

**No.40796-5-II**

**COURT OF APPEALS - DIVISION II  
OF THE STATE OF WASHINGTON**

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**Colin Young., *Appellant/ Cross-Respondent***

**v.**

**David Ellis, et al., *Respondents/ Cross-Appellants***

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
11 JUL 15 PM 12: 27  
BY  DEPUTY

**Kitsap County Superior Court  
Cause No. 08-2-01776-3**

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**BRIEF OF RESPONDENTS**

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**ORIGINAL**

**TABLE OF CONTENTS**

**A. INTRODUCTION.....1**

**B. ASSIGNMENTS OF ERROR.....1**

    1. *The trial court erred in finding that neither party was the prevailing party in denying respondents request for attorney’s fees.....1,23*

**C. RESPONSE TO APPELLANTS ASSIGNMENTS OF ERROR.....1**

    1. *The trial court did not err in finding that the operating agreements for the two limited liability companies involved in this dispute allowed for Young’s removal as a member and manager by the other three company members.....1,7*

    2. *The trial court did not err in holding disassociation of Young from both LLCs was the appropriate remedy where that relief was requested by all parties. Young cannot now complain that dissolution was required where he opposed dissolution and requested the other members be disassociated both in his pleadings and at trial.....2,12*

    3. *The trial court properly valued Young’s interest in the two limited liability companies based upon the considerable evidence in the record on value of the assets of each company and Young produced no evidence on valuation.....2,15*

    4. *There is substantial evidence to support the court’s determination that just cause existed to remove Young.....2,19*

    5. *The trial court did not err in finding that a majority vote occurred to remove Young.....2,20*

6. *The trial court never was given the opportunity to rule on issues on implied partnership made for the first time on appeal*.....2,20

7. *The trial court properly determined that the money placed into the registry of the court by Yank A Part, LLC for Young’s wages was the appropriate amount and that Young’s refusal to collect the money from the registry does not provide a basis for his wage claim*.....2,21

8. *The trial court did not err in denying Young’s request for quantum meruit pay made for the first time after trial in a motion for reconsideration*.....2,22

9. *The trial court abused its discretion in denying respondents’ motion of attorney’s fees provided for the in operating agreements of the two companies where respondents travailed on every issue at trial*.....3,23

**D. STATEMENT OF THE CASE**.....3

**E. ARGUMENT**.....7

**F. CONCLUSION**.....25

**G. LIST OF APPENDICIES**

*Appendix 1. Page 3 of Yank A Part, LLC and Olympic Holdings, LLC Operating Agreements*.....7

*Appendix 2. Page 6 of Yank A Part, LLC and Olympic Holdings, LLC Operating Agreements*.....8

## TABLE OF AUTHORITIES

### Table of Cases

<b><i>Berg v. Hudesman,</i></b> 115 Wn.2d 657, 810P.2d 222 (1990).....	8
<b><i>Brazil v. Rickerson,</i></b> 268 F.Supp.2d 1091 (WD Missouri 2003).....	13
<b><i>Ermine v. Spokane,</i></b> 143 Wn.2d 636 P.2d (2001).....	24
<b><i>Hearst v. Seattle Times Co.,</i></b> 154 Wn.2d 493, 115 P.3d. 262 (2005).....	8
<b><i>Holman v. Coie,</i></b> 11 Wn. App. 195, 522 P.2d 515 (1974).....	9
<b><i>Jacoby v. Grays Harbor Co.,</i></b> 77 Wn.2d 977, 917, 468 P.2d 666 (1970).....	7
<b><i>Markel American Ins.Co., v. Dagmars Marina, LLC,</i></b> 139 Wn.App. 469, P.3d (2007).....	8
<b><i>Meenach v. Triple “E” Meats, Inc.,</i></b> 39 Wn. App. 634, 640, 694 P.2d 1125, review denied, 103 Wn.2d 1031 (1985).....	25
<b><i>Miller v. City of Tacoma,</i></b> 138 Wn.2d 318 P.2d (1999).....	20
<b><i>Obert v. Environmental Research,</i></b> 112 Wn.2d 323, 771 P.2d 340 (1989).....	11
<b><i>Park v. Ross Edwards, Inc.,</i></b> 41 Wn. App. 833, 838, 706 P.2d 1097, review denied, 104 Wn.2d 1027, (1985).....	25

<b><i>Seattle v. Potu,</i></b> 108 Wn. App. 364, 375, 30 P.3d 522 (2001).....	15
<b><i>Sopen v. Clibborn,</i></b> 31 Wn. App. 767, 644 P.2d 738 (1982).....	24
<b><i>State v. Smith,</i></b> 104 Wn.2d 497, 707 P.2d 1306 (1985).....	21
<b><i>Syrovoy v. Alpine Resources,</i></b> 122 Wn.2d 544, 859 P.2d 51 (1993).....	7

**Table of Statutes**

<b>RAP 2.5(a)</b> .....	17, 21
<b>RAP 18.1</b> .....	25

## **INTRODUCTION**

Appellant Colin Young enjoys practicing law. This appeal occurs after a five week bench trial. The subject matter of the dispute in large part revolves around construction of a series of agreements drafted by Young, Ex. 2 and 3. Young is well known to the Kitsap County Superior Court as he is an active litigant. Young currently has two appeals pending in this court. See *Ambauen v. Young*, Court of Appeals Division II Cause No. 41921-1-II.

