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

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TROY BROWER, Plaintiff/Appellant  
vs.  
DANIEL HOERNER and AUGUSTA HOERNER  
Defendants/Respondents

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**APPEALED FROM SPOKANE COUNTY SUPERIOR COURT  
CAUSE NO. 15-2-04696-3**

**THE HONORABLE RAYMOND CLARY**

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**TROY BROWER'S OPENING BRIEF**

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## **I. INTRODUCTION**

This appeal is the result of the trial court finding Troy Brower (“Brower”) was a 50% member/owner of The Big Dipper, LLC (“Big Dipper”), but that Brower voluntarily disassociated himself from the Big Dipper preventing reinstatement of his equal percentage of membership/ownership in the Big Dipper and/or award of damages. Brower presented substantial evidence supporting that he and Mr. Hoerner had an equal partnership and were equal members of the Big Dipper. The evidence submitted by Brower included documents that Mr. Hoerner created, signed and submitted to the State of Washington to form the Big Dipper, obtain a business license and a liquor license for the Big Dipper. All of these documents show that at all times Brower was an equal owner/member of the Big Dipper. The trial court considered this evidence and found Brower to be an equal partner and member of the Big Dipper.

Despite being equal partners, Mr. Hoerner would not cooperate with Brower to run the Big Dipper, and specifically would not provide financial information to Brower related to the Big Dipper and would not include Brower on bank accounts. Mr. Hoerner’s actions deprived Brower of the benefit of their partnership agreement, and ultimately made their partnership untenable. Without Brower’s knowledge or consent, Mr. Hoerner signed documents and submitted these document to Washington

State agencies removing Brower as a member of the Big Dipper, from the business license and from the liquor license.

Brower presented evidence that Mr. Hoerner had a meeting with himself, an equal partner, and voted Brower out of his equal share of the Big Dipper. Following Mr. Hoerner's unilateral attempt to remove Brower, he solicited the assistance of an attorney to draft a false document that Mr. Hoerner presented to Spokane Police indicating Brower was not a member of the Big Dipper for the purpose of having Brower removed from the Big Dipper premises once and for all. Despite evidence of Mr. Hoerner's fraudulent filings and underhanded acts inconsistent with Washington law, the trial court found it was Brower that voluntarily disassociated himself from his equal share in the Big Dipper.

Mr. Hoerner's only defense to Brower's claim for declaratory relief, breach of contract and fraud was that Brower was never a member of the Big Dipper. Mr. Hoerner failed to present any evidence that Brower was not a member of the Big Dipper. Mr. Hoerner also never presented any evidence or defense to Brower's claims at trial that Brower voluntarily disassociated himself from the Big Dipper. The trial court came to this determination despite no supporting evidence or defense raised by Mr. Hoerner.

Brower also presented uncontroverted expert testimony showing the damages he suffered as a result of Mr. Hoerner unilaterally and

fraudulently removing Brower from the Big Dipper. The damages evidence was presented in the form of a business valuation conducted by a qualified expert. Mr. Hoerner did not dispute the expert's valuation evidence of damages. Despite the damage evidence presented, the trial court did not award Brower damages, but instead found Brower voluntarily disassociated himself from the Big Dipper preventing an award of damages.

The trial court's decision to not reinstate Brower's equal membership in the Big Dipper, that Mr. Hoerner did not breach the parties' oral partnership agreement, and that Mr. Hoerner did not commit fraud by filing false documents with Washington State agencies and submitting a false document to Spokane Police was not based on substantial evidence. The facts and evidence show Brower was at all times a member of the Big Dipper, that no fraudulent actions taken by Mr. Hoerner changed Brower's status as an equal partner, owner, and member of the Big Dipper, and that Brower deserved to have his equal membership reinstated or at the very least be awarded damages. The trial court's decision should be reversed.

#### **ASSIGNMENTS OF ERROR**

A. The trial court committed error in finding the following Findings of Fact that were not supported by substantial evidence: 21, 22,

25, 26, 27, 28, 31, 32, 33, 35, 37, 38, 39, 40, 4, 45, 46, 48, 50, 51, 56, 57, 58, and 60.

B. The trial court committed error by finding Brower voluntarily disassociated himself from the Big Dipper thereby terminating his 50% interest in the Bid Dipper.

C. The trial court committed error by not finding that Mr. Hoerner breached the parties' oral contract related to their partnership.

D. The Trial Court committed error by finding that Brower's claim for fraud was not proven at trial.

E. The Trial Court committed error by finding Brower was not entitled to damages.

## **II. ISSUES PRESENTED**

1. Whether Brower voluntarily disassociated himself from the Big Dipper thereby depriving him of his 50% interest in the Big Dipper?
2. Whether Brower proved his claim of Fraud against Daniel Hoerner?
3. Whether Brower voluntarily disassociated himself from the Big Dipper thereby depriving damages?

## **III. STATEMENT OF THE CASE**

### **Procedural History**

On November 13, 2015, Appellant Brower filed his summons and complaint. CP 1-8. The Respondents filed their answer and affirmative

defenses on December 30, 2015. CP 9-14. On October 6, 2017, Brower filed a motion for partial summary judgment seeking a declaratory judgment finding Brower to be a 50% member/owner of the Big Dipper. CP 15-22. In support of the motion for partial summary judgment, Brower submitted a declaration attaching 11-exhibits showing Brower as a 50% owner/member of the Big Dipper. CP 23-68.

The exhibits submitted by Brower included: (1) the Certificate of Formation for the Big Dipper filed with the Washington Secretary of State; (2) the Business License; (3) documents submitted by Daniel Hoerner to the Liquor Control Board to obtain a liquor license for the Big Dipper and later to remove Brower from the liquor license issued to the Big Dipper; (4) A change in ownership form submitted to State of Washington Business Licensing Service by Daniel Hoerner unilaterally removing Brower as an owner of the Big Dipper; and (5) an email sent to Brower by Daniel Hoerner indicating he unilaterally voted Brower out of the Big Dipper. CP 28-73. All of these exhibits showed Brower as a 50% owner/member of the Big Dipper, and all of the exhibits that were submitted to the State of Washington were signed by Daniel Hoerner. CP 23-68.

