

COURT OF APPEALS
DIVISION II

No. 40796-5-II

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STATE OF WASHINGTON

BY cm DEPUTY COURT OF APPEALS

Division II

OF THE STATE OF WASHINGTON

Colin F. Young, *Appellant*

v.

David Ellis et al, *Respondents*

Reply Brief of Appellant

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Table of Contents

Table of Authorities	iii
I. Restatement of the Case	1
II. Response to Cross-Appellant’s Assignment of Error	2
1. The trial court did not abuse its discretion in denying the defendants’ request for attorney fees.....	2
III. Argument	2
1. The defendants are precluded from any award of attorney fees due to their deliberate deception and fraud on the court in order to conceal embezzlement of LLC funds and true motive in replacing Young.....	2
a. Trial revealed Johnson brothers’ degrading financial situation in late 2007, followed by their desperate acts in early 2008 on default of \$1.12 million in loans, and threat of foreclosure of their Brown Lee project.....	3
b. Trial has shown defendants knowingly misled the Spearman court at the initial hearing, submitted sworn falsehoods, and fabricated evidence to hide their true motive in seizing the partners’ business and its bank accounts	7
c. Defendants’ counsel drafted and submitted to the Spearman court the 8/7/08 Declaration of Bradley Johnson containing known falsehoods.....	8
d. Defendants counsel’ promoted prejudice and misled the Spearman Court during oral arguments on 8/8/08	12
2. Trial has revealed defendants willfully withheld and/or extensively delayed discovery of critical financial records to avoid revealing their embezzlement of LLC funds, Young’s unpaid hours, and their true motive for removing Young. Defendants then deliberately deceived and misled the court at subsequent pretrial discovery hearings precluding award of attorney fees to defendants..	13
3. Defendants did not prevail and are not entitled to attorney’s fees.....	15
4. Defendants’ criminal actions assign liability for civil damages and which preclude any award of attorney fees	17
a. Defendants unlawfully back-fit YAP employee records to convert a consultant to employee and give the appearance of improperly calculated and underpaid state and federal taxes.....	17

b Defendants back-fit YAP books fraudulently converting records of principal paid on the Chase/Ellis loan to interest, resulting in the theft of principal by partner.....	17
5. Defendants fabricated meeting minutes attempting to justify their removal Member-Manager with resolutions, then defrauded the lower courts as to the occurrence of the meeting and vote underlying defendants resolutions.....	18
6. Defendant failed to produce discovery of monthly statements for the Chase/Ellis loan to YAP, back-fit YAP records to convert all YAP principal payments to interest, then co-mingled YAP’s loan liability with his own by using dedicated Chase/Ellis loan as his personal line of credit	28.
7. Defendants’ demonstrations of bad faith - including various breaches, criminal offenses, and abuse of corporate form - demands appropriate remedies and precludes any award of attorney fees.....	31
IV Reply to Defendants’ Response.....	35
1. Partner’s LLC Operating Agreements do not provide for removal any <i>member</i> or the contract specified <i>member-manager</i> without the written unanimous consent to modify LLC operating agreement.....	35
2. Without providing expert testimony, substantive argument, or supporting citations to LLC asset values in record, defendants’ bald claims of the trial court’s correctness of LLC valuation does not constitute substantial evidence	43
3. Material issues of bad faith, breach of contract, spoilage of evidence, and defendants pattern of discovery abuses were all before the trial court, and each support Young’s request for specific performance, quantum meriut, front pay, and award of attorneys fees.....	46
4. Issue of partnership was raised and evidenced before the court	48
V Attorney Fees	49
IV Conclusion	50

Table of Authorities

Chambers v. Nasco, Inc. 501 U.S. 32, 46 111 S. Ct 2123 (1991).....	49
Hsu Ying Li v. Tang, 87 Wn.2d 796, 798, 557 P.2d 342 (1976);	11
In Recall of Pearsall-Stipek, 135 Wn.2d 225, 96 P.2d 343 (1998).....	50
Kottsick, 86 Wn.2d at 390.....	11
Obert v. Environmental Research, 112 Wn.2d 323, 771 P.2d 340 (1989)	41
Malnar v. Carlson, 128 Wn.2d 521, 525, 910 P.2d 455 (1996)	48
Meisel v. M&N Modern Hydraulic Press Co., Wn 2d 403, 409-10, 645 P.2d 689 (1982).....	33
Public Util. Dist. No. 1 v. Kottsick, 86 Wn.2d 388, 389, 545 P.2d 1 (1976).....	11
Rivers v. Wash. State Conference of Mason Contractors, 145 Wn.2d 674, 692, 41 P.3d 1175 (2002).....	16
Truckweld Equip. Co. v. Olson , 26 Wn.App 638 , 643, 618 P.2d 1017(1980)....	33
Wash. Water Jet Workers Ass'n v. Yarbrough, 151 Wn.2d 471, 90 P.3d 42 (2004).....	33
Weiss v. Bruno, 83 Wn.2d 911, 914, 623 P.2d 915(1974).....	11
 Statutes	
RCW 25.15.060	34
RCW 25.15.120	34,42
RCW 25.15.155.....	34
 Court Rules	
CR 11	7,8,11,19
RAP 18.1	50

I. Restatement of the Case

Appellant/plaintiff is Colin Young. Respondents/defendants are David Ellis and brothers Bradley and Michael Johnson. For ease of reference the parties will be referred to as “Young” and the “defendants.”

On February 26, 2008, three months after start of wrecking yard operations, the defendants violated the partners LLC operating agreements as they seized the wrecking yard and its LLC bank accounts [rp 1561], then locked Young out, isolating him from all LLC financial records and withholding his unpaid wages. [rp 1545:11 - 1546:1] Five weeks later, on 3/31/08, defendants forged then filed with the Secretary of State their Amended Initial Report for Yank A Part LLC (YAP) and Olympic Holdings (OH) (ex 163). These 4/4/08 “false filings” amended the LLCs’ memberships, unlawfully removed Young, and converted all his LLC assets to defendants. [rp 2512-13] In June 2008 Young sued for breach of contract, general and special damages for unpaid wages, injunctive relief, and the dissociation of defendants for breach under partnership statutes, (supl cp 1-23) At Young’s 8/8/08 default motion hearing, defendants answered and cross-claimed for breach of fiduciary, damages, and dissolution (supl cp 35-47). then pled for time to amend.

Young made numerous comprehensive financial discovery requests starting in November 2008 and continuing through the summer of 2009. This, in an attempt to access basic financial and business information critical to his case, as well as to track funds defendants removed from LLC bank accounts. Defendants repeatedly delayed producing on Young’s request for LLC bank and financial records until well into April 2009. (ex 174) Defendants’ incomplete and non-production of LLC financial records led to an unending circle of court appearances. From March through August

2009 parties were regularly in court on discovery issues. The court finally ended discovery with a threat of assigning a special master. But defendant's financial disclosure was incomplete and missing critical YAP records for February and March 2008. Defendants personal bank and loan statements and income tax records were never produced, nor were the Grandview and Johnson Properties' business records¹, bank, or loan statements. (ex 174)

The trial record shows that under Brad's control, many tens of thousand of defendants' claimed YAP "expenses" had no receipts. Moreover, Brad abused the corporate form as he habitually co-mingled LLC funds, accounts and expenses with the Johnsons' personal and business credit accounts [rp 1846-56]

II. Response to Cross-Appellants' Assignment of Error

1. The trial court did not abuse its discretion in denying the defendants' request for attorney fees.

The trial court did not abuse its discretion in denying the defendants' request for attorney fees given defendants did not prevail on any of their claims; defendants willfully misled the court; defendants abused the corporate form to advance their financial positions; defendants chronically delayed and withheld critical discovery; defendants violated court orders; and defendants concealed substantial LLC assets. As shown below, any of these offenses is sufficient grounds for denying attorney's fees, and awarding fees to the Young. Standard of review is abuse of discretion.

III Argument

1 The defendants are precluded from any award of attorney fees due to their deliberate deception and fraud on the court in order to conceal their embezzlement of LLC funds and true motive in replacing Young.

¹ Excepting a one page 2008 Expenses and Income Report (ex 157)

Brad's philosophy on dealing with his default at Brown Lee [rp 1822] was to "*figure out where you're going to get the money from.*" [rp 2397:12-23] He clearly did just this when defendants removed Young and began a shell game of "lending for spending" at YAP - largely self dealing loaned money to his own companies, and the outright embezzlement of many tens of thousands of dollars in 2008 by cashing dozens of checks written to "Cash", "Yank A Part", and Brad. However, the defendants went to great lengths to avoid disclosing this.

a. Trial revealed Johnson brothers' degrading financial situation in late 2007 followed by their desperate acts in early 2008 on default of \$1.12 million in loans and impending foreclosure of their Brown Lee project.

By late 2007 the Johnsons had overspent their Brown Lee construction project, going into default on their undisclosed \$1.12 million construction loan from Westsound Bank.[rp 1822] By late January 2008 Grandview's construction funds had run dry, all attempts for further financing were turned away, and large sums of money were yet required to finish Brown Lee.(ex 57)

Evidence in the record made clear that by January 2008 the Johnson brothers desperately needed a way out of their \$1.12 million dollar default which unquestionably stemmed from Brad's mismanagement and failure to budget the Brown Lee project. In short, the Brown Lee project was broke, the homes were not complete, and in early 2008 the Johnsons were facing the real possibility of personal bankruptcy and the loss of their homes to foreclosure.

The Johnsons' temerity in seizing YAP and locking Young out was quite obviously rooted in their desperate need to access the large sums of money they saw coming into YAP in January 2008. (ex 170) However, by way of Young's

duty bound financial reporting at December 2007 through mid February 2008 business meetings. (actual minutes withheld by defendants) Defendants knew Young closely watched every dollar YAP brought in to maximize profits, and that Young would not stand for any misappropriation of LLC funds [rp 2383:15 -2386]

In retrospect, it is clear that only Young and YAP's operating agreement stood between the Johnsons and their eventual extraction of LLC funds needed to re-capitalize Johnson's Brown Lee project, and save them from financial disaster. With no hope of further financing, the Johnsons seized control of YAP.

The trial evidence overwhelmingly supports the defendants ulterior motive in removing Young was to provide the Johnsons unobstructed access to YAP funds.

