

No. 86643-1

SUPREME COURT  
OF THE STATE OF WASHINGTON

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HUMPHREY INDUSTRIES, LTD.,

Appellant,

v.

CLAY STREET ASSOCIATES, LLC, et al.,

Respondents.

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**BRIEF OF RESPONDENTS**

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## I. INTRODUCTION

In 2004, Clay Street LLC (“Clay Street”) was unable to function because the principal of one of its members, George Humphrey (Mr. Humphrey) of Humphrey Industries (“Humphrey”), could not get along with the other members. Having already been subjected to an unhealthy dose of Mr. Humphrey’s obstreperous litigiousness, the members tried to dissolve the relationship. True to form, Mr. Humphrey refused to allow that to happen. He also refused to make a capital contribution needed to keep Clay Street afloat. Eight years later, Humphrey is still at war with its former business associates. Now it is challenging decisions the trial court made after this Court reversed statutory fee awards entered following a fair value trial and ordered a remand for reconsideration.

The dispute – and the current appeal – stem from Humphrey’s unsuccessful pursuit of a hugely disproportionate share of proceeds from the sale of Clay Street’s sole asset. When that effort failed, Humphrey embarked on a campaign to recover its “shockingly” high legal fees. That effort also failed, as Humphrey has been awarded roughly 10 percent of its expenses. Faced with these disastrous results, Humphrey has resorted to taking ever more extreme positions. On remand and on appeal, it argues that this Court sharply limited the trial court’s discretion – despite the Court’s clear recognition of that discretion. It has demanded prejudgment interest on the entire reversed judgment – despite unambiguous case law precluding such awards in circumstances like those at issue here. It argues

that liability should be imposed on LLC members – despite statutory language precluding that result. And it asks this Court to decide factual, legal, and equitable claims and issues never presented to the trial court, and to revisit issues already conclusively resolved against it.

Humphrey’s arguments to this Court are unreasonable, unsupported by evidence or authority, and in many cases, improperly before the Court. The trial court committed no error and exercised its discretion in a most reasonable manner. This Court should affirm the judgment in all respects and put an end to this protracted litigation.

## **II. RESTATEMENT OF ISSUES**

1. In this appeal from a judgment entered on remand, should the Court refuse to review issues, evidence, and previously-filed materials that were not resubmitted to the trial court on remand?

2. Should the Court decline appellant’s invitation to act as the finder of fact on claims raised for the first time on appeal?

3. When the Court reverses fee awards because they are based in part on improper evidence, orders a remand for reconsideration of the awards, and instructs that the decision whether to award fees for bad faith conduct is a matter for the trial court’s discretion, on remand does a trial court err by exercising its discretion and reinstating the reversed awards in whole or in part based on other, properly considered evidence?

4. Does a trial court abuse its discretion by denying prejudgment interest on a reversed judgment entered on attorney fee awards, when the

trial court must recalculate the awards using its discretion, thereby making the new judgment unliquidated until entered?

5. Is it error for a trial court to deny prejudgment interest on a reversed fee award judgment when there is no basis for finding the prior judgment creditors were unjustly enriched and the original judgment debtor elected to make direct payment rather than employing other, less risky RAP 8.1 stay of enforcement mechanisms?

6. Where a statutory scheme limits liability for fair value assessments and fee awards to LLCs and dissenting members, does a trial court err by refusing to enter judgment against individual members?

7. Would reassignment be warranted when the requesting party fails to make a showing of bias or lack of impartiality by the trial judge familiar with the case?

8. Where a dissenter fails to state any tenable basis for recovering fees incurred on appeal and misrepresents the nature of the proceedings below, should the dissenter's request be denied?

### **III. PROCEDURAL OBJECTIONS**

The purpose of an appeal is to correct a trial court error. Issues and claims of error not raised in a trial court thus ordinarily are not subject to review, as otherwise the trial court has no opportunity to correct its alleged errors and the opposing party has no opportunity to respond or shape its presentation to the trial court. RAP 2.5(a); *In re Audett*, 158 Wn.2d 712, 725-26, 147 P.3d 982 (2006). This fundamental premise

applies to the record on appeal as well, thus appellate courts rarely consider documents not presented to the trial court. *See* RAP 9.11.

Ignoring these rules, Humphrey relies heavily on claims, arguments, and materials that it failed to present to the trial court on remand. For example, it repeatedly cites Clerk's Papers prepared in connection with the first set of appeals, i.e., "2007 CP," but makes no showing that it called those materials to the trial court's attention on remand. The same is true of pages 727-969 of the "2011" Clerks Papers. Those documents, Sub Nos. 89, 238, and 277, were filed before the first set of appeals. Trial court judges perform remarkable feats, but it is unrealistic to assume the trial court here somehow remembered and considered materials filed years ago – particularly absent a specific citation by either party.

Humphrey also makes frequent citation to Clay Street's and the Rogels' appellate submissions – including a post-remand submission to this Court. Except for three pages of the Supplemental Brief Clay Street and the Rogels filed in this Court (CP 420-22, 1031-32), and their Motion for Reconsideration and Clarification (CP 46-71), Humphrey did not submit those materials to the trial court.

Clay Street and the Rogels therefore object to Humphrey's attempted use of materials not before the trial court on the 2011 remand as support for arguments made in this appeal. They respectfully ask the

Court to disregard the improper citations and all arguments and claims premised upon them.

#### IV. RESTATEMENT OF FACTS

##### A. Identity of Parties and Nature of the Case

Humphrey's appeals arise from rulings made in connection with an RCW 25.15.475 fair value proceeding Clay Street brought against Humphrey in July 2005. CP 90-91 (summary of claims presented at trial); CP 388-90 (petition). The action's narrow scope is not reflected in the caption, which includes as parties a number of entities and individuals named in an entirely different lawsuit that Humphrey filed against eight defendants in June 2005, in which Humphrey made claims against Clay Street, two other LLCs, and certain LLC members. CP 586-95. In April 2006, the trial court consolidated Humphrey's suit with Clay Street's valuation action. CP 381 (citing [Supp CP \_\_] Dkt. 125). By then, Humphrey's claims had largely been dismissed or referred to arbitration; the only claim left for trial was Clay Street's valuation action. CP 642-44, 646-49; *see also* CP 90-91, 381. The dismissed claims in the consolidated cases included ones unsuccessfully made for the second time against Joseph and Ann Lee Rogel (the Rogels) in connection with another LLC. *See* CP 111, 586-95. Nevertheless, and as was later determined in unchallenged findings, Humphrey arbitrarily and vexatiously refused to let the Rogels withdraw from the RCW 25.15.475 valuation action. CP 111-12, 115-18; *see also* CP 694-95.

## **B. Background Facts**

Clay Street's valuation action was necessitated by Humphrey's insistence on a hugely disproportionate share of proceeds from the sale of Clay Street's sole asset, a money-losing warehouse. *See* CP 90-102. Humphrey was one of four members of Clay Street, an entity whose members could not get along and which became dysfunctional as a result.<sup>1</sup> CP 91-93. When Humphrey refused to agree to sell the warehouse and allow Clay Street to dissolve, the other members followed their attorney's advice and, pursuant to RCW 25.15.400, took steps to merge Clay Street into a new entity. Humphrey then refused a capital call issued to each member to cover mortgage payments, taxes, and other expenses, and dissented from the merger after it took effect. CP 92-95; *see* Appendix 43.<sup>2</sup>

The warehouse sold for \$3.3 million in May 2005, resulting in the three non-dissenting members each receiving net proceeds of \$266,529.67. CP 100. Humphrey, however, demanded a \$605,799.69 payment based on Mr. Humphrey's unreasonable opinion – one without “substantial or credible evidence to support it” and “well outside the mainstream of reasonably-based valuations” – that the warehouse was actually worth

<sup>1</sup> Clay Street's members were Humphrey, ABO Investments, the Rogels, and their son, Scott Rogel. Gerry Ostroff, ABO Investments' principal, became the managing member after Mr. Humphrey resigned in 2003. CP 91-92.

<sup>2</sup> Appendix 43-49 are documents attached to Humphrey's brief. The documents are not in the Clerk's Papers, apparently because the declaration to which they were attached was designated inaccurately. *See* CP 1095-96.

\$4.1 million. CP 99, 101, 110. After a week-long trial necessitated by Humphrey's adherence to the incredible and unreasonable \$4.1 million valuation and consequent rejection of Clay Street's generous offers,<sup>3</sup> the trial court found the value of Humphrey's interest in the property on the effective date of the merger (December 7, 2004), to be \$231,947.17, an amount just \$50,754.53 more than Clay Street had already paid Humphrey and the exact amount Clay Street proposed at trial. CP 90, 102, 104. Had Humphrey accepted an offer Clay Street made in July 2005, it would have received a supplemental value payment of \$150,764.00 – over \$100,000 more than it recovered at trial and without incurring any legal expenses. CP 110. Had Humphrey accepted Clay Street's September 2006 CR 68 offer, it would have recovered even more and avoided incurring hundreds of thousands of dollars in legal fees. CP 110-11; *see* CP 120-26, 461-552.

