to the value and importance catalytic converters as yard asset (rp 1314:20) (ex 34). By using Smith’s “time of trial” 750 car inventory as the full yard figure, and 300 cars as the time of purchase inventory (derived from John Miles testimony of just over on third full), a conservative estimate for valuation purposes is an increase of yard inventory of 450 cars. Using an average vehicle crush weight of 1.5 tons and Brad’s “time of trial” scrap value of \$200/ton, and with an allowance of \$100 for each vehicle’s catalytic and radiator, **just this 450 car increase in inventory is conservatively worth \$182,200.**<sup>19</sup> Compared to the trial court’s net increase of \$53,550 - derived from the 10% per year for YAP for adjusted gross value of \$308,550 less purchase price of \$255,000 (cp 1520-21) - it is clear that YAP’s increase in inventory was not fairly or properly accounted for in the trial court’s valuation.<sup>20</sup>

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<sup>19</sup> Because the defendants were crushing during trial, the number of cars in the crush pile could not be set. Crush pile averages 50 -70 cars, is not yard inventory, and should be valued separate.

<sup>20</sup> By the same method and without consideration of any other marketable parts, the “time of trial” crush value for all 750 cars in inventory is \$300k. By another path, using the “time of purchase” \$50k inventory value detailed in finding of fact #4 (cp 1513) this \$300k “time of trial” value yields a net yard inventory increase of \$250k.

Clearly, “inventory” is a principal business asset where quantity and value fluctuate independent of the growth of a business. Despite substantial evidence of YAP inventory detailed above, in an abuse of discretion the trial court has erroneously generalized the increase in value of YAP by including YAP’s “inventory” in its overall business growth factor. On the other hand, the court’s application of a 10% per year business growth factor (is reasonable as applied to goodwill and other minor business assets. (cp 1513)

By any reasonable measure, the proper way to account for growth in the value of YAP is to subtract the \$50k “time of purchase” inventory value from the \$255k initial selling price (FF #4), leaving the balance of \$205k which then is adjusted for 27 months of growth using the trial court’s 10% per annum business growth factor.<sup>21</sup> The time of trial inventory value of \$300,000 is then added back in to produce a supportable YAP gross value of \$564,541. When compared to the trial court’s YAP gross value of \$308,550 (CL #12) the defendant are unfairly enriched by a windfall of over \$250k. The forgoing YAP gross value figures do not include YAP loan liabilities or cash assists in YAP bank accounts yet to be disclosed<sup>22</sup>

**H. Trial court abused its discretion when it denied Young’s motions for Revaluation and Reconsideration following the trial court setting the valuation date as 19 days after the close of trial.**

The challenged portion of CL #9 provides “this court will adopt the general formula of assessing value to the assets, determining the amounts of the obligations

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<sup>21</sup> 27 months passed between yard purchase on 11/30/07, and court’s valuation date of 2/23/10.

<sup>22</sup>. Select LLC bank accounts and/or balances are still not disclosed and appellant disputes the court’s YAP loan liability figures as unsubstantiated and dependent on testimony of defendants who have previously misled the court and concealed assets.

and mathematically deterring the ‘buy out’ price.” As detailed in the reasoning for the trial court’s erroneous YAP valuation above, and related calculations herein, this portion of CL #9 is not supported by substantial evidence in the record, is erroneous, and conclusions of law based thereon are erroneous. Standard of review is de novo

Young’s post trial motion for Revaluation was justified due the court’s surprise LLC valuation in judgment, selection of a valuation date after close of trial, incomplete records of current cash assets, insufficient loan documentation, and substantial errors in its calculations of LLC value. The parties were prejudiced when the court directed the parties mid trial that it was not going to get into appraisals - thereby implying disposition of the case would not require LLC valuation.<sup>23</sup> (rp zzz ) Consequently only incidental evidence as to the value the LLCs is present in the trial record.

The trial court selected the date of its decision, 2/23/10, as the valuation date. But this date was nearly three weeks after close of trial. As such, relevant bank statements and proper accounting of all LLC loan liabilities were not considered by court in its 2/23/10 memorandum decision. Testimony and evidence as to the volatility of scrap metal and catalytic converter prices also justified revaluation. The fact that that older Westsound accounts still existed at the time trial was testified to by Silva. (rp 701 ) Defendants had months earlier terminated production of Westsound Bank statements, and without them the court’s valuation is not accurate.

**Challenged FF #23** The primary liabilities of Yank-a-Part LLC are 1) The debt owed to David and Cheryl Ellis of \$225,000; 2 The debt owed to Brad Johnson of \$17,000 (cp 1517)

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<sup>23</sup> This statement by the court strongly suggested disposition of specific performance or dissolution of the LLCs, neither of which occurred, but would not have required valuation.

**Challenged CL #12** It appears that the company has grown approximately 10% per year since Yank A Part started operations. Thus, based upon the sale price, the current gross value of the company should be \$308,550. The debt owed to Cheryl and Dave Ellis is currently \$225,000 (footnote: A Quick Books Ledger was produced showing the loan balances at the initial value. For the reasons discussed above, the ledger lacks credibility and the court will maintain its earlier finding that of the value of the loan based on testimony.) The debt still owed Brad Johnson is roughly \$17,000. In addition to these liabilities, Yank A Part also had a bank account with an ending balance of \$33,589 in the month of February. The statement also confirms the influx of cash from the business. The net value of Yank A Part LLC at month end of February 2010 was \$100,148. Accordingly Colin Young's share is worth \$25,037. (cp 1521)

FF #23 is not supported by substantial evidence in the record and any conclusions of law based thereon (including CL #12) are erroneous. A described below substantial evidence in the trial record does not support FF #23 and CL #12 findings and conclusions that on the valuation date of 2/23/10 Brad Johnson was still owed \$17,000 and that the Ellis-Chase loan balance was \$225,000. For reasons detailed below the last five sentences of CL #12 is also erroneous and unsupported by substantial evidence in the record, and any conclusions of law based thereon are also erroneous, including the Amended Judgment. Standard of review is de novo.

The court was well aware that Ellis did not continue to produce all his Chase loan statements as requested in discovery, (cp 974 - 989) and at trial the court attempted to rectify the situation through its own lengthy examination of Ellis. (rp 2057-67) It is apparent by the court's post trial comment "*I am not sure if he (Ellis) wasn't plucking that number out of the air*" that the court was not satisfied with its attempt to determine the status of the Ellis-Chase loan at trial or Ellis' claim of YAP's indebtedness to him. (rp 4/9/10 p.22-23) On 4/9/10 trial court reviewed Young's Motion for Revaluation in open court. The court indicated its frustration with not

having current LLC bank statements and that it “*didn’t have all the statements for the loans*” causing it to extrapolate rather than use hard evidence for valuation. (rp 4/9/10 p.23-25 ) The court then found that that the defendant’s were responsible for not producing current LLC bank statements and current loan information. Id.. Defendants were ordered to produce additional loan statements for the Olympic Holdings and Ellis/Chase loan, and LLC bank statements “*for the date of the memorandum opinion*”- already established as 2/23/08. (rp 4/9/10 p.27:4-23) However as extensively detailed in Young’s Objections to Financial Submittal (cp 1452), defendants production on this order was deficient.

