No. 325776-III

COURT OF APPEALS OF THE STATE
OF WASHINGTON, DIVISION III

ROIL ENERGY, LLC, a Nevada Limited Liability Company, by and through the derivative claim of ALLAN HOLMS, a married man and a Washington resident; and ALLAN HOLMS, individually, a married man and a Washington Resident,

Plaintiffs/Appellants,

v.

JOSEPH ("JAY") EDINGTON and JANE DOE EDINGTON, husband and wife and residents of Spokane County, Washington; TOLL RESERVE CONSORTIUM INC., a Nevada Corporation recently renamed as HOLMS ENERGY DEVELOPMENT CORPORATION, a Nevada Corporation; VAL AND MARI HOLMS, husband and wife, and the marital community comprised thereof, residents of the State of Montana; HOLMS ENERGY, LLC, a Nevada Limited Liability Company, and BAKKEN RESOURCES, INC., a Nevada Corporation

Defendants/Respondents.

APPEALED FROM SPOKANE COUNTY
SUPERIOR COURT CAUSE NO. 12-2-010395
THE HONORABLE LINDA G. TOMPKINS

APPELLANTS/CROSS-RESPONDENTS' REPLY BRIEF

ROBERT A. DUNN, WSBA # 12089
BIL G. CHILDRESS, WSBA # 45203
DUNN BLACK & ROBERTS, P.S.
111 North Post, Suite 300
Spokane, WA 99201
(509) 455-8711
Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

Appendices

"The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."[1]

I. INTRODUCTION

Defendant Val Holms in a calculated effort to divert this Court from his own fraudulent and unlawful misconduct has brazenly misrepresented the record and misstated the law. Indeed, Val continues to advance the fiction that his brother, Plaintiff Allan Holms somehow engaged in a nonexistent "*scheme to seize control of Val's North Dakota mineral interests*" despite the Trial Court having soundly rejected this baseless "conspiracy" theory. See Brief of Respondents ("Resp. Brief"), p. 1; CP 5267. More pointedly, Val intentionally mischaracterizes the capitalization plan developed by Allan as "*a complex transaction which involved reaching agreement on many important issues, and the drafting and approval of multiple documents.*" Id., p. 9. In reality, Val's Reverse Merger agreement with his brother was remarkably simple: Val offered to split his Mineral Interests "*50/50 down the line*" in exchange for Allan providing funding for a development project. RP 285; Exs. P-163, P-165.

Even a cursory review of the record overwhelmingly confirms that it was Val and Defendant Jay Edington[2] who unlawfully conspired to

---

[1] Bigelow v. RKO Radio Pictures, 327 U.S. 251, 265, 66 S. Ct. 574, 90 L Ed. 652 (1946).

[2] Defendant Jay Edington settled with Plaintiffs prior to trial. CP 2235-38.

develop and implement their "Plan B" conspiracy, which "*involved circumventing and deceiving Allan Holms into believing that Val Holms was going to keep his minerals to himself and not move forward with the reverse merger/capitalization plan.*" CP 4431 – Unchallenged Finding No. 54. Given this fraudulent misconduct, the Trial Court correctly entered judgment against Val and his corporate entities, Defendants Bakken Resources, Inc. ("Bakken" or "BRI") and Holms Energy, LLC ("Holms Energy"), for their tortious misconduct; and properly exercised its discretion under Nevada law to enter an award of attorney fees in favor of Allan Holms.

Most of Respondents' Brief is devoted to misdirecting this Court into accepting that the Trial Court's erroneous refusal to award Allan's clearly calculable damages somehow sanctions avoidance of liability altogether. Additionally, Respondents want this Court to ratify Val's fraudulent and deceptive unlawful misconduct enabling him to wrongfully retain ill-gotten gains, despite no factual support or applicable law.

II. DISCUSSION

A. Allan Had No "Scheme" To Seize Val's Mineral Interests.

Val Holms secretly conspired with Jay Edington (1) to deceive his brother Allan into believing that Val's purported "misgivings" were genuine and (2) to fraudulently induce Allan to abandon their joint

venture. CP 4431-32 – Unchallenged Findings Nos. 54-55; CP 4436-37 – Conclusions Nos. 19-20, 24-25. Yet, throughout the trial Val repeatedly and unsuccessfully attempted to deflect the Trial Court's attention from his own egregious betrayal by vilifying Allan as "*the instigator of a failed and hostile takeover attempt.*" CP 3039, ll.28-29.

In fact, Val sanctimoniously portrayed himself, Defendants Holms Energy and BRI as "*the would-be victims of the attempted takeover,*" while dramatically mischaracterizing Allan's ultimately-successful lawsuit against him as "*clearly a malicious sham*" that was "*inflicted*" upon him. CP 3040, l.6; CP 3044, ll.22-23. The Trial Court rejected these transparently self-serving claims. CP 5262-67. Yet, on appeal Val continues to wrongfully assert Allan purportedly had a "*plan to seize control of Val's minerals*" with nothing in the record to support this patent misrepresentation. Resp. Brief, p. 37.

In flagrant disregard of the undisputed facts Val repeatedly and without justification insists that "*Allan had positioned himself to be the controlling shareholder of APD*" as a means of gaining control of Val's minerals. Resp. Brief, p. 8. However, Val openly acknowledges it was Edington not Allan, who "*made arrangements with certain shareholders of APD to sell their shares of stock to Allan.*" Id., p. 7. Indeed, it was Edington not Allan, who "*defined and outlined*" the capital structure. RP

820-21. Also, it was Edington not Allan, who "*commenced a plan for Allan Holms to purchase up to 2.5 million shares of common stock of the public shell corporation, APD.*" CP 4425 – Finding No. 19.

Val misrepresents to this Court that Allan was to personally control the APD stock purchased for the benefit of the joint venture by Allan and Edington's nominees. Resp. Brief, p. 8; see Exs. P-35, P-67, P-82, P-163. In fact, Allan not only agreed to advance the purchase price funds on behalf of the joint venture, but he expressly promised to "*share those stocks 1/3; 1/3; and 1/3.*" Ex. P-163. As such, Respondents' statement that "*Nothing in the record supports the assertion by Allan that the [APD] shares were purchased with partnership assets*" is patently untrue. Resp. Brief, p. 28; see Exs. P-35, P-67, P-82, P-163, D-687.

Likewise, Val's revisionist history that he "*had heard that Allan was 'running all over Montana telling everybody' that he has control of Val's minerals*" cannot be reconciled with Tommy Greenfield's unequivocal trial testimony. RP 967. The fact is, Val betrayed his brother because "*he didn't like the 50/50 deal with Allan...*" CP 3634.

B. It Was Error To Conclude No Enforceable Agreement Existed.

1. Defendants Misrepresent The Contract Claims.

Defendants speciously argue that Allan's contract "*claim was always that there was a 40/40/20 deal.*" Resp. Brief, p. 19. However, the

plain language of Allan's pleadings defeats this spurious claim. For in his original Complaint (filed 3/14/12), Allan expressly alleged "*Val Holms agreed to accord Allan Holms half of Val's ownership position in the McKenzie County Mineral Interests.*" CP 19, Complaint, ¶2.6. Subsequently, Plaintiffs filed a First Amended Complaint (10/4/12) and a Second Amended Complaint (7/30/13) reiterating the same contention. CP 1075, ¶2.9; CP 2204, ¶2.9. Moreover, at trial "*Allan testified that in late December, 2009, (sic) Val offered to share his mineral interests on a 50-50 basis.*" CP 4428 – Finding No. 38. Thus, Defendants' new claim that the Holms brothers' "50/50" agreement is "*a new angle for [Allan's] case*" brazenly misrepresents the record. Resp. Brief, p. 20.

2. <u>The "50/50" Agreement Was A Simple, Bilateral Executory Contract.</u>

Defendants misrepresent that a " *multitude of steps and agreements were necessary to complete the performance of an alleged joint venture for a reverse merger.*" Resp. Brief, pp. 26-27. In so doing, Defendants intentionally misstate the facts and flagrantly disregard well-settled principles of contract law.