This being said, Young has never gone to law school. He has not taken the bar exam. He disdains legal advice. He apparently believes advice of a lawyer is not necessary in light of his own keen legal mind.

This brief will address Young's challenges to the decisions of the Kitsap County Superior Court. Most of Young's arguments challenge factual determinations of the able trial court. With the exception of the trial court's denial of Respondents' request for attorney's fees, this brief will illustrate the correctness of the trial court's decisions in this matter.

### **ASSIGNMENTS OF ERROR**

1. The trial court erred in finding that neither party was the prevailing party in denying respondents request for attorney's fees.

### **RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. The trial court did not err in finding that the operating agreements for the two limited liability companies involved in this dispute allowed for Young's removal as a member and manager by the other three company members.

2. The trial court did not err in holding disassociation of Young from both LLCs was the appropriate remedy where that relief was requested by all parties. Young cannot now complain that dissolution was required where he opposed dissolution and requested the other members be disassociated both in his pleadings and at trial.

3. The trial court properly valued Young's interest in the two limited liability companies based upon the considerable evidence in the record on value of the assets of each company and Young produced no evidence on valuation.

4. There is substantial evidence to support the court's determination that just cause existed to remove Young.

5. The trial court did not err in finding that a majority vote occurred to remove Young.

6. The trial court never was given the opportunity to rule on issues on implied partnership made for the first time on appeal.

7. The trial court properly determined that the money placed into the registry of the court by Yank A Part, LLC for Young's wages was the appropriate amount and that Young's refusal to collect the money from the registry does not provide a basis for his wage claim.

8. The trial court did not err in denying Young's request for *quantum meruit* pay made for the first time after trial in a motion for reconsideration.

9. The trial court abused its discretion in denying Respondents' motion of attorney's fees provided for the in operating agreements of the two companies where respondents prevailed on every issue at trial.

#### **STATEMENT OF THE CASE**

Colin Young wanted to buy an auto wrecking yard. RP 56, 59, 63. Lacking any financial resources and having no ability to borrow money based upon his inadequate credit rating, Young prepared a prospectus and began soliciting investors. RP 56, 66, 216, 2120, 2121, Ex. 14. In making his solicitation, Young did not register his offering or comply with any state or federal security laws. RP 2121-2123.

Young successfully recruited respondents David Ellis, Bradley Johnson and Michael Johnson to acquire an existing wrecking yard and the real property where the wrecking yard is located in North Kitsap County. RP 208-290. Young formed two limited liability companies. Ex. 2, 3. Olympic Holdings LLC was formed to acquire the real property. RP 15, Ex. 2. Yank A Part, LLC was formed to acquire the auto wrecking business. RP 16, Ex. 3.

Yank A Part, LLC was unable to borrow sufficient monies to acquire the wrecking yard business. RP 1427, 1428. Young indicated that he only had \$2,500.00 to contribute to the venture. RP 221, 2534. Because of the financial strength of the other three members and their existing relationship with local banks, financing was obtained for most of the funds

needed for acquisition of the real property and the business. RP 278, 279, 329.

Member David Ellis and his wife Cheryl took out a second mortgage on their home to provide the necessary additional funds to acquire the business. RP 2036, 2057. The members agreed that they would sign individual notes in favor of Ellis with adequate security so that in the event of a default or loss, all members would share in that loss equally. RP 15, 16, 1425, 2130. Young never signed his note and never provided adequate security. RP 2128, 2130. The other members learned after they committed themselves to this venture that Young had outstanding judgments against him which had not been disclosed to the other members. RP 327.

Pursuant to the operating agreement, Young initially managed the auto wrecking yard business as managing member of Yank A Park, LLC. RP 182, 1724, Ex. 3. The other members were active participants in the business and spent countless hours at the wrecking yard helping with various daily activities. RP 2026. None of the members other than Young received any compensation for the time spent at the business. Young was paid a salary. RP 175, 1383, 1384, Ex. 3.

Soon after the operation began, the other members began noting serious deficiencies in Young's day-to-day management of the business activities. RP 135, 1146, 1644. Young would leave the business without advising as to his whereabouts and would be gone for several hours at a

time. RP 1145. Young initially refused to obtain a cellular phone so he could be contacted by employees or the other LLC members. RP 988, 989, 1086, 1167. Young failed to put into place any accounting system. RP 738. Cash receipts were not properly accounted for. RP 739, 745. There was at least one instance where cash monies went missing. RP 671, 673. A control number invoice system was not put into place for the handling of the cash. RP 134, 741. There was no cash register. RP 333, 837. Cash was placed into a box. RP 256. Double entry accounting was not utilized. RP 566.

In addition, Young hired at least one employee and failed to pay the required taxes for that employee. RP 396-398. Young claimed the employee was an “independent contractor.” RP 395. The testimony reveals that this person was clearly an employee. RP 989.