Substantial evidence in the trial record does not support CL #12 that Brad Johnson is owed \$17,000, and any conclusions of law based thereon are erroneous. Brad Johnson failed to produce loan agreements to document any of his alleged “loans to YAP”, nor was there any direct evidence that YAP had not paid Brad back. Given the fact that Brad Johnson deliberately misled the 8/8/08 motion court, in all fairness YAP’s indebtedness to Brad must be substantiated.

Substantial evidence in the trial record does not support CL #12 that “Yank A Part also had a bank account with an ending balance of \$33,589 in the month of February” and any conclusions of law based thereon are erroneous. More than “a” Yank A Part bank account existed in February 2010 and not all YAP bank accounts were included in CL #12 calculations. As detailed herein older Westsound bank accounts were not considered in valuation but still existed at trial. (rp )

CL #12 “The net value of Yank A Part LLC at month end of February 2010 was \$100,148. Accordingly Colin Young’s share is worth \$25,037” is not supported by substantial evidence and is therefore erroneous, and any conclusions of law based thereon are also erroneous. As detail herein substantial evidence shows that CL #12, FF #23 are unsupported and the valuation of YAP inventory, cash accounts and loan liabilities are inaccurate, incomplete and erroneously calculated, and Young’s “share” cannot be fairly calculated without all LLC bank statements and revaluation correcting the trial court’s valuation deficiencies.

Without relying on Ellis’ questionable recall of the remaining YAP balance (rp 4/9/10 p.22-23) sufficient documentary evidence was present in the trial record to reasonably calculate the total amount of principal and interest YAP paid on the Ellis-Chase loan. YAP quickbooks establishes the original Ellis-Chase loan at \$242,000. By LLC valuation date of 2/23/08, Ellis had received 27 \$1800 monthly payments totaling \$48,600 (cp 1393) <sup>24</sup> Despite Young’s discovery request for all his chase loan statements, Ellis produced only his 3/11/09 statement (rp 1689), which was entered in the trial record (RP 2316) (ex #194) This 3/11/09 Chase statement shows the loan’s annual interest rate at 2.75%, monthly interest payment of \$566, the previous monthly payment made by Ellis of \$511, and a balance due of 242,660. This information was

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<sup>24</sup> Silva and Brad back fit YAP records for first 3 months YAP payroll (rp 1682) (ex 158) and principal paid on Ellis-Chase loan to show 100% interest (rp 545) (cp 1393) “If the parties were guilty of the conduct which the trial court found that they were, the appellant comes squarely within the rule that equity will deny it relief, because coming into a court of equity and asking relief after willfully concealing, withholding, and falsifying books and records, is certainly not coming in with clean hands. [Income Investors, Inc., v. Shelton 3 Wash.2d 599, 101 P.2d 973 (1940)].

sufficient to reasonably extrapolate YAP's Ellis-Chase loan liability for valuation and show that Ellis had not paid much if any principal on the Chase loan by 3/11/09. The \$1234 difference between the YAP's regular \$1800 a month payment to Ellis and his \$566 payment to Chase clearly went to Ellis' personally as unjust enrichment.

Ignoring the Chase statement in evidence was an abuse of discretion by the court based on untenable reasons. As detailed above, sufficient information was before the court to reasonably calculate YAP's Ellis-Chase loan liability. YAP principal should have been reduced \$1234 mon. over 27 months, or \$33,318 in total principal paid against the Chase Ellis loan. Using Quickbooks initial Ellis Loan of \$242,000 this leave a valuation date balance of \$208,682 and not the \$225,000 figure used by the court in valuation of the Ellis-Chase loan liability

Denial of the majority of Young's post trial Motion for Revaluation and his entire Motion for Reconsideration of Judgment was abuse of discretion. In the end the trial court went with Ellis' testimony that YAP's Ellis-Chase loan balance was an even \$225,000, despite substantial evidence to the contrary. Even after the inclusion of over \$44,000 in LLC funds concealed during trial by defendants in 1st Security Bank, (cp 1387 & 1390 - 2/23/10) (rp 1527) (ex 148), the trial court did not properly account for valuation date balances in all LLC bank accounts or verify loan liabilities. The Kitsap Bank (formally Westsound) statements for the LLCs were not produced by the defendants and were thus omitted from the revised valuation for Amended Judgment.

**I. Defendant unsubstantiated expenses and co-mingling of credit accounts, and funds with LLC funds, debts, and payments is Breach of Fiduciary.**

Brad failed to produce receipts for many tens of thousands in unsubstantiated checks to “cash”, himself, (ex 100) and other expenses including records and receipts for over \$25,000 in cars Brad claims he purchased (cp 927) This request was also renewed with his trial subpoena but Brad could not produce the receipts. (rp 2382)

Young testified to having extensively examined the quickbooks and finding 95% of credit charges for the LLC’s went through Johnson personal or business accounts (rp 2436), and finding numerous unsubstantiated “loans” between Grandview, Brad Johnson, and YAP, and OH, (rp 1683-84) as well as Brad’s co-mingling of LLC debts and payments with Johnsons personal credit cards including fuel, (rp 1682-84) (ex 160) confirmed by the tow truck driver Steve Paulson (1621-22), and discovery of a \$2537 YAP check for the Grandview employees payroll on 5/07/08 (rp 1693) at time when quickbooks showed Grandview had no income (ex 157). Under Young’s examination Brad admitted to paying his Grandview payroll with YAP funds “as a loan.” (rp 1827)

As a result of his trial subpoena Brad produced a large quantity of previously withheld YAP financial documents and personal credit card statements. Monthly statements showed Brad habitually billing YAP for purchases made with his personal and business credit cards. (rp 2436) YAP then paid on Brad’s personal credit cards in an amount decided by Brad and without verification. Brad testified that he regularly instructed the book keeper, Karen Silva, to enter these payments to his credit cards into the YAP quickbooks financial records as YAP expenses, and that he did this to provide “better record keeping,” and that this practice was continuing through trial.

(rp 1889-1892) Brad also testified that receipts for fuel marked as “shop truck” were his personal vehicle which he regularly fueled at YAP’s expense, and that he continued this practice through the time of trial.

**J. Undisputed evidence established \$4380 in unpaid wages are due Appellant. Appellant’s access to all LLC financial records and his unpaid wages then willfully withheld.**

The overall trial record demonstrates the defendants willfully withheld \$4380 in wages due Young from time of his exclusion. Claims by defendant’s attorney of defendant’s deposit of \$3000 in wages into the court registry (just prior to trial) are of no consequence. The trial record also establishes defendants acted as agents of YAP who readily paid all other YAP employees, but willfully withheld Young’s wages requiring application of RCW 49.52.050 and 49.52.070 doubling with personal liability falling to defendants as agents of the employer LLC.