On November 3, 2017, Respondents filed their motion for summary judgment. CP 71-72; 130-149. In support of Respondents' motion for summary judgment, Respondent Daniel Horner submitted a

declaration attaching many of the same exhibits as Brower. CP 73-129. In their summary judgment motion, Respondents argued that at no time was Brower ever a member of the Big Dipper, and was therefore not entitled to any rights in the entity. CP 137-142. Respondents argued at the hearing that despite Brower being listed as an “executor” on the Certificate of Formation filed with the Washington Secretary of State, Brower was not a member of the Big Dipper. RP 18. Respondents also misrepresented to the trial court that Brower was never listed on any official business records as member of the Big Dipper. RP 20.

The trial court denied both motions for summary judgment. RP 41-42. In its ruling, the trial court indicated, “*there are cases that say that the court can decline summary judgment even where the facts appear to be undisputed and entirely in favor of one party, but that party has an interest in the statements that that party has made.*” RP 42. The trial court was referring to the facts being undisputed and favoring Brower. RP 7-42. As a result of the trial court denying the motions for summary judgment, despite there being no genuine issue of material fact to allow Respondents to proceed to trial, the parties went to a bench trial.

At the completion of trial, and after considering the parties written closing arguments, the trial court determined Brower had failed to prove all of his claims and Respondents prevailed. CP 515-528. The trial court’s decision was largely based upon the finding that Brower had

voluntarily disassociated himself as a member/owner of the Big Dipper. CP 515-528. The trial court made this finding of fact despite the evidence showing that Mr. Hoerner had already filed paperwork to remove Brower as an owner/member without Brower's knowledge or consent, created a false document that he provided to police showing Brower was not a member of the Big Dipper so that Brower would be removed from the Big Dipper's premises and could not return.

Because the trial court's decision is not based on the facts and evidence presented at trial, Brower appealed the trial court's decision. Brower seeks a reversal of the trial court's decision not to award declaratory relief by reinstating his equal interest in the Big Dipper. Brower also seeks reversal of the trial court's denial of his breach of contract claim, fraud claim, and to be awarded damages.

### **Statement of Facts**

On November 3, 2013, Brower and Daniel Hoerner formed the Big Dipper. RP 77-78; Ex. D-101; Ex. P-1. The "Certificate of Formation" for the Big Dipper shows Brower and Mr. Hoerner as the executors. Ex. D-101; P-1. Mr. Hoerner agreed to pay the fee for forming the Big Dipper, as Brower had already contributed money for furniture for the business. Ex. P-53. Mr. Hoerner testified at trial that he and Brower had a business partnership in the Big Dipper. RP 104-105. However, Mr.

Horner testified that Brower was never a member of the Big Dipper. RP 131-134.

On February 21, 2014, Mr. Hoerner applied for a “Business License” for the Big Dipper. Ex. P-2. On the second page of the “Business License Application” it asks the applicant to list all “Owner Information.” Ex. P-2. This business license application was signed by Mr. Hoerner under the penalty of perjury, and indicates that Brower is a 50% owner/member of the Big Dipper. RP 82-86; Ex. P-2. On March 10, 2014, Mr. Hoerner provided further information to the State of Washington Business Licensing Service showing Brower and a 50% owner of the Big Dipper. RP 86-90; Ex. P-3. The same information showing Brower as a 50% owner/member was provided to the Washington State Liquor Control Board when Mr. Hoerner filled out the application to obtain a liquor license for the Big Dipper. RP 90-94; Ex. P-23.

On March 13, 2014, Mr. Hoerner executed a document assigning the lease for the Big Dipper building from himself to the Big Dipper entity. RP 367-370; Ex. P-23. The owner of the building where the Big Dipper is located, Steve Spickard, testified that both Brower and Mr. Hoerner met with him to take over and run the Big Dipper. RP 367-370. The same day the lease was assigned to the Big Dipper, an article based on an interview with Mr. Hoerner was published in the “Journal of Business.” RP 97-100; Ex. P-42. In this article, it indicates that Mr. Hoerner and

Brower formed the Big Dipper as partners, and had spent \$50,000 renovating the building to open their business. Ex. P-42. To open the Big Dipper, Mr. Hoerner and Brower performed the following work: (1) repair the interior, (2) refit plumbing, (3) install new linoleum, (4) install hardwood flooring, (5) rewiring the electrical system, and (6) redecorate the building. RP 101-102; Ex. P-42 & Ex. P-55. Brower used his skill and expertise as a carpenter to perform the renovation work on the Big Dipper. RP 101-102.

The list of corporate minutes reflecting the work that needed to be performed prior to opening the Big Dipper appears in an email sent by Mr. Hoerner to Brower on December 12, 2013. RP 224-226; Ex. P-49. Brower testified that the work he performed as a carpenter to get the building and business ready for opening was valued at \$50,000, this estimate was based on his work and experience as a carpenter working in Spokane, Washington for 25-years. RP 212; 226-228.

After the Big Dipper began to operate, Brower demanded to see the financial statements for the business, and inquired of Mr. Hoerner as to the financial status of their business. RP 228-230. On June 23, 2014, after Brower insisted that he be provided with financial statements for the Big Dipper, Mr. Hoerner indicated that he would provide Brower with the financial information when it was prepared for the July 2014 tax filing, however Mr. Hoerner never provided this information to Brower. RP 229-

231; Ex. P-61. Mr. Hoerner refused to allow Brower to view any financial information related to the Big Dipper. RP 134-137, 236-238; Ex. D-107. Mr. Hoerner's refusal to provide Brower with any financial information related to the Big Dipper caused tension in their partnership. RP 330-331.