In its post-trial findings, the trial court made clear just how baseless was Humphrey's valuation and its position at trial. Among other things, the court found no credible evidence supported the distressed,

<sup>3</sup> Clay Street and the Rogels recognize that evidence of Humphrey's rejection of Clay Street's attempts to resolve this matter short of trial is not admissible for statutory fee award purposes. However, Humphrey is now asking this Court to exercise its equitable powers to afford relief to Humphrey. Having done so, all of Humphrey's actions are fairly before the Court, as one must have clean hands to obtain equitable relief. *E.g., McAlpine v. Miller*, 51 Wn.2d 536, 541, 319 P.2d 1093 (1950). Humphrey's hands are decidedly unclean – a fact confirmed by the trial court having twice found it acted arbitrarily, vexatiously, and not in good faith; its unwarranted insistence on trial; and its principal's (Mr. Humphrey's) long history of fomenting expensive and unnecessary disputes with those with whom he does business. *E.g.* CP 106-18, 692-95; *see* CP 586-95. (Additional evidence of Mr. Humphrey's inequitable conduct is in the pre-remand materials at CP 789-821, 837-45).

forced, or fire sale allegations with which Humphrey attacked the May 2005 sales price basis for Clay Street's valuation. CP 95-100. It also found that Humphrey's self-calculated \$4.1 million valuation was "well outside the mainstream of reasonably-based valuations," did "not have substantial or credible evidence to support it," and in fact was "without support[.]" CP 99 at ¶¶ 39-40; CP 101 at ¶ 44. The court later confirmed the untenable nature of Humphrey's position with a never-challenged finding that "the real amount in controversy in this case was between \$50,000 to \$85,000." CP 113 at ¶ 2.

Humphrey moved for a fee award under RCW 25.15.480(2)(a) ("§ (2)(a)") and RCW 25.15.480(2)(b) ("§ (2)(b)").<sup>4</sup> CP 346-71. Recognizing the provisions' narrow scope, Humphrey sought fees only from Clay Street. *Id.* Clay Street moved for a fee award under § (2)(b) and for its post-September 2006 costs pursuant to CR 68. CP 249-259. The Rogels, elderly passive investor/members of Clay Street who Humphrey improperly refused to dismiss from the statutory valuation proceeding, also sought fees and costs under § (2)(b). CP 261-68. The trial court granted Clay Street's and the Rogels' motions, and denied

<sup>4</sup> RCW 25.15.480 provides that in a proceeding under RCW 25.15.475:  
"(2) The court may also assess the fees and expenses of counsel and experts for the respective parties, in amounts the court finds equitable:

(a) Against the limited liability company and in favor of any or all dissenters if the court finds the limited liability company did not substantially comply with the requirements of this article; or

(b) Against either the limited liability company or a dissenter, in favor of any other party, if the court finds that the party against whom the fees and expenses are assessed acted arbitrarily, vexatiously, or not in good faith with respect to the rights provided by this article."

Humphrey's. CP 106-18. Because the fee and cost awards greatly exceeded the additional amount Clay Street owed Humphrey for the warehouse, the trial court entered judgment against Humphrey in Clay Street's and the Rogels' favor. Although no enforcement action was pending or threatened, Humphrey chose to immediately pay Clay Street and the Rogels all amounts owed under the judgment. *See* CP 33.

Humphrey appealed the trial court's valuation (the core issue in this appraisal case) and its collateral fee award-related rulings that: (1) Clay Street substantially complied with the LLC Act despite having violated the 30-day time-of-payment requirement of RCW 25.15.460(1) by not paying Humphrey until the warehouse sold; (2) Clay Street did not act arbitrarily, vexatiously, or not in good faith; and (3) Humphrey did act arbitrarily, vexatiously, or not in good faith. Humphrey's appeal was fraught with procedural error, including the failure to assign error to any finding made in the fee award order. *See* CP 195-96.

The Court of Appeals affirmed the trial court on both the core valuation and the collateral attorney fee issues. CP 192-207. Regarding Clay Street's § (2)(b) award, the Court of Appeals held the trial court erred by considering Humphrey's rejection of Clay Street's CR 68 offer as evidence of bad faith. CP 205. However, other evidence of Humphrey's vexatious conduct – particularly, evidence that Humphrey rejected a supplemental valuation payment offered by Clay Street that exceeded the other members' payments and the amount ultimately awarded after trial

without reasonable cause to do so; that Mr. Humphrey was the source of the acrimony and dysfunctional relationships that led to Clay Street's demise; and Humphrey's excessive litigiousness – was sufficient to support the trial court's finding of vexatiousness. CP 205-06.

Humphrey capitulated on the core valuation issue and petitioned this Court for review of three issues pertaining just to the collateral fee rulings: (1) did the Court of Appeals err in affirming the trial court's substantial compliance finding; (2) did the Court of Appeals err in affirming the § (2)(b) fee awards despite having rejected the CR 68 evidence; and (3) should the Court of Appeals have ordered a "*remand to permit 'a full and fair opportunity to develop facts' relevant to the decision on vexatiousness.*" CP 215 (emphasis added). In support of the latter request, Humphrey argued:

An appellate court "may affirm a lower court's ruling on any grounds" but only if those are "adequately supported in the record." "*[T]he underlying assumption of the general rule permitting affirmance of the trial court upon a correct, alternative ground not considered by the trial court "is, of course, that the parties had a full and fair opportunity to develop facts relevant to that decision. Where this opportunity has not been available, the proper resolution of the appeal is not affirmance but remand."* Bernal v. American Honda Motor Co., 87 Wn.2d 406, 414, 553 P.2d 107 [(1976)] (citation omitted).

CP 227-28 (underlining by Humphrey; italics added). Humphrey claimed (wrongly) that the trial court had awarded § (2)(b) fees based solely on its rejection of Clay Street's CR 68 offer, accused the Court of Appeals of improperly combing the record to find other support for the trial court's

vexatiousness finding, and complained that this process deprived it of its constitutional right of access to the courts. CP 224, 228-33.

Humphrey repeated its remand request in its Supplemental Brief, asking this Court to “*remand ... for factual determinations regarding Humphrey’s alleged vexatiousness not tainted by the inadmissible CR 68 offer and other errors[.]*” CP 294 (emphasis added); *accord id.* ([t]his Court must ... remand to the trial court for a determination on ‘vexatiousness’ not predicated on legal error.”). Humphrey’s arguments and requests for relief necessarily dictated that the scope of Clay Street’s and the Rogels’ response would be limited. Thus they focused on the propriety of the Court of Appeals’ decision not to order a remand (based on evidence other than the CR 68 offer and primarily on Humphrey’s rejection of Clay Street’s first supplemental value payment offer) and whether its affirmance of the trial court’s § (2)(b) award deprived Humphrey of its day in court. *See* CP 421-22. Given the procedural posture and remedy sought, the parties never squarely addressed whether a vexatiousness finding can properly be premised on a dissenter adhering to a baseless valuation figure throughout the appraisal litigation, and the issue thus was never squarely before the Court.

This Court reversed the lower courts’ substantial compliance determinations and remanded for the trial court to consider whether, “given Clay Street’s failure to substantially comply with the LLC Act,” a § (2)(a) award of fees to Humphrey was appropriate. *Humphrey Indus.,*

*Ltd. v. Clay Street Assocs., LLC*, 170 Wn.2d 495, 507, 242 P.3d 846 (2010) (“Op.”). It additionally held that the trial court erred not only by using Humphrey’s rejection of the CR 68 offer to support its arbitrary, vexatious, not in good faith finding, but also by considering evidence of Humphrey’s pre-litigation conduct and its conduct in other suits against Clay Street and the Rogels. *Id.* at 508. The Court reversed the fee awards against Humphrey in favor of Clay Street and the Rogels, as they derived in part from an error of law as to what evidence may properly be considered on a § 2(b) request and thus were based on “untenable grounds.” *Id.* at 507-08. Accordingly, the Court ordered a “remand for reconsideration of the attorney fee award.” *Id.* at 498. It also awarded Humphrey its appellate fees and costs based on Humphrey’s “prevailing party” status on the § (2)(a) substantial compliance issue. *Id.* at 509.