Young had no management training or management skills. RP 2133, 2134. He would berate employees while they were attempting to do their job. RP 1644. He would provide inconsistent instruction to employees creating low morale and operating inefficiencies. RP 1644, 1649. When the company hired a new bookkeeper over Young’s objection, Young failed to provide the required financial information and what he did provide was inadequate for the bookkeeper to do her job. RP 735, 738, 739.

The other members expressed concern to Young about the various problems the business was experiencing. Ex.18. In response, Young

drafted a letter to the other members which member Michael Johnson referred to as the “I am the king” letter. RP 2154, 2521, Ex. 17. The letter made many demands in violation of the Operating Agreements.

At a meeting Young refused to attend, the other three members voted to remove Young as the manager of the two limited liability companies. RP 171, Ex. 15. After Young’s removal, he was removed as a signator on the company bank accounts and the day-to-day management of the wrecking yard was assumed by member Bradley Johnson. RP 10, 1152, 1647.

The trial court determined that the other three members also voted to remove Young as a member at that meeting. CP 1514. Ftnt.3. Young then commenced this legal action against the other members. He failed to include the limited liability companies as parties.

Respondents joined the two LLCs as parties. Poulsbo attorney Jeff Tolman appeared for the companies but withdrew before trial.

Upon conclusion of the trial, the trial court issued Findings of Fact, Conclusion of Law and a Judgment upholding Young’s removal. All of the claims made by Young were denied.

Young then moved for reconsideration of the Court’s decision and revaluation of the assets of the two companies. CP 1289-1290, 1359-1371. The Court denied the motion for reconsideration but partially granted the motion for revaluation which increased the value of Young’s interest. CP 1510-1522. Young was paid \$32,600.00 CP 1359. Young stated on the

record that he was satisfied with the Court's methodology in arriving at the values for the two companies and agreed with the Court's date of valuation. April 9, 2010 RP 25-26.<sup>1</sup> CP 1497. Respondents' request for attorney's fees was denied. CP 1497.

## ARGUMENT

1. **The trial court correctly concluded that the operating agreements of the two limited liability companies provide for removal or expulsion.**

As indicated earlier, the two operating agreements at issue in this case were drafted by Young. Young now argues that these agreements prohibit his removal either as the manager of the Yank A Part LLC or as a member of both LLCs.

The interpretation of operating agreements for limited liability companies is governed by general rules of contract interpretation. *Syrov v. Alpine Resources*, 122 Wn.2d 544, 859 P.2d 51 (1993) Contract interpretation and construction is a question of law which the court decides. *Id.* Words or phrases that are unambiguous are to be given their common sense, ordinary meaning. *Jacoby v. Grays Harbor Co.*, 77 Wn.2d 977, 917, 468 P.2d 666 (1970). A contract or a contractual provision is ambiguous if it is susceptible of more than one meaning.

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<sup>1</sup> Young failed to provide the Report of Proceedings of the April 9, 2010 hearing. Respondents have obtained a copy of the transcript from the court reporter. Citation to this hearing includes the date of the hearing and the page number in the transcript provided.

*Berg v. Hudesman*, 115 Wn.2d 657, 810P.2d 222 (1990). In determining whether contract language is ambiguous, the court reads the contract as a whole, not just the single word or phrase. *Hearst v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.3d. 262 (2005). Failing these interpretive aids, if a contract provision is still ambiguous it must be construed against that party responsible for its drafting. *Markel American Ins.Co., v. Dagmars Marina, LLC*, 139 Wn.App. 469, P.3d (2007).

The two operating agreements in the case *sub judice* are very similar. Section 5.2 of both agreements at page 3 which is attached as Appendix 1 to this brief states as follows:

**9.2 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 meet a majority of the members.**

This language is not susceptible of interpretation. Unless otherwise expressly provided in the agreement, any decision or action of the company is accomplished by a vote of the majority of the members. Olympic Holdings, LLC and Yank A Park, LLC each have four members. Three votes are needed when action is required.

The operating agreement for Olympic Holdings, LLC (owner of the real property) provides for it to be managed by its members. Section 9 of both agreements at paragraph 9.1.4 provides for expulsion of a member. A copy of this section of the operating agreement of Olympic Holdings is

attached as Appendix 2. While this section makes it clear that expulsion of a member is authorized by a majority vote of the members, no other guidance is provided. Therefore, cause is not needed for expulsion. A meeting is not required for expulsion. Notice and an opportunity to be heard are not required for expulsion. As the trial court properly opined, all that is required is a majority vote of the members. CP 1504, Conclusion of Law 1.

This proposition is confirmed by analogous decisions found in partnership law and the Uniform Partnership Act. In *Holman v. Coie*, 11 Wn. App. 195, 522 P.2d 515 (1974), the court was presented with claims by a law partner that he had been improperly expelled from his law firm. The expelled partner made numerous procedural and constitutional arguments in his claim that his expulsion was improper. In ruling against the expelled partner, the court stated that the partnership agreement did not set forth any method or procedure to be followed in an expulsion action. The court noted that the partnership agreement was silent as to any requirement of cause. The court further noted that the partnership agreement contained no requirements of notice or due process and determined that the express language of the partnership agreement itself was controlling. *Id.* at 205.