An "*executed contract is a contract in which all promises have been fulfilled and nothing remains to be done, while an executory contract is one in which the parties have bound themselves to future activity that is*

not yet completed." Felt v. McCarthy, 130 Wn.2d 203, 212 (1996) (Sanders, J., concurring) (citation omitted). Additionally, a "*bilateral contract is one in which there are reciprocal promises. The promise by one party is consideration for the promise by the other. Each party is bound by his promise to the other.*" Cook v. Johnson, 37 Wn.2d 19, 23 (1950). As a matter of law, enforcement of bargains "*is extended to the wholly executory exchange in which promise is exchanged for promise.*" Restatement (Second) of Contracts § 75 cmt. a (1981).

Here, Defendants' arguments ignore completely the difference between an executed contract and a bilateral, executory contract. For example, Val claims execution by the members of Roil Energy, LLC of an Operating Agreement was "*a critical element of the reverse merger transaction...*" Resp. Brief, p. 24. Defendants urge that because "*no operating agreement was ever finalized or signed*", Val Holms is somehow immunized as a matter of law from all liability for his illegal and deceptive conspiracy to defraud his brother Allan. Id., p. 9.

Even though Edington might have later "*characterized the operating agreement as critical*" (CP 4428-29), the overwhelming evidence was that Defendants had already initiated their "Plan B" conspiracy well-before Edington even proposed an Operating Agreement.

Exs. P-150, P-154, P-171. But even then Edington only described the Operating Agreement as being "*very critical for tax purposes.*" Ex. P-171.

Defendants also insist that no agreement was finalized because detailed and comprehensive documents still needed to be drafted. Resp. Brief, p. 26. However, Edington's unrebutted trial testimony was that the project at the time it was stopped, was more than ready to proceed. RP 862. The only reason the agreement was not completed is because of Val's prior unlawful and fraudulent conduct. Id.; CP 3634; Wolk v. Bonthius, 13 Wn.2d 217, 219 (1942) ("*a party may not benefit by his wrongful acts.*"). The bilateral, executory "50/50" agreement between Val and Allan bound each party to his promise to the other. Cook, 37 Wn.2d at 23. Accordingly, the Trial Court erred in concluding the brothers' "50/50" agreement was unenforceable.

3. The Material "50/50" Agreement Terms Were Sufficiently Definite.

Defendants argue Val's "50/50" agreement with Allan is unenforceable because "*it lacks definite material terms.*" Resp. Brief, p. 21. Although joint ventures arise by contract, the law "*requires little formality in the creation of a joint adventure.*" 138 A.L.R. 968 (Originally 1942); Nicholson v. Kilbury, 83 Wash. 196, 201-02 (1915). Indeed, "*an agreement is not invalid because it is not definite with respect to its*

details." 46 Am. Jur. 2d Joint Ventures § 9. Likewise, "*the fact that there is* ***no definite agreement*** *or that there is* ***a misunderstanding as to how the profits of each are to be determined*** *does* ***not*** *prevent the parties from having assumed the relationship of joint adventurers*." 138 A.L.R. 968 (emphasis added).

The fact is, an "*agreement creating a joint venture is in a special category and not subject to as strict a test of definiteness as contracts generally*." Mason v. Rose, 176 F.2d 486, 489 (2d Cir. 1949). Courts apply a flexible test of definiteness where:

> (1) "*[T]he parties had agreed in general terms upon a joint venture, and where usually the aggrieved party had put money into it*";
>
> (2) "*Whether or not the aggrieved party had put in money, the other party ... had at least been able to exploit [the proposed subject matter] for his own advantage*"; and,
>
> (3) "*[W]hen the aggrieved party called him to account, he answered that there had never been any contract because all the terms had not been agreed upon, and, since there was no valid contract, he owned nothing to the aggrieved party except to return the money, if any, advanced.*"

Id. "*In such situations the courts decide that this answer is not sufficient and hold that the party who took over or exploited the subject matter did*

so as a joint adventurer."[3] Id. Thus, as a contract for joint venture the agreement is "*not subject to as strict a test of definiteness as contracts generally.*" Id.

Moreover, Defendants' reliance on 16th St. Investors, LLC v. Morrison, 153 Wn. App. 44, 55 (2009) in misplaced. In Morrison, the court refused to order specific performance of a real estate purchase contract, reasoning that "*When parties seek specific performance of a contract, rather than damages, a higher standard of proof must be met...*" Id. The plaintiffs there had not offered clear and unequivocal evidence as to the terms, character, and existence of the contract, thus specific performance was not appropriate. Id. at 55-56.

In contrast, Allan sought damages arising from the breach of their "50/50" agreement – not specific performance. CP 2232. Yet, the Trial Court erroneously applied the strict test of definiteness articulated by the Morrison court. Indeed, the Trial Court's numerous findings regarding "*written agreements and other documents*" not finalized and/or executed,[4] reveal the flawed reasoning by which it erroneously concluded that "*no enforceable agreement or contract was made by and between Allan Holms*

---

[3] Alternatively, defendants may breach "*an imposed fiduciary duty*" where they derive a benefit from the proposed subject matter of the common adventure. Mason, supra at 489.

[4] CP 4424 – Finding No. 15; CP 4428-30 – Findings Nos. 40, 42, 46-50.

and Val Holms" and that "*No enforceable contract for joint venture was established.*" CP 4434-35 – Conclusions Nos. 10 and 13.

C. The Executed, *Notarized* Mineral Deeds Conveyed Title To Roil Energy As A Matter Of Law.

Despite the unambiguous plain language of the **notarized** Mineral Deeds, Defendants urged the Trial Court to accept (1) that the Mineral Deeds violated the statute of frauds; (2) that there was no agreement to transfer the Mineral Interests to Roil Energy; and (3) that Val's testimony regarding a purported secret, subjective "intent" to conditionally deliver the Mineral Deeds was admissible evidence. Resp. Brief, p. 38.

In doing so, the Trial Court ignored that (1) Val Holms executed two Mineral Deeds in favor of Roil Energy; (2) Val had the Deeds notarized; (3) Val provided copies of the acknowledged Deeds to Allan on 2/19/10; and (4) Val falsely assured Allan the originals had been sent away to be recorded. CP 4425 – Unchallenged Finding No. 17; Ex. P-130. As such, "*the rights and obligations of the parties do not rest merely on an oral contract to sell land, but* ***on the deed itself as an instrument conveying title***." 100 A.L.R. 196 (emphasis added); RCW 64.04.010.

1. Defendants Misstate Roil Energy's Legal Claims.

In flagrant disregard of the facts, Defendants insist "*Plaintiffs claimed, and argued at the trial that Toll Reserve Consortium, Inc. had breached its* ***oral contract*** *with Roil Energy, LLC by not deeding the*

McKenzie County mineral interests to Roil Energy." Resp. Brief, p. 29 (emphasis added). However, Defendants wholly fail to address Roil Energy's claim for declaratory judgment "*declaring that Toll Reserve Consortium, Inc., executed and delivered to Roil Energy, LLC, for valuable consideration, a deed for the McKenzie County Mineral Interests.*" CP 2229, ¶5.11. More pointedly, the plain language of Roil Energy's pleadings confirms its contract claim arose out of written Mineral Deeds which "*Toll Reserve Consortium, Inc. did execute and deliver to Roil Energy...*" CP 2215-16.

In addition, Plaintiffs' argument at trial was unequivocal:

> "*Once the deed was given by Toll Reserve, it cannot, without breaching the contracts and covenants and warrantees in that deed to Roil Energy, give another deed, which it did, to Holms Energy, LLC. And so it breached that contract...*"

RP 1356. Even a cursory review of the record defeats Defendants' after-the-fact revisionist attempt to reframe Roil Energy's legal claims.