On August 28, 2014, unbeknownst to Brower, Mr. Hoerner signed a "Change in Governing People, Percentage Owned and/or Stock/Unit Ownership" with the intent to file it with the State of Washington Business Licensing Service. RP 111-113; Ex. P-5. The purpose of filing this document was to retroactively remove Brower's 50% ownership in the Big Dipper back to February 10, 2014. RP 111-113; Ex. P-5. Mr. Hoerner testified that including Brower as a 50% owner/member on the documents signed by him and filed on behalf of the business with the State of Washington was a mistake, despite his representation under the penalty of perjury the information was true and correct. RP 113-115. Mr. Hoerner disputed the plain language of the signed documents he and his lawyer, Lisa Dickenson, created removing Brower from the Big Dipper without Brower's knowledge or consent. RP 115-124; Ex P-1, P-2, P-3, & P-7. Mr. Hoerner even disputed the plain language of emails he drafted indicating that Brower made contributions towards the Big Dipper. RP 118-123; Ex. P-51 & Ex. P-53.

On September 20, 2014, Mr. Hoerner sent an email to Brower indicating Mr. Hoerner had a meeting with himself and unilaterally voted that Brower was no longer a member of the Big Dipper, was banned from the premises, and Brower had no right to any financial information related to the Big Dipper. Ex. P-9<sup>1</sup>. On September 20, 2014, after unilaterally voting Brower out as a member, Brower appeared at the Big Dipper and Mr. Hoerner called the police and attempted to have Brower removed from the premises. On September 22, 2014, when Brower returned to the Big Dipper to work, Mr. Hoerner called the police for a second time and had Brower successfully removed from the premises. RP 127-128; D-106.

On September 22, 2014, when police arrived, Mr. Hoerner provided police with a document that he worked with his attorney Lisa Dickenson to create stating that Brower was not an owner/member of the Big Dipper, and that Mr. Hoerner was the sole owner of the Big Dipper. RP 128-129; 241-242; Ex. P-35. The document presented to Spokane Police indicated that Mr. Hoerner was the, “*sole legal owner of The Big Dipper, LLC, and the sole tenant at 171 South Washington Street, Spokane WA 99201.*” RP 129-131; Ex. P-35. Based on this document, Brower was removed from the premises by Spokane Police.

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<sup>1</sup> Plaintiff's Ex. 9 was admitted by stipulation of the parties; however, it is omitted from the exhibit list prepared for the Report of Proceedings. RP 55.

Brower was very emotional and distraught by Mr. Hoerner's actions to have him removed from the business and from the premises by police. RP 236. On September 22, 2014, after being removed by the police for the second time in three nights from the premises of Big Dipper, Brower drafted a Facebook post indicating he was scammed by Mr. Hoerner out of his 50% ownership in the Big Dipper. Ex. D-107. Brower also indicated in the Facebook post he was never provided any financial information related to money earned, alcohol sales or personal taxes, and that Mr. Hoerner presented documents to the police showing Mr. Hoerner as the sole owner, despite their equal partnership agreement. RP 341; Ex. D-107. Brower also indicated because of all these actions taken by Mr. Hoerner, he was no longer the co-owner of the Big Dipper. Ex. D-107.

On October 22, 2014, without notice to Brower, without Brower's consent or knowledge, Mr. Hoerner provided information to the Washington State Liquor Control Board taking back Brower's 50% ownership in the Big Dipper. RP 113-115; Ex. P-27. This document indicates that Mr. Hoerner is taking back ownership because Brower failed to pay \$5,000 as his part of the business, and also indicates that Mr. Hoerner was trying to get Brower to sign to relinquish his interest in the Big Dipper. RP 113-115; Ex. P-27. On November 12, 2014, Mr. Hoerner signed a letter verifying its content was true and correct that was sent to Washington Liquor Control Board. RP 117-118; Ex. P-7. This letter

requested that Brower be removed from the liquor license. RP 117-118; Ex. 7.

Brower had no knowledge that Mr. Hoerner was filing documents to have him removed as an owner/member of the Big Dipper, nor that Mr. Hoerner was working with a lawyer, Lisa Dickenson, to have Brower removed. RP 236. Brower first became aware of the documents filed by Mr. Hoerner to remove him when he did a public records request. RP 236. When Brower received, the information related to the Big Dipper as a result of his public record request and discovered Mr. Hoerner filed document to have him removed as an equal owner/member, he immediately filed the necessary paperwork with the Washington Secretary of State to correct his removal as a member/owner. RP 281-284; Ex. P-31 & P-32.

Based on the evidence presented at trial, the trial court found Brower to be an equal member/owner of the Dig Dipper. CP 515-528. Despite making this finding, the trial court refused to reinstate Brower's equal interest in the Big Dipper or award any damages for loss of his equal interest in the Big Dipper, breach of contract, or fraud. CP 515-528. The trial court's decision not to reinstate Brower or award any damages pursuant to Brower's claims is based solely on the trial court's finding that Brower voluntarily disassociated himself from the Big Dipper. CP 515-528. The sole piece of evidence the trial court relied upon to find that

Brower voluntarily disassociated himself from the Big Dipper was Ex. D-107, which was a Facebook post authored by Brower. CP 515-528. The trial court took the Facebook post out of context and refused to consider all relevant evidence leading Brower to draft the Facebook post. Brower did not disassociate himself from the Big Dipper in this Facebook post, he indicated that he was defrauded by his longtime friend and business partner. Ex. D-107.

The trial court's decision is not supported by substantial evidence and should be reversed.

#### IV. ARGUMENT

##### A. The Trial Court Correctly Found Brower was an Equal Member/Owner of the Big Dipper, but Erred in not Reinstating Brower's interest and/or awarding Damages.