In the instant case, the partnership agreement provides for expulsion by a majority vote of the members. At trial, respondents requested that the trial court confirm that the members have the right to

expel a member. The court concluded that this right existed under the operating agreements. CP 1504, Conclusion of Law 2.

The analysis of the Yank A Part, LLC Operating Agreement is more convoluted on removal of the manager. The Yank A Part, LLC Operating Agreement provides for a manager who is granted the authority under the operating agreement to manage and operate the company on a day-to-day basis. Ex. 3, p.2. This provision is found at Section 5.1.1 of the agreement.

Young also sneaked in an additional section on amendment of the agreement. He uses this section to argue that his removal as the manager of Yank A Part violates Section 10.1 of the Yank A Part Operating Agreement. That section states as follows:

**10.1 Amendments. Amendments to this agreement may be proposed by any member. A proposed amendment will be adopted and will become affective as an amendment only on the written approval of all of the members (Exhibit 3 at page 7).**

Under Young's construction of this section, he can never be removed as the manager of Yank A Part because removal would require amendment of the operating agreement which he would never vote for. Taking this argument to its logical conclusion, Young could engage in any conduct as manager and not be subject to removal. He could embezzle money from the company without being removed. He could sexually harass employees of the company without being removed. Obviously, such a construction of

the agreement is nonsensical and contrary to the agreement when read as a whole.

For example, the provision of Section 5.2 giving the majority of the members the authority to make decision is inconsistent with section 10. Section 9.1.4 providing for expulsion of a member is inconsistent with this provision. The construction argued by Young places him in the position of manager of the LLC for his lifetime or until he chooses to resign. Young's trick cannot be sustained. It shows a lack of good faith and is unreasonable. The trial court correctly reasoned that removal was allowed. CP 1504.

Instructive on this issue is *Obert v. Environmental Research, 112 Wn.2d 323, 771 P.2d 340 (1989)*. The *Obert* decision required the court to construe a provision in a limited partnership agreement providing that upon expulsion of the general partner, a successor general partner would need to be elected by a unanimous vote of the holders of the outstanding partnership units. The limited partnership had removed the general partner but had failed to unanimously elect a successor general partner. The argument on appeal was that the partnership needed to be dissolved in light of the lack of unanimity in electing a successor general partner.

In ruling against dissolution, the court stated as follows:

**Both the trial court and Court of Appeals correctly held that the unanimity requirement in paragraph 18 and the majority vote (66%) requirement of paragraph 14 conflicted, thereby creating an ambiguous contractual provision to be construed in favor of the plaintiffs, the non-**

**drafting party. Consequently, the 66% provision paragraph 14 controls, electing Pace the successor general partner. The contractual interpretation question was not an issue raised in the petitions for review. Id. at 326.**

The similarities of *Obert* to the instant dispute are obvious. Young drafted a partnership agreement providing that decisions affecting the LLC would be made by a majority of the members. The agreement also includes language limiting the powers and duties of the manager and requiring a majority vote of the members on issues such as capital acquisitions, insurance, professional service, acquisition and company safety policies. Ex. 3 at 5.1.1.

These provisions are inconsistent with paragraph 10.1 which purports to require unanimous vote to amend the company's operating agreement. Quixotically, the agreement allows the majority of the members to remove Young as a member. This authority is found in Sections 5.2 and 9.1.4 cited earlier. Once Young was removed as a member under 9.1.4, the operating agreement could have been unanimously amended in any way the remaining members saw fit including removal of Young as the manager.

**2. The trial court had the authority to disassociate where Young had been previously removed by a majority vote and all parties to the litigation requested disassociation as a remedy.**

In its decision, the trial court confirmed that the operating agreements of both companies provide for expulsion of a member. CP

1517, Conclusion of Law 1. The trial court also notes that the Limited Liability Certificate of Formation drafted by Colin Young and signed by the members provides for expulsion of a member. Ex 2, 3.

The trial court properly concluded that it had the authority to disassociate Young and allowed the business to continue for two reasons. RP 2115. First, expulsion was provided for in the certificate of formation and operating agreements. RP 2111, 2114. In addition, all parties to the litigation requested disassociation as a remedy. CP 1520 Conclusion 7, RP 19, 2098, 2495.

Young relies on authority from other jurisdictions for the proposition that a court does not have the power to disassociate a member of a limited liability company. His support for that proposition is *Brazil v. Rickerson, 268 F.Supp.2d 1091 (WD Missouri 2003)*. Young's reliance on this authority is misplaced. Specifically, that court confirmed after review of the various operating agreements in that dispute that the agreements authorize the expulsion of a member. That opinion also confirms that in that dispute, as here, the majority members have the power to expel a member.

*Brazil v. Rickerson, supra*, is more helpful to respondents than Young. Construing language remarkably similar to that in the instant case, the court concluded that expulsion of a member does not require cause or any particular procedure. The court also notes that the procedure to

remove someone as manager under the agreement considered in that decision provides a different mechanism (“cause”) than expulsion.