2. The *Notarized* Mineral Deeds Satisfy The Real Estate Statute Of Frauds (RCW 64.04.010).

Despite **notarized** Mineral Deeds, Defendants advance the specious theory that the Deeds are ineffective and invalid because they "*do not contain, or even allude to, the terms upon which the minerals were purportedly to be transferred.*" Resp. Brief, p. 30. However, the Mineral Deeds are conveyances of real property governed by the real estate statute

of frauds, RCW 64.04.010 (**Appendix A**), not the general statute of frauds, RCW 19.36.010 (**Appendix B**). Because the general statute of frauds differs from the real estate statute of frauds, Defendants' argument fails. Firth v. Lu, 146 Wn.2d 608, 614 (2002).

The general statute of frauds, RCW 19.36.010, "*must be strictly construed and not applied to cases that are not squarely within its terms.*" Sherwood B. Korssjoen, Inc. v. Heiman, 52 Wn. App. 843, 852 (1988); Chambers v. Kirkpatrick, 145 Wash. 277, 280 (1927). By its plain language, the general statute of frauds applies only to five specific cases. RCW 19.36.010; see **Appendix B**. If an agreement falls outside any of these five categories RCW 19.36.010 does not apply. Id. In contrast, "*RCW 64.04.010 applies only to the following agreements: (1) actual conveyances of title ... and (2) agreements that create or evidence an encumbrance of real property.*" Firth, 146 Wn.2d at 614.

Here, the Trial Court erroneously ignored that the Mineral Deeds are "*actual conveyances of title*" which do not fall within any of the five cases specified in RCW 19.36.010. Thus, as a matter of law, only the real estate statute of frauds – and not the general statute of frauds – applies to the Mineral Deeds. Because the Mineral Deeds here were (1) in writing, (2) signed by Val Holms, and (3) acknowledged, the Deeds comply with the real estate statute of frauds. Ex. P-130; RCW 64.04.010 and RCW

64.04.020. Therefore, the Deeds as a matter of law transferred title to the Mineral Interests. RCW 64.04.010 and RCW 64.04.020.

Defendants cite to certain general statute of frauds cases as support for their claim that the Mineral Deeds are defeated. However, they do so in utter disregard for the facts of this case. The case of Friedl v. Benson, 25 Wn. App. 381 (1980) is cited to support their novel theory that:

> "*To satisfy the statute of frauds, the* ***documents*** *'...must embody all the essential and material parts of the* ***[agreement]*** *with sufficient clarity and certainty to show that the minds of the parties have met on all material terms with no material matters left for future agreement or negotiation.*'"

Resp. Brief, p. 30 (emphasis added) (brackets in original). However, Defendants materially altered Friedl's actual text in a desperate attempt to apply Friedl's analysis of the *general* statute of frauds (RCW 19.36.010) to their novel interpretation of the *real property* statute of frauds (RCW 64.04.010). What Friedl actually says is that:

> "***A memorandum or memoranda of an agreement for a lease, in order to satisfy the statute of frauds****, must embody all the essential and material parts of the* ***contemplated lease*** *with sufficient clarity and certainty to show that the minds of the parties have met on all material terms and with no material matter left for future agreement or negotiations.*"

Friedl, 25 Wn. App. at 387 (elided text in bold) (emphasis added). The Friedl court explained that "*Agreements to lease for a period exceeding 1 year come within the purview of two statutes of frauds, RCW 19.36.010...*

and RCW 64.04.010..." Id. at 386. Accordingly, a long-term lease agreement must satisfy both statutes of frauds.[5]

However, nothing in Friedl supports Defendants' claim that RCW 19.36.010 applies in any way to the executed, **notarized** Mineral Deeds which "*are not strictly within its terms.*" Chambers, 145 Wash. at 280. Therefore, Friedl's discussion "*relating to the sufficiency of memoranda*" under RCW 19.36.010 is wholly immaterial and irrelevant. Friedl, supra at 387. Because the Deeds are "*actual conveyances of title*," the parties' rights and obligations rest "*on the deed itself as an instrument conveying title.*" Firth, supra at 614; 100 A.L.R. 196.

Defendants also rely on McLain v. Healy, 98 Wash. 489 (1917) to support their claim that conveyances of real estate are ineffective as a matter of law unless they "*contain the contract which appellants must prove before they can recover.*" RCW 64.04.010; Resp. Brief, p. 32. However, McLain is inapposite. The McLain defendants deposited an executed deed with an escrow agent pursuant to an oral agreement to exchange real property. Supra at 490. Although the defendants later "*instructed him not to deliver their deed,*" the court refused to compel delivery. Id. at 490-91. The McLain court explained that an enforceable

[5] Notably, the "*fact that the parties contemplated later execution of a formally integrated and mutually executed writing was not a condition precedent to [the defendant's] obligation on the agreement to lease.*" Friedl, supra at 388.

escrow "*must rest upon an enforceable contract,*" and the plaintiffs failed to establish their right to the undelivered deed. Id. at 491-92.

In contrast here, Val did deliver acknowledged copies of Deeds to Allan, albeit falsely assuring his brother that the originals were sent to North Dakota for recording. RP 367-69, 1050-51; CP 4425 – Unchallenged Finding No. 17. Washington law is clear:

> "*If the grantor do (sic) not intend that his deed shall take effect until some condition is performed or the happening of some future event, he should either keep it himself, or leave it with some third person as an escrow, to be delivered at the proper time.*"

Richmond v. Morford, 4 Wash. 337, 342 (1892). In fact, "*A deed can only be delivered as an escrow, to a third person.*"[6] Lawton v. Sager, 1851 WL 5327, 11 Barb. 349 (N.Y. Gen. Term. 1851) (cited with approval by Richmond, 4 Wash. at 343) (emphasis in original). As such, Defendants' reliance on McLain is misplaced.

3. Defendants' Contrived Claim Regarding Purported Failure Of Consideration Is Meritless.

Val's claim that "*any transfer of title to the minerals was still conditioned upon receipt of consideration from Allan*" fails as a matter of fact and law. Resp. Brief, p. 32. The fact is, Allan provided consideration

[6] In North Dakota, "*A grant may be deposited by the grantor with a third person to be delivered on the performance of a condition*" (NDCC 47-09-08), but as in Washington, "*A grant cannot be delivered to the grantee conditionally. Delivery to the grantee or to the grantee's agent as such is necessarily absolute and the instrument takes effect thereupon...*" NDCC 47-09-07.

when he promised to provide $200,000 in "seed money" by 3/1/10 and to raise an additional $2 million. Cook, supra at 23. Thus, by 2/19/10, Val had already received Allan's consideration. Id.

In addition, the overwhelming preponderance of competent evidence established that Allan was not expected to actually provide the promised consideration until 3/1/10. Exs. P-101, P-137. In fact, Edington "*wanted to put the $200,000 into North Dakota* ***when Bakken was merged***" – not into Roil Energy on 2/19/10. RP 359 (emphasis added). Accordingly, on 2/17/10 – two days before Val executed and notarized the Deeds – Edington confirmed that "*When APD is converted to Bakken Resources, then is the time to develop a bank account in Williston, [North Dakota.]*" Ex. P-120. On 2/18/10, Edington reiterated that the plan to "*Set up bank acct (sic) in Williston after merger*" was scheduled to take place "*down the road.*" Ex. P-126. Val's revisionist self-serving claim that he expected Allan to provide $200,000 the very next day, 2/19/10, cannot be reconciled with the objective evidence. Resp. Brief, p. 32.

Notably, Val's own trial testimony established that Val "*needed $10,000 to pay some bills...*" RP 1231. Yet, Val's "*salary of $6,000 per month*" would not commence until Roil Energy's structure was in place. Ex. P-94. Accordingly, Val delivered copies of the notarized Deeds to Allan on 2/19/10 inducing him to provide the money he did. RP 1231.

Additionally, as a matter of law, when some consideration is given, it need not be in an "adequate" amount, i.e., "*mere inadequacy of consideration is not ground to set aside a deed.*"[7] Bale v. Allison, 173 Wn. App. 435, 448 (2013). "***Any** valuable consideration, even a nominal sum of money, **is sufficient**, as between the parties... to render a deed operative to pass title to property.*" 23 Am. Jur. 2d Deeds § 77 (emphasis added). Thus, "*recital of the payment and receipt of $1 and other good and valuable consideration is sufficient.*" Id.