The Johnsons' were in a degrading financial position in the second half of 2007 as shown at trial by the following: Brad had insisted in summer of 2007 that Dave Ellis join the partnership to help with "financing"; January 2008 Grandview's Brown Lee project showed no further income to pay Brad's salary or outstanding bills (ex 157), and was still months from completion [rp 1822-27]; In late 2007 further credit was not available to the Johnsons due to their undisclosed default at Brown Lee; Brad failed to disclose that their real estate assets were already fully leveraged when he pushed for a single loan - secured with the Ellis property - for the balance of the wrecking yard purchase, rather than the planned individual home equity loans; In a partnership vote 11/30/07 - prior to the start of Young's management of "day to day operations" - defendants voted 3-1 against Young to abandon the critical shut down and business preparation period and open YAP LLC 12/1/07 to "generate cash."

That the Johnsons and Grandview were in desperate financial condition very early in 2008 is shown by the Johnson's refusal to release personal and business financial and bank records in discovery², as well as the following Brad secret acts: Brad's late January or early February 2008 unauthorized hiring and secret instructions to Grandview's bookkeeper, Karen Silva, to take over all YAP and OH book and record keeper; Brad's unauthorized removal LLC records, files, and corporate documents from file cabinets in the YAP office file; and Mr. Ainsley's month late drafting of the 2/26/08 meeting minutes and resolutions to give the appearance of an official and legitimate replacement of Young with Brad as manager. (ex 15, 11) Furthermore, each of the foregoing secret acts constituted a breach of the YAP operating agreement.³ (see also appellant's opening brief)

Proof of defendants true motive also was presented in the limited quickbooks LLC reports finally released mid April 2009 which showed over \$100,000 in unsubstantiated YAP payments unaccounted, or accounted only as "expenses," including over \$28,000 in checks written to "Cash" in 2008 beginning immediately after Young was removed and locked out.(ex 36) YAP quickbooks reports show unsubstantiated payments (generally over \$1000) were most prolific in 2008, yet continued into 2009. These unsubstantiated checks were written to Grandview Development, Yank A Part, Cash, Brad, and Johnson Properties and cashed by Brad. (ex 35,38, 39, 40, 41) At trial Brad testified he would later instruct the

² Here, despite motions to compel production and court order to produce, defendants refused without consequence to produce requested financial reports, bank statements, and income tax returns for Grandview, Johnson Properties and each defendant. Such failure to produce presupposes existence of damaging information relating to the many tens of thousands in unaccounted LLC funds absconded under Johnson's management.

³ From October 08 to March 09 Brad breached his fiduciary duty as he failed to make YAP's monthly \$1800 loan payment to Ellis for five months (ex 195) [rp 2423-24]

bookkeeper to record these checks as “expenses,” without providing any supporting documents or receipts. In fact at trial Brad was ordered by trial subpoena to produce receipts for these cash “expenses.” Brad could not produce any of these subpoenaed receipts. [rp 2375-2380, 2407-2415]

That the Johnsons were in desperate straits was shown by the profound risk they took in breaching the LLC operating agreements, hijacking YAP in Young’s absence, emptying and closing the LLC bank accounts,⁴ and converting Young’s LLC assets to themselves. Clearly, no good faith or “duty of utmost loyalty to partners” can be found in the defendants’ foregoing secret and desperate acts. In fact, Dave Ellis even admitted at trial to the partners acting in bad faith in Young’s removing Young. [rp 2046]

Although the Johnsons’ were well aware of their loan default at Brown Lee prior to the partnership’s formation of the LLCs , they failed to disclose it to Young or Ellis. In failing to reveal this default and related liabilities prior to LLC formation, the Johnsons breached their partners’ fiduciary duty to Young and Ellis. In fact, the Johnsons’ default at Brown Lee was not exposed until Brad was confronted with the “Realist” reports (ex 4) demonstrating the Brown Lee construction loan amounts at trial. Brad then testified to the Johnson brothers default on their loans and their inability in 2007 to pay the default interest demanded by Westsound.⁵ [rp 1814-15, 320:3-10, 321:9-28, 812-32]

⁴ YAP ebay bank account was emptied by Brad without signature authority on the account.(ex 31) Not only is this a crime, but Brad defrauded the bank.

⁵ It is noteworthy that Brad Johnson’s answers at trial to questions of Johnsons’ default and the Brown Lee loans were particularly deceptive - including his failure to recall the amount of his two Brown Lee construction loans, the loan interest rate, the amount of the monthly interest payments he “could not afford,” and the eventual short

b Trial has shown defendants knowingly misled the Spearman court at the initial hearing, submitted sworn falsehoods, and fabricated evidence to hide their actual motive in seizing the partners' business and its bank accounts.

In opposing Young's initial motions for default judgment, protection, and return to status quo business operations, defendants' counsel, William Broughton misled and deceived the 8/8/08 Spearman court with his responsive pleadings, oral arguments, Brad's 8/7/08 bad faith declaration (ex 7), and defendants' fabricated formal 2/26/08 meeting minutes. (ex 6 verb. rpt. 8/8/08) (ex 18, 141) (cp 1516 at CL #13) Trial has shown each of the forgoing defendant submissions were overrun with bald assertions, known falsehoods, and outright fabrications, and as such, each was drafted, signed, and promoted 8/8/08 without solid foundation in violation of CR11.

From the time of Young's exclusion 2/26/08 and through the 8/8/08 motion hearing, the defendants exclusively held all LLC financial and bank records. Counsel for the defendants knew full well that under such circumstances, Young could not disprove any disparaging claim against him, regardless of how unfounded, deceptive, or malicious those claims may be.

Taking full advantage of Young's isolation from YAP records, Mr. Broughton detailed a litany of bald and bad faith claims in his drafting of the 8/7/08 Declaration of Bradley K. Johnson. Mr. Broughton also included the same or similar claims in defendants' Answer and Counterclaim, as well as in defendants' responsive pleadings submitted for the 8/8/08 motion hearing.⁶

sale price and date for their Brown Lee homes in foreclosure. However Mike Johnson testified to the fact that had they lost \$400k at Brown Lee. [rp 88:22 -89:16]
⁶ Within the defendants' response brief are the same bald claims and fabrications discounted below. However, now defendants' attorney absurdly proffers his own unsupported and personal statements in opening and closing arguments as proof of these

On 8/0/08 each these defendant submissions were before the Spearman court, and were disengenously proffered by Mr. Broughton. (ex 6 - verb. rpt. 8/8/08)

c. Defendants' counsel drafted and submitted to the Spearman Court the 8/7/08 Declaration of Bradley Johnson containing known falsehoods

In violation of CR11, at the 8/8/08 motion hearing the defendants' counsel, presented without sound basis Brad's 8/7/08 bad faith Declaration.

"CR 11 requires that every pleading, motion, and legal memorandum be signed either by an attorney of record or by the party itself. By signing, the attorney or party certifies, among other things, that the pleading, motion, or legal memorandum is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." If a pleading, motion, or legal memorandum is signed in violation of this rule, the court may impose "an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred . . . including a reasonable attorney fee." CR 11.

In his 8/7/08 bad faith Declaration, Brad swears to defendants' February 2008 "audit" of YAP books showing missing checks, missing LLC funds, overpayment of Young's wages, damages to YAP and lost profits - all of which were attributed to Young's mismanagement of YAP. Brad further swears in his 8/7/08 Declaration that Young failed to keep any business records for YAP, illegally paid YAP employees with cash, improperly accounted payroll taxes, and never contributed to the LLCs. (ex 7) Conspicuous in its absence was any attachment of proof or documentary results of this alleged "audit."

In fact not one of Brad's claims in his 8/7/08 bad faith Declaration was supported by any audit report, receipt, or any other document. Furthermore the defendants produced no proof or results of their alleged "audit" at the 8/8/08

facts and assertions. [see specifically Resp. Brief p. 3 - citing RP 56, 66, 2534 ; p.4 - citing RP 15,16 ; p.19 - citing RP 2561 ; p.22 - citing RP 2504, 2505]

hearing or any other time. (ex 6) Truth be told, Brad's entire 8/7/08 Declaration was fiction, no "audit" was ever performed, and his bald claims were falsehoods known to him. These facts were established at trial, and in part by Johnson's own testimony and other admissions.(ex 171 p1) [rp 653, 1976-1983]

Brad's knowingly false claims included but were not limited to: no employee payroll record keeping⁷, missing YAP checks, missing YAP funds, and employees paid in cash without taxes withheld.(ex 7 p.2-4) These unfounded declaration claims were later shown false by trial Johnson's own testimony [rp 2014-15], YAP financials, and discounted in findings of fact #12,13,14. (cp 1514)

Brad admitted at trial that all members had paid their initial LLC consideration of \$2500 [rp 1722-26] - thus proving knowingly false his 8/7/08 declaration claim "*Mr. Young at no time tender funds for his interest in Yank A Part*" (ex 7 at 5) This falsehood clearly shows Johnson's deliberate participation in a high level scheme to deceive the Spearman Court and bring a collateral attack on Young's standing to sue.

Defendants specifically mislead the Spearman court with bald claims of: Young's "serious mismanagement" that had "harmed and endangered" YAP (ex 7 at 6); that there were lost profits under Young, and that YAP had enjoyed a return to profits under Brad's management. However the 2008 YAP Profit and Loss reports show actual net losses under Brad's mismanagement exceeding \$41k for

⁷ The YAP employee payroll ledger was purposely withheld in discovery by defendants, because Brad Johnson swore in his 8/7/08 declaration that Young never kept employee records. But a copy of the employee payroll ledger literally slipped through on the trial subpoena to bookkeeper Karen Silva, thus proving false another of Brad Johnson's sworn to claims. [rp 1284:7 - 1286: 7, 2014-15]

each the month of July and August 2008 the two exact months which straddled Brad's 8/7/08 declaration.(ex 151) Clearly Brad's bad faith declaration was designed to keep him in control of YAP so he could continue bleed capital from the LLCs, keep paying himself Young's contract wages, and finance the completion of Brown Lee. [rp 1970 - 2005 generally]

Any responsible attorney would have discovered Johnson's false claims with a cursory examination of the YAP financial records and review of the defendants' alleged "audit" Here, although the "audit" never existed, and with defendants; complete access to all financial records, either Mr. Broughton actively participated in the fabrication of Johnsons bald claims and falsehoods, or he was inexcusably negligent in his professional obligation to verify Brad's assertions prior to pleading, answering, and cross-claiming for breach of fiduciary duty and monetary damages.⁸ In either case this leaves standing the conclusion Mr. Broughton negligently promoted Johnson's knowingly false claims on 8/8/08 without providing the court any supporting documents or reasonable inquiry.