###### 1. Standard of Review.

Brower brought a cause of action for declaratory relief, seeking to have his equal membership/ownership in the Big Dipper reinstated by the trial court. CP 1-8. A trial court has the power to “*declare rights, status or other legal relations whether or not further relief is or could be claimed.*” RCW 7.24.010. A trial court has the authority to determine partnership rights and interest. Guenther v. Fariss, 66 Wash. App. 691. 833 P.2d 417 (1992). For a trial court to entertain a claim for declaratory

judgment, there must be justiciable controversy, which is shown by meeting the following elements:

- (1) an actual, present, and existing dispute, or mature seeds of one, as distinguished from possible, dormant, hypothetical, speculative or moot disagreement,*
- (2) between parties having genuine and opposing interests,*
- (3) which involves interests that must be direct and substantial rather than potential, theoretical, abstract, or academic, and*
- (4) a judicial determination of which will be final and conclusive.*

Rhoades v. City of Battle Ground, 115 Wash. App. 752, 760, 63 P.3d 142 (2002). It is undisputed that the parties to this action had a justiciable controversy to be decided by the trial court.

Ordinary rules of appellate procedure apply to review of a trial court's decision regarding a declaratory judgment. Nollette v. Christianson, 115 Wash.2d 594, 599-600, 800 P.2d 359 (1990). The Appellate Court will determine if the trial court's findings of fact were supported by substantial evidence in the record, and if so then whether the findings of fact support the trial court's conclusions. Schneider v. Snyder's Foods, Inc., 116 Wash. App. 706, 713, 66 P.3d 640 (2003). A trial court's findings of fact will not be disturbed if they are supported by substantial evidence. Id. "*Substantial evidence is evidence sufficient to persuade a reasonable person of the truth of the finding.*" Mansour v. King County, 131 Wash. App. 255, 262, 128 P.3d 1241 (2006).

Conclusion of law involving the interpretation of statutes are reviewed de novo. Nollette, 115 Wash.2d 594 at 600. The trial court's

finding that Brower voluntarily disassociated himself as a member/owner of the Big Dipper, and is therefore, not entitled to declaratory relief is not supported by substantial evidence. Also, trial court's decision is not supported by Washington law, and therefore must be reversed.

2. The Trial Court's Decision that Brower Voluntarily Disassociated Himself from the Big Dipper is not Supported by Substantial Evidence.

In support of his declaratory claim, Brower presented substantial evidence showing that he was an equal owner/member of the Big Dipper since the Big Dipper was established on November 3, 2013. Ex. D-101; P-1; P-2; P-3; P-23; P-42; P-49; and P-53. Based on the testimony and evidence presented by Brower, the trial court found that Brower was an equal member of the Big Dipper. CP 515-528. This evidence included, but is not limited to, Brower appearing as an equal member/owner on: (1) the Certificate of Formation for the Big Dipper, (2) the business application, and (3) the liquor license. Ex. P-1, P-2, and P-3.

The evidence presented at trial showed Brower made multiple requests for financial information related to the Big Dipper, and that Mr. Hoerner's refusal to provide this information caused tension in their partnership. RP 228-231, 330-331. Mr. Hoerner did not believe he had a duty to show Brower the financial information or include him on bank accounts because Mr. Hoerner did not consider Brower to be an equal

member/owner of the Big Dipper. RP 134-137, 236-238. The refusal to provide financial information to Brower caused a dispute between the parties. RP 330-331.

On August 28, 2014, unbeknownst to Brower, Mr. Hoerner signed a “Change in Governing People, Percentage Owned and/or Stock/Unit Ownership” with the intent to file it with the State of Washington Business Licensing Service. RP 111-113; Ex. P-5<sup>2</sup>. The purpose of filing this document was to retroactively remove Brower’s 50% ownership in the Big Dipper back to February 10, 2014. RP 111-113; Ex. P-5. On September 20, 2014, a little less than a month after signing the document to remove Brower’s 50% ownership from the business license, Mr. Hoerner sent Brower an email at 6:30 AM indicating that Mr. Hoerner was unilaterally removing Brower as an equal member from the Big Dipper. Ex. P-9<sup>3</sup>. Mr. Hoerner’s September 20, 2014, email to Brower stated that Mr. Hoerner held a meeting with himself, and voted as follows:

- A. You are no longer a member of The Big Dipper, LLC.***
- B. You have no authority regarding nor right to access to any financial information or any matters of whatever kind and nature of The Big Dipper, LLC.***
- C. You are hereby banned from the premises where The Big Dipper, LLC does business and should you enter upon said premises during business hours, you will be arrested for trespass...***

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<sup>2</sup> Ex. 5, was received by the State of Washington Business Licensing Service on September 26, 2014.

<sup>3</sup> Plaintiff’s Ex. 9 was admitted by stipulation of the parties; however, it is omitted from the exhibit list prepared for the Report of Proceedings. RP 55.

Ex. P-9.

After receiving this email from Mr. Hoerner, Brower appeared at the Big Dipper for work on September 20, 2014, and Mr. Hoerner called the police on Brower to have him removed. This initial complaint to the police was not effective to remove Brower, as he claimed equal ownership in the Big Dipper. When Brower returned to the Big Dipper on September 22, 2016, Mr. Hoerner once again called police to remove Brower from the premises. RP 127-128; D-106. Mr. Hoerner worked with his lawyer Lisa Dickenson, to create a document indicating that Mr. Hoerner was the sole owner of the Big Dipper and that Brower was not an owner/member. RP 128-129; 241-242; Ex. P-35. This document was created by Hoerner and specifically indicated that Mr. Hoerner was the, “*sole legal owner of The Big Dipper, LLC, and the sole tenant at 171 South Washington Street, Spokane WA 99201.*” RP 129-131; Ex. 35. Based on this document, Brower was removed from the Big Dipper premises by police.