“Legislature has evidenced a strong policy in favor of payment of wages due employees by enacting a comprehensive scheme to ensure payment of wages, including the statutes at issue here which provide both criminal and civil penalties for the willful failure of an employer to pay wages”. [See *United Food & Commercial Workers Union Local 1001 v. Mutual Benefit Life Ins. Co.*, 84 Wn. App. 47, 51-52, 925 P.2d 212 ]

Young provided undisputed testimony and documentation that his unpaid wages from YAP after February 3, 2008 totaled 146 hours for \$4380. (rp zzz ) Young provided undisputed testimony that he recorded his hours worked on a large desktop calendar in the YAP office. (rp zzz ) Young testified that he showed Brad Johnson in January 2008 where Young kept his hours along with other partners’ Sunday hours on this desktop calendar and that Brad was instructed in the YAP payroll process and

Westlaw search of all state and federal case law relating to corporate membership, breach of contract, or unpaid wage claims. An “implied grant of authority” is clearly not synonymous with a “consent judgment” or “implied consent” yet the trial court seems to imply this. Although the court’s claimed authority sounds of CR 15(b) “implied consent”, “dissociation” is a remedy and not an issue, and CR 15(b) does not apply.<sup>6</sup> Furthermore, no evidence in the trial record establishes the parties “consent” to judgment, mutual or otherwise.

CL #7’s finding of fact or conclusions of law is “Dissociation is a better result all around than dissolution” and CL #8 “Young should be the member dissociated.” are each not supported by substantial evidence in the record and erroneous, and any conclusions of law based thereon are also erroneous. In the event either or both are dependent on FF #11,15,17 and/or CL #1,3,7 all are unsupported by substantial evidence in the trial record and erroneous. (cp 1515-19)

**1. The court’s options for disposition of this case are limited by statute and contract and as such the trial court abused its discretion in expelling Young from the partnership’s LLCs.**

Issues of monetary damages aside, the court’s authority to act in equity - while remaining in compliance with LLC contract terms and controlling statutory mandates in RCW 25.15 and 25.05 - is limited it to the three following dispositions. Any other solution, including the one crafted by the trial court, is err and an abuse of discretion.

“An abuse of discretion occurs when the trial court bases its decision on untenable grounds or reasons, or when its decision is manifestly unreasonable.” *Lian*, 106 Wn. App. At 824. zzz

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<sup>6</sup> Taking “implied grant of authority” at face value, the trial court violates the parties’ fundamental right to prior agreement and notice of resulting consequences **before** submitting to a judgment outside the authority of law and parties’ contracts. No evidence in the trial record shows any such agreement and notice.

Shown below, the trial court based its judgment on the untenable grounds of an “implied grant of authority” expelling Young as the most “commercially reasonable” .

1. “Dissociation” of Defendants. Dissociation is the most tentatively founded disposition option in this matter. Arguably, under the facts of the case and the express LLC operating agreements, the only method of member “dissociation” that may be available to the court is to apply the partnership statute which requires “dissociation” for breach of operating agreement, intentional misconduct, or knowingly violated the law. (RCW 25.05.225) For dissociation to occur in this case, the court must first find the existence of a pre LLC implied “partnership” and this partnership continued at least to the point of defendant’s first breach of one or both the partnerships’ LLC operating agreements. If all foregoing conditions are met, the court must then rule on application of partnership statutes (specifically RCW 25.05.225 (5)(a),(b),or (c) ) to the defendants bad acts or breach of the partnerships’ LLC operating agreement(s). If the court finds the partner’s LLC operating agreements are de facto “partnership operating agreements” then the court must enforce mandatory “dissociation” of defendants under authority of RCW 25.05.225. (This is a first impression issue)

2. “Specific Performance” under YAP contract. Given the parties’ near three months of part performance under the contract (rp 1432:25), “specific performance” remains the most straight forward and proper solution for disposition of this case. Under disposition of specific performance the court would enforce the terms and conditions of the LLC agreements, and provide restraining orders against further defendant interference with Young’s management of the business. Specific performance would eliminate quantum meriut and mechanics of LLC dissolution.

3. "Dissolution" of the LLCs. Conditions of dissolution and winding up of the LLCs are strictly provided for under terms of Section 9 of the operating agreements. Statutory requirements of RCW chapter 25.15 zzz (specific) mandate that dissolution and winding up of the LLCs must be accomplished in accordance with the terms of the LLC operating agreement.

Despite the forgoing, and under the guise of equity, the trial court crafted its own solution which clearly violated LLC operating agreements, Limited Liability Company statutes, and the parties intent as unambiguous expressed in the LLC agreements. In doing, so the trial court grossly exceeded its authority, abused its discretion, and effected a manifest injustice by dissociating the innocent party in this action.

**2. The trial court erroneously engaged in "interest balancing" and contract rewrite to resolve this case rather than settling the case on the merits.**

The courts power in this matter is limited by contract, contract law, and applicable statutes. The trial court erred in judgment because it assumed a role not proper to it when it wrote Young out of the parties' LLC agreement. The trial court engaged in "interest balancing" seemingly to protect the unsecured investment of Ellis (cp 1517, FF #20) The trial court has improperly substituted its judgment for the contractual intent of the parties. (ex 2 - Sections 5,6,9,10) It matters not that this "interest balancing" was done under the guise of crafting a "commercially reasonable" solution, the terms of the LLC contracts are superior. The unfortunate side effect of this "commercially reasonable" judgment was the court's underwriting of defendants' bad acts, rampant self dealing, and de facto approval of many tens of thousands in

unsubstantiated LLC cash expenses in spite of a trial subpoena to Brad specifically for these receipts. (see: zzz in unsubstantiated LLC expenses below)

A court's power to adjudicate the rights and duties of parties to a contract is determined by the legislative framework within which the parties have contracted, the agreement between the parties, and the common-law doctrines which bear upon the parties' mutual exercise of their freedom of contract. Neither this court nor a trial court may make a new contract for the parties. Courts have the lawful power only to enforce the contract which the parties have made for themselves. *Foster v. Knutson* 84 Wn.2d 538, 527 P.2d 1108 (1974) quoting *Spokane Sav. & Loan Soc'y v. Park Vista Improvement Co.*, 160 Wash. 12, 294 P. 1028(1930).

No finding establishes either LLC agreement as “ambiguous.” At trial no member identified even one ambiguous sentence in either LLC agreement. As such, contractual rewrite is not permitted and terms of the LLC contracts must be enforced.

“Thus, it follows that the courts cannot and ought not make contracts for the parties and, assuredly, cannot make a contract for them which they did not make for themselves.” *Jackson v. Domschot*, 40 Wn.2d 30, 239 P.2d 1058 (1952); *Merlin v. Rodine*, 32 Wn.2d 757, 203 P.2d 683 (1949). “Courts should take care under the guise of interpretation not to rewrite the contract for the parties, or create a new one“ [*Clements v. Olsen*, 46 Wn.2d 445, 282 P.2d 266 (1955)]

In its judgment of dissociation the trial court acted beyond its lawful powers as its essentially creates new LLC contracts for the parties. Here the court violated the YAP and OH integration clause at Section 10.3 and 10.5, and the section 10.1 written unanimous consent requirement for amendment. By dissociating Young the trial court has effectively written Young and Section 10 out of both LLC operating agreements. This the court cannot do and no evidence supports consent by the parties.