Clay Street and the Rogels asked the Court to reconsider the “prevailing party”<sup>5</sup> fee award and the imposition of strict evidentiary limits on fee decisions made under § (2)(b). They also asked the Court to clarify “that on remand . . . the trial court may also consider” whether to award fees to Clay Street and/or the Rogels, and to clarify that Humphrey is not entitled to an award of statutory fees against individual LLC members. CP 50-51, 62-65, 68-69. The Court issued a one sentence order denying “the motion for reconsideration and clarification[.]” CP 3.

<sup>5</sup> Pursuant to RAP 2.5(c)(2) and in light of Humphrey’s request for an additional “prevailing party” fee award, Clay Street reiterates its opposition to any fee award made under RCW 25.15.480 based solely on “prevailing party” status. *See infra* at 43-44.

Humphrey's assertions notwithstanding, the Court's refusal to clarify establishes only that the Court believed clarification of those two issues was unnecessary.

The Clerk then awarded Humphrey less than half the fees it requested, finding Humphrey's legal expenses "shocking," CP 124, both in the number of attorney hours and the hourly rates charged. CP 120-26. Perhaps unaware the caption on appeal did not accurately identify the remaining involved parties, the Clerk directed that "the award amount shall be paid by the Respondent, Clay Street Associates, LLC, et. al." CP 126. On May 23, 2011, the Court entered a supplemental judgment against "Respondents, Clay Street Associates, LLC, et al pursuant to the Clerk's ruling on Costs." CP 144. The "Respondents" against whom judgment was entered included all defendants named in Humphrey's long inactive June 2005 lawsuit – including two LLCs other than Clay Street, and entities and individuals that were not Clay Street members. CP 144.

### **C. Proceedings on Remand**

In vacating the trial court's fee awards to Clay Street and the Rogels and ordering a "remand for reconsideration of the fee award," Op., 170 Wn.2d at 498; this Court made clear that whether to enter any award on remand was a matter within the trial court's discretion:

[E]ven if Clay Street *did* fail to substantially comply with the 30 day statutory deadline, or if Humphrey *did* act arbitrarily, vexatiously, or not in good faith, the opposing party is not automatically *entitled* to an award of attorney fees. ***Rather, the decision to award attorney fees rests in the discretion of the trial court.***

Op., 170 Wn.2d at 507 (bold italics added). However, based on excerpts from a handful of other paragraphs in the 19-page majority opinion, Humphrey took the position that this Court had directed the trial court that it could not award any fees to Clay Street or the Rogels. Thus began another round of disputes.

Humphrey asked for judgment in the amount of Clay Street's reversed fee award. CP 32-36. Although it asked the trial court to enter that judgment against Clay Street, CP 36, 41; it named as judgment debtors Clay Street, Scott Rogel, ABO Investments, and Gerry Ostroff (who was not even a Clay Street member, CP 91-92), CP 39. Humphrey also asked the Court to award prejudgment interest accruing from November 19, 2007, the day Humphrey voluntarily paid Clay Street, on the full amount of the reversed award. CP 33, 36, 38-41. Humphrey additionally sought judgment against the Rogels for the money it had paid on their reversed § (2)(b) judgment, plus prejudgment interest, CP 34, 38-41; and against Clay Street, the Rogels, Scott Rogel, ABO Investments, and Gerry Ostroff, for the \$98,191 appellate fee and cost award, CP 39.

Clay Street and the Rogels objected to Humphrey's motion as premature given Clay Street's, the Rogels', and Humphrey's intent to move for fee awards. CP 72-83. They pointed out that recalculating the underlying judgment would render the final judgment amount unliquidated and not subject to prejudgment interest, and they challenged Humphrey's

attempt to make individuals and entities who were not parties to the statutory valuation proceeding into judgment debtors. *Id.*

Humphrey replied by arguing (as it does here) that the trial court could not award fees to Clay Street and the Rogels because this Court precluded any such award when it said:

Evidence of conduct in settlement negotiations ... is inadmissible to prove liability for or invalidity of the claim or its amount. The trial court should not have relied on Humphrey's pre-litigation conduct or conduct in other suits against Clay Street and the Rogels in awarding fees against Humphrey.

...

*Even if the evidence was admitted for a permissible purpose, given the circumstances of this case, the record does not establish that Humphrey's actions were arbitrary, vexatious, and not in good faith. If any acts were in bad faith, they were committed by the other members of Clay Street, who sought to bypass the dissenters' rights statute and section 8.1 of their own LLC Agreement, which specifies that the property, "shall not be sold, conveyed, and/or assigned without the mutual consent of each of the members...."*<sup>6</sup>

We reverse the trial court's award of attorney fees against Humphrey and in favor of the other parties, based as it was on "untenable grounds."

Op., 170 Wn.2d at 508 (emphasis added) (quoted in part at CP 132).

Humphrey also argued that because (in Humphrey's opinion) the Supreme Court had ruled that Clay Street and the Rogels could not recover any fees, the amount it was due was liquidated and thus subject to

<sup>6</sup> Although Humphrey argues otherwise, the Court's observation about Clay Street's "bad faith" was of little import. Indeed, Humphrey described it as only a "rather pointed hint." CP 436. Moreover, since the majority unambiguously held that pre-litigation conduct cannot support a § (2)(b) award, and since the alleged "bad faith" acts described by the Court occurred pre-litigation, those acts were irrelevant to a § (2)(b) fee award determination. Op., 170 Wn.2d at 508.

prejudgment interest. CP 134-35. It additionally argued that the trial court should enter judgment against Clay Street members *and their principals* because this Court had denied Clay Street's and the Rogels' request for clarification on that issue, and because, it alleged, "Clay Street was an inactive entity when this suit was filed." CP 135. Humphrey provided no evidentiary support for the latter allegation. *Id.*

Over the next several months, the parties repeated these themes in more than a dozen additional filings submitted to the trial court on remand. *See* CP 684-86. Clay Street asked the trial court to reconfirm its never-challenged CR 68 cost award of \$24,961.55, and to reinstate some or all its § (2)(b) fee award based on Humphrey having forced a valuation trial at which the trial court accepted Clay Street's valuation and wholly rejected Humphrey's as baseless. CP 154-165, 423-28; *see* CP 99, 102, 104. The Rogels asked for reinstatement of their § (2)(b) fee and cost award for the same reason and also because Humphrey had refused to dismiss them from the statutory valuation action to which they were not proper parties. *Id.* Humphrey continued to argue that the trial court had no discretion to award fees to Clay Street and the Rogels, that Humphrey was entitled to prejudgment interest (on the full amount of the reversed awards),<sup>7</sup> and that judgment should be entered against LLC members and

<sup>7</sup> Long after oral argument on the parties' fee motions, Humphrey revised its prejudgment interest request by asking for interest on the reversed award amount plus the fair value award that had been set off from Clay Street's fee and cost award. *See* CP 560, 1086.

non-member principals. It did not, however, make many of the arguments it is now making to this Court.

For example, Humphrey now complains that in awarding fees to Clay Street and the Rogels, “the trial court failed to address” RAP 12.2. App. Br. at 25. Humphrey never asked the trial court to consider that rule. Indeed, it never mentioned it. CP 130-35, 405-17, 433-38, 970-74, 1098-1112.

Humphrey also now argues it is entitled to prejudgment interest because the \$50,754.63 “fair value award” (\$60,588.22 with interest) was never modified and the RESTATEMENT OF RESTITUTION § 74 (1937) supports prejudgment interest awards. App. Br. at 28-33. Humphrey did not make these arguments in its briefs to the trial court. Instead, Humphrey argued it was entitled to interest on the entire reversed awards and the valuation set off since (according to Humphrey) the trial court’s lack of discretion to make offsetting awards to Clay Street and the Rogels rendered the amounts at issue liquidated. CP 35-36, 133-35, 560, 971.

Certain of Humphrey’s arguments for imposing liability on individual Clay Street members and/or their non-member principals are also newly formulated. Relying largely on “2007 CP” citations, i.e., documents Humphrey did not cite to the trial court on remand, Humphrey now argues principal/member liability is warranted because Clay Street’s members violated duties imposed on trustees, made unauthorized distributions, and cannot meet solvency requirements. App. Br. at 33-39.

Humphrey did not make those arguments below. CP 135, 433-38, 972, 1112.