As shown in Appellant's Opening Brief, it is well established that one parties intransigence is grounds for award of attorneys fees to the adverse party. As a corollary - intransigence precludes award of fees and costs to the offending party. In this matter the defendants intransigence is shown herein and by the overall case record, and it is blatant and recurrent. As evidenced in pretrial hearings, the chronically deceptive behavior at the bar by defendant's counsel, as well

⁸ Considering Mr. Broughton's tenure, it is highly unlikely that he was unaware of the truth of the alleged "audit" or had not reviewed the YAP quickbooks and other financial records and material required to properly assess the case.

defendants' disrespect for court and its discovery rules, precludes any award of fees to defendants and suggests CR11 sanctions.⁹

Fortunately, it remains within the reviewing court's inherent powers to yet award fees for Brad's bad faith Declaration, defendants frivolous counterclaim, and/or defendants frivolous cross-appeal.

"it is within our inherent powers to award attorney fees on equitable grounds". [*Public Util. Dist. No. 1 v. Kottsick*, 86 Wn.2d 388, 389, 545 P.2d 1 (1976).]
"We are at liberty to set the boundaries of the exercise of that power."
[*Weiss v. Bruno*, 83 Wn.2d 911, 914, 623 P.2d 915 (1974).]
"We have already recognized that bad faith litigation can warrant the equitable award of attorney fees." [*Hsu Ying Li v. Tang*, 87 Wn.2d 796, 798, 557 P.2d 342 (1976); *Kottsick*, 86 Wn.2d at 390.]

Brad's known falsehoods were commonly propagated among his 8/7/08 Declaration, defendants' fabricated Meeting Minute, Resolutions of 2/26/08, Defendants' Answer and Counter claim, as well as defendants' responsive pleadings for the 8/8/08 motion court. Therefore in response to defendants' opening brief, the appellant moves this court accordingly for CR11 sanctions, costs, and attorney fees for any or all the foregoing submissions.

Ample trial evidence has shown Brad repeatedly lied in his 8/7/08 Declaration before the Spearman court. Ultimately, these lies and the erroneous 8/8/08 decision by Judge Spearman led to enormous loss of conservatively projected profits for Yank A Part LLC in 2008. [rp 1976-88] (ex 170, 170a)¹⁰

⁹ Under just these circumstances, equity provides for an award of attorney fees and costs to the adverse party - in this case Young - regardless of the court's determination that "no party prevailed"

¹⁰ This loss of profits are directly reflected in member share value and justify Young's request for damages of lost profits (remedy of disgorgement) from the defendants who abused the corporate form to advance themselves at the expense of minority partner. However, in judgment the trial court abused its discretion when it ignored Young's claim of damages of lost profits, making no findings or conclusions on the issue.

d Defendants counsel promoted prejudice and mislead the Spearman Court during oral arguments on 8/8/08.

In oral arguments before the Spearman court on 8/8/08 Mr. Broughton attempted to bring the 8/8/08 hearing court in league with him.¹¹ Mr. Broughton belittled Young as “not an attorney” - promoting prejudice which resulted in Young thereafter being unfairly and repeatedly cut off by Judge Spearman. Young was denied a fair opportunity to present his both his motions, and the court’s lack of impartiality was blatant. (ex 6 - verb. rpt. 8/8/08 p.6-end)

Young was forcibly and completely isolated from all aspects of YAP for a year and a half after defendant hijacked YAP. Due to defendants’ discovery abuses it was not until mid 2009 Young was able to prove false any of the various bald claims of Mr. Young’s damaging performance as YAP manager as expounded by Mr. Broughton in oral arguments at the 8/8/08 hearing. Moreover, these claims were eventually discounted by the trial court (cp 1514-15)

Not only did defendant Brad admit at trial to material falsehoods before the pivotal 8/8/08 Spearman Court, but the much delayed release of LLC financial records in May 2009 has shown the defendants deliberately misled the 8/8/08 Spearman court on every claim, issue, and defense they proffered.

That the defendants misled the lower courts to maintain control of the LLCs and continue Young’s isolation from critical LLC and other financial discovery is obvious from the overall record. This bad faith isolation of Young as an LLC member and litigant, as well as defendants chronic discovery delays (ex 174)

¹¹. This same prejudicial “*birds of a feather flock together*” ploy is now presented in defendants/respondents opening brief on page 1

prejudiced Young in his ability to prepare for trial. Defendants are yet to be held accountable for misleading the lower courts.

In its oral decision the Spearman court failed restore Young to his contract position and failed to return YAP to the status quo operations under the terms of the YAP operating agreement. This was not only an abuse of discretion, but it was a mistake of law which the Spearman court failed to correct in reconsideration. The tragic effect being Young wasting nearly three years and Johnsons continued their secret embezzlement of YAP funds to ward off personal bankruptcy and complete the Brown Lee project.¹²

2. Trial has revealed defendants willfully withheld and/or extensively delayed discovery of critical financial records to avoid revealing their embezzlement of LLC funds, Young's unpaid hours, and their true motive for removing Young. Defendants then deliberately deceived and misled the court at subsequent pretrial discovery hearings precluding award of attorney fees to defendants.

Having unethically defeated Young's 8/8/08 motions by fabricating a bad faith declaration and proffering intentionally misleading oral assertions, defendants' counsel then orchestrated delay upon delay in discovery. (ex 141) This resulted in over a year of wasted time and court resources as the defendants bent and broke discovery rules avoid disclosure of defendants' true motive in removing Young. Meanwhile, YAP losses under these delays exceeded a hundred thousand dollars.

¹² Brad Johnson testified that neither Johnson Properties or Grandview Development were of a corporate or limited liability nature, thus liability for default and collections following Westsound's foreclosure and short sale losses at Brown Lee attach directly to the Johnsons. Mike Johnson testified to losses of \$200k on each of the two homes [rp 88:22 - 89:16]

The quantum of evidence in the overall case record makes clear the fact that defendants purposely delayed discovery to avoid revealing Johnsons hidden embezzlement of YAP's funds as defendant's true motive in removing Young.

The 8/8/08 Spearman court was first to be deliberately misled with defendant falsehoods.. Afterwards, the trial judge Honorable Anna Laurie, conducted all pretrial hearings and was subject to more defendant excuses, misleading claims, and falsehoods at discovery hearings, and was fully aware of defendants' repeated discovery abuses. (ex 174)

Repeated discovery demands by Young beginning in November 2008 failed to produce any evidence of this alleged "audit." As to the question of this "audit" ever occurring, the defendants admitted at trial to knowing that that their claims of an "audit" before the court 8/808 court were false. [rp 1723]

Ellis, the Johnsons, Johnson Properties, and Grandview Development were all subject to Young's requests for production of comprehensive financial disclosure, but defendants' failed to produced on any of these requests.

Despite numerous motions brought by Young on defendants' discovery violations, abuses, and delays, the defendants failed to provide complete and ongoing financial discovery. Withheld personal financial disclosure would unquestionably have shown defendants personally receiving the missing, unaccounted, and absconded LLC funds as well as YAP's lost profits.

Defendants willfully ordered the bookkeeper to turned off Young's online LLC quickbooks after just six weeks of access. Defendants also failed in their ongoing obligation to produce LLC bank records, and deliberately concealed new bank accounts leading to an amended judgment following Young's discovery of \$44k in

undisclosed LLC accounts (ex 148) [rp 1526:10 - 1528] However, Judge Laurie unfairly refused all requests to impose sanctions and/or costs against the defendants following their discovery abuses and repeatedly wasting the court and Young's time. This failure to sanction the defendants simply encouraged further defendant discovery abuses and delays, which again disadvantaged Young. Impartiality by the court was not shown here.

3. Defendants did not prevail and are not entitled to attorney's fees.

The defendants claim that "*As the record indicates, the trial court ruled against Young on every claim advanced by him during the course of the proceedings*" (Resp. Brief p. 23). Here Mr. Broughton is again attempting to mislead the court. Withholding of Young's unpaid wages was one of Young's claims. In summary had this lawsuit not been prosecuted by Young there would not have been awarded any of his \$4380 in unpaid wages (ex 191)¹³ maliciously withheld for well over a year. Young's award of \$32,660, which he would not have received otherwise hardly supports Young not prevailing on any issue or claim.

In the trial court's second amended findings of fact and conclusions of law (as drafted by defendants' attorney) Conclusion of Law #16 states "Neither party is the prevailing party, and as such, neither party is entitled to attorney's fees"

However defendants failed to assign error to Conclusion of Law #16 as it applies to them, and as such, Conclusion of Law #16 is a verity on appeal.

¹³ Defendants deposited \$3000 into the court registry for Young's unpaid wages a year after being served with this lawsuit. Claims of having "paid" Young's wages into the court registry omit the fact that any payment was too late to avoid mandatory doubling and attorney fees for willful withholding wages ...

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)]

In the event that the court instead accepts defendants' assignment of error to the denial of defendants' motion for attorney fees, the following response to defendants claims of being the "prevailing party" in the matter is provided.

Although the trial court failed to detail the basis of its decision that neither party prevailed, the trial and pretrial record and quantum of evidence clearly justify the trial court's decision not to award defendants attorneys fees, if for no other reason, in consideration of defendants intransigence and under the guise of equity.

The quantum of evidence in the trial record shows that defendants' claims of Young's alleged impropriety and serious mismanagement of damaging YAP- as found in defendant's counterclaim and other pleadings - were without merit and frivolous.. As a result the trial court found contrary to defendants cross-claim, and granted none of their original relief requested in defendants' answer or cross claim. Moreover the trial court ruled Young had not breached his fiduciary duty, and defendants were not awarded and monetary damages. Young clearly prevailed in that the trial court awarded Young damages of unpaid wages - in the amount he had originally claimed..

Regardless of which party ultimately prevails, defendants' spoilage and fabrication of evidence; abundant demonstration of bad faith; criminal acts; breach of fiduciary; breach of contract; fraud; intransigence; and other discovery abuses are substantial and preclude any award of fees or costs to the defendants.

These and many other defendant wrongs were shown by trial by testimony and documents in the record, as well as Young's early motions to compel discovery and for default on defendants repeated failure to produce. As demonstrated by his

letters to Mr. Broughton on the issue of withheld, incomplete, fabricated, and delayed discovery, defendants were cherry picking their releases (ex 174).

4. Defendants' criminal actions assign liability for civil damages and which preclude any award of attorney fees.

As shown in the Appellant's Opening Brief - By state statute, any criminal act constitutes a "gross negligence", and attaches civil liability for damages to the actor. Here, liability and damages for loss of reasonable anticipated profits, damages for loss of employment under contract, and damages for Quantum Meruit all attach individually to each defendant through their criminal acts, fraud, and abuse of the corporate form.

a. Defendants unlawfully back-fit YAP employee records to convert a consultant to employee and give the appearance of improperly calculated and underpaid state and federal taxes

In order to falsify employee payroll records and support defendant claims of Young's mismanagement, Brad, and LLC bookkeeper Karen Silva unlawfully back-fit of YAP books for the months of December 2007 through February 2008. to retroactively converted part time consultant John Miles to a regular hourly YAP employee. [rp 2012:12 -2013] This unlawful act then had effect of showing improper accounting and payment of payroll taxes by Young..

b Defendants back-fit YAP books fraudulently converting records of principal paid on the Chase/Ellis loan to interest, resulting in the theft of principal by partner.