After receiving Mr. Hoerner’s email attempting to unilaterally remove Brower as a member, being removed from the premises by the police, and seeing the document Mr. Hoerner worked with his to lawyer draft indicting Mr. Hoerner was sole owner of the Big Dipper, Brower posted a message on the Big Dipper Facebook account. In his Facebook post, Brower stated in pertinent part:

***Big Dipper fans...This is Troy Brower. I am no longer the co-owner of The Big Dipper. I was led to believe I was and so were others...Tonight I found out I was scammed by my over 20 year friend Dan Hoerner. I invested my money, a year of hard days and late nights, thinking I was sharing in a Partnership of The Big Dipper LLC 50/50...***

***This well woven play caused crazy amounts of stress and worry. I was mocked and ridiculed by Dan and it would peak with retaliation when I asked about the financial information for The Big Dipper LLC. How much did we make a night? What were alcohol sales? How much did the band make? What about my taxes?...It was a well crafted fraud committed upon me and others. A feat of Trickery of the finest stage...***

***I lay on the sidewalk in front of The Dipper, sobbing at the feet of authority. Tonights drizzle and three Spokane Police Department Officers questioning my ire insistence on a right to occupy my place of business. Then boom! The papers of Incorporation of our business that Dan and I signed at my house, that happy day, were never filed. With the kind yet somewhat tense back and forth help of the police I realized Dan had filed for himself solely. Old Switcheroo...***

***After weeks of emotional torture and near arrest for the second night in three days. Im burned out...That was my friend, I'm glad to be gone. Dan you crafted your game and won...Time for some rest and solitude.***

Ex. D-107.

The trial court relied solely upon the above statement made by Brower that he was “no longer the co-owner of The Big Dipper” to find Brower voluntarily disassociated his equal interest the Big Dipper. CP 519, 523. Based on this post, the trial court found Mr. Hoerner was justified in filing documents removing Brower as an equal member/owner of the Big Dipper, because Brower consented to his interest being

terminated. CP 523. In its “Findings of Fact,” the trial court references Brower’s Facebook statement in Paragraphs 32, 33, and 37. CP 519.

Based on solely Brower’s Facebook post, and disregarding all evidence of Mr. Hoerner’s prior actions leading to Brower’s post, the trial court’s “Conclusion of Law” regarding the claim for declaratory judgment found Brower voluntarily disassociated himself from the Big Dipper by this statement. CP 523. The trial court found that “*Mr. Hoerner consented to Mr. Brower’s written disassociation by filing the Change in in Governing People, Percentage Owned, and/or Stock/Unit Ownership on or about September 26, 2014.*” CP 523. The above filing referenced by the trial court was signed by Mr. Hoerner on **August 28, 2014**, a month prior to Brower’s Facebook post. RP 111-113; Ex. P-5. This finding by the trial court is not supported by substantial evidence.

In making its finding based on Brower’s Facebook post, the trial court completely ignored the September 20, 2014, email sent by Mr. Hoerner two days prior to this post attempting to unilaterally vote Brower out of his equal interest in the Big Dipper, and threatening to have him removed by police should be return to the Big Dipper. Ex. P-9. The trial court also ignored that prior to Brower’s post, Mr. Hoerner worked with his lawyer to draft a false document for the purpose of misrepresenting to police that Mr. Hoerner was the, “*sole legal owner of The Big Dipper,*

LLC, and the sole tenant at 171 South Washington Street, Spokane WA 99201.” RP 129-131; Ex. P-35.

“*Substantial evidence is evidence sufficient to persuade a reasonable person of the truth of the finding.*” Mansour v. King County, 131 Wash. App. 255, 262, 128 P.3d 1241 (2006). The trial court’s finding that Brower voluntarily disassociated himself from the Big Dipper by posting on Facebook, “I am no longer the co-owner of The Big Dipper;” “I am burned and out;” and “I am glad to be gone,” is taken completely out of context. CP 519. Brower had just been physically removed from his own business by police as a result of Mr. Hoerner creating a fraudulent document stating he was the sole owner of the Big Dipper. RP 129-131; Ex. P-35. To conclude that Brower was only an equal member of the Big Dipper until September 20, 2014, the date Mr. Hoerner first called the police, or September 26, 2014, the date the document Mr. Hoerner filed without Brower’s knowledge or consent removing him from the business license is not supported by substantial evidence and must be reversed.

This Court should reverse the trial court’s finding that Brower voluntarily disassociated himself from the Big Dipper, and reinstate his 50% interest.

3. The Trial Court’s Decision that Brower Voluntarily Disassociated Himself from the Big Dipper is not Supported by Washington Law.

The trial court's conclusion of law that Brower voluntarily disassociated himself as an equal member of the Big Dipper is not supported by Washington law. RCW 25.15.131 sets forth the circumstances in which a member may be disassociated from an LLC, and none of the events listed occurred in this matter. It appears the trial court found that Brower voluntarily withdrew as a member of the Big Dipper, however a voluntary withdrawal must comply with RCW 25.15.131(2). Pursuant to RCW 25.15.131(2) a voluntary withdrawal as a member of a limited liability company can occur as specified and in accordance to the company agreement, which did not occur in this matter because there was no such agreement. CP 517. In the event there is no company agreement, "*a member may not withdraw from the limited liability company without written consent of all other members.*" RCW 25.15.131(2).

In this matter, Mr. Hoerner attempted to unilaterally remove Brower as a member by sending his September 20, 2014 email, however there is no evidence Brower withdrew as a member and that Mr. Hoerner provided written consent for Brower's withdraw as a member. Ex. P-9. Further, Washington limited liability company laws require compliance with the statutes, meaning the party must make a "*bona fide attempt to comply with the law and...must actually accomplish its purpose.*" Humphrey Indus., Ltd. v. Clay St. Assoc., LLC, 170 Wn.2d 495, 504

(2010) (internal citations and quotations omitted). Compliance is measured by the substance essential to the statute's reasonable objectives so that the purpose of the statutory requirement is generally satisfied. See Id. (internal citations omitted).