Exercising remarkable patience, the trial court (the Hon. Harry McCarthy) carefully considered the more than 1,000 pages of materials submitted by the parties and gave Humphrey multiple opportunities to explain its positions and document its fees. CP 449-50 (order asking Humphrey to segregate fees); CP 439 (reference to Judge McCarthy's acceptance of and call for a response to Humphrey's unsolicited post-hearing submission); CP 684-97 (final order listing the 15 briefs and related exhibits considered on remand). In a thoughtful decision that carefully considered this Court's November 2010 decision, the applicable statutes, and previously entered findings that now are verities; and which recognized the considerable discretion this Court acknowledged RCW 25.15.480 affords trial courts; Judge McCarthy ruled:

- **As the Supreme Court observed, “the decision to award attorney’s fees [under the LLC Act] rests in the discretion of the trial court.”** CP 688.
- **Humphrey was entitled to a § (2)(a) award** for fees and costs incurred obtaining the uncontested order confirming that Clay Street's post-sale payment violated the time-of-payment requirement of RCW 25.15.460. Humphrey's fees and costs for that effort totaled \$7,479.86. CP 688-92.
- **Reinstating the modest (~ \$34,000) § (2)(b) award to the Rogels was warranted** since (as previously established in unchallenged findings) Humphrey had no valid reason to keep the Rogels in the lawsuit once it narrowed to an RCW 25.15.475 valuation. Humphrey's denial of the Rogels' request to dismiss them from the lawsuit thus was arbitrary, vexatious, and not in good faith. CP 694-95.

- **Reinstatement of Clay Street’s CR 68 cost award was warranted** because it had never been challenged. CP 694.
- **A reduced § (2)(b) fee award to Clay Street was warranted** because (as previously established in findings that were now verities), Humphrey litigated this case based on an unreasonable, baseless valuation claim unsupported by any credible evidence. Such conduct is grounds for awarding § (2)(b) fees. However, given the reviewing courts’ rulings on the inadmissibility of other evidence of Humphrey’s bad faith, Clay Street’s prior award would be reduced by 40 percent. CP 692-93.
- **Humphrey was not entitled to prejudgment interest** because (1) the amount of the reversed fee awards that Humphrey would recover was subject to discretionary decisions and therefore not liquidated, and (2) prejudgment interest is not appropriate when a trial court judgment is reversed and a new judgment must be entered. CP 695-96.
- **Only the LLC and dissenter are appropriate parties to a judicial valuation.** CP 694. Clay Street thus was the only judgment debtor for the amount due Humphrey after all additions and offsets were calculated. CP 696; *see* CP 699 (\$165,781.53 judgment for Humphrey).

Humphrey’s response was two-pronged. It petitioned this Court for a “RAP 12.9(a) Determination of Compliance with Mandate” and also sought direct appellate review by this Court. By Order dated November 30, 2011, the Court denied the Determination of Compliance motion, but agreed to retain the appeal. In its appeal brief, Humphrey argues the trial court exceeded its powers by awarding fees to Clay Street and the Rogels; abused its discretion by refusing Humphrey’s request for prejudgment interest; and erred by refusing to enter judgment against Clay Street members and their principals. Humphrey does not challenge the trial court’s findings or legal conclusions supporting the § (2)(b) awards or the

amount of Humphrey's § (2)(a) award. App. Br. at 4-6, 11 n.13. The findings are verities<sup>8</sup> and the conclusions are not in issue.

As it did in its first appeal, Humphrey disregards procedural requirements. It failed to assign error to the trial court's findings. It relies on documents it did not cite or submit to the trial court on remand (*e.g.*, all "2007 CP" citations, and 2011 CP 727-969); arguments it did not make to the trial court on remand; arguments the Court of Appeals rejected and for which Humphrey sought no additional review; and even arguments characterizing this action as one based on the LLC Agreement – a characterization Humphrey knows is untrue. CP 90-91;<sup>9</sup> *see* CP 646-49 (ordering arbitration of claims based on LLC Agreement). Humphrey asks the Court to ignore clear statutory language as well as Humphrey's own arguments and concessions. And Humphrey inappropriately asks this Court to assume the role of a trial court by making evidentiary determinations and granting equitable relief. Clay Street and the Rogels respectfully urge this Court to deny Humphrey's requests and affirm the trial court's carefully considered rulings.

<sup>8</sup> *E.g.*, *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002).

<sup>9</sup> Indeed, in one of the documents not cited on remand but which Humphrey nonetheless included in the 2011 Clerks Papers, Humphrey conceded "[t]he pending trial has a very limited scope: the judicial appraisal of the fair value of Humphrey's interest in defendant Clay Street Associates, L.L.C. ("Clay Street") pursuant to the dissenters' rights statute." CP 749.

## V. ARGUMENT

### A. The Trial Court Properly Exercised Its Discretion in Making § (2)(b) Awards to Clay Street and the Rogels

#### 1. The Trial Court's Bases for the § (2)(b) Awards Are Legally Sound and Unchallenged

Humphrey challenges the trial court's § (2)(b) awards to Clay Street and the Rogels on just one ground, namely, that this Court took away from the trial court all discretion to make any such awards. By this all-or-nothing challenge, Humphrey concedes the § (2)(b) award amounts are reasonable and that the evidence and arguments presented to the trial court support the awards. Nevertheless, given Humphrey's long-standing disregard of procedural rules, including rules limiting the scope of a reply, the bases relied on by the trial court in making the § (2)(b) awards are summarized below.

With respect to Clay Street, the trial court relied on its post-trial findings (now verities<sup>10</sup>) that Humphrey's dogged adherence to a baseless valuation figure forced an unnecessary trial at which no more than

<sup>10</sup> Humphrey never assigned error to the findings entered in support of the 2007 fee award. CP 195-96. Those unchallenged findings established Humphrey's unreasonable advocacy of a baseless valuation figure. CP 110 (incorporating CP 99-100 ¶¶ 39-41); *see* CP 113 ¶ 1 (incorporating all prior findings, CP 90-101). Further, although Humphrey did assign error to trial court valuation findings that Humphrey's \$4.1 million valuation was "well outside the mainstream of reasonably based valuations," lacked "substantial or credible evidence to support it," and was "without support;" the Court of Appeals left those findings intact and Humphrey did not ask the Supreme Court to review that decision. CP 192-207, 215; Op., 170 Wn.2d at 501. As a result, Humphrey waived further review of those findings and they are verities. *Robel*, 148 Wn.2d at 42 (unchallenged findings are verities); *Garth Parberry Equipment Repairs, Inc. v. James*, 101 Wn.2d 220, 225 n.2, 676 P.2d 470 (1984) (petitioner's failure to raise issues raised below in its petition for review resulted in their waiver).

\$50,000 to \$85,000 was in dispute. CP 692-93; *see* CP 99-110, 113. In so doing, the trial court acted in accord with legislative history and case law interpreting similar legislation. As stated in the Legislature’s Official Comment to the virtually identical provision in Washington’s Model Business Corporation Act, trial courts were given the power to impose fee awards for arbitrary, vexatious, or not-in-good-faith conduct “to increase the incentives of both sides *to proceed in good faith ... to attempt to resolve their disagreement without the need of a formal judicial appraisal[.]*” Comments, WASH. BUSINESS CORP. ACT § 13.31, 2 Senate Journal, 51st Leg., Reg. Sess. at 3093 (Wash. 1989) (emphasis added).<sup>11</sup> Thus, “*if the dissenter’s supplemental demand is unreasonable, the dissenter runs the risk of being assessed litigation expenses....*” Comments, *supra* § 13.28, 2 Wash. Senate J. at 3092 (emphasis added).

Courts in jurisdictions with similar or identical provisions agree that dogged adherence to a self-determined baseless buyout figure can support an award under provisions such as § (2)(b). *See, e.g., Columbus Mills, Inc. v. Freeland*, 918 F.2d 1575, 1576-77, 1579-80 (11th Cir. 1990) (where corporation offered \$43.00 per share offer based on publicly traded stock price, dissenter’s demand of \$85.00 was arbitrary, vexatious or not in good faith); *Santa’s Workshop v. A.B. Hirschfeld Press, Inc.*, 851 P.2d

<sup>11</sup> The Comments were promulgated by the Washington State Bar Association’s Corporate Act Revision Committee and published in the Senate Journal as the official legislative history of the Business Corporation Act. 1 Stewart M. Landefeld & Eric A. DeJong, WASH. BUSINESS ENTITIES: LAW & FORMS § 1.01 n.5 (2d ed. 2011). They are reprinted in the WSBA, WASH. BUSINESS CORP. ACT (RCW 23B) SOURCEBOOK.