Nothing in the record suggests the parties granted the court authority to dissociate whereby the losing party would be subject to the opposing party's theory and mechanism of “dissociation.” Certainly one party's request for remedy of “dissociation” does not make the second party's request and theory for the same

remedy valid especially in absence of “entitlement.” Clearly justice is not served by such flawed logic.

For the remedy of “dissociation” or “expulsion” to be viable under CR 54(c) , there must be an underlying mechanism and reasons enumerated in statute or operating agreement and the facts in the record must demonstrate entitlement to “expulsion” or “dissociation” of Young. Here defendants evidence neither valid reasons, mechanism, or entitlement and any application of CR 54(c) is error.

“Decision is based on “untenable grounds” or made for “untenable reasons” if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.” [State v. Rohrich 149 Wn.2d 647, 71 P.3d 638 (2003)].

The quantum of evidence in the record clearly shows Young was without fault in this matter and the defendants were the aggressor party with ulterior motive. The trial court abused its discretion and exceeded its authority when unfairly ordering “dissociation” of Young without tenable basis.

### **C. Embedded employment contract - “just cause” was not evidenced**

The existence of both LLC operating agreements was stipulated to at trial and no party has claimed ambiguity. Embedded in Section 6.2 of the YAP Operating Agreement is an employment compensation clause for Young, and for Young alone. Defendants are precluded from receipt of salary by Section 6.2 and wages paid to Brad Johnson are breach of contract.

“The most reliable clue to the parties' intentions in a deliberately prepared and negotiated contract is the language of the contract.” *Hastings v. Continental Food Sales, Inc.*, 60 Wn.2d 820, 376 P.2d 436 (1962); *Boeing Airplane Co. v. Firemen's Fund Indem. Co.*, supra; *Gwinn v. Cleaver*, 56 Wn.2d 612, 354 P.2d 913 (1960). “When the intention of the parties is clear from the written instruments, the courts have nothing to construe and must be governed by the language.” *Silen v. Silen*, supra. Words will be given the meaning which best gives effect to the parties' apparent intentions.” [*Patterson v. Bixby*, 58 Wn.2d 454, 364 P.2d 10 (1961)].

By the unambiguous language of Section 10, it is clear all parties intended the LLC operating agreements to remain their original form until amended by written unanimous consent. Defendants "Resolution" of 2/26/08 was a de facto amendment of "this Agreement" which removed Young as Member-Manager and violated Sections 5.1, 5.1.1, 6.2, 10.1, 10.3, and 10.5 of the YAP agreement.<sup>7</sup> (ex 2)

Under the trial court's erroneous assumption that defendants can waive Section 10 unanimous consent requirements and integration clause, demonstration of knowledge of "just cause" before 2/26/08 becomes a deciding factor in "authority" to remove manager." For the defendants to remove Young (absent Section 10 mandates) substantial evidence for "just cause" must exist and been specifically known by defendants prior to their alleged vote for Young's removal 2/26/08. No evidence in the trial record establishes this knowledge.

The trial court states "an employment contract was embedded in the Operating Agreement and, consistent with common law, requires that the other member have just cause to fire Colin Young" (cp 1504) In CL #4, the court concludes that defendants had "just cause" to remove Young. In CL #3 the court separately finds Young's removal "justified because of his unorthodox methods of record keeping" Neither CL #3 nor CL #4 are supported by substantial evidence in the record and they are therefor both erroneous. The trial court failed to specifically identify this "just cause," and "just cause" is not substantially evidenced in the trial record. As

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<sup>7</sup> In its amended judgment, the trial court also violates these same sections with a de facto rewrite of the both contracts to remove Young as a member

In September 2008 the court abused its discretion when it denied Young's Motion to Leave Amended Complaint. (cp 1054-1086 ) Appellant has assigned error to that summary oral ruling as the trial courts decision to deny leave was based on untenable reasons which prejudiced Young.(rp 0/18/09 p. 19) Specifically the court had ruled the defendants would be prejudiced because of the closeness to trial, despite Young's pleadings and evidence that showed the defendant delays in producing discovery were actually responsible for lateness of amendment.

In amendment Young claimed front pay , quantum meriut, and made additional claims based on defendant bad faith, self dealing, lost profits due to mismanagement by Brad Johnson. (cp 1054-1083 )

The overall case record clearly shows Young had been substantially prejudiced by defendants' delayed production (5-8 months late in most cases) and piecemeal release of LLC financial records which continued to dribbled in through the time of trial. The trial court's ruling against Young leaving Amended Complaint was unfair and prejudicial to Young, and specifically to correcting his unpaid wages amount.

**1. The trial erred in failing to award the proper unpaid wage amount.**

The \$4380 amount of wages due Young was not disputed any evidence at trial. At trial defendants failed to deny withholding Young's wages intentionally. Defendants offered no excuse or remorse at trial for failing to pay Young's termination wages for over a year and a half.

**CL #5: "Mr. Young is owed wages for the hours spent prior to his removal. In his complaint he requested \$2,880.00, which sum was deposited into the court registry. He is entitled to that sum to be paid from the court registry with the balance to be returned to Yank A Part." (cp 1519)**

Findings of fact and conclusion of law in bold type within CL #5 are erroneous and not supported by substantial evidence in the record, and any finding of fact supporting conclusion of law in bold type is also not supported by substantial evidence in the record. Any conclusion of law base on CL #5 portion in bold type are also erroneous and unsupported by the record. Standard of review is de novo

Finding of fact within CL #5 stating that Young is entitled to unpaid wages in the amount of \$2880 is not supported by substantial evidence in the record. CL # 5 contains finding of fact “In his complaint he requested \$2,880.00, which sum was deposited into the court registry.” This finding of fact is not supported by substantial evidence in the record. As detailed below, Young provided undisputed testimony to the facts and circumstances of his mistake in determining his \$2,880 claim for unpaid wages and the correct amount of \$4380 for his unpaid wages claim as demonstrated by his undisputed testimony and documentary evidence in the record.

The fact that Young is owed \$4380 for 146 hours in unpaid wages willfully withheld by the defendants is supported by substantial evidence in the trial record. Young presented incontrovertible evidence of his last paycheck was #1102 (ex 145) which compensated him for pay period “1/29 - 2/3/09” as designated in the memo field. Young provided undisputed testimony as to the correctness of check #1102 and that it was his last YAP check received. (rp zzz ) LLC financial records confirm YAP check # 1102 details and show no further wage payments to Young for 146 hours worked after 2/03/08. (ex 106, p. 1-6, check # 1083 & 1102)

YAP quickbooks records in evidence show Young has not been paid for any work past February 3, 2008. (ex 191) (rp 2425) Substantial evidence in the trial

record shows Young actually worked 146 hours after February 3 for \$4380 wages yet due.<sup>28</sup> The court committed an obvious error and abused its discretion for untenable reasons as it determined that the \$2880 Young originally claimed in his complaint was the amount of unpaid wages due Young. (cp FF & CL )

CL # 5 also contains the conclusion of law “He is entitled to that sum to be paid from the court registry with the balance to be returned to Yank A Part.” This conclusion of law is erroneous and not supported by substantial evidence in the record. Specifically for reasons foregoing “he is entitled to that sum” (\$2880) is not supported by substantial evidence in the record. In fact, Young’s original complaint is the only place that unpaid wages of \$2880 is found. CL # 5 is therefor erroneous with regard to the unpaid wages sum being \$2880 and that Young entitled to only \$2880.