4. Defendants' Evidentiary Arguments Are Meritless.

Defendants insist that before deciding whether Val's self-serving, after-the-fact testimony should have been considered, "*the court must first determine whether these two deeds were 'intended to be the final expression of the agreement.'*" Resp. Brief, p. 33. However, Defendants' novel "integrated contract" theory is fatally flawed since the Mineral Deeds are "*actual conveyances of title*," not contracts for the purchase and sale of real property. Firth, supra at 614. Therefore, "*Washington law requires that the intent of the parties be determined from the unambiguous language of the document itself.*" Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc., 168 Wn. App. 56, 69 (2012).

---

[7] In North Dakota, "*consideration is not necessary*" for a valid deed. NDCC 47-09-03.

Additionally, Defendants insist "*Val's intent in giving copies of the deeds cannot be determined from the language of the deed itself.*" Resp. Brief, p. 36. Even if Defendants were correct, the "*search for intent is illuminated by three factors: (1) deed language, (2) circumstances surrounding the execution of the deed, and (3) the subsequent conduct of the parties.*" Brown v. State, 130 Wn.2d 430, 449 (1996) (Sanders, J., dissenting in part, concurring in part).

"***The first step*** *in any analysis of the language in a deed is to give the words their general and ordinary meaning to see if they create any ambiguity, and if the words create no doubt, the deed is clear and unambiguous...*" 23 Am. Jur. 2d Deeds § 197 (emphasis added). However, "***a secret, subjective, or unexpressed intention or purpose cannot be considered in the construction of deeds***." Id. (emphasis added). Accordingly, even if extrinsic evidence was admissible to show "intent," the Trial Court erred in relying on Val's self-serving, after-the-fact testimony regarding his secret, subjective, and unexpressed intent.

Further, as a matter of law, when a presumption of delivery arises, "*a mere preponderance of the evidence is not sufficient.*" 23 Am. Jur. 2d Deeds § 148 (citing Adams v. Little Missouri Minerals Ass'n, 143 N.W.2d 659 (N.D. 1966)). Yet, Val's contrived testimony is the only "evidence" that even remotely suggested that Val's delivery of the Mineral Deeds was

in any way contingent upon Allan delivering $200,000 to Val on 2/19/10. Because Defendants and the Trial Court relied exclusively on Val Holms' self-serving revisionist testimony, it was reversible error to conclude there was no deed delivery.

Defendants cite to Lopez v. Reynoso, 129 Wn. App. 165, 170-71 (2005) as support for their theory that "*the parole evidence rule is only applied to writings intended as the final expression of the terms of the agreement.*" Resp. Brief, p. 33. However, Lopez involved an installment sales contract for a used car – not a delivered "conveyance of real estate." Id.; RCW 64.04.010.

Likewise, Defendants mis-cite to Matter of Prior Bros., Inc., 29 Wn. App. 905, 909 (1981) for the proposition that a "*conditional delivery exception to the parole evidence rule*" exists. Resp. Brief, p. 37. However, the actual case – Int'l Harvester Co. v. Bank of California – holds that exceptions to the parole evidence rule "*are for third party beneficiary contracts and contracts which have been assigned.*" 29 Wn. App. at 911. Thus, even if Defendants were correct that the Int'l Harvester court articulated a "conditional delivery exception" in a case involving a purchase contract for the sale of goods, the narrow "exception" does not pertain to Mineral Deeds.

Defendants also rely on Kapetan v. Kelso, 4 Wn. App. 312, 314 (1971) to support their theory that "*parole evidence is admissible to show that a written instrument is not to become a binding obligation except upon the happening of a certain event.*" Resp. Brief, p. 37. However, in Kapetan, the "written instrument" at issue "*was an agreement to agree later upon a formal lease*" – not one involving a delivered deed. 4 Wn. App. at 313. As with Friedl, nothing in Kapetan contradicts or overrules Washington's long-standing prohibition on conditional delivery of a deed. See Richmond, supra at 342-43.

Further, Defendants claim that parole evidence is "*admissible to show what the true consideration is where the contract contains a mere recital of consideration...*" Resp. Brief, p. 38 (citing Malacky v. Scheppler, 69 Wn.2d 422 (1966)). However, in Malacky, the decedent assigned her seller's interest in three real estate contracts to her children as "co-grantees." Id. at 423. As such, Defendants' out-of-context citation to Malacky – like Friedl, Lopez, and Kapetan – is fatally flawed in that nothing in Malacky even remotely authorizes the use of parole evidence to defeat the plain language of a delivered deed.

The fact is, "*a deed is valid and operative as between the parties and their privies, whether or not founded on a consideration...*" 23 Am. Jur. 2d Deeds § 78. "*Even total failure of consideration does not*

necessarily entitle the grantor to cancellation of the deed..." Id. "*A decision based on an erroneous view of the law necessarily constitutes an abuse of discretion.*" Sales v. Weyerhaeuser Co., 163 Wn.2d 14, 19 (2008). Accordingly, the Trial Court erred in relying on Val Holms' contrived testimony regarding "true consideration" to defeat delivery of a deed "*which was absolute upon its face, and completely executed, and required no further act on the part of the grantors to give it validity...*" Richmond, supra at 341.

5. Plaintiffs Properly Raised North Dakota Law.

Defendants spuriously claim that Plaintiffs are precluded "*from relying on North Dakota law in this appeal*" (Resp. Brief, pp. 18-19), despite the fact Defendants at trial expressly relied on North Dakota law regarding (1) delivery of a deed and (2) the admissibility of extrinsic evidence of the grantor's intent. CP 3077-78. Thus, Defendants' position that they were not given notice that "*North Dakota law has application to the issue of the delivery of the mineral deeds*" is wholly without support in the record. Resp. Brief, p. 40.

Further, Defendants' assertion that "*Plaintiffs never proffered any North Dakota law for consideration*" blatantly ignores Plaintiffs' trial briefing. CP 3240-46. In fact, Plaintiffs were compelled to file such briefing because Defendants cited the Trial Court to cases from North

Dakota "*regarding the issue of delivery of the Mineral Deeds as a necessary element to the conveyance of title to the Mineral Interests to Roil Energy, LLC.*" CP 3241.

Further, on 11/15/13, Defendants submitted North Dakota related law to the Trial Court for the second time. CP 4415-19. Defendants expressly represented that they "*have cited to this court both Washington and North Dakota case law...*" CP 4416. Unquestioningly, the Trial Court considered all the pleadings filed (CP 5264), thus Defendants' claim that "*North Dakota law was not considered by the trial court*" is patently untrue. Resp. Brief, p. 40.

The reality is under North Dakota law, "*Statements of a grantor made after the delivery of a deed are admissible in a suit to enforce title thereunder when such statements support the deed But (sic)* ***not*** *when they are against it.*" Gajewski v. Bratcher, 221 N.W.2d 614, 627 (N.D. 1974) (citation omitted) (emphasis added). Accordingly, the Trial Court erred in relying on "*evidence that was received in violation of the parole evidence rule*"[8] to invalidate the notarized and executed Mineral Deeds. Id. at 630.

[8] Washington law is in accord: "*The parol evidence rule is not a rule of evidence, but one of substantive law. Even though evidence which falls within the inhibition of the rule is admitted without objection, it is not competent and cannot be considered as having probative value.*" Fleetham v. Schneekloth, 52 Wn.2d 176, 179 (1958).

D. Refusal To Award Damages Was Error.

The Trial Court correctly concluded Plaintiffs produced "*sufficient evidence of a direct loss by Allan Holms*" (CP 4438 – Conclusion No. 28) yet inexplicably and erroneously refused to award damages.