264, 266-67 (Colo. App. 1993) (dissenter’s failure to “relate its demand to any recognizable method of ... valuation,” relevant to whether conduct was arbitrary or vexatious); *Montgomery Cellular Holding Co. v. Dobler*, 880 A.2d 206, 229 (Del. 2005) (in assessing bad faith, it is appropriate for court to consider whether a party adhered to a baseless valuation figure during the appraisal litigation). When one pursues an appraisal “without reasonable cause to believe that there can be a greater recovery *than the amount offered by the corporation*,” the court can find that party acted arbitrarily, vexatiously or not in good faith and hold it liable for its opponent’s fees. *Application of Deutschmann*, 281 A.D. 14, 22-23, 116 N.Y.S.2d 578, 585 (1952) (emphasis added); *accord Leighton v. Am. Tel. & Tel. Co.*, 397 F. Supp. 133, 137-38 (S.D.N.Y. 1975). That is exactly what the trial court did here in premising a § (2)(b) award on Humphrey having forced a trial by demanding a disproportionate share of the warehouse proceeds based on Mr. Humphrey’s incredible, unsupported, and unreasonable valuation. CP 692-94; *see* CP 160-62 (Clay Street’s and the Rogels’ brief to the trial court on remand). Tellingly, Humphrey makes no argument that conduct such as the trial court found it engaged in does not support a § (2)(b) fee award.

Neither does Humphrey argue that a § (2)(b) award is not warranted when, as here, a dissenter refuses to dismiss passive investor members from a statutory appraisal action. As the trial court twice found – in findings to which Humphrey has never assigned error – even though

Humphrey acknowledged it had no claim against the Rogels, it refused to dismiss them from the valuation proceeding. Instead, it found that Humphrey “required the elderly couple to defend and sit through a trial that did not involve them.” CP 694; *see also* CP 112 (similar unchallenged 2007 finding). “This conduct ... was potent evidence of Humphrey’s willingness to act ‘vexatiously, arbitrarily and not in good faith’” against the Rogels. CP 694.

## **2. The Trial Court Properly Interpreted This Court’s Opinion**

Rather than challenging the legal and evidentiary bases for the § (2)(b) fee awards, Humphrey argues that this Court’s November 2011 opinion directed that the trial court could not award § (2)(b) fees to Clay Street or the Rogels. The trial court disagreed with that interpretation. In so doing, it read the decision correctly. The decision nowhere says the trial court could not award Clay Street and the Rogels § (2)(b) attorney fees if it relied on admissible evidence. That is dispositive. When a reviewing court intends to limit the scope of remand to a specific issue, “*it will give instructions to that effect in unmistakable language.*” *Godefroy v. Reilly*, 140 Wash. 650, 657, 250 P. 59 (1926) (emphasis added). The opinion nowhere unmistakably limited remand to an assessment only of Humphrey’s right to fees. To the contrary, the Court opined that “even if ... *Humphrey did* act arbitrarily, vexatiously, or not in good faith, the opposing party is not automatically entitled to an award of attorney fees”

and “*the decision to award attorney fees rests in the discretion of the trial court.*” Op., 170 Wn.2d at 507 (bold italics added) (quoted by trial court at CP 688). It is telling that Humphrey does not address this statement or the unmistakable direction rule.

Nor does Humphrey explain how its interpretation of the opinion survives the uncontested fact that had the Supreme Court made the discretion-limiting decision Humphrey asserts, it would have been granting relief very different than that Humphrey requested *without affording Clay Street and the Rogels an opportunity to respond* – an approach reviewing courts are loathe to take. In particular:

(1) Humphrey asked this Court to remand the § (2)(b) awards because “[t]he record below is complex, convoluted, and voluminous. It was far too complex and fact-intensive to allow the Court of Appeals [or, by necessary implication, the Supreme Court] to randomly comb through the record” to make a vexatious conduct assessment. CP 293-94 (emphasis added); *see also* CP 215, 227-28; and

(2) Clay Street and the Rogels thus had no reason to (and did not) address whether the evidence of Humphrey’s adherence to a baseless valuation figure and unreasonable payment demand, and its refusal to dismiss the Rogels, would support § (2)(b) awards. *See* CP 420-22, 1031-32. Had Humphrey asked the Court to decide whether, as a matter of law, evidence of a dissenter’s adherence to a baseless valuation figure or refusal to dismiss an uninvolved party could support a finding of arbitrary

vexatious, or not in good faith conduct, Clay Street and the Rogels would have submitted very different briefs.<sup>12</sup>

These facts rebut Humphrey's self-serving interpretation of the opinion. Humphrey knows that. Its interpretation is based on the Court's comments that evidence of Humphrey's pre-litigation and conduct in other suits "did not establish that Humphrey's actions were arbitrary, vexatious, and not in good faith;" and its observation that "[i]f any acts were in bad faith, they were committed by the other members of Clay Street."<sup>13</sup> The comment regarding Humphrey's conduct pertained to evidence the Court had deemed improper, not to Humphrey's adherence to a baseless valuation; and Humphrey admits the comment about Clay Street was just a "*rather pointed hint* regarding Clay Street's bad faith." CP 436 (emphasis added). A discussion of disallowed evidence does not unmistakably bar consideration of proper evidence and a "*pointed hint*" is not an unmistakable direction and certainly is not binding on a trial court.

As Humphrey's "*pointed hint*" admission recognizes, however, only Clay Street's and the Rogels' interpretation of the Court's decision is consistent with the rule that reviewing courts do not retry factual issues or

<sup>12</sup> And, presumably, the Court would have addressed whether adherence to a baseless valuation figure is grounds for awarding § (2)(b) fees. Had the Court intended to hold that such adherence is not grounds for a § (2)(b) award, it likely would have explained its reasoning, since its ruling would have contravened clear legislative intent and analogous case law. *See supra* at 21-23. As the trial court found, those authorities establish that Humphrey's stubborn insistence on a trial of its baseless valuation claim is precisely the kind of conduct that warrants a § (2)(b) award. CP 692-93.

<sup>13</sup> Op., 170 Wn.2d at 508.

examine the adequacy of the record unless a finding of fact has been challenged.

As explained ... many times ... we do not retry factual issues, and our examination of the record where a finding of fact is challenged, goes no further than to determine whether there is substantial evidence to sustain that finding.

*Govett v. First Pac. Inv. Co.*, 68 Wn.2d 973, 413 P.2d 972 (1966). Here, there were no challenges in the Supreme Court to the trial court's findings about Humphrey's adherence to a baseless valuation figure and its refusal to dismiss the Rogels from a trial that did not involve them. CP 214-15. Humphrey's insistence that this Court nevertheless explored issues and findings beyond those presented to it and awarded relief beyond that requested, reflects a fundamental misunderstanding of the scope of review. Under RAP 13.7(b) "the Supreme Court will review only the questions raised in the ... petition for review ... unless the Supreme Court orders otherwise upon the granting of the ... petition." This Court expressly cited that rule in noting its limited review in this case. Op., 170 Wn.2d at 501. Humphrey's arguments theorizing that this Court nevertheless exercised its inherent powers to make unrequested fact assessments, disregards that dispositive citation.

In sum, the trial court did not misinterpret this Court's decision or violate the Mandate by entering § (2)(b) awards in Clay Street's and the Rogels' favor. This is not a case of a trial court ignoring clear instructions from the reviewing court. It is instead one where the trial court carefully analyzed the governing decision as a whole and in light of the issues

presented on appeal, looked to findings which were verities, and relied on this Court's express recognition that "the decision to award attorney fees rests in the discretion of the trial court." CP 688 (quoting Op., 170 Wn.2d at 507). The trial court did not violate the Mandate by awarding § (2)(b) fees to Clay Street and the Rogels.

**3. The Trial Court Did Not Violate the Constitution or Any Other Doctrine By Interpreting the Court's Decision Consistently With Legislative Intent**

Humphrey additionally argues that the trial court erred by failing to address RAP 12.2 (a rule Humphrey never mentioned to the trial court), constitutional restrictions, and the law of the case doctrine. App. Br. at 23-26. It also accuses Clay Street and Rogels of urging the trial court to disregard the Court's decision and thereby ignore constitutional limits and the law of the case doctrine. *Id.* None of these assertions are well taken.

On remand, all parties urged the trial court to adopt their interpretation of this Court's decision. Among other things, Clay Street and the Rogels explained that this Court's denial of their motion for clarification did not (as Humphrey argued) indicate the Court agreed with Humphrey's position. Instead, that ruling meant only that "[e]vidently the Supreme Court believed its opinion was sufficiently clear[.]" CP 159. Based on that interpretation, Clay Street and the Rogels "respectfully submit[ted] that in so doing, the Supreme Court confirmed" that its evidentiary rulings did not limit the trial court's discretion to consider all allowable evidence and, if warranted, to award them § (2)(b) fees. CP

159-60. That Humphrey misleadingly omits this language from the excerpt it quotes on page 23 of its brief speaks volumes.