The trial court found that the defendants deposited into the court registry their payment for Young’s wages claim (CL # 13) but the court failed acknowledge that this deposit was a year and half late and the amount was \$3000. (cp tender of funds)

**Challenged CL #13** “As previously noted Mr. Young is owed \$2880 from the money deposited into the court registry. He is entitled to a judgment against the three remaining members in the amount of \$32,660, as the fair market value of this member share in both Olympic Holdings and Yank A Part.”

CL #13 is not supported by substantial evidence or findings in the record, and is therefore erroneous, and any conclusions of law based thereon are also erroneous. Here the court erroneously finds \$2880 deposited by the defendants for Young’s wages, which is not supported by substantial evidence in the record. Washington courts liberally construe wage statutes. Any deficiency in Young’s claims or

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<sup>28</sup> 146 hours are calculated against rate of \$30/hr in Young’s employment contract imbedded in Section 5 of YAP operating agreement. These 146 hours demonstrated \$4380 wages due and willfully withheld.

pleadings for unpaid wages should have been corrected by CR 15(b) - Amendments to conform to evidence and CR 54(c) as “Every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings”. [CR 54 (c)]

The defendants’ of \$3000 deposit into the court registry for unpaid wages on 9/17/09 amounts to prima facia evidence of defendants’ wrongdoing and willful withholding of Young’s termination wages. (rp 1483:8). As such bad faith and material breach by the defendants was demonstrated. The threshold of “willful” withholding enabling doubling of damages is thus surpassed.<sup>29</sup>

In early March 2008 the defendants exclusively held the desktop calendar with Young’s hours, the YAP checkbook stubs, and carbons of previous paychecks.<sup>30</sup>

Young testified that in January 2008 he instructed Brad on all payroll procedures including YAP payroll ledger and where Young’s hours were kept on the desktop calendar aside the other members Sunday hours.<sup>31</sup> Defendants also failed produce the early YAP payroll ledger for the three months ending February 2008 critical to Young countering defendants’ illegal employee and insufficient record keeping allegations. When a fax copy of the YAP payroll ledger sheet finally appeared by way of Silva’s trial subpoena, it was discovered the 2/27/08 payroll detail line was written by Brad, and the fax date of 2/21/08 imprinted thereon showed Brad’s phone number.

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<sup>29</sup> Young’s Motion for Reconsideration of Memorandum Decision (cp 1252) and Motion for Reconsideration (cp 1395) further exploration of these issues.

<sup>30</sup> See rp 1473 for further description of Exhibit # 146 by Young.

<sup>31</sup> The ninth bullet in FF # 11 (“Resolution’ based justifications for Young’s removal) states “Colin Young overpaid himself” This allegation clearly shows that before the 2/26/08 “Resolution” was drafted the defendants had reviewed Young’s paychecks and his hours as were recorded on his desktop calendar.

Young provided undisputed testimony that Brad was present at the yard nearly all of February when Young worked. Young testified that Brad was specifically shown where Young recorded his hours on the large desktop calendar. Defendants were aware of Young's last paycheck and his unpaid hours by their "Resolution" claim that he was "overpaid" (rp 1870-7) (FF #11) The quantum of evidence points to the extreme likelihood Brad Johnson purposely "chucked" Young's desktop calendar because it recorded Young hours and defendants fully intended to deny Young his termination wages. (rp 1872)

Young testified at trial as to each day he was due unpaid wages. Using notes from his personal notebook (ex 146) Young demonstrated the days he worked after his last paycheck pay period ended 2/3/08. (ex 145, check 1102) Young indicated the number of hours he worked each day on a large calendar in the courtroom Young's demonstration of unpaid wages amounted to sequentially reciting the number of hours he worked on each day between February 4th and the 21st. Young then detail five additional hours work on his trip and on his return. (rp 1482:10-20, 1483: 4-11).

"Personal liability for an employer's nonpayment of wages attaches to an agent who exercises control over the payment of wages" [Ellerman v. Centerpoint 143 Wn.2d 514, 522-23 (2001)]. "Failure of employer's corporate officers to pay employees' wages had been "willful" as required to impose personal liability for the wages on the officers.... officers made payroll decisions and determined which bills to be paid." [Morgan v. Kingren 166 Wn.2d 526, 210 P.3d 995]

Young provided undisputed testimony that all defendants were in fact "agents" of YAP by their actions and ability to write checks. Brad testified that he wrote paychecks on 2/27/08, and all defendants were able to write a checks (rp 1182-1883:1) Brad demonstrated agency when stepped in and started writing checks for

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Young provided undisputed testimony that all defendants were in fact "agents" of YAP by there actions and ability to write checks. Brad testified that he wrote paychecks on 2/27/08, and all defendants were able to write a checks (rp 1182-1883:1) Brad demonstrated agency when stepped in and started writing checks for wages. Any employer operating in good faith would contacted Young and settle the unpaid wages issue within the time required by law. Here, the record shows that rather than contact Young about his wages, he was threatened to stay away.<sup>32</sup> (FF 10)

'The critical determination in a case under RCW 49.52.070 for double damages is whether the employer's failure to pay wages was "willful." **In the past, our test for "willful" failure to pay has not been stringent:** the employer's refusal to pay must be volitional. Willful means "merely that the person knows what he is doing, intends to do what he is doing, and is a free agent.'" Brandt, 1 Wn.App. at 681. Ebling v. Gove's Cove, Inc., 34 Wn.App. 495, 500 (1983) "Under RCW 49.52.050(2), The nonpayment of wages is willful "when it is the result of a knowing and intentional action" Lillig v. Becton-Dickinson, 105 Wn.2d 653, 659, 717 P.2d 1371 (1986). (emphasis added)

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<sup>32</sup> At trial the defendants stipulated to having never attempted to contact Young for any reason after service of his lawsuit and Brad Johnson admitted to never contracting Young after 3/1/08

It is clear that Young's wages were deliberately and willfully withheld in bad faith by the defendants. Any willful withholdings of wages is a violation of RCW 49.52.050 (2) and a misdemeanor. "The statute must be liberally construed to advance the Legislature's intent to protect employee wages and assure payment." [Brandt v. Impero, 1 Wn.App. 678, 682, 463 P.2d 197 (1969)]

**2. Given the strong legislative policy to protect workers' rights, the express language of RCW 49.52.070, the trial court erred in not holding the defendants personally liable.**

As to timely payment on termination, RCW 49.48.010 provides "When any employee shall cease to work for an employer, whether by discharge or by voluntary withdrawal, the wages due him on account of his employment shall be paid to him at the end of the established pay period ..."