1. Competent Evidence That Allan Suffered Substantial Damage Was Ignored.

In Gilmartin v. Stevens Inv. Co., 43 Wn.2d 289 (1953), the trial court failed to make a substantial award of damages despite finding "*substantial damage had been sustained*" and in disregard of "*competent and undisputed opinion evidence*" of the plaintiffs' damages. Id. at 297. Thus, on appeal the trial court's finding "*That the amount of the damage ... is incapable of determination under the evidence presented*" constituted reversible error. Id. at 293, 297-99. The same situation exists here.

The Gilmartin court explained that "*the standard of 'reasonable certainty' is concerned more with the fact of damage than with the extent or amount of damage.*" Id. at 295 (emphasis supplied). Because "*the evidence was as certain as could be expected,*" the trial court "*had the duty either to make an award of substantial damages or to give appellants an opportunity to submit additional proof as to damages.*" Id. at 296-98.

Although Gilmartin involved a bench trial, the Supreme Court reasoned by analogy that "*Had this case been tried to a jury, appellants would have been entitled to a substantial award based upon the jury's*

estimate." Id. at 298. The Court went on to hold, "*If a jury had answered a special interrogatory to the effect that appellants had suffered substantial damage, but had brought in a general verdict allowing nominal damages, the trial court or this court would have ordered the case retried.*" Id. The court concluded (1) that the general verdict – the award of nominal damages – was inconsistent with the trial court's finding that there was substantial damage, and (2) that this inconsistency violated the principle that a judgment must accord with the findings. Id. Thus, the court reversed and remanded for new trial on damages. Id. at 299-300.

In Jacqueline's Washington, Inc. v. Mercantile Stores Co., 80 Wn.2d 784, 789 (1972), the court was unequivocal in restating the rule: "*Plaintiff is not to be denied a substantial recovery merely because the precise amount of damage is incapable of exact ascertainment.*" Id. Where there is no uncertainty as to the existence of substantial damages, "***recovery of substantial damages is not to be denied*** *merely because the extent or amount thereof cannot be ascertained with mathematical precision, provided the evidence is sufficient to afford a reasonable basis for estimating loss.*" Id. at 786 (emphasis added). Indeed, "*courts should be exceedingly reluctant to immunize defendants...*" Id. Thus, the Jacqueline's court went on to hold (1) that a more stringent requirement would be contrary to the basic principle that the wrongdoer shall bear the

risk of any uncertainty which his own wrong has created, and (2) that the "*constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done.*" Id. at 789-90.

Here, just as in Gilmartin and Jacqueline's, the Trial Court found "*sufficient evidence of a direct loss by Allan Holms.*" CP 4438 – Conclusion No. 28. Specifically, as a result of Val's fraudulent "Plan B" conspiracy to eliminate Allan from the Reverse Merger capitalization plan, "*Allan lost the opportunity to participate in the project as it was then initially configured.*" CP 4436 – Conclusion No. 20. Moreover, it is undisputed that Val "*received lease royalties and capital investment income*," as well as "*40,000,000 shares of BRI stock, $100,000 cash, and a 10-year overriding royalty...*" CP 4432 – Unchallenged Finding No. 60. As such, it is clear from the record that Allan suffered substantial damage as a result of "*the fraudulent actions of Jay Edington and Val to exclude him.*" Jacqueline's, supra at 785; CP 4438 – Conclusion No. 30.

In addition, the Trial Court actually "*invited [the parties] to further brief and argue*" (CP 4438 – Conclusion No. 30) Allan's lost "Facilitation Value", but emphatically declared there would be "*No new evidence.*" RP 1439-40. The Trial Court's refusal to give Allan an opportunity to submit additional proof as to damages, and its inconsistent failure to award damages despite finding that direct damages were substantial, violate "*the*

principle that the judgment must accord with the findings." Gilmartin, supra at 297-98. Accordingly, the Trial Court committed reversible error.

2. Substantial Evidence Established Allan's "Facilitation Value" Damages.

Allan produced relevant and undisputed expert opinion testimony regarding his "Facilitation Value" which was as certain as could be expected. Id. at 296. Yet, the Trial Court erroneously ignored its "*duty to make a substantial award of damages.*" Id.

In fact, contrary to Respondents' claim (Resp. Brief, p. 46), the unrebutted trial testimony of expert William Ross established that (1) "*The [shell] company created the opportunity to raise money*"; (2) "*there was about $2.8 million raised after the shell transaction*"; and (3) Val "*used all of the benefits of a shell, which is the concept that Allan brought to the table...*" RP 1029-30; Ex. P-353. The trial evidence was 'but for' Allan's Reverse Merger capitalization strategy, Bakken Resources would not have the revenues it has today, if any at all. Id.

Notably, the Trial Court here did not question expert Ross's veracity or his competency to express an opinion as to the values at issue, and gave no intimation during trial that Ross's testimony was not credible. See Gilmartin, supra at 296-97. In addition, the Trial Court here relied upon expert Ross's uncontroverted testimony correctly concluding that

"*More probably than not, but for the contact with Jay Edington facilitated by Allan, Val would not have capitalized his minerals through a merger with a public shell provided by Edington.*"[9] CP 4530 – Conclusion *30. In that regard, expert Ross testified at trial that Val and Bakken received "*all of the benefits of a shell*" – including Bakken's revenue and the opportunity to raise money from investors as a result of "*the concept that Allan brought to the table...*" RP 1030.

Defendants continue to attack the damages claim asserting that "Facilitation Value" "*means the value of Allan's introduction of Val to Jay...*" Resp. Brief, p. 45. However, Defendants have not and cannot cite to any authority for support of their baseless proposition that "*Allan's loss is limited to what is commonly referred to as a 'finder's fee.*" Id. Indeed, the Trial Court clearly understood the scope of the damage when it specifically requested additional briefing and argument regarding "*what, if any facilitation value was lost to Allan by the fraudulent actions of Jay Edington and Val to exclude him*" from the Reverse Merger capitalization project. CP 4438 – Conclusion No. 30. The "Facilitation Value" lost by Allan as a result of the fraudulent actions against him clearly entailed Allan's "*opportunity to participate in the project...*" CP 4436 – Conclusions 19-20.

[9] Defendants did not assign error to or otherwise challenge Conclusion *30.

Moreover, the "*direct loss suffered by Allan Holms*" (CP 4438 – Conclusion No. 28) due to Defendants' unlawful misconduct was clearly ascertainable from the evidence provided at trial. RP 1029-30. In fact, the compensation paid to Edington by Val for the unauthorized use of Allan's Reverse Merger strategy provided a reasonable basis for estimating the loss of Allan's "Facilitation Value." Jacqueline's, supra at 786. Substantial evidence confirmed that Edington received approximately 20 percent of Holms Energy's 40,000,000 shares of BRI stock (7.9 million shares) in compensation from Val. Ex. P-320.

In addition, evidence at trial regarding the cash equivalent of Edington's 7.9 million shares was that its value was between $0.22 and $0.28 per share. RP 755-56, 949, 1261; Ex. P-341. Accordingly, based on the readily ascertainable monetary value of the BRI stock Val granted to Edington upon the November 2010 closing of the Reverse Merger, Val was willing to pay between $1,738,000 (7.9 million shares x $0.22) and $2,212,000 (7.9 million shares x. $0.28) for the development and capitalization of his Mineral Interests through a public company. Exs. P-320, P-341; RP 755-56, 949, 1261.

Given the uncontroverted evidence regarding Edington's compensation, and the share price range for BRI stock, the Trial Court had sufficient evidence to afford a reasonable basis for estimating the loss.

Jacqueline's, supra at 789. As a matter of law the Trial Court "*had the duty either to make an award of substantial damages or to give appellants an opportunity to submit additional proof as to damages.*" Gilmartin, supra at 297-98. Because the Trial Court did neither, this case must be reversed and remanded for a new trial on damages.