David Ellis, Brad, and LLC bookkeeper Karen Silva each knowingly participated in the scheme to unlawful back-fit of YAP books for the months of December 2007 through February 2008 when they converted all principal paid by YAP on the Chase/Ellis loan to interest. [rp 2344:10-25] This provided Ellis with over \$1000 a

month on average pocket money which could be aptly be characterized as his “share” of the benefit of Young’s removal. (ex 194,195) This amounted to fraud by the bookkeeper and theft of principal by member and partner David Ellis. (see also : Motion for Revaluation)

5. Defendants fabricated meeting minutes attempting to justify their removal Member-Manager with resolutions, then defrauded the lower courts as to the occurrence of the meeting and vote underlying defendants resolutions.

Beginning in November 2008 and continuing for over next six months the defendants were subject to repeated discovery requests and court orders to produce the “original” YAP meeting minutes notebook. for inspection and copying . [rp 1918-20] This meeting minutes notebook was critical to Young’s case. However, like most of Young’s requests for production, defendants ignored their discovery obligations until forced to appear in court whereupon the defendants’ counsel would typically offer up excuses for lack of production and be permitted further delay.

Young testified extensively at trial to his many discovery requests to inspect the “original” YAP minutes notebook and defendants fabrication of meeting minutes. [rp 1441-47] Young also testified that all meeting minutes would have been found in the “original” bright colored 60 page YAP meeting minutes spiral notebook which he had purchased, and had been in the possession of Cheryl Ellis. Young testified to the 5-6 previous meetings recorded by Cheryl Ellis¹⁴ [rp 1301-1306:3]

¹⁴ Young extensively testified to his discovery requests to inspect and copy YAP’s meeting minutes “notebook” were critical to his case. and to the early January meetings missing in discovery [rp 1292, 1440:25-1446] This notebook was required to show his good faith, disclosure to partners of all YAP financial matters, the progression of the wrecking yard licensee, and his progress to the business model at meetings held after January 1, 2008.

When later asked about the many months of delay despite court orders to produce the notebook, Brad testified he was aware of court orders to produce the original notebook for “inspection” but Brad also admitted at trial to “Not (making) a big effort” in producing ordered discovery. [rp 2015]

Only threat of default judgment after months of delay did the defendants attorney finally produced copies of pages torn from a spiral notebook, curiously volunteering before the bar that said copies to be the only meeting minutes that existed . However defendants had once again failed to produce the spiral notebook for inspection, as requested by Young and ordered by the court. [rp 1440-45]

Because the copies showed that minutes had obviously been torn from a spiral notebook, it was impossible to verify the authenticity of the 2/26/08 meeting minutes based on their sequential order being retained in the spiral notebook [rp 1903 line 8 - 1904] Despite Young’s repeat inquires as to why the minutes were torn out, and why six months of delay producing the “original” notebook, the defendants continued to stonewalled the notebook issue. (ex 174)

It was not until trial Brad admitted he “*tore*” out the minutes, and provided the ridiculous excuse that he had to remove them to “*copy*” them [rp 1909] Even though the defendant produced hand written meeting minutes (ex 18) proved to fabricated this was an admission of spoilage of evidence. Defendants suffered no consequence for this or any other discovery abuses despite Young’s disadvantage and requests for CR11 sanctions and costs.

On the court’s issuance of further orders, and the defendants finally produced a large 250 page well aged, dark blue spiral notebook, claiming it to be the “original meeting minutes notebook.” Obviously this was not the “original” small meeting

notebook Young purchased December 2008 and was subsequently used for taking meeting minutes. Also produced at this time were the source documents of the February 2008 minutes the defendants had earlier produced.¹⁵ Young testified the large notebook produced was not the “original” and the collection of minutes produced was incomplete and fabricated. (ex 148) [rp 1528 -33]

By the close of trial, the record contained no less than three different versions of the 2/26/08 “minutes”(ex 141). Due to conflicting and deceptive testimony about the origin and production of these critical minutes, none of the three versions of the 2/26/08 minutes is reliable. [rp 1902-05, 1907-09 line 11] From the evidence in the record it is not possible to factually date or say what took place at any meeting alleged, much less at the critical meeting to remove Young.

All evidence considered (much of it detailed elsewhere in this brief) the only possible conclusion is that the defendants fabricated evidence of minutes for the February, 2,12, and 26, then withheld or destroyed the “original” 6-7 meeting minutes and the “original” small notebook.¹⁶

However, in their response brief, the defendants assert “*Substantial evidence is provided in the record that three of the four members voted to remove Young as manager of Yank A Part at a meeting held February 26, 2008. The meeting minutes themselves were introduced into evidence*” citing to RP 171,1860 and Ex. 15. (Resp. Brief p. 20)

¹⁵ Later at trial Young testified the February 2nd and 12th meeting minutes produced by the defendants did not represent the events of those meetings, the minutes produced were not from the original meeting minutes notebook, and that all January 08 meeting minutes were still missing in discovery.

¹⁶. The “why” is fairly clear, the actual meeting minutes preceding 2/26/08 showed Young’s effective management, YAP profits, and full disclosure of all financial matters.

Supporting this assertion the defendants' cite to testimony by Brad "*Because you were fired. Yes, I became the manager*" [rp 1860 line 10] - which clearly gives no confirmation of a vote, and Mike Johnson's contradicting and unreliable testimony "*I was there for the vote, you bet.*" and "*When you were removed during the week I was -- was gone*". [rp 171 lines 7, 5] No reasonable person would conclude a "majority vote" took place from either of the defendants' two cites to supporting testimony. Consequently neither of the defendants' citations stands as substantial evidence of a "majority vote" occurring,

Three different versions of minutes for the 2/26/08 meeting are in the trial record and none constitute "substantial evidence" of a "majority vote" to remove Young as defendants assert. As detailed below, Mike Johnson's testimony as to the alleged 2/26/08 meeting and vote is unreliable, contradictory, and conflicting with the all three versions of the 2/26/08 minutes as well as the other defendants' testimony.

The trial record contains an abundance of conflicting evidence and relating to defendants' alleged meeting, minutes, and "majority vote" to remove Young. Conflicts in defendant testimony make it is impossible to factually determine what day defendant's alleged meeting to remove Young occurred - or if this alleged critical meeting and "*majority vote*" ever occurred. .

Conflicting defendant testimony and other related documents in the record caused defendants' deception to unravel at trial. This unraveling should rightly have discredited the defendants as a whole and removed all the respondent's meeting minutes from consideration of the court - but unfairly, it did not.

Based on defendants' testimony and submissions, two different dates are presented the court as the day of the critical meeting and "majority vote" to remove Young: Tuesday, 2/26/08, and Thursday 2/28/08. Brad and Cheryl Ellis each testified that the meeting was held 2/28/08 while all three versions of the 2/26/08 meeting minutes date the critical meeting and "majority vote" at 2/26/08. Under Mr. Young's direct examination Michael Johnson testified:

Q. So when you made the decision that I was going to be out of the company, what action was taken immediately or within the next two weeks?

MJ. *I'll be honest. I was out of town at the time so I wasn't directly involved.*

Q. At which time was that?

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

Q. So you weren't there for the vote?

MJ. *I was there for the vote, you bet.*

Q. What day was that?

MJ. *I don't know.*

Q. But it was during the week?

MJ. *No.*

Q. It was on a weekend?

MJ. *It was on a weekend. Because I was gone. [rp 171]*

Asked when action to remove Young took place, Mike Johnson stated he "*I was out of town at the time so I wasn't directly involved*" and "*When you were removed during the week I was -- was gone.*" Then Mike Johnson testifies that he was there for the vote, but that it happened on the weekend. (clearly not Tuesday 2/26/08 or Thursday 2/28/08)

For a majority vote to have occurred as alleged in the all three versions of the defendants 2/26/08 minutes, Mike Johnson had to be "in town" Tuesday 2/26/08 to attend this critical members meeting, be "directly involved" and not "gone" in order to vote to remove Young. Despite his contradicting testimony Mike Johnson

could not have voted “*on a weekend*”, and likely never voted at all despite what is presented in the defendants’ minutes.

Regardless of how it is looked at, Mike Johnson’s testimony does not constitute consistent, substantial, or credible evidence. Mike’s testimony conflicts with all three versions of the 2/26/08 meeting minutes as to his presence on 2/26/08. Most importantly, without the certainty of Mike being present for the decision to remove Young, there is no majority vote, and the defendants’ 2/26/08 resolutions can not be given effect. Substantial evidence does not support Mike Johnson being present for a “majority vote” to remove Young.

Both Brad and Cheryl Ellis testified that the critical meeting and vote to remove Young occurred the evening of 2/28/08. [rp 3124-5] Cheryl Ellis testified that there was just one “hand written” 2/26/08 meeting minutes. [rp 1335-36] and she identified exhibit 18 as her original - and the only “hand written” minutes she had produced. (ex 18)

When examined about the “2/26/08” date on the top of her alleged original meeting minutes (ex 18) conflicting with her testimony of the meeting and vote held on “2/28/28” Cheryl Ellis testified that her “2/26/08” minutes were really the “2/28/08 meeting minutes because Young did not show up on the 26th and it was an “oversight” that she did not change the date at the top of these minutes to reflect the meeting and majority vote actually happening the evening of 2/28/08. [rp 1340-42] However, when Cheryl Ellis was then presented with a second but significantly different “hand written” version 2/26/08 minutes (ex 141) Cheryl Ellis testified it was also in her handwriting, acknowledged that it as different from the one she earlier claimed as the “original” (ex 18) yet confirmed the fax time/date stamp this

second "hand written" 2/26/08 minutes as 10:45 a.m. on 2/28/08, or six hours prior to when she and Brad testified the critical meeting and vote took place [rp 1373 - 77] At this point the defendants' house of cards they constructed to justify their hijacking of YAP had come apart.

Ignoring the extreme likelihood that there never was any meeting or vote to remove Young as stated in defendant's resolutions, either Cheryl Ellis fabricated hand written minutes hours before the alleged meeting and vote, or she and Brad lied about when the critical meeting happened because Michael Johnson testified he was not present on 2/26/08 as was indicated in her minutes.