In the instant case, the court found that an employment contract was created between Young and the LLC based upon the trial court’s construction of Sections 5.1 and 6.2 of the Yank A Part Operating Agreement. Conclusion of Law 4, CP 1517. The trial court also concluded that the other three members were justified in removing Young as manager because of his unorthodox methods of record keeping and the result and confusion. Conclusion of Law 3, CP 1517.

The court deals with expulsion differently and includes conclusions on expulsion under Conclusion of Law 7. CP 1518. Like *Brazil v. Rickerson, supra*, the court does not find that cause is required for expulsion of a member. In addition, the court recognizes in Finding of Fact 10 that at the time Young was removed as manager of Yank A Part, LLC, he was also expelled from both LLCs. CP 1515.

As stated earlier in this memorandum, the operating agreements clearly allowed for expulsion of Young as a member. At trial, the respondents sought confirmation from the court that Young be removed as a member of both companies. RP 18. All parties requested disassociation. RP 19, 2098, 2495.

Despite his repeated request to the trial court that it disassociate the other three members of the two LLCs, Young now claims that disassociation is not a remedy available to the trial court. Appellant’s

Brief, p. 7. Young also argues that the expulsion language in Section 9.1.4 of the two agreements does not provide authority for the removal of Young in any capacity.

As indicated earlier, Young's arguments are not supported by any legal authority. In addition, Young has waived any objections to the court's authority to grant the request of the other members to expel or disassociate Young.

Instructive on this point is *Seattle v. Potu*, 108 Wn. App. 364, 375, 30 P.3d 522 (2001). That decision discusses the invited error doctrine. The goal of the invited error doctrine is to prohibit a party from setting up an error at trial and then complaining of it on appeal. In the instant case, Young repeatedly sought disassociation and now complains that the court lacked legal authority to confirm his removal from the two companies. Young first raised this issue after trial in violation of RAP 2.5(a). Not surprisingly, Young ignores the expulsion language in the two agreements because he had no votes to accomplish expulsion.

In summary, the trial court correctly found that Young's removal as a manager of Yank A Part and as a member of the two companies was appropriate. RP 2513.

**3. The trial court properly valued the assets and liabilities of the two limited liability companies at the conclusion of the trial and revalued both limited liability companies based up Young's post-trial motion for revaluation.**

Young argues that the trial court improperly valued the assets and liabilities of the two limited liability companies. Appellant's Brief, p. 28. Young also attempts to excuse his own lack of objection and failure to provide expert testimony on the value of the companies as a surprise. Appellant's brief, p.28. Respondents provided significant evidence of value including voluminous financial records.

When the court indicated that it had sufficient evidence upon which to perform an evaluation of the two limited liability companies, Young did not object or request that he be allowed an opportunity to reopen the trial to present expert testimony. Instead, Young waited until the court made a decision on valuation and filed a motion for a revaluation. CP 1359-1371.

In plaintiff's motion for revaluation, he again fails to request that expert testimony be obtained. Instead, his objection to the court's initial valuation is that it did not include an increase in the inventory of Yank A Part, LLC and that the Court failed to identify a valuation date for the "cash on hand." CP 1359. In that pleading, Young agreed that the court had the ability to value the two limited liability companies in light of the voluminous financial information in evidence. CP 1359-1371. His argument is only that the court failed to consider the increase in wrecking yard inventory and cash in the bank accounts of the two companies.

At a post-trial hearing on April 9, 2010 Young stated the following when asked to respond to the Court's inquiry:

**Mr Young: Well, Your Honor, your date was fine. But I've done a lot of research on valuation date and the mechanisms that are used, and you are not off the mark. April 9, 2010 RP 26**

Young then explains at great length his reasons for requesting revaluation which resulted in the Court requiring production of additional financial data. April 9, 2010 RP 26-27. The court responded to the motion for revaluation by ordering respondents to produce additional financial information and documentation. In doing so, the Court cautioned Young that he was assuming the risk of a decrease in his value. April 9, 2010 RP 27. Young stated on the record he was in agreement with the Court's approach. April 9, 2010 RP 27.

On April 16, 2010, respondents furnished the court with additional bank statements reflecting the month of February 2010 for both the companies as well as current documentation on the balance of the loans outstanding against the two companies. CP 1382-1394.

After reviewing the additional information, the court filed an amended judgment and second amended judgment granting additional monies to Young. CP 1493-1522.

Young's failure to produce any expert testimony, his lack of objection to the court's valuation of the businesses and his successful motion for revaluation operate as a waiver of appellant's right to now complain about these issues on appeal. RAP 2.5(a). Moreover, a review of Young's arguments before this court do not challenge the court's authority

or ability to value the two businesses but instead factually challenge the result. Appellant's brief, p. 29-33.

A review of the records indicates that the court was provided with hundreds of pages of financial information as well as the testimony of a banker, financial analyst and financial records preparer. RP 261-541, 424-759. Hundreds of pages of documents were introduced into evidence including but not limited to real property tax appraisals, profit and loss statements, tax returns, charts of account, bank statements and balance sheets. Ex. 30, 31, 36-39, 43, 44, 51, 52, 57-63, 71, 98-100, 104-107, 113-136.