Absent any unmistakable direction from this Court limiting the trial court's discretion to consider appropriate evidence on remand, and given Humphrey's "*pointed hint*" concession, Humphrey's assertions that the trial court unconstitutionally or otherwise impermissibly overrode the Court's decision are untenable. The trial court carefully considered this Court's decision and adhered to what it determined to be the Court's intent. That it did so is confirmed by the trial court's listing of this Court's decision as the first matter considered in the attorney fee order, CP 684; and its repeated reference to the decision in its specific rulings, CP 687, 688, 690, 692, 693, 695.

In any event, Humphrey's theories all rely on a determination by this Court that its discussion of the parties' relative bad faith was an evidentiary finding that conclusively precluded the trial court from awarding fees to Clay Street and the Rogels for any reason. For the reasons stated above, that is simply not the case. Thus not only did the trial court commit no error by failing to specifically address Humphrey's theories (argued or not), it committed no error in awarding § (2)(b) fees to Clay Street and the Rogels.

**B. The Trial Court Did Not Abuse Its Discretion by Rejecting Humphrey's Request for Prejudgment Interest**

Humphrey relies on two theories to support its claim the trial court abused its discretion by denying prejudgment interest: (1) the amount in issue was liquidated; and (2) a newly developed argument that RAP 12.8 and/or other equitable principles require Clay Street and its members to disgorge amounts by which they were unjustly enriched, and a disgorgement remedy necessarily includes interest running from the date of the original payment. Humphrey's arguments are again without merit.

**1. Any Amounts Due Humphrey Were Not Liquidated**

The rules applicable to Humphrey's first theory are not in dispute. Prejudgment interest is awarded only on liquidated amounts. If the amount owed cannot be ascertained without the exercise of discretion, the amount is not liquidated. *E.g., Hansen v. Rothaus*, 107 Wn.2d 468, 472-73, 730 P.2d 662 (1986). "Awards reversed on review do not bear interest ... where the court 'has reversed the trial court judgment and directed that a new money judgment be entered ...'." *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 373, 798 P.2d 799 (1990) (quoting *Fulle v. Boulevard Excavating, Inc.*, 25 Wn. App. 520, 522, 610 P.2d 387, *review denied*, 93 Wn.2d 1030 (1980)). And, lastly, attorney fee awards are discretionary, are not liquidated, and are not subject to prejudgment interest. *E.g., Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 687-88, 15 P.3d 115 (2000); *Flint v. Hart*, 82 Wn. App. 209, 225-26, 917 P.2d 590 (1996).

These rules apply here and require affirmance of the trial court's denial of prejudgment interest. This Court reversed the fee award judgment in Clay Street's and the Rogels' favor and directed the trial court to exercise its discretion in reconsidering the fee award. Op., 170 Wn.2d at 498, 507. That required the trial court to make new findings as to reasonable attorney fees and, necessarily, to then enter a new judgment. The trial court followed the Court's directions and entered a new judgment reflecting its discretionary decisions whether to award any fees at all and if so, the amount of § (2)(a) fees due Humphrey and/or the amount of § (2)(b) fees due Clay Street and the Rogels. CP 684-700. Under the authorities cited above, these circumstances established that the amount of Humphrey's reimbursement was unliquidated, and so no prejudgment interest was due. CP 695-96; *see Hansen*, 107 Wn.2d at 472-73. They also established that this case is governed by the no prejudgment interest on reversed awards rule, CP 695-97; *see Fisher*, 115 Wn.2d at 373-75; *Fulle*, 25 Wn. App. at 522; as well as the rule that attorney fee awards are not subject to prejudgment interest, *see Weyerhauser*, 142 Wn.2d at 687-88; *Flint*, 82 Wn. App. at 225-26.

Humphrey nevertheless claims its reimbursement was a liquidated sum because this Court's opinion of the significance of the improperly considered evidence and its "hint" about Clay Street's bad faith precluded the trial court from exercising its discretion to award fees to Clay Street or

the Rogels. App. Br. at 27-28; *see* CP 436. For the reasons explained in the preceding section, that is incorrect.

On appeal, Humphrey seemingly recognizes that it overreached in the trial court and argues that it was at least entitled to prejudgment interest on the never-modified supplemental fair value award. App. Br. at 28-30. But Humphrey never asked the trial court to enter such an order, which would have accrued interest at 7.75 percent, not the 12 percent it demanded. CP 38-42, 102, 104, 560, 1084-93. Having failed to do so below, Humphrey cannot do so now. As RAP 2.5(a) and countless cases make clear, absent exceptional circumstances a party cannot make arguments and raise issues on appeal that were not presented to the trial court. RAP 2.5(a); *Audett*, 158 Wn.2d at 725-26; *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). That is particularly true when, as here, the party so doing seeks a reversal. *State v. Peterson*, 29 Wn. App. 655, 663, 630 P.2d 480 (1981) (“[w]hile the trial court may be affirmed ... on any theory, it should not be reversed on a theory not raised”), *aff’d on other grounds*, 97 Wn.2d 864, 651 P.2d 211 (1982).

## **2. Humphrey Is Not Entitled to Equitable Relief**

The no-new-theory-on-appeal rule is also dispositive of Humphrey’s newly formulated equity-based arguments regarding prejudgment interest. Humphrey never referenced RAP 12.8 to the trial court, nor did it claim an equitable right to prejudgment interest. Having failed to present those arguments to the trial court, Humphrey cannot do so

now. RAP 2.5(a); *Audett*, 158 Wn.2d at 725-26; *Smith*, 100 Wn.2d at 37; *Peterson*, 29 Wn. App. at 663.

Regardless, Humphrey's equity-based arguments are premised on a misapprehension of the law, and demonstrate once again its penchant for overreaching. Prejudgment interest is awarded only when one party retains funds that rightfully belong to another and the amount at issue is liquidated. *E.g.*, *Mahler v. Szucs*, 135 Wn.2d 398, 429-30, 957 P.2d 632, 966 P.2d 305 (1998). Moreover, the general rule is that "[a]wards reversed on review do not bear interest." *Fisher*, 115 Wn.2d at 373. These rules apply whether a party is invoking legal or equitable principles to support its prejudgment interest request. For the reasons stated above, their application here necessitates affirmance of the trial court's ruling.

Moreover, Humphrey's request that the Court apply equitable principles in its favor is disingenuous. Humphrey is not an innocent party wrongly deprived of its funds. Mr. Humphrey's inability to get along with other Clay Street members forced the merger that ultimately led to this litigation. CP 90-94, 108-10. Humphrey's refusal to accept Clay Street's generous supplemental payment offers and its dogged adherence to a baseless valuation figure it hoped would yield a windfall resulted in Humphrey expending roughly a million dollars to recover just over \$50,000; and, following its first appeal, a § (2)(a) fee award of less than \$8,000. CP 94-118, 684-97; *see* CP 146-51, 461-552 (documenting Humphrey's pre-remand legal expenses). So extreme have been

Humphrey's positions and demands that the trial court twice found it acted arbitrarily, vexatiously, and not in good faith. CP 106-18, 692-95.<sup>14</sup>

Whether or not those findings can be used to support a statutory fee award, they are highly relevant to Humphrey's eligibility for equitable relief. As this Court has long admonished, one who seeks equity must do equity, and equitable relief is available only those who come to court with clean hands. *E.g., McAlpine v. Miller*, 51 Wn.2d 536, 541, 319 P.2d 1093 (1950). Humphrey, an entity with an exceptionally litigious principal, has not treated its former co-Clay Street members equitably, and its hands are decidedly unclean.

In any event, ample authority supports denying Humphrey prejudgment interest premised on equitable principles. After entry of the 2007 judgment, Humphrey chose to pay Clay Street and the Rogels instead of depositing the funds in the court registry or employing other RAP 8.1 stay of enforcement methods. When, as here, a party against whom judgment is entered chooses to accept the risks of making direct payment, that "suggests that [it] is not entitled to equitable relief." *Ehsani v. McCullough Family P'ship*, 160 Wn.2d 586, 595 n.3, 159 P.3d 407 (2007) (further observing that a party who forgoes making use of RAP 8.1 legal remedies may not be eligible for equitable relief). That suggestion is particularly apt when, as here, the judgment debtor opted to pay its

<sup>14</sup> So, too, did other triers of fact, as demonstrated by documents submitted to the trial court in support of Clay Street's and the Rogels' post-trial § (2)(b) fee requests that Humphrey included in the Clerk's Papers even though they were not before the trial court on remand. CP 789-821, 837-45.

judgment creditor knowing that fee awards are not subject to prejudgment interest, that awards reversed on review ordinarily do not bear interest, and that Clay Street and the Rogels were likely to disburse the fee award judgment monies to their attorneys. *E.g.*, *Weyerhauser*, 142 Wn.2d at 687-88; *Fisher*, 115 Wn.2d at 373-75; *Fulle*, 25 Wn. App. at 522.