"Washington law does not shield management from liability for willful failure to pay wages under the theory that management is an agent who acts on behalf of a corporate entity; no "corporate veil" exists. The law curbs employers and certain employees with positions of financial authority, namely officers, vice principals or other employer agents, from willfully and intentionally depriving employees of wages. RCW 49.52.050(2). Courts liberally construe the anti-kickback statute." [Schilling, 136 Wa.2d at 159,961 P.2d 371]

An employer can be found liable under the statute. RCW 49.52.050. Employers include "every person, firm, partnership, corporation, the state of Washington, and all municipal corporations." RCW 49.48.115. Our courts broadly apply liability to persons who could be considered an employer under the statute. See Schilling, 136 Wa.2d 152,961 P.2d 371; see also Ellerman, 143 Wa.2d 514, 22 P.3d 795. Dickens v. Alliance Analytical Laboratories, UC, 127 Wn. App. 433, 439-40, 111 P.3d 889

(2005). The Washington Legislature established a remedy of exemplary damages when an employer willfully refuses to pay wages:

**RCW 49.52.070**, "Civil liability for double damages," provides in pertinent part: Any employer and any officer, vice principal or agent of any employer who shall violate any of the provisions of subdivisions (1) and (2) of RCW 49.52.050 shall be liable in a civil action by the aggrieved employee or his assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees ...

Defendants Brad Johnson, Mike Johnson, and Dave Ellis as manager, principals and/or agents of Young's employer, Yank A Part, LLC, are not exempt from this statutory provision. RCW 49.52.070 does not require the employee to pierce the corporate veil in order to hold agents personally liable when they control the employer's funds. It is noteworthy that no defendant presented evidence or testified in opposition to Young's unpaid wages claim for 146 hours or their responsibility to pay YAP wages.

This Court recently held that a person who exercises control over payment of funds, and acts under that authority, will be held personally liable. *Durand v. HIMC Corp.*, 151 Wn. App. 818, 835, 214 P.3d 189 (2009). "And liability under RCW 49.52.070 does not turn on piercing the corporate veil" *Id.* This Court also liberally construed the wrongful withholding statute in holding that the individual defendants were personally liable because of their exercise of control over the payment of funds. *Id.* at 835.

Consequently, just as in *Durand*, this Court should again hold that defendants were agents of the employer YAP who exercised control over the payment of compensation to former employee Young, and are each subject to personal liability for

refusal to remit compensation. Just as in *Durand*, this Court should reject any argument that piercing the corporate veil is a prerequisite to holding agents of a company personally liable for failing to remit wages to a former employee.

**3. Given the express language of RCW 49.52.050, the strong legislative policy to protect workers' rights, the trial court erred in not holding defendants willfully deprived Young of his wages.**

**RCW 49.52.050**, "Rebates of wages- False records- Penalty," provides in part: Any employer or officer, vice principal or agent of any employer, whether said employer be in private business or an elected public official, who ....  
(2) Willfully and with intent to deprive the employee of any part of his wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract. ...  
Shall be guilty of a misdemeanor.

Significantly, the standard of proving "willful" withholding of payment of wages is extremely low. "If an employer knows that he is not paying wages when due, and intends such conduct, then the action is willful." *Chelius v. Questar Microsystems, Inc.*, 107 Wn. App. 678, 683-84, 27 P.3d 681 (2001) (emphasis added) citing *Shilling* at 159-60. Defendants were all well-aware that Young worked more than full time for YAP from the first of February 2008 through the 21st and then again on the afternoon of the 2/28/08. Defendants were well-aware of the terms of Young's compensation in Section 5 of the YAP operating agreement. CP 42-44, 62.

This is not a situation in which the employer, or its agents were careless, or committed an error, or asserted a genuine "bona fide" dispute in failing to pay wages. Each of the defendants, and all of them, acted knowingly, willfully and wrongfully to withhold Young's wages for more than a year and a half prior to depositing partial compensation in the court registry. Just as in *Durand*, this Court should hold that

defendants were exercising control over payment of funds after removing Young, that defendants knew or should have known termination wages were due Young in the amount of \$4380, that defendants were willfully negligent in their duties to investigate and pay termination wages, and that the defendants were clearly notified that back wages were due Young on service of this suit and then did nothing, and that each of these separate acts was willful.

**4. Given the express language of RCW 49.52.070, strong legislative policy to protect workers' rights, and the holdings of Washington Courts, the trial court erred in not resolving the issue of willful withholding of wages in favor of the Appellant.**

Given the strong legislative policy to protect workers' rights, and the holdings of Washington Courts, the trial court erred in not holding that failure to make any payment of wages constituted payment of a "lower wage" than Young was entitled to receive. Defendants clearly ignored their obligation to pay Young termination wages. When nothing is paid to Young, there can be no question that Young was paid a "lower wage" to provide a basis for double damages in accordance with the non-discretionary language of RCW 49.52.070. The trial court's decision to not award the proper amount of back wages with statutory double damages is not in the least compelling.

**K. Defendants breached their fiduciary duty, Young did not**

The trial court finds in CL #3 "No member violated his fiduciary duties" As it applies to Young, substantial evidence in the record supports the conclusion of law

However, as CL #3 applies to the defendants, substantial evidence in the record does not support this finding of fact or conclusion of law "No member violated his

fiduciary duties” and as such CL #3 and any conclusion of law based on CL #3 is erroneous and unsupported by substantial evidence in the record. Standard of review for CL #3 is de novo.

As established by substantial evidence, all defendants breached their fiduciary duty to Young as OH managers under OH operating agreement through their bad faith exclusion of Young and their willful removal of him from OH by forgery and false filing of 4/8/08. Also established below by substantial evidence, YAP manager Brad Johnson breached his fiduciary duty when he willfully removal of Young from YAP LLC by forgery and false filing 4/8/08. Moreover, as demonstrated at trial and detailed below Brad repeatedly breached his fiduciary duty to Young and other members after taking over Young’s express position (ex # 3 - section 5.1.1 and 6.2) by self dealing, co-mingling of personal and business funds and debts with YAP, and generally mismanaging YAP to enormous monthly losses of over \$40k/mon. (cp 976 - 805)

**L. Young is entitled to an award of Quantum Meriut for his uncompensated partnership work prior to LLC formation**

A shown above Young provided undisputed testimony as to his extensive work for the partnership starting in early 2006 in designing the new business and attending to all matters required for the partnership’s purchase of the wrecking yard. Early in 2006 agreements and promises were made between Brad and Young where Young would be designated Manager of the wrecking yard. (rp 2082-3). Young also provided undisputed testimony that he worked a year without compensation in consideration of that promise, and that this promise was then formally expressed in the YAP Operating Agreement.

“Quantum Meriut” literally means “as much as deserved” and is a remedy for restitution for a reasonable amount of work or services. [Douglas Nw. Inc. v. Bill O’Brien & Sons Constr. Inc. 64 Wn.App. 6661, 693, 828 P.2d 656 (1992)]

Substantial evidence in the trial record clearly supports an award under the doctrine of quantum meriut as defendants breached their promise of employment, breached the YAP Operating Agreement, and excluded Young by unlawfully removing him from membership three months after start of YAP operations.