At trial, Brad's testimony followed his brother and Cheryl Ellis. Brad first agreed with the occurrence of a Tuesday 2/26/08 meeting and the accounting of the attendees within the minutes in evidence as follows:

Q. And so your testimony today is that Dave and Mike and Brad and Cheryl were present at that meeting?

BJ. If that's what it says in the minutes, that's -- yep.

Q. Okay. Can you explain how it is your brother has testified he wasn't even there from the weekend until Thursday when I arrived in the evening?

BJ. You know, I think you may have asked him a question that he probably didn't remember exactly. I would say he was maybe mixed up [rp 1879]

Bearing in mind that all three versions of the critical meeting minutes (ex 141) indicate the alleged meeting and vote occurred on Tuesday, 2/26/08, after first agreeing with the 2/26/08 meeting minutes, Brad then testified that the meeting really took place the evening of Thursday 2/28/08

Q. Okay. So we were able to establish that to your testimony, no meeting took place on the 26th. You made no attempt to contact me. On the 28th, you went down in the morning and changed the accounts, removed me from all the accounts, and bought new locks to lock me out of the business and came back. And then I arrived in time to sell the cores. And you have no recollection of me coming in. And then after I left, you had a meeting and the vote; is that correct?

BJ. *After -- yes.*

Q. Okay. So why does this formal document, known as the Resolution and Minutes for February 26, have your signature on it, when it's inaccurate?

BJ. *What's inaccurate?*

Q. Well, it states that the meeting happened on the 26th.

BJ. *That might have been --*

Q. A typo?

BJ. *-- a typo, possibly. I don't know.*

Q. And who drafted up the final version of those minutes? Wasn't it Stuart Ainsley?

BJ. *Maybe.*

Q. Okay. And was he working for Yank A Part, or was he working for Dave Ellis?

BJ. *I would say Yank A Part.*

Q. Okay. But you never signed a retainer with him and didn't have a formal arrangement with him?

BJ. *Not that I can remember. [rp 1887]*

A "typo" as to the date of meeting on a lawyer prepared formal meeting minutes for a critical meeting and vote to remove a LLC member manager is extremely unlikely. What is much more likely is that the whole meeting and "majority vote" story was cooked up after the fact while Mike Johnson was out of town and that why he could not keep his story straight..

When asked about Stuart Ainsley's involvement in drafting the formal 2/26/08 meeting minutes, Brad's answers were deceptive at best. Brad was clearly attempting to avoid disclosure of defendants' fabricating formal 2/26/08 meeting minutes weeks "after the fact." Evidence in the record shows Brad faxed one version of the hand written meeting minutes - imprinted with "Grandview" and his phone number as sender, and fax time/dated 10:45 a.m. on February 28th at least 6 hours *before* he and Cheryl Ellis claim the meeting and majority vote occurred the evening of 2/28/08. [rp 1373-77] (ex 141) The recipient of this minutes was someone who in turn stamped it "Received". [1902:15 - 1903:7] then later returned it. (*Johnson admitted on the stand that he "may have" faxed the minutes to*

Ainsley) This was consistent with one of line the hand written 2/26/08 minutes directing the minutes be “submitted to a lawyer” [rp 1373]

There is no question that Stuart Ainsley drafted the formal version of the 2/26/08 minutes first produced for Young. Brad wrote YAP check # 1161 on 5/5/08 for \$1884 to Stuart Ainsley and paying Ellis’ attorney bill. This bill details Ainsley’s work drafting the minutes several weeks after the alleged vote. (ex 11) [rp 1887:22 - 1888:9, 1998-2000] Clearly Brad was instrumental in the production of the 2/26/08 minutes and had direct knowledge of Stuart Ainsley’s drafting the formal meeting minutes “after the fact.” Johnson was obviously trying to control a degrading situation with his deceptive testimony and lies on the stand.

Instead of the court selecting one of two dates put forth for the alleged meeting and vote - then impartially incorporating the consequences into its decision - the trial court simply ruled the hand written meeting minutes were “more usable” than the attorney’s work product, and moved on.¹⁷ In any event, the occurrence of a “majority vote” to remove Young was not supported by substantial evidence and all conclusions of law based thereon are erroneous.

Given the glaring conflicts in evidence surrounding the critical meeting and vote, it was abuse of the trial court’s discretion to find a “majority vote” removed Young. Furthermore, it was a demonstration of bias and unfairness by the court to turn a blind eye to the defendant’s obvious fabrication of meeting minutes and conspiracy to defraud the court with them.

¹⁷ In footnote 4 of its 2/23/10 Memorandum Decision the trial court addresses the disparity in minutes and testimony by simply discarding the formal “2/26/08” version of the minutes drafted by Ellis’ attorney Stuart Ainsley.

As all three versions of the critical 2/26/08 “minutes” differ, simple logic dictates that at least two of these minutes are fraudulent¹⁸ Young testified that the two earlier dated meeting minutes produced by the defendants also were not from the “original” meeting minutes notebook, and substantially did not reflect the events of those two meetings where he was in attendance. [rp 1292:4, 1301-1306:0]

Long established precedence dictates that once a party fabricates one document as evidence to mislead, all documents produced by that party are in doubt. The trial record clearly shows the defendants fabrication of 2/26/08 meeting minutes by circumstance and testimony. It is beyond question that the trial court discarded the formal 2/26/08 minutes drafted by Stuart Ainsley as the least credible. However this action establishes the lack of credibility of the defendants key submission, and calls into doubt all other submissions.

In consideration of the foregoing, Young’s testimony of his recall of the events of the December through February meetings should have been adopted, and his testimony as to “original” minutes and notebook should have been accepted by the court. Moreover, no “resolution” found within any of the three versions of 2/26/08 minutes should have been judged effective. In finding effective defendant resolutions, the trial court has demonstrated its unfairness and lack of impartiality.

As Brad and Cheryl Ellis each testified that the meeting and vote to remove Young actually occurred after the close of business on Thursday 2/28/08 defendants’ intentional bad faith and breach of contract is shown by Brad’s receipts and testimony of his purchase of new YAP locks [ex 167] and his removal of funds

¹⁸ Cheryl Ellis testified to having taken the minutes of the meeting to remove Young and that there was only one “original” hand written “minutes”.

and closing of LLC bank accounts which occurred five hours prior to Young's late afternoon return on 2/28/08. [rp 1885-87, 1911-15]

It is also significant that when the court discarded Stuart Ainsley's formal version of the 2/26/08 meeting minutes (ex 141) the trial court removed from consideration the only signed version of the critical minutes and resolution.¹⁹ The trial court's decision is then based one of two hand written 2/26/08 minutes. It is not reasonable for the court to give weight to unsigned corporate minutes, nor consider such unsigned minutes to contain an effective resolution on this critical issue, especially when such resolution directly conflicts with YAP contract..

Regardless of whether a "majority vote" to remove Young as member-manager is lawfully permitted under the YAP operating agreement, in its judgment the trial court has been unreasonable and unfair in its assessment of the conflicting evidence of this critical meeting and that this critical "majority vote" occurred. Substantial evidence does not support a "majority vote" to remove Young as member-manager.

6. Defendant failed to produce discovery of monthly statements for the Chase/Ellis loan to YAP, back-fit YAP records to convert all YAP principal payments to interest, then co-mingled YAP's loan liability with his own by using dedicated Chase/Ellis loan as his personal line of credit.

Just prior to LLC formation November of 2007, the partners agreed the Ellis loan (the Ellis/Chase loan) would be an exclusive loan where billing for principal and interest to Ellis from lender Chase would pass straight through to YAP. The actual interest Ellis was charged was to be the interest YAP paid, with the balance of YAP's monthly payment applied directly to the principal of the Chase loan by

¹⁹ It is telling that by Ainsley's dating for hours spent on his bill to Ellis this formal version of the 2/26/08 minutes was still being drafted weeks after it would appear respondents signed it (ex 14).

Ellis. Months earlier in the partnership all partners (including Ellis) agreed to these terms and early loan payoff prior to distribution of any profits [rp 2049-50] This early agreement to dedicate all profits to early loan payoff was formalized in YAP Operating Agreement 6.4 “*from time to time Member-Manager Colin Young shall determine additional Company funds to be paid directly against the principal of Yank A Park Initial Financing Note*”²⁰ (ex #3 at 6.4)

In discovery Young requested production from Ellis of his monthly Chase loan statements. These statements were required to properly account the YAP loan liability on the Ellis/Chase loan. Given bad faith, breach of contract, and breach of fiduciary duty already demonstrated by the defendants, verification of all LLC indebtedness claims is clearly necessary. [rp 2324:10 - 2424]

In May 2009 the much delayed access to YAP quickbooks data showed the YAP records of the early principal payments on the YAP Ellis/Chase loan had been back-fit to reflect 100% interest, and to the limits of discovery produced (Feb. 2009) quickbooks showed no decrease whatsoever in the principal YAP owed Ellis [rp 2035-37] In interrogatories following, Young’s requested of Ellis his monthly loan statements from Chase. (ex 191,194,195) In response Ellis produced just one monthly statement.²¹ Young complained to the court of this deficiency in production, Mr. Brought made excuses, but no further records were produced until post trial proceedings.

²⁰ This note was drafted by early January 2008 and submitted to the partners for approval. Ellis withdrew this note from consideration at a mid January 2008 meeting stating he was going to have his attorney redraft it.

²¹ A post-trial order produced only one additional Chase statement - that being for the valuation date. See defendant’s Notice of Submittal of Financial Information Pursuant to the Court’s Oral Ruling of April 9, 2010 for this Chase statement

Moreover, when Ellis was examined as to the Chase./Ellis loan [rp 2033-38] he revealed for the first time that the YAP - Chase/Ellis loan was actually a home equity line of credit and Ellis indicated he subsequently used this line of credit for personal charges. [rp 2037 lines 1-5] This being the case Ellis had good reason to withhold his Chase statements - Disclosure would show Ellis was co-mingling YAP loan liabilities with his own purchases, and that he had breached his fiduciary duty and his agreement with the partners. Clearly Ellis had been misled the court and Young as to the amount he was owed by YAP. (see *Plaintiffs Objections to Defendants Submittal of Financial Information* for a detailed overview of post trial proceedings and analysis of the court's errors in valuation of LLC) (cp 2143)

Trial testimony and evidence also showed that like the Ellis/Chase loan, none of Johnsons' claimed loans to the LLCs by Johnsons' were supported by documents, nor were they substantively verified by the court for outstanding LLC liability or repayment status prior to valuation.