In addition, under RAP 12.8 and the general law of restitution, prejudgment interest on a reversed judgment is appropriately awarded only if necessary to avoid unjustly enriching the original judgment creditor. *Ehsani*, 160 Wn.2d at 589-95; *accord* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 18 (2010) (transfer of property in consequence of subsequently reversed judgment gives disadvantaged party “a claim in restitution as necessary to avoid unjust enrichment”); *id.* § 53(4) (one liable for restitution is also liable for prejudgment interest if the failure to award prejudgment interest would contribute to the restitution defendant’s unjust enrichment); *accord* RESTATEMENT OF RESTITUTION § 74 (1937).

The essential elements of an unjust enrichment are:

[A] benefit conferred upon the defendant by the plaintiff; an appreciation or knowledge by the defendant of the benefit; and the acceptance or retention by the defendant of the benefit *under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.*

*Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008) (emphasis added). The circumstances here do not satisfy these elements. Until this

Court's decision, Clay Street and the Rogels had no reason to believe they were not entitled to the fee award sums Humphrey paid them, and there was nothing inequitable about their use of those amounts to pay their lawyers.

An invalid or erroneous judgment that gives effect to a valid liability does not create unjust enrichment: the ensuing transfer has a sufficient legal basis in the underlying liability, notwithstanding the deficiencies of the judgment.... By the same token, a judgment that establishes the rights of the parties conformably to the correct legal standard does not necessarily give rise to unjust enrichment merely because it is procedurally defective.

RESTATEMENT (THIRD), *supra* § 18 cmt. e. In such circumstances, if an award of prejudgment interest is warranted at all, interest accrues only “from the date the recipient has notice of the claimant’s entitlement.”

RESTATEMENT (THIRD), *supra* § 53(4)(c). Here that would, at the earliest, be either when this Court issued its opinion or the Mandate.

In sum, the trial court did not abuse its discretion in denying Humphrey’s request for an all or nothing prejudgment interest award on an amount subject to multiple discretionary set offs. Its denial conformed to settled law and even though the trial court was not asked to apply equitable principles, the result it reached was in accord with them.

**C. The Trial Court Correctly Applied RCW 25.15.480 In Refusing to Impose Judgment Against LLC Members and Their Principals.**

Humphrey asks the Court to reverse the trial court’s determination that Clay Street was the only judgment debtor and direct that judgment be entered against Clay Street members and the members’ principals. As is

again evidenced by Humphrey's reliance on "2007 CP" citations, Humphrey's arguments were not made to the trial court on remand. That, alone, is reason for the Court to deny its request. RAP 2.5(a); *Audett*, 158 Wn.2d at 725-26; *Smith*, 100 Wn.2d at 37; *Peterson*, 29 Wn. App. at 663.

Regardless, Humphrey's arguments are untenable. When, as here, a satisfied judgment is reversed on appeal, the only party responsible for repaying that amount is the former judgment creditor – here, Clay Street. *Ehsani*, 160 Wn.2d at 594-95 & n.3. A party that elects to satisfy a judgment cannot pursue those to whom its judgment creditor distributed the payment, even if the judgment creditor became judgment proof during the appeal.

At first glance, it may seem unfair to conclude that Ehsani is limited to seeking restitution from the McCulloughs, as they previously filed for bankruptcy and, thus, cannot actually provide Ehsani with relief. However, Ehsani had the ability to protect himself from this precise situation by filing a supersedeas bond, *see* RAP 8.1; yet he chose not to do so. While filing a bond is not a prerequisite to recovery under RAP 12.8 ... failing to do so entails assuming the risk of execution prior to reversal and no recovery thereafter. That Ehsani took this risk and lost suggests that he is not entitled to equitable relief.

*Ehsani*, 160 Wn.2d at 595 n.3.<sup>15</sup>

<sup>15</sup> To support its member liability arguments, Humphrey uses unjust enrichment arguments premised on alleged pre-litigation misconduct involving the merger and payments other members made for various Clay Street expenses. App. Br. at 38 n.72. Its wild accusations, unsupported by any trial findings, are irrelevant – particularly since, as is evidenced by the "2007 CP" citations upon which Humphrey relies, those issues were previously before the trial court and were necessarily rejected. CP 90-104, 192-207, 215. Humphrey's attempt to reassert them in this Court is improper. But Humphrey's attempt to use equitable principles to support its member liability arguments does confirm that the *Ehsani*

Humphrey also ignores that the identity of the judgment debtor in litigation such as this is statutorily limited to the LLC or the dissenter. As Humphrey has admitted, this is an action for “the judicial appraisal of the fair value of Humphrey’s interest in ... Clay Street Associates, L.L.C. ... pursuant to the dissenter’s rights statute.” CP 749; *see also* CP 90-91, 388-90. The only parties in such an action are the LLC and the dissenter, here Clay Street and Humphrey. The appraisal action statute is unambiguous as to this limitation:

(1) If a demand for payment under RCW 25.15.450 remains unsettled, *the limited liability company shall commence a proceeding ... and petition the court to determine the fair value of the dissenting member's interest in the limited liability company....*

(2) *The limited liability company shall commence the proceeding in the superior court....*

(3) *The limited liability company shall make all dissenters (whether or not residents of this state) whose demands remain unsettled parties to the proceeding as in an action against their membership interests in the limited liability company....*

...

(6) *Each dissenter made a party to the proceeding is entitled to judgment for the amount, if any, by which the court finds the fair value of the dissenter's membership interest in the limited liability company, plus interest, exceeds the amount paid by the limited liability company.*

RCW 25.15.475 (emphasis added). Consistent with this statutory mandate, only Clay Street and Humphrey were named as parties to the valuation action and they were the only proper parties. CP 388-90.

limitation on parties against whom restitution may be sought applies here and is dispositive of Humphrey’s efforts to expand the reach of its judgment. 160 Wn.2d at 594-95.

The same party limitations apply to post-valuation fee requests. After a judicial valuation, the court may assess fees and costs only against the parties to the appraisal, i.e., the LLC or the dissenters. RCW 25.15.480(1) provides that the court “*shall assess the costs against the limited liability company, except that the court may assess the costs against all or some of the dissenters ... to the extent the court finds the dissenters acted arbitrarily, vexatiously, or not in good faith in demanding payment.*” (Emphasis added). RCW 25.15.480(2)(a) allows a failure to substantially comply award only “[a]gainst the limited liability company and in favor of any or all dissenters.” (Emphasis added). RCW 25.15.480(2)(b) limits the court to assessing “the fees and expenses of counsel and experts *for the respective parties ... against either the limited liability company or a dissenter[.]*” (Emphasis added). Nothing in these provisions authorizes an award against individual, nondissenting LLC members or their principals. Humphrey knows this, as its post-trial fee motion sought judgment only against Clay Street. CP 346-71.

Not only is Humphrey’s request for member and member-principal liability statutorily precluded, its arguments ignore the general rule that LLC managers and members are not personally liable for LLC debts. There are exceptions to that rule, but Humphrey proffered no evidence on remand establishing their application here, nor has it done so on appeal. *See App. Br.* at 33-39 (citing mostly to “2007 CP” briefs, contrary to the rule that averments in briefs are not evidence). If Humphrey wants to

make a Clay Street member liable for the judgment against Clay Street, it must establish with evidence that the member violated statutory winding up requirements or personally committed a tort, or that grounds for piercing the corporate veil exist. *Chadwick Farms Owners Ass'n v. FHC LLC*, 166 Wn.2d 178, 200-01, 207 P.3d 1251 (2009). Since claims premised on such conduct were not asserted in the valuation action, CP 388-90 (or even in Humphrey's 2005 complaint, CP 586-95); Humphrey must establish a basis for imposing member or member/principal liability in an independent lawsuit. And of course any member against whom Humphrey seeks personal liability must be given an opportunity to respond and proffer evidence in its defense.

Humphrey tries to avoid these dispositive limitations with conclusory assertions about purported distribution improprieties by Clay Street members. Those arguments are as irrelevant as they are invalid. The issue here is liability for an RCW 25.15.475 fair value award and an RCW 25.15.480 fee award, not an improper distribution.

Even were that not the case, Humphrey's accusations are untenable since any claim based upon them would be time-barred. A claim to recover an improper distribution must be brought within three years of the distribution. RCW 25.15.235(3). The warehouse sale distribution Humphrey references occurred shortly after the May 2005 closing (and Humphrey admittedly received his payment on May 27, 2005, CP 592 ¶ 20); and the only other distribution Humphrey mentions was in late

2006. *See* Appendix 47. Yet Humphrey never asserted its RCW 25.15.235 rights, even though it knew it had to do so. *See* CP 388-90, 586-95; Appendix 48. This being 2012, the time for Humphrey to do so passed long ago.