3. It Was Error To Refuse Imposition Of A Constructive Trust.

Defendants brazenly claim "*Val did not gain something for himself which he should not be permitted to hold, nor has Val been unjustly enriched.*" Resp. Brief, p. 50. This ignores the undisputed fact that "*but for the contact with Jay Edington facilitated by Allan, Val would not have capitalized his minerals through a merger with a public shell provided by Edington.*" CP 4530 – Conclusion *30. More pointedly, Defendants blatantly disregard the fact that "*No oil well had ever been drilled on Val Holms' mineral interests*" when Allan initially proposed the Reverse Merger. CP 4429 – Unchallenged Finding No. 45. Yet, after implementing "Plan B," Val subsequently capitalized and developed his Mineral Interests through a public "shell" company thereby unjustly reaping the benefit of Allan's proposed business strategy. CP 4432 – Unchallenged Finding No. 60.

Equity will raise a constructive trust "*where one through actual fraud ... gains something for himself which in equity and good conscience he should not be permitted to hold.*" Scymanski v. Dufault, 80 Wn.2d 77, 88-89 (1971) (citations omitted). Considering that Bakken's entire existence was based on Allan's Reverse Merger capitalization strategy, the Trial Court erred in refusing to impose a constructive trust upon Val's ensuing windfall which he has retained.

E. Defendants' "Procedural" Arguments Fail.

Defendants advance a dogmatic and rigid view of the Rules of Appellate Procedure in total disregard for the plain language of RAP 1.2(a) and (c), RAP 10.3(g), and this Court's prior decisions. The rules are to be liberally interpreted to promote justice and facilitate the decision of cases on the merits. RAP 1.2(a). Where an appeal challenge is perfectly clear as set forth in an appellate brief, the Court will consider the merits of the challenge. State v. Olson, 126 Wn.2d 315, 322 (1995). Here, the nature of the appeal is clear and Defendants have failed to identify any prejudice as a result of any purported failure to assign error. State v. Turner, 156 Wn. App. 707, 712 (2010). Further, the issues are well framed by the record and the briefing. Bott v. Rockwell Int'l, 80 Wn.

App. 326, 335 (1996). Thus, Plaintiffs deserve a decision of their cases on the merits.[10] RAP 1.2(a).

F. It Was Error To Dismiss Plaintiffs' Tortious Interference Claims.

1. Defendants Misstate Washington Law.

Defendants continue to erroneously assert that Val Holms as a matter of law could not interfere with Roil Energy's expectancies or with Allan Holms' expectancies because "*Val, Allan, Jay, Roil Energy, and APD (the target shell corporation) were all parties to this proposed joint enterprise or joint venture and not strangers to the proposed transaction...*"[11] Resp. Brief, pp. 51-52. In so doing, Defendants advance a novel legal theory that a member of an LLC cannot as a matter of law interfere with the expectancies of another company member or of the company itself. However, no Washington court has ever adopted this narrow, unprecedented view of the tort of intentional interference.

---

[10] To eliminate any purported non-compliance with RAP 10.4(c), each challenged Finding and Conclusion is expressly set forth in the attached Appendix.

[11] Defendants mistakenly assert that "*appellants make no argument that Bakken Resources, Inc. or Holms Energy, LLC tortiously interfered with any business expectancies.*" Resp. Brief, p. 55, n.2. In fact, error was expressly assigned to the Trial Court's dismissal of Plaintiffs' tortious interference claims. See Opening Brief, Assignment of Error No. 4, p. 5. Moreover, as co-conspirators BRI and Holms Energy as a matter of law are "*liable for all of the acts done in pursuance of the conspiracy in the same manner that they would be had they been a party to all of the wrongful acts.*" Sears v. Int'l Brotherhood of Teamsters, 8 Wn.2d 447, 452 (1941).

Defendants cite to certain Washington cases for support of their claim that "*A party to the **relationship** cannot be held liable for tortious interference.*" Resp. Brief, p. 53 (emphasis added). However, these opinions do not even remotely support the Trial Court's erroneous legal conclusion that Defendants have absolute immunity because "*they are all parties to the overall business relationship...*" RP 9-10. Indeed, both Houser v. City of Redmond, 91 Wn.2d 36 (1978) and Vasquez v. State, Dep't of Soc. & Health Servs., 94 Wn. App. 976 (1999) involved an employee suing his employer for tortiously interfering with his employment. Houser, 91 Wn.2d at 37; Vasquez, 94 Wn. App at 979.

The Houser court explained that employees acting within the scope of their employment cannot tortiously interfere with their employer's contracts. 91 Wn.2d at 39-40. Relying on Houser, the Vasquez court held that an employer could not be held vicariously liable for tortious interference with its own employment contract based on the acts of its agents. Vasquez, supra at 989. The Houser and Vasquez facts have no application to the facts here.

2. Defendants Misrepresent The Record.

Further, Defendants misstate the facts when they claim that "*the only alleged business expectancy was the one resulting from the business relationship of all the parties.*" Resp. Brief, p. 56. In fact, Plaintiffs

expressly alleged that "*Allan Holms, as a member of Roil Energy LLC, would have been entitled to his share of the profits or assets of Roil Energy LLC...*" CP 1092, ¶4.12. In addition, Roil Energy explicitly alleged that Defendants interfered with its "*Prospective Business Opportunity to own and develop the McKenzie County Mineral Interests*," as well as Roil's "*prospective contractual relationship with enterprises that would want to capitalize, develop and lease the oil and gas rights that could possibly be extracted from the properties contained in the McKenzie County Mineral Interests...*" CP 1088, ¶3.10. As such, Defendants' claim that there were no separate business expectancies involving Roil Energy is patently false.

3. Alabama's Artificially Constricted View Of Tortious Interference Liability Is Incompatible With Binding Washington Precedent.

In flagrant disregard for binding Washington precedent, Defendants rely on – and the Trial Court adopted – the artificially constricted view of tortious interference liability as expressed by an Alabama Court in BellSouth Mobility, Inc. v. Cellulink, Inc., 814 So. 2d 203, 212 (Ala. 2001) and its progeny, Waddell & Reed, Inc. v. United Investors Life Ins. Co., 875 So. 2d 1143 (Ala. 2003). That case makes it clear that Alabama has adopted the extraordinarily narrow view that any

participant in an underlying contract or expectancy enjoys absolute immunity from tortious interference liability. Waddell, supra at 1157.

Here, the Trial Court erroneously adopted Alabama's expansive view of absolute immunity for any "participant" in a business relationship. RP 45-46; Waddell, supra at 1157. Indeed, the Trial Court inexplicably ignored binding Washington precedent embracing instead the Alabama notion that "*there wasn't a possibility as a matter of law*" (RP 46) for Val to interfere with Plaintiffs' independent expectancies simply because Val would benefit economically from the alleged injured relations. Id. at 1156. That is simply not the law in Washington. Olympic Fish Products, Inc. v. Lloyd, 93 Wn.2d 596, 599 (1980).

4. Defendants' Misplaced Reliance On "Other Jurisdictions."

Nevada law governs Roil Energy and Allan's independent expectancies. RCW 25.15.310(1)(a). In Nevada, as in Washington, agents acting within the scope of their employment cannot tortiously interfere with their principal's contracts. Welder v. Univ. of S. Nevada, 833 F.Supp. 2d 1240, 1244 (D. Nev. 2011). However, nothing in Welder or other Nevada cases bars an interference claim where an agent breaches his fiduciary duty and acts in his own self-interest as occurred here. "*Where Nevada law is lacking, its courts have looked to the law of other*

jurisdictions, particularly California, for guidance." Mort v. United States, 86 F.3d 890, 893 (9th Cir. 1996).

In California, "*courts have repeatedly held that parties with an economic interest in a contractual relationship may be liable for intentional interference with that contract*." United Nat. Maint., Inc. v. San Diego Convention Ctr., Inc., 766 F.3d 1002, 1008 (9th Cir. 2014). Under California law, "*the pertinent economic relationship is the one that exists between the two contracting parties.*" Id. at 1007. Accordingly, California courts allow "*contract interference claims to be stated against owners, officers, and directors of the company whose contract was the subject of the litigation.*" Woods v. Fox Broad. Sub., Inc., 129 Cal. App. 4th 344, 28 Cal. Rptr. 3d 463, 472-73 (2005). "*While those defendants may attempt to prove that their conduct was privileged or justified, that is a defense which must be pleaded and proved.*" Id. at 473. Thus, in contrast to the absolute immunity afforded to mere "participants" by Alabama's courts, the California rule is virtually identical to the rule articulated by Washington courts. See Olympic Fish, supra at 599.