Utilizing the testimony presented and the extensive financial data, the very experienced trial court provided a reasonable and comprehensive analysis as well as the methodology behind that analysis. CP 1518, 1520-1522.

The court considered the original purchase price for the real property and the business. CP 1520-1522, Conclusion of Law 10 and 11. The court considered the liabilities of the companies. CP 1520-1522, Conclusion of Law 10. The court considered the growth rate of the companies. CP 1520-1521, Conclusion of Law 12. The court considered the current liabilities of the companies. CP 1520-1522, Conclusion of Law 12.

Young concurred in the methodology employed by the court to value the two companies. The court was presented with evidence both in

testimony and financial records that allowed it to make a fair and reasonable determination of the value of the two limited liability companies. In response to Young's motion for revaluation, the court gathered additional evidence and increased the value of the companies resulting in more money being awarded to Young. Young cannot now complain of the result.

Moreover, while the court includes the valuation and the methodology for the valuation in the Conclusion of Law, those conclusions are more appropriately considered findings of fact. The court had significant evidence upon which to make these findings. Ex. 30, 31, 36-39, 43, 44, 51, 52, 57-63, 71, 98-100, 104-107, 113-119, 120-125, 127-136.

**4. There is substantial evidence to support the court's determination that just cause existed to remove Young.**

Young argues just cause for his removal as manager was not established. Appellant's brief, p. 10-11. The record is replete with evidence of Young's lack of experience and inability to manage the finances of the business. There was no cash register. RP 333, 837. Cash was placed in a cigar box. RP 2561. Young used sticky notes to document financial transactions. RP 739-740. Young would give the driver cash money for purchase of fuel. RP 1641-1642. Young hired employees and paid them as independent contractors. RP 395. Based upon this evidence, the court determined that the disarray of the financial records as recorded

by the companies bookkeeper fell below a certain minimum standard that the members of the LLC could reasonably expect from their manager.

CP 1516, Finding 15. Based upon this factual determination, the court concluded that the members had just cause to terminate Young.<sup>2</sup>

While Young challenges the court's findings of fact claiming that there was not substantial evidence to justify the court's decision, it is clear from the record that there was a plethora of evidence in support of the trial courts findings. CP 1497-1509, Finding of Fact 15. As this court is aware, a trial court's factual findings that are supported by substantial evidence are verities on appeal. *Miller v. City of Tacoma 138 Wn.2d 318 P.2d (1999)*.

**5. The trial court did not err in finding that a majority vote occurred to remove Young .**

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. Ex. 15. Testimony from all three members who were present at the meeting confirmed that the three had voted to remove Young as manager. RP 171, 1860.

**6. The trial court never was given the opportunity to rule on issues on implied partnership made for the first time on appeal.**

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<sup>2</sup> While respondents/ cross-appellants have not challenged the trial court's determination that just cause was required for termination, the operating agreements do not require cause for removal. Ex. 2 and 3.

Young argues to this court that the LLC members had an implied partnership prior to formation of the LLCs and that partnership was superior to the limited liability companies. Brief of Appellant, p. 22-27.

Unfortunately, these arguments were never raised before the trial court in any manner whatsoever. These issues are not found in Young's complaint. They are not found in his trial brief. They are not found in his closing argument. They are not found in any of his post-trial motions.

It is inherently unfair to Respondents and the trial court to request that this court review issues not raised in the trial court. **RAP 2.5(a)**. Washington law is clear that with the exception of a few limited constitutional issues, an alleged error not brought to the attention of the trial court will not be considered on appeal. *State v. Smith 104 Wn.2d 497, 707 P.2d 1306 (1985)*.

**7. The trial court's Findings of Fact and Conclusion of Law that Young was paid wages owed him by the company is supported by substantial evidence.**

Young argues that he is entitled to unpaid wages in the amount of \$4,380.00. Brief of Appellant, p. 35-41. However, the trial court made a specific finding of fact (labeled as a conclusion of law) that Young is owed wages for the hours spent prior to his removal in the amount of \$2,880.00. CP 1518-1519, Conclusion of Law 5). This conclusion or "finding" is supported by substantial evidence.

In his complaint, Young claimed he was owed wages in the amount of \$2,880.00. In response to Young's complaint, respondents tendered into the registry of the court the sum on \$3,000. RP 2105-2106. Young refused to withdraw this money from the registry of the court, claiming he thought it was a "trick." RP 2106.

During discovery, Young produced documentation consisting of his own hand written time records supporting his request for \$2,880.00. RP 2103-2105.

For the first time at trial, Young produced another hand written document he claims to have found "under the seat of his car" during the trial. RP 2103-2104, Ex.146. Significant evidence was provided by respondents that Young was owed, at most, \$3,000.00. RP 2103, 2015, 2504. Upon receiving Young's request for unpaid wages, respondents paid those monies into the registry of the court. RP 24, 2106, 2504.