In judgment the trial court deducted \$17,000 (FF #23) from LLC valuation for an unidentified outstanding loan from Brad. This mistake is yet to be corrected. Brad testified his loans to YAP were "all paid up";

Q. Currently, are there any outstanding loans?

A. No. I think we're all paid up right now.

Q. Why did you loan money to the company?

A. We would have gone into default, if we hadn't. [rp 2341:4]

It is not reasonable that any normal person would not recall being owed \$17,000, therefore, the courts valuation was erroneous and abuse of discretion as it was based in part on an outstanding YAP loan from Brad of \$17,000

The above admission of operating YAP on the brink of default, and in the complete absence of loan documentation under Brad's management, further underscores Brad's incompetence. Receivership is clearly in order as well as a complete LLC accounting followed by revaluation, as requested by Young. (see: Motion for Revaluation for further argument and detail)

The above demonstrated collusion converting principal to interest, undisclosed co-mingling by Ellis, and Ellis' withholding of monthly Chase statements speaks to Ellis deliberately misleading the court and Young as to the LLC liabilities.

Withholding of the Chase statements to prevent disclosure of the Ellis benefit from conversion of principal paid by YAP prejudiced Young's ability to prepare for trial as well as the courts ability to properly value the LLC liabilities.

Considering foregoing intransigence and discovery violations by Ellis wasted substantial judicial resources, and Young's time, the trial court would not be justified in any award of attorney fees to the defendants.

7. Defendants' demonstrations of bad faith - including various breaches, criminal offenses, and abuse of corporate form - demands appropriate remedies and precludes any award of attorney fees.

Acting in agreement, the defendants removed Young from ownership and membership in YAP LLC on 4/8/08.(ex 163) by removing Young's name from the list of members with a 3/31/08 forgery and 4/8/08 false filing of YAP Amended Annual Report with the Secretary of State in Olympia. This one act alone constituted bad faith, breach of fiduciary, breach of contract, breach of promise, a felony, and abuse of corporate form. Ellis admitted bad faith in February [rp 2046]

The defendants intended their forgery and false filing of 4/4/08, and it was no "mistake". The defendants confirmed there intent by similarly removing Young

from Olympic Holdings LLC (OH) on that same day. At trial Brad admitted to removing Young as a member and owner because Young was “fired.” The trial court found the defendants’ later removal of Young as a member was “intentional”(cp 1513 footnote #3) defendants each testified to knowing and approving this filing of corporate documents to remove Young.

On 2/26/08 the defendants collectively violated the corporate form to remove Young in his absence and physically locked Young out of the YAP facility.

Having assumed the position of manager of YAP 2/26/08 Brad immediately took full advantage of his corporate position to isolate Young from access to all LLC financial and bank records, close the LLC bank accounts,²² impound two of Young’s vehicles at the yard (seriously damaging one and later crushing the other), to destroy the desktop calendar which he knew recorded of hours owed Young, to withhold \$4380 in wages owed for Young for February 2008, and breach the YAP operating to assume Young’s contract wages without proper education, qualifications, or any resolution authorizing payment of wages or salary..

All defendants were complicit or approved of the foregoing acts [rp 1921-24], and each act was a violation of the covenant of good faith and fair dealing owed by the LLC majority to Young as the LLC minority. Moreover none of the foregoing acts could have happened without Johnson’s abuse of corporate privilege.

Where a party abuses corporate privilege to advance his position at the expense of another party, no argument or case law supports an award of attorney fees to the party abusing the corporate privilege.

²² In doing so Johnsons defrauded Westsound bank as Young was the only account signer on the YAP ebay account and the only member able to remove the funds.

Piercing the corporate veil is an equitable remedy imposed to rectify an abuse of the corporate privilege. *Truckweld Equip. Co. v. Olson*, 26 Wn.App 638, 643, 618 P.2d 1017 (1980). In this case, disregarding the limited liability company form to hold members personally liable for a company act is the only equitable remedy to available rectify the defendants' well evidenced abuse of the corporate privilege.

"In general, to pierce the corporate veil the plaintiff must show that the corporate form was used to violate or evade a duty and that the corporate veil must be disregarded in order to prevent loss to an innocent party." [*Wash. Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 471, 503, 90 P.3d 42 (2004); *Meisel v. M&N Modern Hydraulic Press Co.*, Wn 2d 403, 409-10, 645 P.2d 689 (1982)]

It was shown at trial that each defendant was complacent or approved Brad's criminal forgery and false filing of two separate LLC Initial Report recordings on 4/8/08, one for each LLC (ex 163) These recording at the Secretary of State constitute at least four separate criminal acts, removed Young as a member and owner from both LLCs, and converted his LLC assets equally to each defendant in a clear act of theft and precluded his legal right to access any of the LLC's bank account information. These and other lesser defendant wrongs serve to pierced the corporate veil and attach personal liability to defendants for all resulting and related wrongs and damages in this case.

The Schafer court extrapolated from this holding that "whether a technical breach has occurred is not the sole consideration "because "actions taken in accordance with [an operating] agreement can still be a breach of fiduciary duty if [members] have improperly taken advantage of their position to obtain financial gain." [741 N.E.2d at 175.]

Here financial gains included conversion of over \$70,000 a year of Young's future contract wages to Brad, chronic and unchecked self dealing that continues today, and immediate division of Young's LLC assets among the defendants.

The defendants' above detailed bad faith breach of duties, abuse of the corporate form, and gross negligence in knowingly committing wrongful and criminal acts are clearly grounds to remove the corporate veil. These and other defendants' bad acts against Young including self-dealing serve to attach individual liability to defendants for restitution of disgorgement. In this case disregarding the corporate form to recover embezzled and misappropriated LLC funds is the only option available if justice is to be served. ²³

Although Young repeatedly raised RCW 25.15.155(1) attaching personal liability to claims in his amended complaint (cp 1054), the court ruled against Young's motion to leave amended complaint, thus unfairly undermining his attempt to conform his complaint and claims to defendants late release of LLC financial records and other evidence.

It is well established that commission of criminal acts - in this case forgery and false filing 4/4/08, theft of LLC assets, and providing banks with false information of account ownership - while standing in a corporate capacity constitutes "gross negligence" by the actor(s) and comports personal liability for damages under RCW 25.15.060 and 25.15.155(1)

Here, loss of YAP profits are reflected in defendants' receipt of ill-gotten LLC proceeds . All ill-gotten LLC proceeds are rooted the defendants' criminal acts, abuse of the corporate form, and self-dealing. At trial it was demonstrated lost profits, self

²³ It should be noted that any issue raised at trial - in this case the return of wages and proceeds of self dealing as lost profits - but not specifically pleaded prior to trial (restitution of disgorgement not specifically pled) yet conforms to the evidence at trial is subject to amendment under CR 15(b) - amendment to conform to the evidence produced at trial, and/or CR 54(c) - entitlement to relief not demanded.

dealing and unjust personal advancement through defendant's abuse of the corporate form and are one and the same.²⁴

Restitution of disgorgement following defendants breach of contract and abuse of corporate privilege was in order.²⁵ Given the abundance of evidence in the record of the defendants' breaches of fiduciary and contract, co-mingling of LLC funds, self-dealing, and bad faith violations of the corporate form, any trial award of attorney fees to defendants is an abuse of discretion.

IV. Reply to Defendants' Response

1. Partners' LLC Operating Agreements do not provide for removal of any *member* or the contract specified *member-manager* without the written unanimous consent to modify LLC operating agreement.

Partner's LLC Operating Agreements do not provide for removal any *member* or the contract specified *member-manager* without written unanimous consent of all the members to modify the LLC operating agreement. The question of when, and if, the alleged vote to remove Young as member-manager of YAP occurred is surrounded by conflicting evidence. [rp 1301-06:8]

Of primary consideration here is the fact that defendants never claimed to have voted to remove or "expel" Young as a *member* of either LLC, nor is there any evidence in the record that a majority vote to remove Young as *member* ever

²⁴ In two years since 2/26/08 defendants self dealing amounted to well over \$150,000: YAP leasing an unneeded second tow truck (ex 8) from Brad Johnson for \$1000 a month (\$500/mon profit above truck purchase payment) [rp 1793-1802, 2032]; paying Grandview over \$65,000 for LLC repairs in just 2008 (ex 27); payments averaging \$2000/mon to Johnson Properties for equipment rental (ex 41); and leasing the new loader from Johnsons for \$1000 a month starting 2009.

²⁵ If the corporate veil is not removed, Young has no recourse to recover his lost future wages and lost YAP profits that went Ellis, the Johnsons, and the Brown Lee project. It is neither equitable or feasible to collect lost profits and wages from the LLCs, as the money simply isn't there but rather resides in the pockets of the defendants..

occurred. Moreover, both Johnsons testified that Young was considered an LLC member by the defendants at the time of trial. All argument presented in the defendants response brief of the defendant's authority to remove Young as a *member* is therefore moot and should be stricken from consideration..

Consideration and argument on appeal of Young's removal as LLC member is thus limited to: 1) propriety of the trial court's judgment of dissociation; and, 2) Brads criminal acts of forgery and false filing of corporate documents removing Young as *member* from the LLCs on 4/8/08. These are two separate issues which are discussed herein as well as in appellant's opening brief.

Defendants use a broad brush to claim "*all parties requested dissociation*". (Resp. Brief p.11) The issue of when, why, and how dissociation is allowed was extensively briefed in Appellant's Opening Brief and Plaintiff's Trial Brief. Suffice to say that the defendants arguments in response are still misplaced, without merit, and non-responsive.

Under Washington statute and contract law the question of the correctness of LLC dissolution and LLC member dissociation does not hinge on the desires of any one or both parties. Neither does the trial court's unfounded homogenization of each party's vastly different theory of dissociation justify a remedy in judgment of dissociation. It is yet to be demonstrated how such a fanciful notion can trump unambiguous contract expressions found in the LLC operating agreements. Correctness of LLC dissolution and member dissociation are each a question of law and subject to de novo review.

In spite of the 8/8/08 Spearman court's erroneous and simplistic ruling that the LLC "majority" can do what ever it wants - the fact remains that the courts may

not impair the rights, obligations, or benefits under a contract nor write a contract for the parties that the parties did not write themselves. Here both the trial court and the Spearman court ignoring the YAP Operating Agreement **and** unanimous consent requirement. The trial court's creative remedy and justification for Young's dissociation in judgment handily avoids overruling the earlier erroneous Spearman decision of 8/8/08..