Yet, Defendants inexplicably claim that tortious interference "*can only be asserted against a stranger to the relationship*" under California law. Resp. Brief, p. 53. However, Defendants mistakenly rely on Kasparian v. County of Los Angeles, 38 Cal. App. 4th 242, 45 Cal. Rptr.

2d 90 (1995), which has been repeatedly rejected and expressly declined as precedent by other California courts. Resp. Brief, p. 53; Woods, supra at 471; Asahi Kasei Pharma Corp. v. Actelion Ltd., 222 Cal. App. 4th 945, 169 Cal. Rptr. 3d 689 (2013). In California, a tortious interference claim will lie even where the defendant shares "*an inherent unity of economic interest and purpose with a contracting party.*" Id. at 702 n.13. Accordingly, Kasparian is inapposite and irrelevant as a matter of law.

III. PLAINTIFFS' RESPONSE TO DEFENDANTS' CROSS-APPEAL

A. The Trial Court Correctly Concluded Defendants Committed Fraud, Civil Conspiracy, Breach Of Fiduciary Duty, And Oppression Of Minority Interest.

Unchallenged findings are verities on appeal, and review is limited to determining if the trial court's unchallenged findings support its conclusions of law. All Star Gas, Inc., of Washington v. Bechard, 100 Wn. App. 732, 740 (2000). Here, Defendants blatantly ignore the "*clear distinction in the meaning of the terms 'damage' and 'damages.'*" Gilmartin, supra at 302 (Schwellenbach, J., dissenting). "*'Damage' is legal injury,*" while "*'damages' is the pecuniary compensation for such legal injury.*" Id. Here, the Trial Court's unchallenged findings support its conclusion that Defendants invaded Plaintiffs' legal rights.

1. Sufficient Evidence Established Plaintiffs' Fraud Claim.

Here, Defendants' claim that "*Allan failed to prove that he suffered any damages*" is meritless. Resp. Brief, p. 57. First, Defendants misstate the Trial Court's conclusions. Although the Trial Court erroneously refused to award clearly calculable damages, it did so based on a purported "*absence of ascertainable damages.*" CP 4437 – Conclusion No. 21. Moreover, the Trial Court explicitly concluded Plaintiffs produced "*sufficient evidence of a direct loss suffered by Allan Holms.*" CP 4438 – Conclusion No. 28.

Additionally, "*The damage which will support an action for fraud or deceit ... need not be readily computable in terms of money provided it is a legal injury.*" 37 C.J.S. Fraud § 69. Rather, "*legal injury must accompany an actionable fraud*" and the invasion of a right imports damage. Id. Accordingly, "*an action of deceit may lie, even though the injury lacks a compensable market value.*" Id.; see also Sigman v. Stevens-Norton, Inc., 70 Wn.2d 915, 921-22 (1967).

2. Sufficient Evidence Established Plaintiffs' Conspiracy Claim.

Civil conspiracy exists when "*(1) two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an*

agreement to accomplish the conspiracy." All Star Gas, supra at 740. Overwhelming evidence[12] supported the Trial Court's conclusion that:

> "*The ruse perpetrated by Val Holms and Jay Edington on Allan Holms to cause him to abandon his participation in the capitalization program involving Roil Energy LLC, as well as the attempted dissolution of Roil Energy, LLC, and transfer to Holms Energy LLC of the minerals originally deeded to Roil but not recorded are, combined, sufficient evidence of an agreement by Val Holms and the remaining defendants to accomplish the conspiracy.*"

CP 4437 – Conclusion No. 24.

Yet, Defendants inexplicably insist that Plaintiffs failed to meet their burden of proving their civil conspiracy case. Resp. Brief, p. 58. Defendants' arguments are completely revisionist ignoring that Val (1) organized Roil Energy; (2) executed and delivered **notarized** Mineral Deeds; (3) requested and received from Allan $10,000 of seed capital to cover Roil Energy's immediate expenses, including his (Val's) own salary; and (6) opened Roil Energy's bank account, deposited Allan's $10,000, and immediately paid himself a $6,000 salary. Exs. P-130, P-134; RP 369, 633, 688-89, 965-66, 1051, 1239; CP 4426-28 – Findings Nos. 33-35, 37

[12] CP 4425 – Unchallenged Finding No. 17; CP 4431-32 – Findings Nos. 54-55, 57, 59; Exs. P-83, P-127, P-150, P-154, P-155, P-160, P-161, P-184, P-205, P-210, P-218, P-220, P-221.

In addition, under Nevada law, Roil Energy "*is an entity distinct from its managers and members*" as soon as it is "*legally organized pursuant to [NRS 86].*" NRS 86.201(1), (3). Thus, when Val organized Roil Energy, he created a new legal "person" with legal rights and responsibilities of its own. Id. As such, Defendants' mischaracterization of the joint venture as "simply discussions" that Val could walk away from at any time fails as a matter of law and fact. Resp. Brief, p. 59.

Further, Defendants rely on Corbit v. J.I. Case Co., 70 Wn.2d 522, 529 (1967) as support for the proposition that "*the circumstances must be inconsistent with a lawful or honest purpose and reasonably consistent only with the existence of the conspiracy.*" Resp. Brief, p. 58. However, Defendants misstate Corbit's holding. In Corbit, the court ruled that "*a finding that a conspiracy existed may be based on circumstantial evidence,*" but the Corbit plaintiffs failed to produce even "*the proverbial scintilla of evidence respecting civil conspiracy...*" Id. at 529. Accordingly, as a matter of law the Corbit plaintiffs failed to produce clear, cogent, and convincing evidence of a civil conspiracy. Id.

In stark contrast to Corbit's total lack of evidence, here there was substantial evidence establishing Val's civil conspiracy with Edington. On 3/19/10, Edington expressly advised Val "*to say that the deal with Allan has been terminated by you and just let them think you are not going*

public for the near term." Ex. P-245. Edington cautioned Val, "*we have to be extremely careful with out (sic) communications.*" Id. At trial, Edington admitted he "*was trying to provide a recommendation to [Val] that would potentially keep that from happening*" because he and Val were concerned about going down a litigation road with Allan. RP 725-26.

Defendants knew that secrecy and deception were crucial to the success of their fraudulent "Plan B." Ex. P-248. Accordingly, in furtherance of their conspiratorial undertaking to conceal their activities from Allan, Edington located a substitute public "shell" company – Multisys Language Solutions, Inc. ("MLS") – "*that would be an alternative to APD.*" RP 728. Notably, Edington had previously settled on APD as an appropriate public "shell" only after he discovered his original choice "*had too many contention liabilities...*" RP 562.

However, by fraudulently inducing Allan to abandon his participation in the Reverse Merger capitalization strategy Defendants exposed themselves and APD to "contention liabilities." Accordingly, Defendants identified a third public "shell" (MLS) (Ex. P-67) that was free from the "*liability factor*," and agreed to be extremely careful with their communications lest their fraudulent deception come to light. Ex. P-245.

Defendants insist that the Trial Court's failure to award any damages somehow constitutes a "finding" that "*Allan failed to prove* ...

that he was damaged by the alleged civil conspiracy." Resp. Brief, p. 59. Defendants cite to W.G. Platts, Inc. v. Platts, 73 Wn.2d 434, 438 (1968) for support of their claim that "*damage must be shown.*" Resp. Brief, p. 58. However, Defendants' argument and reliance on Platts is misplaced based on the same flawed misunderstanding of "damages" that defeats their fraud arguments.