By any reasonable standard, three months as paid YAP member-manager does not compensate Young for his year of uncompensated work in consideration of the partners’ promise of a paid and continuing position as the YAP member-manager. Moreover Young paid \$2500 in initial consideration of his express “perpetual” position, and subject only to amendment of the YAP agreement.

At the 4/19/10 post trial hearing the trial court admitted “I think I may have overlooked your issue of quantum meriut, didn’t address it in my memorandum opinion and should have.” (rp 4/9/10 p. 22:16-20)

**Challenged CL # 15** : “Because Colin Young’s claim for quantum meriut was neither pled nor tried, no award is proper on that basis.”

Findings of fact and conclusion of law in CL #15 is not supported by substantial evidence in the record, is erroneous, and any conclusion of law based thereon is also unsupported by substantial evidence and erroneous. Standard of review for CL #15 is de novo. Young’s pleadings for remedy of quantum meriut and evidence of his entitlement are a matter of record (rp 2540) Young first raised his

claim of quantum meruit in his amended complaint following defendants' chronic delays and withholding of LLC financial records.

**Plaintiff's 9/3/2009 amended complaint:**

17.4 Should judicial "winding up" occur, the doctrine of "**Quantum Meruit**" should be applied to plaintiff's claim to compensate plaintiff for his pre LLC formation work performed in researching and designing the partners' business model, plan, and operating agreements, as well as setting up, negotiating, promoting, marketing, and otherwise facilitating the partners' wrecking yard venture. (cp 1054 - at 17.4)

The trial court denied Young's motion to leave his amended complaint, but Young's claim for quantum meruit was also argued in Plaintiff's Trial Brief. The court acknowledged the brief the first day of trial. (rp 4:2) (cp 1154-1202) In his trial brief under "Damages for Lost Wages and Mitigation of Damages" Young's pleads in support an award of quantum meruit and front pay (cp 1179)

Young provided undisputed testimony at trial that he was repeatedly offered a management position at \$35/hr with Kingston Electric by Bill Anderson which Young passed up in consideration of his promised manager position. This position was later written into the YAP operating agreement.(rp 60-61:9) Bill Anderson, owner of Kingston Electric, provided undisputed testimony that he repeatedly offered Young this management position with his company from 2006 through 2010. (rp 1830-1846 gen.) Bill Anderson and Kelly Svarthumle provided undisputed testimony as to Young's abilities, previous employment, and offers of employment. (rp 1830 - 1846 generally) During closing arguments Young specifically stated his claim for the remedy of "Quantum Meruit" summarizing his entitlement (rp 2491:5-24).

In conflict with CL #15, is the first conclusion of law in CL #5 "Mr. Young is owed wages for the hours spent prior to his removal" This first sentence of CL #5 is

not challenged, and is supported by substantial evidence in the record. (rp p. 2491) Here the court refers specifically to “*hours spent*”, a phrase that clearly means to encompass more than just “wages earned” or “hours worked” under employment contract. The phrase “*hours spent*“ accurately describes the year of uncompensated *hours (Young) spent* working in furtherance of the business venture, having relied on the partners’ agreement and promise that Young would manage the business. (rp 55,59, 2082-2083 ) The first conclusion of law in CL #5 clearly supports an award of back pay under the doctrine of quantum meruit.

The trial court abused its discretion by failing to award Young back pay under the “Doctrine of Quantum Meruit” for his year of work preparing for the purchase and conversion of Jims Auto Wrecking for the benefit of the partnership and in consideration of his promised position Member-Manager as expressed in the YAP Operating Agreement

Under the circumstances of defendants’ breach of promise and bad acts, Young is clearly entitled to quantum meruit for his year of uncompensated work for the partnership in 2006 and 2007 as requested in his closing arguments. (rp 2539). Even if Young’s trial pleading for quantum meruit are considered deficient, quantum meruit should have been provided under CR 54(c)

**M. Young is entitled to an award of Front Pay for lost employment due to defendants breach of contract, bad acts, and requirements of litigation.**

Here Young not only performed under the terms of the YAP contract, but he paid \$2500 in consideration of his express position of employment on the expectation

of that position and income continuing in the well into the future. Young's loss of employment and income due to defendants bad faith acts and his dependence on the defendants' promise of employment produced a situation where Young had no choice but continue litigation of the case pro se after his reserves ran out in 2008 always anticipating this case would settle and he could return to YAP. (cp 1539:9-15) Pro se litigation in turn precluded Young from accepting other management opportunities (shown above) offered him by Bill Anderson at Kingston Electric in 2008 and 2009 as testified to by Young and Bill Anderson. Young's entitlement to front pay is supported by the undisputed and Young has thus mitigated his damages for an award of front pay and the trial court abused its discretion when it did rule on the issue

Under the bad acts of defendants' breach of promise, Young is entitled to an award of his contract wages from the time of his exclusion through the close of trial due to his inability to work during the prosecution of this case. Even if Young's trial pleading for front pay is considered deficient front pay should have been awarded under CR 54(c) at the level of \$1200 a week, as pled in closing arguments. (rp 2539)

**N. Appellant should be awarded Attorney Fees and costs.**

Young assigns err to the trial court award of attorney fees to the defendants and denial of fees and costs to Young. For the reasons following CL #16 supported by substantial evidence in the record and thus is erroneous as to Young's entitlement to Attorney fees and costs. As defendants did not prevail on any of their claims, but Young prevailed on his unpaid wages claim the award of trial fees and costs to defendants should be reversed. Trial costs and fees should be awarded Young under

Section 10.4 of the YAP operating agreement. These same 10.4 provisions apply at the appellate level and Costs and Fees should be awarded Young on that basis.

Moreover, “As an independent ground we may award attorney fees and costs based on intransigence of a party, demonstrated by litigious behavior, bringing excessive motions, or discovery abuses.” *Gamache v. Gamache*, 66 Wn.2d 822, 829-30, 409 P.2d 859 (1965); *Eide v. Eide*, 1 Wn. App. 440, 445-46, 462 P.2d 562 (1969).

Here, among the defendant’s many other detailed discovery abuses, concealment of over \$44k in LLC funds, fabrication of meeting minutes, forgery, false filing, conversion, and Brad knowingly submitting bad faith declaration to mislead the 8/8/08 court each qualify as intransigence. *In re Marriage of Mattson*, 95 Wn. App. 592, 606, 976 P.2d 157 (1999) “A party's intransigence in the trial court can also support an award of attorney fees on appeal.”

### **CONCLUSION**

Arguably, this whole case was based on defendants’ after the fact production of their “Resolution” in an effort cover their breach of the YAP contract. Nearly every other issue and claim that followed was derivative. As shown above the defendants’ counterclaim and removal of Young were based on bald claims and deliberate falsehoods as within defendants’ “Resolution” and mirrored in Brad Johnson’s 8/7/08 bad faith declaration before the 8/8/08 motion court. In sum, the quantum of evidence in the record shows that defendants’ crossclaims were without merit and Young should be awarded compensation for defending against the defendants’ frivolous crossclaim. Clearly Young is entitled to a reasonable award for compensation of three years of financial hardship he has suffered as a direct result of withheld wages

and his inability to accept employment brought on by the defendants' breach of partners' LLC contracts, conversion of his LLC membership and assets, habitual discovery violations, (ex 174) (cp 628-703).