At issue in this matter is the propriety of the respondent's actions as indicated by their "Resolutions" as found within the "Formal Minutes of the Special Meeting of the Members" dated February 26, 2008. (ex 141) From beginning to end, the defendant's proffered these formal 2/26/08 minutes and "Resolution" as the legitimacy of their removal of Young. However, overwhelming evidence presented at trial and detailed herein show defendants' 2/26/08 minutes and resolutions do not pass muster, and the defendants have clearly misled the court

In their response brief, defendants' hang their hat on YAP operating agreement 5.2 (limitations on decisions by the members) and 9.1.4 (events leading to dissolution of the LLC). Although the defendants' misplaced reliance on 5.2 and 9.1.4 was extensively argued in appellant's opening brief, the defendants have chosen not to respond to Young's opening arguments, and instead continue to rehash their own ill founded logic.

So being the case, appellant is compelled to highlight a few points of defendants erroneous reliance on YAP 5.2 and 9.1.4 as allowing for expulsion of Young as a *member* and as the contract designated *member-manager*.

Regardless of the question of "cause", the oblique mention of "expulsion" is without weight does not stand as authority to remove Young.

Contrary defendants' bald assertion "*the operating agreements clearly allow for expulsion of Young as member*" (Resp. Brief p14), the oblique mention of "*expulsion*" in the LLC operating agreements at 9.1.4 is merely part of a list of events that trigger LLC **dissolution**. YAP and OH 9.1.4 are each completely void of any supporting express or statutory mechanism to effect expulsion or dissociation of a member..

In their response brief the defendants fail to argue how such an oblique reference of "*expulsion*" among a list of events requiring dissolution at YAP 9.1.4 could allow for expulsion of any "*member*" or expressly designated "member-manager" without violating 10.1 or 10.3 of the YAP operating agreement. The trial court's reliance on 9.1.4 in judgment is erroneous for this same reason.

Defendants and the trial court misconstrue LLC operating Agreement section 5.2 to legitimize defendants' alleged "majority vote"

In YAP and OH operating agreements paragraph 5.2 is a limiting clause wherein use of the word "**in**" absolutely limits application of 5.2 to references actually contained within the four corners of each LLC operating agreement.

However, the defendants and the trial court each confuse the use of "in this Agreement" with "under this Agreement." Section 5.2 of both LLC operating agreements begins with "*Whenever in this agreement reference is made....*" 5.2 does not begin with: "*Whenever under this agreement reference is made..*" Clearly there is an enormous difference. Use of the word "*under*" could result in application of section 5.2 to references of decisions in other later LLC documents. However, "*under*" is not present in YAP section 5.2 and properly construed 5.2

does not reach other later LLC documents (in this case 2/26/08 minutes) in search of a “reference” to a “decision” - such as defendants’ vote reference in resolution.

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. [note: *defendants’ have misquoted YAP 5.2 - see Resp. Brief p.8*]

To misconstrue YAP 5.2 as applying to the members alleged 2/26/08 minutes and “majority vote” is to force an unnatural and disharmonious interpretation on the YAP operating agreement and raise a conflict between YAP 5.2 with YAP section 10 provisions. The defendants’ 2/26/08 vote and resolutions clearly conflict with express contract designations and thus violate the YAP integration clause at 10.3 as well as the unanimous consent clause at 10.1.

10.1 Amendments. 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.

10.3 Entire Agreement; Modification. This Agreement constitutes the entire understanding and agreement between the Members with respect to the subject matter of this Agreement. No agreements, understandings, restrictions, representations, or warranties exist between or among the members other than those in this Agreement or referred to or provided for in this Agreement. 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. (ex #2 - YAP LLC Operating Agreement)

Moreover, section 10.1 provides for amendment of the agreement’s express provisions, and clearly qualifies as the provision and mechanism “otherwise expressly provided for in this agreement” within 5.2. Therefore, section 10.1 controls and must be followed when any “decision” conflicts with or modifies any YAP or OH Operating Agreement provisions.

Under proper construction, Defendants 2/25/08 minutes and resolutions to replace Young stand as a violation of 10.3 as it is not signed by all the members and it is therefore not binding.

In point of fact, section 5.2 is a limiting clause, whereby the use of the word “in” absolutely limits application of 5.2 to references within the four corners of each LLC operating agreement.

For “majority vote” justification of Young’s removal, the trial court appears to have given, “in this agreement” the equivalent meaning as “under this agreement” when erroneously applying “in this agreement” to the 2/26/08 minutes and “Resolutions”. (2/26/08 minutes are outside the YAP operating agreement document) As so misconstrued, decisions therein may be subject to a simple majority vote, but only if that “majority” action does not disturb the express conditions of the YAP operating agreement.

Here the 2/26/08 “majority vote” decision and removal action disturbs critical YAP Operating Agreement expressions and designations (5.1, 6.2, 6.4) and violates YAP 10.3. As defendants were made aware of their breach by Young (ex 17) [rp 1454:22 - 1457:15] , and with their 2/26/08 alleged “majority vote” coming within a week of their notification of strict application of the contract (ex 16), the defendants have shown their breach of the YAP operating agreement was planned, willful, and without remorse.

Under proper construction of YAP 5.2. and 9.1.4 there is no ambiguity and no need for judicial interpretation. For the alleged 2/26/08 “majority vote” to be effective the YAP operating agreement must be properly amended using the YAP 10.1 provisions.

Section 5.2 has been subjected to a strained construction by the defendants and trial court to reach the end goal. As a matter of law 5.2 applies only to decisions referenced “in” the agreement and does not apply to decisions literally “outside” the four corners of the YAP agreement.

Defendants argue that *Obert v. Environmental Research*, 112 Wn.2d 323, 771 P.2d 340 (1989) applies in this case.(Resp. Brief p.11) However the *Obert* decision is not on point to the issue at hand and is easily distinguished.

In *Obert*, partnership agreement contained express provision and mechanism for removal as well as election of a successor General Partner. This action by the limited partners must be evaluated in two parts: First, removal of the only General Partner by a “majority” of limited partners - which occurred following numerous breaches of the General Partner’s fiduciary duty, and Second, the election of a successor General Partner - where express voting requirements are called into question by claim of another clause conflicting or controlling appointment of a successor. In pertinent part the Campus Park LP Agreement in *Obert* provides:

- 14.2 **Limited partners shall only have the right to vote upon the following matters affecting the basic structure of the Partnership:**
 - 14.2.1 Removal of the General Partner for cause;
 - 14.2.2 Election of a successor General Partner;
 - 14.2.3. Termination and dissolution of the Partnership;
 - 14.2.5 Amendment of the Partnership Agreement.....
- [*Obert v. Environmental Research*, 112 Wn.2d 323, 771 P.2d 340 (1989)]

Additionally, as expressed in sections 14.7 and 3.8. of the Campus Park LP agreement, for each of these listed “rights to vote” the limited partners were required to meet a 66% ”majority” based on the shares of limited partners.

The YAP Operating Agreement provides no similar expressions of entitlement to remove the *member-manager* (apparently analogous to General Partner) or

amend the operating agreements by a defined majority of the members (analogous to limited partners). Moreover the court found that Young did not breach his fiduciary duty. *Obert* is thus distinguished and analysis could stop here.

Further distinguishing *Obert*, there is no claim or finding of ambiguity of YAP's section 10.1 "unanimous consent" requirement to amend the YAP Operating Agreement, nor between YAP 10.1 and the default statutory requirement within RCW 25.15.120 (2) which requires unanimous consent to change manager.

Also noteworthy is YAP 5.1.1 where voting by the non-manager members is limited to "*matters of company benefit programs, company safety policy, acquiring professional services, insurance, and capital acquisitions in excess of \$8,000.*" [ex #2 at 5.1.1] This shows that consideration was given to select instances where a "majority vote" of the members might occur without causing the modification of the operating agreement.

Extremely telling on this issue is Brad's own trial testimony showing **Brad knew amendment of the YAP Operating Agreement was required to replace the member-manager.** [rp 1726]

In *Obert* the reviewing court's examined ambiguity of election voting requirements - unanimous vs. 66% - relating to election of a General Partner. The limited partners' election of the successor General Partner occurred with 74% approval of the shareholders. The ambiguity considered was between default statutory language requiring unanimous consent for a new General Partner, and the partnership agreement requiring 66% majority approval. In *Obert* the Supreme Court eventually held that partnership agreement expressions of 66% majority vote controlled over default statutory provisions.

For *Obert* to apply here there must be some significant ambiguity identified relating to the LLC operating agreement provisions for *member* or *member-manager* removal. In this case no such ambiguity has been identified, nor does one exist.²⁶

As YAP Operating Agreement is without express provision and mechanism for the regular *members* to vote to remove and replace the *member-manager*, the Defendant's reliance on *Obert* is misplaced.

At issue in this case is the propriety of the defendant's action under resolution within the 2/25/08 minutes.. The 2/26/08 minutes are intended to stand as the accounting of the process, justification of resolution, and authorization of the defendants actions in their replacement of Young as contract designated member-manager and not his expulsion as a member. (ex 141,14) Unlike *Obert*, nothing in the defendants 2/26/08 resolution deals with Young being removed as a member of Yank A Part LLC or Olympic Holdings LLC. Moreover, there are several special provisions in the YAP Operating Agreement that specifically name Young and clearly require amendment of the agreement to replace him as member-manager.

2. Without providing expert testimony, substantive argument, or supporting citations to LLC asset values in record, defendants' bald claims of the trial court's correctness of LLC valuation does not constitute substantial evidence

Young was the only trial witness with expertise to forensically analyze the voluminous LLC quickbooks records against wrecking yard operations. Defendants failed to object to Young's demonstration of expertise, qualifications. or opinion testimony, and thus cannot now claim Young failed to "*provide expert*

²⁶ "Ambiguity" should not be confused with "misconstrued." Both the trial court and the respondents have "misconstrued" YAP 5.2 and 9.1.4 - while ignoring section 10.

testimony” [Resp. Brief p 16] It was well established Young had the specialized expertise required for this analysis. [rp 37-42:11, 44:12-52:5, 1335-37] ²⁷

Young testified to spending hundreds of hours examining and analyzing the YAP and OH financial records. [rp 2435-36] As the trial court never ruled Young was not qualified or that he had not demonstrated sufficient expertise, Young’s testimony, analysis, and expert opinions of the LLC finances, values, inefficiencies, lost profits and mismanagement stand.