In addition to the monies deposited in the registry of the court, Young admitted that he continues to possess and use a cellular phone purchased by the company. RP 2169. In addition, Young received but apparently failed to cash a check payable to Yank A Part LLC from the cellular phone provider for a \$400 cash deposit made by the company to obtain Young's phone. RP 2167, 2505, Ex. 24.

In summary, the court correctly found that Young was not owed any wages by respondents and that Young was not entitled any relief.

8. **The trial court did not err in denying Young’s request for quantum meruit pay made for the first time after trial in a motion for reconsideration.**

Young argues that the trial court should have awarded him *quantum meruit* and front pay. Brief of Respondents, p. 44-48. As with several other arguments advanced by Young, *quantum meruit* was first raised to the trial court after the trial had been concluded and the court had made its decision. As a result, the court ruled at Conclusion of Law page 15 that “because Colin Young’s claim for *quantum meruit* was neither pled nor tried, no award is proper on that basis.” CP 1520-1522.

9. **Respondents request that this court reverse the trial court’s determination that neither party was the prevailing party in denying respondents’ request for attorney’s fees.**

As the record indicates, the trial court ruled against Young on every claim advanced by him during the course of the trial court proceedings. The operating agreements of the two companies provide for award of attorney’s fees in the event of an action to enforce or interpret any provision of each of the operating agreements. This specific provision provide as follows.

**10.4 Attorney’s Fees. In the event of any suit or action to enforce or interpret any provision of this agreement (or that is based on this agreement), the prevailing party is entitled to recover, in addition to other costs, reasonable attorney’s fees in connection with the suit, action, or arbitration, and in any appeal. The determination of who is the prevailing party and**

**the amount of reasonable attorney's fees to be paid to the prevailing party will be decided by the court or courts, including any appellant courts, in which the matter is tried, heard or decided. Ex 2,3.**

Respondents recognize that the decision of the trial court on award of attorney's fees is discretionary. *Ermine v. Spokane, 143 Wn.2d 636 P.2d (2001).*

The court at Conclusion of Law 16 holds that neither party if the prevailing party and as such neither party is entitled to attorney's fees. CP 1520-1522

This conclusion is an abuse of the trial court's discretion. The record before this court, reinforced by the Appellant's Brief, demonstrates that respondents prevailed on every factual and legal issue presented to the court. Washington law clearly provides that the "prevailing party" is the one who successfully prosecuted or defended against the action, the one who is successful on the main issue of the action and in whose favor the decision or verdict is rendered and the judgment entered. *Sopen v. Clibborn, 31 Wn. App. 767, 644 P.2d 738 (1982).*

Discretion is abused in an award of attorney's fees if the decision is based on untenable grounds or reasons. **Ermine v. Spokane, supra.**

The trial court does not explain how it determined that neither party was the prevailing party. One justification could be that Young was awarded a judgment in payment for his interest in the two limited liability companies. However, respondents did not dispute Young's entitlement to

compensation for his interest in the two companies. Therefore, respondents successfully defended each and every claim made by Young. The successful defense of litigation by defendant makes that defendant the prevailing party entitling an award of attorney's fees. *Park v. Ross Edwards, Inc.*, 41 Wn. App. 833, 838, 706 P.2d 1097, review denied, 104 Wn.2d 1027, (1985); *Meenach v. Triple "E" Meats, Inc.*, 39 Wn. App. 634, 640, 694 P.2d 1125, review denied, 103 Wn.2d 1031 (1985).

Young's actions throughout the course of this litigation, including a protracted and unnecessary trial have caused the defendants to incur tens of thousands of dollars in attorney's fees. The claims made by Young against respondents personally were all defeated at trial. Young failed to join the two limited liability companies initially. Those companies were added at the behest of respondents in order to include the real parties in interest. Young's payment for his interest in the two companies was paid by the companies.

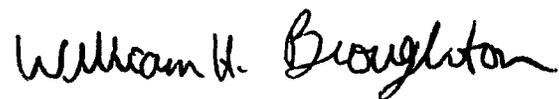
Similarly, this court should award attorney's fees to respondents for having to defend this appeal. Pursuant to **RAP 18.1**, respondents also request attorney's fees for the fees expended in this appeal.

### **CONCLUSION**

The decision of the trial court should be affirmed.

DATED this 14<sup>th</sup> day of July, 2011.

BROUGHTON LAW GROUP, INC. P.S.



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William H. Broughton  
Attorney for Respondents/ Cross-Appellants

# APPENDIX 1

5.1.3 Third parties dealing with the Company shall be entitled to rely conclusively upon the power and authority of the Members to manage and operate the business and affairs of the Company.

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.

5.3 Withdrawal by a Member. A Member has no power to withdraw from the Company, except as otherwise provided in Section 8.

## SECTION 6

### SALARIES, REIMBURSEMENT, AND PAYMENT OF EXPENSES

6.1 Organization Expenses. All expenses incurred in connection with organization of the Company will be paid by the Company.

6.2 Salary. No salary will be paid to any Member for the performance of his or her duties under this Agreement unless the salary has been previously approved in writing by a Majority of the Members.

6.3 Legal and Accounting Services. The Company may obtain legal and accounting services to the extent reasonably necessary for the conduct of the Company's business.