The overall record shows the trial court was provided ample opportunity to correct its errors, mistakes, and oversights by Young's objections, motions, and pleadings.<sup>33</sup>

Now therefore it is respectfully requested that this court: overrule the trial court and award the appellant the correct \$4380 amount of unpaid wages of with statutory doubling with mandatory fees and costs. Further, and due to the defendants demonstrated disingenuous behavior before the trial court, this court should remand for accounting of LLCs assets and liabilities, and disgorgement of all defendant misappropriated LLC funds, unsubstantiated expenses, and proceeds of self dealing.

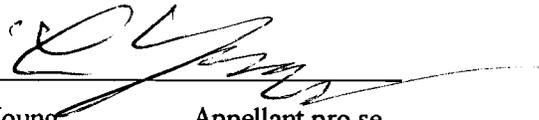
Appellant further requests disgorgement of all LLC wages paid to Brad Johnson in violation of LLC operating agreement expressions, and remand for findings and award on issues of front pay, back pay, lost profits, breach of contract, bad faith, breach of fiduciary, with pre judgment interest ; **and** 1) Dissociate defendants under partnership statutes for breach of operating agreement; **or** 2) Order specific performance under the LLC operating agreements where the defendants are restrained from the business, **or** 3) Order dissolution of the LLCs under the terms of the LLC operating agreements.

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<sup>33</sup> **Pretrial pleadings** put the trial court on notice of material issues, oversights, mistakes and errors. These pleadings include plaintiff's pretrial 8/8/08 motions to Restore Status Quo and Order of Protection; Motion for Reconsideration of 8/8/08 decision; numerous discovery motions to compel and for default, Motion for Default or Receivership, Motion to Leave Amended Complaint and Accounting, Motion for Declaratory Judgment; **post trial:** Objections to Defendant's Proposed Findings of Fact and Conclusions of Law, Plaintiff's Proposed Findings of Fact; Motion for Revaluation; Defendant's Financial Submittals, Objections to Defendants Financial Submittal, Motion for Reconsideration of Judgment.

On the issue of Attorney Fees and Costs, it is further requested that this court:  
award Young fees and costs of this appeal under LLC operating agreement section 10.4  
and RCW 49.52.070, and remand for award to Young of trial costs and fees under LLC  
operating agreement section 10.4 of and RCW 49.52.070

Respectfully submitted this 1st day of April 2011

  
Colin Young Appellant pro se  
1785 Spirit Ridge Dr.  
Silverdale, WA 98383 360-697-4966

## APPENDIX

(Portions in bold type are challenged)

### **Challenged Findings of Fact and Conclusions of Law**

#### Finding of Fact 1 **[Mixed FF & CL]**

Four partners entered into an ill-fated arrangement in November of 2007 (footnote : **The term partners is used only in the very generic sense for ease of reference. The parties ultimately became members in Limited Liability Companies which is the proper legal label.** ) The arrangement was memorialized by two “Certificates of Formation” and two “Operating Agreements”, one for a real estate holding company (Olympic Holdings) and another for the operation of a wrecking yard business (Yank A Part) located on that real property.

Finding of Fact 2 [Mixed FF & CL]

**In the spring or summer of 2007 Colin Young generated the concept for these businesses and approached Brad Johnson about joining forces to purchase an existing wrecking yard Jim's Auto Wrecking. Brad Johnson in turn approached his brother, Michael Johnson about joining the enterprises.** Later still Brad Johnson suggested a fourth partner, Dave Ellis to enable the financing of the purchase of the wrecking yard. The addition of Dave Ellis was necessary as neither Colin Young nor the Johnson brothers had sufficient unencumbered equity to satisfy a lender.

Finding of Fact 8

**Contrary to Young's express wishes the parties decided to begin operations on December 1, 2007, the day after the purchase document were signed.** Initially, all parties cooperated in getting the wrecking yard ready for business. However, relatively quickly a schism developed with Colin Young on one side and Brad Johnson, Michael Johnson, and Dave Ellis on the other. At trial both sides pointed fingers at the other and offered various complaints about each other's performance under the agreements. **It is not clear that those complaints were actually voiced in the early months of the working relationship.**

Finding of Fact 9. [Mixed FF & CL]

**It is clear that on February 12, 2008, the battle lines were drawn.** The precipitation action was a 3-1 vote of the partners to hire Karen Silva as a bookkeeper. Ms. Silva was the book keeper for Johnson Properties and Grandview Development, both companies owned by Brad Johnson and Michael Johnson. Brad Johnson was familiar with her work and had confidence in her abilities. Colin Young also had a history with Ms. Silva, but his perception of her abilities and cost-effectiveness differed from those held by Brad Johnson. **Ms. Silva was hired but refused to deal with Colin Young and only dealt with Brad Johnson.**

Finding of Fact 10 [Mixed FF & CL]

**Within two weeks the other partners had voted to remove Colin Young as manager.** (footnote: This action was later characterized as a "firing" of Colin Young as manager, but the contemporaneous actions of the remaining members show that they intended to exclude him as member as well) Colin Young was removed from the bank accounts, his name was taken off the official filings for Yank A Part and Olympic Holdings at the Secretary of State's Office, the locks on the office were changed, the padlock on the gate to the yard was changed, and he was warned to stay away from the business.

Finding of Fact 11 [Mixed FF & CL]

**The justification for removing Colin is found in the minutes of the February 26th meeting, Exhibit 18 (footnote: The actual meeting minutes created by the members are more useful than the subsequent work product of an attorney.) These minutes state the reasons that Colin Young was fired: 1. He did not attend meetings. 2. He has not provided acceptable collateral for the Ellis loan. 3. MBL will be pulled by March 10th if complete application is not received. 4. Bookkeeper indicates books are in disarray. 5. L&I not payed [sic] 6. State tax for January not paid [sic] 7. No sales tax paid 8. Checks**

11 APR 12 11:25 AM  
STATE OF WASHINGTON  
BY \_\_\_\_\_

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

COLIN YOUNG,  
Appellant,

vs.

DAVID ELLIS, et al  
Respondent

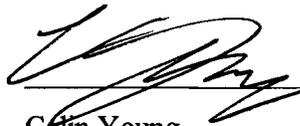
No. 40796-5-II

DECLARATION OF SERVICE

I, Colin Young certify (or declare) under penalty of perjury under the laws of the State of Washington that the following is true and correct:

1. I am over 18 years of age and competent to make this declaration and I am a resident of Kitsap County
2. I reside at 1785 Spirit Ridge, Silverdale Washington. Kitsap County
3. On April 1, 2011, I served the respondents associate attorney Matthew Mills by leaving at his office in Bremerton Wa, the following documents:

- 1) Plaintiff's Opening Brief - Amended
- 2) Motion to Leave Oversize Brief



Signed this 1st day of April, 2011 at Silverdale Washington

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