At trial Young identified and testified to the LLCs assets, liabilities, and values, as well as defendants’ LLC mismanagement, waste, self-dealing, issues of undocumented loans, unaccounted for expenses, lost profits. As shown in Appellant’s Opening Brief, Brad personally testified to habitual co-mingling of LLC funds with his other businesses and personal accounts

Defendants’ counsel attempts to mislead the reviewing court with an out of context quote suggesting Young agreed with the court’s valuation as being “not off the mark”. (Resp. Brief p.17) As shown below, Young only agreed with the trial court’s valuation date, not its valuation.:

Mr. Young: Well, Your Honor, your date was fine. But I have done a lot of research on valuation date and the mechanisms that are used, and you are not off the mark. You seem to follow the convention on -- and I have no objection to the date. [rp 4/9/10 p.26 line 22-1]

Unlike Young, at trial defendants failed to provide a wrecking yard and financial expert, nor did the provide any analysis of quickbooks records, YAP operations,

²⁷ In point of fact, Young’s experience, skills, education, and management training were extensively testified to by four witnesses: Kelly Svarthumle [rp 1243-1250, 1265:21-1267:7], Bill Anderson[1840-43] Brent Stenman [rp 288 line 17-22], and even Karen Silva.

inventory value, or any other LLC financial records.²⁸ Obviously, Brad was not qualified to speak to the issue. As a result defendants have no grounds to indicate the correctness of the trial court valuation. Instead defendants twice point blindly to the exact same laundry list of exhibits, without further analysis, discussion., or rebuttal of Young's business analysis or LLC valuation. (see: Resp. Brief p.18,19)

Young on the other hand generated quickbooks reports, bar charts, and financial tables which were used at trial to demonstrate his extensive financial analysis of YAP since the start of operations in 2007 and his entitlement to damages of lost profits. His unrebutted analysis, accounting, and conclusions were based on his years of experience and training in budgeting and forensic financial analysis, as well as his extensive management training and experience in the automotive industry.

In Young's expert forensic analysis of YAP processes, costs, and cash flow under Brad's management, Young identified and detailed Johnson's inefficiencies including over-staffing, mismanagement, waste, self dealing, nonessential spending, and co-mingling of LLC funds with Brad's personal and business credit accounts. Young also highlighted for the court the many tens of thousands of dollars in defendants undocumented and self serving expenses at YAP. Young also detailed the Johnsons' shell game of loaning money to YAP through the front door while paying themselves out the backdoor. This was accomplished through self dealing and questionable repairs billed by Brads' other companies (ex 27) [rp 1419-20]

Young then showed how the foregoing improprieties and inefficiencies resulted in loss of anticipated profits (ex 170, 170a) and how it severely impacted the LLC

²⁸ Further demonstrating his incompetence, Brad Johnson testified that he never looked at the YAP quickbooks reports until Young requested them.

budget projections, (ex 45) loan payoff expectations, equity building, and ultimately his LLC share value. [rp 2231-32]

Short of examining the tax assessed value of the OH land; the Purchase and Sale agreements; the Ellis and Westsound loan balances, and 1st Security Bank Statements; no examination, analysis, or consideration of the LLC financial data by the court is suggested by the courts findings or judgment. The court's ruling is unfairly devoid of any consideration of loss to share value through Brad's mismanagement, self-dealing, or unaccounted expenses all leading to loss of profits and LLC equity.²⁹

Defendants have failed to rebut Young's substantive financial arguments that the court did not properly value the YAP inventory, LLC loan liabilities or counter citations supporting his LLC asset valuation. Defendants have failed to provide any alternative financial analysis or values of assets that would support the court's valuation. Defendants' failure specify and demonstrate LLC asset values with citation, then to the trial evidence, and then summarize rather than analyze the trial court's valuation (Resp. Brief 16-18) does not constitute identification of substantial evidence supporting of the trial court's valuation. Defendants fail to demonstrate why revaluation was, and is not yet, the proper course of action given the court's oversights in LLC loan liability, increase in inventory value, and missing LLC bank statements.

3. Material issues of bad faith, breach of contract, spoilage of evidence, and defendants pattern of discovery abuses were all before the trial court, and each support Young's request for specific performance, quantum meriut, front pay, and award of attorney fees

²⁹ The court has unfairly sidestepped ruling on evidence and testimony of defendants' co-mingling of LLC funds, unaccounted expenses, embezzlement, waste, lost profits; and the substantial trial evidence of defendants' rampant and yet ongoing self-dealing.

Where Young is entitled to an award of attorney fees in equity, there can be no award of attorney fees for the defendants.

Locking Young out of all aspects of the partnership's LLCs underscores the defendants bad faith intent and violation of duty to loyalty among partners.

Defendant's discovery abuses in this matter can be measured by their bad faith submissions, deceit, and disrespect for court orders to produce. Aside from defendants casual treatment of orders for financial records production, defendants remained bound by fiduciary duty to Young as a minority member and are required produce all LLC records he requests.. Being a litigant did not save the defendants from this responsibility and breach of fiduciary results. Clearly the defendants' destruction, delay, and withholding of Young's wage records was done in bad faith - and stands as a premeditated attempt to limit the defendants' exposure to exemplary damages for unpaid wages. (ex 191)

This pattern of defendants' bad faith behavior continued well after they hijacked YAP. Brad admitted never contacting Young, that he "pitched" Young's desktop calendar - which recorded Young's hours worked, and crushing one of Young's vehicles.³⁰ These facts that only came to light during the trial.. [rp 1990-1994]

Under circumstances such as these, specific performance, quantum meriut, front pay, and award of attorney fees and costs exclusively to Young are justified remedies available to the court in equity or under contract law.

³⁰The trial court stated in its memorandum decision that Young was entitled to the return of his personal property including two vehicles impounded, power tools, a new digital camera, and specialty auto parts. The only property returned was his digital camera (brought to trial missing the memory card and battery later found to be broken) and his '99 Chrysler Concorde - heavily damaged from being pushed around by a loader. Young's tools were never returned and respondents admitted at trial to knowingly crushing Young's Dodge Rampage. [rp 2346-47]

4. Issue of partnership was raised and evidenced before the court

Defendants' assert that Young never raised the issue of partnership before the trial court "*in any manner whatsoever*" (Resp. Brief p 21) This assertion is simply absurd. The material issue of partnership was raised and evidenced before the court [rp 2027:2-7, 2034] and underlies proper determination of defendants' duty of loyalty, breach of promise, failure to disclose, breach of fiduciary, and bad faith - all being case determining issues raised before the court, and supported by trial evidence and testimony (see: Plaintiff's Proposed Findings of Fact 1-12 as to partnership issues and related evidence) Trial testimony and documentary evidence clearly demonstrate pre LLC plans and agreements (common goal) [rp 2049:18], the sharing of costs (profits/losses), and shared labor. (ex 5)

Furthermore "partnership" - its existence and materiality - is raised in Young's original complaint, Plaintiffs Amended complaint (cp 1054), his Motion for Summary Judgment, Plaintiff's Trial Brief, Plaintiff's Proposed Findings of Fact (#1-22, 42), and closing argument. [rp 2541]

Failure of the trial court to rule on the primary and material issue of partnership was a cascading error that undermined proper ruling on defendants' negligence as to their duties, breach, and disclosure. The question of partnership is a question of law - and subject to de novo review.

'Where, from all the competent evidence, it appears the parties have entered into a business relation combining their property, labor, skill and experience, or some of these elements on the one side and some on the other, for the purpose of joint profits, a partnership will be deemed established.' (citing *Nicolson v. Kilbury*, 83 Wash. 196, 202, 145 P. 189 (1915) [*Malnar v. Carlson*, 128 Wn.2d 521, 525, 910 P.2d 455 (1996)]

Defendants did not dispute Young's testimony and evidence as to the wrecking yard venture's pre LLC plans, nor the pre LLC work accomplished by Young and Brad, or that intention of the partnership was for profit. Brad even testified why he wanted Ellis brought into the "Partnership" [rp 1721:16 - 1722]

Defendants also misleadingly assert that partnership was not raised in appellant's Trial Brief (Resp. Brief p. 21) In fact "partnership" is found throughout Young's trial brief: Just one of many examples follows:

3.1 Yank A Part LLC and Olympic Holdings LLC are operating businesses in County of Kitsap, State of Washington, formed and controlled under one superior partnership, also located in Kitsap County ... [Trial Brief at 3.1]

Trial testimony indicates the parties were already working towards a common objective in 2006 [rp 2137 line 18-22] An implied partnership is obvious.(ex 5) Moreover, it is not stated in any conclusion of law or finding of fact that "*partners*" or "*partnership*" did not precede or co-exist with "*members*" and the LLCs.

Although the trial judge admitted to difficulty deciding this case [rp 2440:10-22] it is prejudicial for the trial court to rule insufficiently on the primary and material issue of partnership, then turn a blind eye to defendants' secret vote, fabrication of evidence, bad faith, self-dealing, discovery abuses and criminal acts - all of which clearly violate the implied duty of good faith and loyalty between partners.

V. Attorney Fees

As shown above, Young is the prevailing party at trial and entitled to attorney's fees and costs under statute, contract, and equity - on defendants' showing of bad faith and discovery abuses. "A party may demonstrate bad faith by, inter alia, delaying or disrupting litigation." *Chambers v. Nasco, Inc.* 501 U.S. 32, 46 111 S. Ct 2123, 115 L. Ed.2d 27 (1991) "The equitable grounds of bad faith may justify

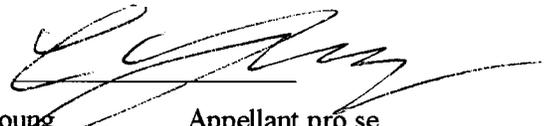
attorneys fees.” *In Recall of Pearsall-Stipek, 135 Wn.2d 225, 96 P.2d 343 (1998)*

The defendants prevailed on none of their claims and are not entitled to attorney fees. Defendants Cross-Appeal has been shown to be frivolous, as was their Cross-Complaint before it. In response to appellant’s opening brief, the defendants have failed to address a number of issues raised, and fail to argue or evidence: that they did not commit discovery abuses; that defendants did not act in bad faith; or that a partnership never existed. Defendants have not shown by substantial evidence and substantive argument: that the trial court properly valued the LLC’s; or there was “just cause” to remove Young; or that a “majority” was present to vote on 2/26/08 as alleged. Under the “contract” grounds provision of RAP 18.1 and YAP 10.4 Young is entitled to fees and costs defending against the frivolous Cross-Appeal and enforcement of the YAP and OH Operating Agreements.

VI. Conclusion

Based on the forgoing Young is the prevailing party at trial and on appeal, and therefor entitled to damages and relief as detailed in his opening brief, as well as attorney fees and costs at trial and on appeal.

Respectfully submitted this September 28th, 2011


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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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DEPUTY

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 old, and I am a resident of Kitsap County, Washington.
- 2. I am the Appellant/Plaintiff in the above titled action
- 3. That on the 29th day of September, 2011, I served the respondents Attorney, William Broughton, at his office, the following documents

a) Reply Brief of Appellant

 Signed this 29th day of September, 2011 at Silverdale WA.

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