Mr. Hoerner did not comply with Washington's limited liability company statutes. RCW 25.15 *et seq.* Mr. Hoerner violated RCW 25.15.120 which requires the consent of a majority of the members to amend the certificate of formation. The trial court found the Big Dipper is a Washington limited liability company, therefore, the Big Dipper is subject to Washington's limited liability company rules and regulations. CP 517-518. The Big Dipper, consisted of two member/managers, Brower and Mr. Hoerner, who each owned 50% of the LLC. CP 517-518. Therefore, Mr. Hoerner's September 20, 2014, email attempting to remove Brower as a member of the Big Dipper required a vote, approval, or consent of more than 50% of the members. RCW 25.15.120(1); Ex P-9.

In other words, *both* Brower and Hoerner would have to vote to remove Brower from the LLC. Because Mr. Hoerner removed Brower unilaterally and without authority, Brower remained a member of Big Dipper at all times and is entitled to statutory and common law rights as a member. RCW 25.15 *et seq.* Hoerner's unilateral removal of Brower as a

member without his knowledge or consent has no effect and Brower is still a member/owner of the LLC. Mr. Hoerner had no right to file documents with Washington State Agencies removing Brower's interests in the Big Dipper.

If there was a need to dissolve the partnership between Hoerner and Brower, then the LLC must be wound up in accordance with the provisions set forth in RCW 25.05, *et seq.* Mr. Hoerner cannot just make a unilateral decision to remove Brower without his knowledge or call the police after fraudulently altering documents claiming Brower was never a member/owner to remove Brower from his own business. RP 129-131; Ex. P-35. There is a statutory scheme that must be followed and Mr. Hoerner failed to comply with the law in his improper removal of Brower.

Unlike Mr. Hoerner, Brower complied with the statutory scheme and acted promptly when he discovered the false documents. RP 281-284; Ex. P-31 & P-32. RCW 25.15.076(2) requires

*any member who becomes aware that any statement in a certificate of formation was false when made, or that any matter described has changed making the certificate of formation false in any material respect, must promptly amend the certificate of formation.*

Brower promptly submitted his own Change in Governing People, Percentage Owned, and/or Stock/Unit Ownership application only after he discovered the false documents Hoerner had amended and filed with the State. RP 281-284; Ex. P-31 & P-32. Despite Brower's efforts to

comply with the law, while Mr. Hoerner continued to improperly remove Brower as a member/owner. RP 281-284; Ex. P-31 & P-32.

Washington law does not support the trial court's conclusion that Brower withdrew as a member of the Big Dipper, and Mr. Hoerner merely consented to Brower's voluntary withdraw as a member. Further, none of the actions taken by Mr. Hoerner, without Brower's knowledge or consent, to remove Brower from the Certificate of Formation, business license and liquor license have any legal effect. Therefore, the trial court's decision should be reversed and Brower's equal interest in the Big Dipper should be reinstated.

**B. The Trial Court Committed Error in Determining Brower Failed to Prove His Claim for Breach of Contract.**

Generally, the "*plaintiff in a contract action must prove a valid contract between the parties, a breach, and resulting damage.*" Lehrer v. State, Dept. of Soc. and Health Serv., 101 Wn. App. 509, 516 (2000). The standard burden of proof when a breach of contract is alleged is a preponderance of evidence. See generally, Allstate Ins. Co. v. Huston, 123 Wn. App. 530 (2004). The essential elements of a contract are, "*the subject matter of the contract, the parties, the terms and conditions, and (in some but not all jurisdictions) the price or consideration.*" DePhillips v. Zolt Constr. Co., 136 Wn.2d 26, 31 (1998) (quoting Family Med.

Bldg., Inc. v. Dept. of Soc. & Health Serv., 104 Wn.2d 105, 108, 702 P.2d 459 (1985)).

In order for a contract to be formed, there must be mutual assent to the materials terms of the contract. Yakima Cty. (West Valley) Fire Prot. Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 388 (1993). Mutual assent is only required as to the material terms of the contract. Trendwest Resorts, Inc. v. Ford, 103 Wn. App. 380, 388 (2000). Once there is mutual assent to the material terms of the contract, the contract must be supported by consideration. DePhillips, 136 Wn.2d at 31. Washington courts define consideration as, “any act, forbearance, creation, modification, or destruction of a legal relationship, or return promise given in exchange.” King v. Riveland, 125 Wn.2d 500, 505 (1994). Consideration must be bargained for and exchanged for a promise. Williams Fruit Co. v. Hanover Ins. Co., 3 Wn. App. 276, 281 (1970).

The implied duty of good faith and fair dealing in every contract “*obligates the parties to cooperate with each other so that each may obtain the full benefit of performance.*” Badget v. Sec. State Bank, 116 Wn.2d 563, 569 (1991). The duty of good faith and fair dealing prohibits one party from interfering with the other party’s performance. State v. Trask, 91 Wn. App. 253, 272-273 (1998). The duty of good faith does not obligate a party to accept a material change in terms of the contract and obligates the parties to perform their respective obligations imposed by

their agreement. Betchard-Clayton, Inc. v. King, 41 Wn. App. 887, 890 (1985); Barret v. Weyerhaeuser Co. Severance Pay Plan, 40 Wn. App. 630, 635 n. 6 (1985).