Humphrey also seemingly asks this Court to rule that the individual Clay Street members, and Mr. Ostroff, the principal of member ABO Investments, acted with gross negligence, engaged in intentional misconduct, or knowingly violated the law, thereby subjecting them to liability under RCW 25.15.155. App. Br. 37. Such factual determinations are for triers of fact, not appellate courts, particularly when such claims are made for the first time on appeal. If Humphrey wants to pursue such claims, it must prove them in a timely-filed new proceeding.

**D. Humphrey's Reassignment Request is Groundless**

Humphrey asks the Court to order a transfer of this case from Judge McCarthy should there be a remand. For the reasons stated above, no remand is warranted because grounds for reversing Judge McCarthy's rulings do not exist. However, if some type of remand were warranted, reassignment is not. Judge McCarthy did not ignore or refuse to follow the Court's directions. To the contrary, he carefully parsed the evidence from Humphrey's conclusory and/or unsupported assertions in its briefs, and entered judgment accordingly. In so doing, he quite appropriately considered findings now established as verities, including the finding that Humphrey's adherence to a valuation figure that was "without support....

*resulted in the instant valuation proceeding* before this Court,” CP 101 (emphasis added); and that Humphrey had no tenable reason for refusing to dismiss the Rogels from the valuation proceeding, after the claims Humphrey asserted against them *in the consolidated lawsuit* (claims Humphrey was barred from bringing since they had already been dismissed once before) were dismissed, CP 111-12, 115-16, 262. *See generally* CP 684-701. And he properly applied settled law on matters such as prejudgment interest and the identity of judgment debtors in a statutory valuation action.

This dispute has been in litigation for nearly seven years. Judge McCarthy is the only judge with firsthand knowledge of the parties’ positions at trial and whether, given all the evidence, their positions were vexatious or not in good faith. He has displayed remarkable patience, and his 14-page order leaves no doubt of his careful consideration of the matters at issue on remand. CP 684-97. Were this case reassigned, the waste and duplication that would result from Clay Street and the Rogels having to reargue and reprove virtually every finding with which Humphrey is dissatisfied would defy the policies of judicial efficiency and just, speedy, and inexpensive determinations.<sup>16</sup> CR 1.

<sup>16</sup> Judge McCarthy’s knowledge also is invaluable in assessing the credibility of Humphrey’s allegations. As is demonstrated by Humphrey’s untenable attempt to resurrect long-dismissed issues and claims, or issues and claims resolved against Humphrey as support for its fee request, *see infra* at 44-45; such knowledge is critical here.

Moreover, a reassignment must be premised on a showing the trial judge is biased or lacks impartiality. *Santos v. Dean*, 96 Wn. App. 849, 856-57, 982 P.2d 632 (1999), *review denied*, 139 Wn.2d 1026 (2000). “Without evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit.” *Id.* at 857 (citation omitted). Humphrey has made no such showing. Judge McCarthy considered over a thousand pages of documents, heard oral argument, and gave Humphrey multiple opportunities to provide support for its requests. Throughout these hotly contested proceedings, Judge McCarthy has been dispassionate and fair, and exercised admirable restraint. Humphrey’s claims to the contrary are unfair and wholly unwarranted.

**E. Humphrey Is Not Entitled to Recover Fees Incurred on Appeal and Its Arguments for a Member Liability Fee Award are Untenable**

Humphrey has asked the Court to award it appellate fees and costs if it is the prevailing party on appeal. Humphrey has no right to such an award. Under Washington law, a party may recover fees only when a fee award is authorized by contract, statute, or some recognized ground in equity. *E.g., Bowles v. Wash. Dept. of Retirement Sys.*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993). Here there is a statutory basis for a fee award, RCW 25.15.480(2), but that statute does not allow an award simply because a party prevailed. Instead the court must find either (1) a § (2)(a) lack of compliance with the statutory scheme (a determination no longer in issue), or (2) arbitrary, vexatious, bad faith conduct within the purview of

§ (2)(b). Under § (2)(b) and RAP 18.1(a) (allowing an award of fees on appeal only if allowed under applicable law), Humphrey thus could recover its appellate fees only if this Court ruled that Clay Street's and the Rogels' conduct *in this appeal* was arbitrary, vexatious, or not in good faith. Clay Street and the Rogels respectfully submit that they have not acted in that manner. Humphrey does not argue otherwise.

As for Humphrey's arguments for making Clay Street members individually liable for any fee award this Court might make, they are untenable. Humphrey devotes almost three pages to an entirely new argument that it has a purported right to recover fees because it is enforcing the LLC Agreement. App. Br. at 40-42. Aside from the obvious problem with this argument being raised for the first time on appeal, there is no such right. This is not and never was an action to enforce rights under the Agreement; instead, it is a statutory valuation action brought under RCW 25.15.475. CP 388-90. The trial court recognized that, CP 90-91; and Humphrey long ago conceded the issue, CP 749. *See also* CP 346-71 (Humphrey's post trial fee submission making no mention of the LLC agreement). Humphrey had to make that concession since (a) disputes about the LLC Agreement were subject to arbitration; and (b) in October 2005, the trial court ordered arbitration of all Clay Street-related claims except "the appraisal remedy under the dissenters' right statute." CP 648; *see* CP 727-29.

Alternatively Humphrey asks this Court to rule that Clay Street's members are subject to individual liability because they acted in bad faith. The trial court's conclusive determination that Clay Street did not act in bad faith – a determination affirmed by the Court of Appeals and for which Humphrey sought no further review – is dispositive of that claim. *See* CP 112-13, 203-04, 214-15. Humphrey also argues (citing a partnership case) that individual liability is warranted because Clay Street's members breached fiduciary duties owed to it. But under Washington law, LLC members who are not managers do not owe one another fiduciary duties. *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 574-75, 161 P.3d 473 (2007), *review denied*, 163 Wn.2d 1042 (2008). Even if they did owe such duties, most – if not all – of the alleged “breaches” Humphrey cites as support for its claim were rejected in the 2007 valuation trial and on appeal. CP 201-02, 214-15. Humphrey allowed those decisions to stand and thus waived claims premised on those alleged acts. *Garth Parberry Equipment Repairs, Inc. v. James*, 101 Wn.2d 220, 225 n.2, 676 P.2d 470 (1984).

But even more fundamentally, the Court must reject Humphrey's assertions because appellate courts are not triers of fact. To the extent Humphrey's allegations were not already resolved against it, the time and place for deciding their viability was in the trial court, on remand. Under RAP 2.5(a); *Audett*, 158 Wn.2d at 725-26; *Smith*, 100 Wn.2d at 37; and

But even more fundamentally, the Court must reject Humphrey's assertions because appellate courts are not triers of fact. To the extent Humphrey's allegations were not already resolved against it, the time and place for deciding their viability was in the trial court, on remand. Under RAP 2.5(a); *Audett*, 158 Wn.2d at 725-26; *Smith*, 100 Wn.2d at 37; and *Peterson*, 29 Wn. App. at 663; Humphrey's accusations are as inappropriately and untimely made as they are unwarranted.

## VI. CONCLUSION

For all the reasons stated above, Clay Street and the Rogels respectfully ask the Court to affirm the trial court. In the event the Court reverses any of the trial court's rulings, Clay Street and the Rogels urge the Court to remand those issues to Judge McCarthy.

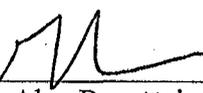
DATED this 11th day of May, 2012.

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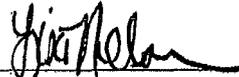
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On May 11, 2012, I caused to be served a true and correct copy of the foregoing document upon counsel of record, at the address stated below, via the method of service indicated:

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I certify under penalty of perjury under the laws of the United States of America and the State of Washington that the foregoing is true and correct.

DATED this 11<sup>th</sup> day of May, 2012, at Seattle, Washington.

  
\_\_\_\_\_  
Lisa Nelson, *Legal Assistant*

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Respectfully submitted in the above-referenced appeal is **Brief of Respondents**. The persons submitting this Brief are Gregory J. Hollon (WSBA No. 26311); Barbara H. Schuknecht (WSBA No. 14106); and Alan Bornstein (WSBA No. 14275), whose email addresses are: [ghollon@mcnaul.com](mailto:ghollon@mcnaul.com), [bschuknecht@mcnaul.com](mailto:bschuknecht@mcnaul.com), and [abornstein@jbsl.com](mailto:abornstein@jbsl.com).

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Thank you.

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