## SECTION 7

### BOOKS OF ACCOUNT, ACCOUNTING REPORTS, TAX RETURNS, FISCAL YEAR, BANKING

7.1 Method of Accounting. The Company will use the method of accounting previously determined by the Members for financial reporting and tax purposes.

7.2 Fiscal Year; Taxable Year. The fiscal year and the taxable year of the Company is the calendar year.

7.3 Capital Accounts. The Company will maintain a Capital Account for each Member on a cumulative basis in accordance with federal income tax accounting principles.

7.4 Banking. All funds of the Company will be deposited in a separate bank account or in an account or accounts of a savings and loan association in the name of the Company as determined by a Majority of the Members. Company funds will be invested or deposited with an institution, the accounts or deposits of which are insured or guaranteed by an agency of the United States government.

## SECTION 8

### TRANSFER OF MEMBERSHIP INTEREST

8.1 Sale or Encumbrance Prohibited. Except as otherwise permitted in this Agreement, no Member may voluntarily or involuntarily transfer, sell, convey, encumber, pledge, assign, or otherwise dispose of (collectively, "Transfer") an interest in the Company without the prior written consent of a majority of the other nontransferring Members determined on a per capita basis.

8.2 Right of First Refusal. Notwithstanding Section 8.1, a Member may transfer all or any part of the Member's interest in the Company (the "Interest") as follows:

# APPENDIX 2

by the Company, its successors and assigns, at the time of the deceased Member's death. Interest will be payable monthly, with the principal sum being due and payable in three equal annual installments. The promissory note will be unsecured and will contain provisions that the principal sum may be paid in whole or in part at any time, without penalty.

8.5.5 At the closing, the deceased Member's estate or personal representative must assign to the Company all of the deceased Member's Interest in the Company free and clear of all liens, claims, and encumbrances, and, at the request of the Company, the estate or personal representative must execute all other instruments as may reasonably be necessary to vest in the Company all of the deceased Member's right, title, and interest in the Company and its assets. If either the Company or the deceased Member's estate or personal representative fails or refuses to execute any instrument required by this Agreement, the other party is hereby granted the irrevocable power of attorney which, it is agreed, is coupled with an interest, to execute and deliver on behalf of the failing or refusing party all instruments required to be executed and delivered by the failing or refusing party.

8.5.6 On completion of the purchase of the deceased Member's Interest in the Company, the Ownership Interests of the remaining Members will increase proportionately to their then-existing Ownership Interests.

## SECTION 9

### DISSOLUTION AND WINDING UP OF THE COMPANY

9.1 Dissolution. The Company will be dissolved on the happening of any of the following events:

9.1.1 Sale, transfer, or other disposition of all or substantially all of the property of the Company;

9.1.2 The agreement of all of the Members;

9.1.3 By operation of law, or

9.1.4 The death, incompetence, expulsion, or bankruptcy of a Member, or the occurrence of any event that terminates the continued membership of a Member in the Company, unless there are then remaining at least the minimum number of Members required by law and all of the remaining Members, within 120 days after the date of the event, elect to continue the business of the Company.

9.2 Winding Up. On the dissolution of the Company (if the Company is not continued), the Members must take full account of the Company's assets and liabilities, and the assets will be liquidated as promptly as is consistent with obtaining their fair value, and the proceeds, to the extent sufficient to pay the Company's obligations with respect to the liquidation, will be applied and distributed, after any gain or loss realized in connection with the liquidation has been allocated in accordance with Section 3 of this Agreement, and the Members' Capital Accounts have been adjusted to reflect the allocation and all other transactions through the date of the distribution, in the following order:

9.2.1 To payment and discharge of the expenses of liquidation and of all the Company's debts and liabilities to persons or organizations other than Members;

9.2.2 To the payment and discharge of any Company debts and liabilities owed to Members; and

9.2.3 To Members in the amount of their respective adjusted Capital Account balances on the date of distribution; provided, however, that any then-outstanding Default Advances (with interest and costs of collection) first must be repaid from distributions otherwise allocable to the Defaulting Member pursuant to Section 9.2.3.

COURT OF APPEALS - DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON

BY Ca  
DEPUTY

Colin Young,,	)	
	)	No. 40796-5-II
<i>Appellant/ Cross-Respondent,</i>	)	
	)	DECLARATION OF
	)	MAILING
	)	
David Ellis, et al.,	)	
	)	
<i>Respondents/ Cross-Appellants.</i>	)	
	)	
	)	
	)	

Katrina Kallio, under penalty of perjury under the laws of the State of Washington, hereby declares as follows:

i) That I am over the age of eighteen (18) years, not a party to this action, and am competent to make this declaration;

ii) That on July 14, 2011 I caused the following document: **Brief of Respondent**, along with this Declaration of Mailing to be sent via first class mail to the following:

Colin F. Young,  
Plaintiff Pro Se  
1785 Spirit Ridge Dr.  
Silverdale, WA 98383

DATED this 14<sup>th</sup> day of July, 2011

  
\_\_\_\_\_  
Katrina Kallio