Where a breach of contract occurs, the injured party is entitled to damages. A material breach is one that sustainably defeats the purpose of the contract and deprives the injured party of a benefit that she reasonably expected. Mitchell v. Straith, 40 Wash. App. 405, 410, 698 P.2d 609 (1085). A material breach allows the injured party to abandon the contract and recover damages. Campbell v. Hauser Lumber Co., 147 Wash. 140, 265 P. 468 (1928). The purpose of damages in a breach of contract action is “not mere restoration to a former position, as in tort, but the awarding of a sum which is equivalent of performance of the bargain –the attempt to place the plaintiff in the position he would be in if the contract had been fulfilled...” Rathke v. Roberts, 33 Wash.2d 858, 865, 207 P.2d 716 (1949). “The amount of damages should reflect what is required to place the [injured party] in the same financial position he would have enjoyed in the absence of the breach.” Family Medical Bldg., Inc. v. State Dept. of Social & Health Services, 104 Wash.2d 105, 114, 702 P.2d 459 (1985).

The trial court found that Mr. Hoerner and Brower had an equal partnership and were equal members in the Big Dipper. CP 517. Despite finding the parties had an equal partnership, the trial court concluded

Brower failed to prove his claim for breach of contract. CP 524. It appears the trial court denied the breach of contract claim because Brower had not performed labor. CP 518. Brower presented substantial evidence that he provided contributions to the partnership. RP 118-123, Ex. P-51 and P-53. Brower also presented substantial evidence that he performed labor and provided materials to renovate the Big Dipper building and get it ready for opening. RP 212; 226-228; Ex. P-49.

Based on his experience as a carpenter for 25-years, Brower testified he provided \$50,000 worth of labor to get the Big Dipper open. RP 212; 226-228. Brower's testimony was supported by an article published in "Journal of Business," where in an interview Mr. Hoerner himself stated they had spent \$50,000 renovating the Big Dipper building. RP 97-100; Ex. P-42. Mr. Hoerner did not dispute Brower performed labor necessary to renovate the Big Dipper. Mr. Hoerner never presented any evidence that he performed under the partnership agreement or that he contributed anything to the partnership. CP 521. In fact, the trial court specifically found Mr. Hoerner never presented such evidence. CP 521.

In addition to proving his performance, Brower proved that Mr. Hoerner breached the covenant of good faith and fair dealing implied in every contract requiring the parties to cooperate to gain the full benefit of the bargain. Badget, 116 Wn.2d at 569 (1991). Brower presented substantial evidence that Mr. Hoerner would not provide him with

financial information related to the business, unilaterally removed Brower as a member without Brower's knowledge and created false documents to prevent Brower from entering the Big Dipper premises. RP 111-113; RP 129-131; RP 134-137, 236-238, 330-331; Ex P-5 Ex. P-35. Mr. Hoerner's conduct constitutes a material breach of the parties' oral partnership contract. Mitchell, 40 Wash. App. at 410.

By materially breaching the parties' partnership agreement, Brower is entitled to be in the same position as he would have been had the partnership had been performed. Rathke, 33 Wash.2d at 865. This means Brower should be put in the same financial position as if he had been a partner in the Big Dipper and not have been removed by Mr. Hoerner. Family Medical Bldg., Inc., 104 Wash.2d at 114.

Brower presented undisputed expert testimony from Joseph Mayo, LLM, CPA, who was qualified as an expert in business valuation. RP 196-197. Mr. Mayo testified that while the Big Dipper lost money in its first year of operation in 2014, however, it was to be expected due to substantial startup costs. 199-201. However, in the second year of operation in 2015, the Big Dipper showed a gross income of \$49,999.00. RP 201, Ex. P-14. In 2016, the gross income was \$22,029.00, and 2017 the gross income was \$15,808. RP 202; Ex. P-68; Ex. P-69. Mr. Mayo testified you had to look at the three most recent years to determine a valuation of the Big Dipper. RP 202. Mr. Mayo added together the gross

income for 2015, 2016 and 2017, and average those amounts and came to \$30,000. RP 203-204. Then using a standard multiple of 3-times gross income, determined the value of the Big Dipper to be \$90,000. RP 204. Mr. Mayo also opined the multiple could be as high as 5-times gross income as a result of the Mr. Hoerner not running the Big Dipper full hours of operation and could have a value as high as \$150,000. RP 204-207. This expert testimony was uncontroverted by Mr. Hoerner.

As a result of Mr. Hoerner's breach of the partnership agreement, Brower is entitled to be put in the same financial position he would have been in had Mr. Hoerner performed under the partnership, which at least half the value of the Big Dipper as stated by Mr. Mayo.

**C. The Trial Court Erred by Not Finding Mr. Hoerner Committed Fraud.**

The standard of proof in civil fraud cases is clear, cogent and convincing evidence. Kirkham v. Smith, 106 Wash. App. 177, 183, 23

P.3d 10 (2001). The elements of the fraud include:

*(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff.*

Adams v. King Cty., 164 Wn. 2d 640, 662, (2008); Stiley v. Block, 130 Wn.2d 486, 505 (1996).

The evidence presented by Brower at trial established that Mr. Hoerner committed fraud on several occasions in removing him as a member of the Big Dipper. The trial court only examined the instances of fraud when Mr. Hoerner misrepresented to the Secretary of State and Washington Agencies that Brower was never a member of the Big Dipper in seeking to have Brower removed as a member without Brower's knowledge. CP 526-527; Ex. P-5; Ex. P-7; Ex. P-27. The trial court erred in not finding Mr. Hoerner committed fraud in these instances, and also committed error by not finding Mr. Hoerner committed fraud by creating a document misrepresenting to police that he was the sole owner of the Big Dipper to have Brower physically removed from the premises. RP 129-131; Ex. P-35.

The undisputed facts at trial show that on September 22, 2014, Mr. Hoerner presented Spokane Police with a document stating he was the "*sole legal owner of The Big Dipper, LLC, and the sole tenant at 171 South Washington Street, Spokane WA 99201.*" RP 129-131; Ex. P-35. This document also indicates "*I have to be able to show that Troy was not a member of the LLC before he could be charged with trespass.*" Ex. P-35. This document was created and provided to Spokane Police for the purpose of misrepresenting to the Spokane Police that Mr. Hoerner was

the sole owner of the Big Dipper so that Brower would be physically removed from the Big Dipper.

The trial court found Brower voluntarily disassociated himself from the Big Dipper as a result of his Facebook post on September 22, 2014. CP 519-523. This document was created and provided to Spokane Police prior to Brower's Facebook post. Ex. D-107. Mr. Hoerner's document makes several representations of existing fact: (1) he is the sole owner of the Big Dipper, the sole tenant, and Brower was not a member of the Big Dipper. Ex. P-35. These representations were material, as they went to Brower's ownership/membership in the Big Dipper. Mr. Hoerner's representations were false, as at the time the representations were made Brower was an equal member, partner, and owner of the Big Dipper. CP 517-518. Mr. Hoerner knew his statements were false, or at the very least Mr. Hoerner was ignorant of the law stating he could not unilaterally remove his equal partner as a member of the Big Dipper. RCW 25.15.120(1). Further, there had been no formal dissolution of the partnership, nor had there been any withdrawal by any member. The document was specifically created to provide to Spokane Police to remove Brower from the Big Dipper. Ex. P-35. As stated in the document, "*The officers that arrived reviewed the available data and reported that I had to be able to show that Troy was not a member of the LLC before he could be changed with Trespass.*" Ex. P-35. The Spokane Police were unaware of

the falsity of the contents of the document provided to them by Mr. Hoerner. Spokane Police relied upon the representation, and Brower was removed from the Big Dipper premises. RP 127-128; D-106.

Brower suffered damages as a result of the fraud committed by Mr. Hoerner. After being removed from the premises and shown the document created by Hoerner and his lawyer, Brower believed he was not an equal member of the Big Dipper. Ex. D-107. Brower was unable to enter the premises of the Big Dipper, and was unaware that Mr. Hoerner filed documents with the Washington Secretary of State, Washington Liquor and Cannabis Board, and State of Washington Business Licensing Service. RP 111-113, 117-118; Ex. P-5; Ex. P-7; Ex. P-27. All of these State agencies relied upon Mr. Hoerner's false filing to remove Brower.

In addition to creating the document to present to Spokane Police, Mr. Hoerner also had his attorney draft a letter to the Washington State Liquor Control Board on November 12, 2014, misrepresenting that Brower was not a member of the Big Dipper. Ex. P-7. On August 28, 2014, unbeknownst to Brower, Mr. Hoerner signed a document that he provided to the Washington Secretary of State transferring Brower's 50% interest to himself. Ex. P-5. These acts meet all nine elements of fraud as well, as these filings are a: (1) representation of existing fact, (2) that are material, (3) they are false, (4) Mr. Hoerner knew the representations were false, as he filed and signed all the necessary paperwork to create the Big

Dipper, get a business license and liquor license representing Brower was an equal member, (5) Mr. Hoerner intended the State agencies to rely upon his representations to remove Brower's interest in the Big Dipper, (6) the agencies were unaware of the falsity of Mr. Hoerner's representations, (7) the agencies relied on Mr. Hoerner's representations to remove Brower's interest, (8) the agencies had a right to rely upon Mr. Hoerner's representations as a member of the Big Dipper, and (9) Brower suffered damages in the loss of his interest in the Big Dipper, which is half the value of the entity.

By the time Brower was able to get documents pursuant to a public records request, he had been unilaterally removed from every agency as a member by Mr. Hoerner. Brower tried to correct the actions by Mr. Hoerner, however he was unsuccessful and it resulted in this lawsuit. RP 281-284; Ex. P-31 & P-32. The damages Brower suffered as a result of Mr. Hoerner's fraud, are stated above in "Section B" regarding the breach of contract claim, and were support by the expert testimony of Mr. Mayo. RP 196-209.

The trial court's finding that Mr. Hoerner did not commit fraud is not supported by substantial evidence, and it is error to deny Brower's claim of fraud and related damages. Based on the evidence, this Court should reverse the trial court's decision.

## **V. CONCLUSION**

The trial court's decision that Brower voluntarily disassociated himself from the Big Dipper and therefore is not entitled to declaratory relief reinstating his equal interest and damages is not supported by substantial evidence. The evidence shows that at no time did Mr. Hoerner honor and perform as Brower's business partner and equal member in the Big Dipper. Mr. Hoerner withheld financial information, created fraudulent documents to remove Brower's equal interest in the Big Dipper, and had Brower removed from the premises by police.

Mr. Hoerner presented no evidence of his performance, and no evidence that showed Brower consented to the removal of his equal interest in the Big Dipper. Further, Brower presented uncontroverted expert testimony regarding damages suffered as result of Mr. Hoerner's actions. This Court should reverse the trial court's decision based on unsupported findings. Brower's equal interest in the Big Dipper should be reinstated, Brower should be awarded damages in the amount of half the value of the business based on his claims for declaratory judgment, breach of contract and fraud.

DATED this 28<sup>th</sup> day of May, 2019.

ROBERTS | FREEBOURN, PLLC

s/ Chad Freebourn

CHAD FREEBOURN, WSBA #35624

Attorney for Troy Brower

### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28<sup>th</sup> day of May, 2019, I caused to be served a true and correct copy of the foregoing document to the following:

- HAND DELIVERY
- U.S. MAIL
- OVERNIGHT MAIL
- EMAIL

s/ Chad Freebourn  
CHAD FREEBOURN

# ROBERTS FREEBOURN

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**Appellate Court Case Number:** 36442-9  
**Appellate Court Case Title:** Troy Brower v. Daniel Hoerner and Augusta Hoerner  
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