3. Defendants Breached Their Fiduciary Duties And Oppressed Allan's Minority Interest.

In flagrant disregard of facts and the law Defendants' assertion that "*there is no Finding of Fact that Allan held a minority interest in Roil Energy, LLC*" is meritless. Resp. Brief, p. 60. In fact, the Trial Court found that Roil Energy's Articles of Organization "*identified its three (3) managing members as: Val Holms, Allan Holms and Jay Edington.*" CP 4426-27 – Unchallenged Finding No. 33. Under Nevada law, "*A person is admitted as an initial member of a limited-liability company ... upon the filing of the articles of organization with the Secretary of State...*" NRS 86.326(1)(a). Thus, Allan was admitted as a "member" of Roil Energy on 2/19/10. Id.; Ex. P-134. By definition, as a company "member," Allan owns "*a member's interest in a limited-liability company...*" NRS 86.081.

Therefore, Defendants' assigned error fails as a matter of fact and law.[13]

As a manager-member of Roil Energy, Val owed fiduciary duties to the Company and to each Company member, including brother Allan. JPMorgan Chase Bank, N.A. v. KB Home, 632 F.Supp. 2d 1013, 1024 (D. Nev. 2009); NRS 86.286(5)-(7). In Nevada, "*a fiduciary has a duty to make full and fair disclosure of all facts which materially affect the rights and interests of the parties, and, where a fiduciary relationship exists, facts which would ordinarily require investigation may not excite suspicion.*" Golden Nugget, Inc. v. Ham, 589 P.2d 173, 175-76 (Nev. 1979). Oppression of a minority interest is a breach of the fiduciary duties owed by majority shareholders to minority shareholders. Carstarphen v. Milsner, 693 F.Supp. 2d 1247, 1249 (D. Nev. 2010).

In Washington, as in Nevada, company members owe "*a fiduciary duty of loyalty and care*" to the company and to other members. Bishop of Victoria Corp. Sole v. Corporate Business Park, LLC, 138 Wn. App. 443, 456-57 (2007). The duty of loyalty requires members "*to avoid secret profits, self-dealing, and conflicts of interest.*" Id. at 457 (citation omitted). One member may not make a profit for himself individually out

[13] This Court may decide what facts were actually found below where "*findings of fact are not explicitly delineated, or where those findings are buried or hidden within conclusions of law...*" Sprint Spectrum, LP v. State, 174 Wn. App. 645, 653 (2013). This court "*may also independently review evidence consisting of written documents.*" Lobdell v. Sugar 'N Spice, Inc., 33 Wn. App. 881, 887 (1983).

of the company's business, or out of the transactions which he conducts privately which in justice and equity ought to have been conducted in the company's name. In re Wilson's Estate, 50 Wn.2d 840, 846-47 (1957). Where a member engages in self-dealing, he will be compelled to account to the other company members for the profits acquired by reason thereof. Stewart v. Ulrich, 117 Wash. 109, 114 (1921).

In addition, company members "*are obligated to deal with each other with candor and the utmost good faith.*" Bishop of Victoria, supra at 456. In fact, each company member is required to fully disclose all known information that is significant and material to the affairs or property of the company. Id. at 458. Members are confidential agents of each other and have a right to know all that the other member knows and are required to fully disclose all material facts that relate to company affairs. Id.

Here, it is beyond dispute that Val Holms was a managing member of Roil Energy. Ex. P-134. In addition, the evidence of his self-dealing and bad faith was beyond compelling. CP 4427 – Finding No. 35; CP 4432 – Unchallenged Findings Nos. 57, 59. Based on these unchallenged findings, the Trial Court correctly concluded:

> "*In carefully worded communications, Val Holms made material representations of fact to Allan Holms, which were false—that Val was going to terminate his involvement in the Roil project and keep his minerals for his family rather than risking the uncertainties of the*

> *reverse merger. Val's purported retention of the minerals was material to Allan's interest. In truth, Val was intending to continue participating in a reverse merger with Jay Edington involving a different shell, ('Plan B') and Val Holms knew his representation to Allan was false.*"

CP 4436 – Conclusion No. 19.

In addition, substantial evidence established that Val intentionally failed to make full and fair disclosure of all facts which materially affected the rights and interests of the parties. Golden Nugget, Inc., supra at 175-76. Likewise, Val made a profit for himself individually out of Roil Energy's business and conducted privately transactions which in justice and equity ought to have been conducted in Roil Energy's name. Wilson's Estate, 50 Wn.2d at 847. In brazen disregard for his fiduciary duty to deal with Allan with candor and the utmost good faith, Val engaged in a calculated scheme to fraudulently deceive Allan in order to induce Allan to abandon his participation in Roil Energy. Bishop of Victoria, supra at 456. Moreover, the Trial Court expressly concluded that Val's "Plan B" deception, the attempted dissolution Roil Energy, and the fraudulent reconveyance of the Mineral Deeds "*supports liability for a breach of fiduciary duties by Jay Edington and Val Holms and minority shareholder oppression.*" CP 4437 – Conclusions Nos. 24, 25.

Defendants' egregious misconduct caused legal injury to Plaintiffs, and the record contains "*sufficient evidence of a direct loss...*" CP 4437-

38 – Conclusion No. 28. Thus, the Trial Court's conclusion that "*Damages however are limited to declaratory relief*" constitutes a reversible abuse of discretion. CP 4437 – Conclusion No. 25.

B. The Trial Court Properly Awarded Attorney Fees To Allan.

Based on conclusive evidence of Defendants' egregious unlawful misconduct, the Trial Court granted declaratory relief and judgment declaring that "*Roil Energy, LLC has proven its claims of fraud, breach of fiduciary duties, and civil conspiracy...*" CP 5263; CP 4436-37. As such, it is beyond dispute that Allan's derivative claims were "*successful, in whole or in part...*" NRS 86.489. Accordingly, the Trial Court properly exercised its discretion as authorized by NRS 86.489 to "*award the plaintiff reasonable expenses, including reasonable attorney's fees*" in the amount of $412,933.08. Id.; CP 5262-67.

1. Statute NRS 86.489 Is Unambiguous.

In Nevada, "*Statutory interpretation is a question of law.*" Sims v. Eighth Judicial Dist. Court ex rel. Cnty. of Clark, 206 P.3d 980, 982 (Nev. 2009). "*When construing a statute, we first inquire whether an ambiguity exists in the language of the statute. If the words of the statute have a definite and ordinary meaning, this court will not look beyond the plain language of the statute, unless it is clear that this meaning was not intended.*" State v. Quinn, 30 P.3d 1117, 1120 (Nev. 2001). "*If language*

is plain and unambiguous, it must be given effect." State v. State of Nevada Employees Ass'n, Inc., 720 P.2d 697, 699 (Nev. 1986)

NRS Section 86.489 provides:

> "*If a derivative action is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise or settlement of an action or claim, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct the plaintiff to remit to the limited-liability company the remainder of those proceeds received by the plaintiff.*"[14]

Pursuant to the plain language of NRS 86.489, the court's discretionary authority to award attorney fees is triggered where (1) "*a derivative action is successful, in whole or in part*," or (2) "*if anything is received by the plaintiff as a result of a judgment, compromise or settlement of an action or claim...*" Although the court is required to "*direct the plaintiff to remit to the limited-liability company the remainder of those proceeds received by the plaintiff*," the only limitation on a court's discretionary authority is that any award – including an award of fees – must be reasonable. Id.

Here, it cannot be seriously contended that Allan's derivative claims were anything but "*successful, in whole or in part...*" Id. Because

---

[14] In contrast, Washington law provides that "*If a derivative action is successful, in whole or in part, as a result of a judgment, compromise, or settlement of any such action, the court may award the plaintiff reasonable expenses, including reasonable attorneys' fees,* ***from any recovery in any such action or from a limited liability company***." RCW 25.15.385 (emphasis added).

of that, the plain and unambiguous language of NRS 86.489 authorized the Trial Court to "*award the plaintiff reasonable expenses, including reasonable attorney's fees...*" NRS 86.489.

2. Defendants' Novel "Fee Sharing" Theory Fails As A Matter Of Law.

In flagrant disregard for the plain and unambiguous statutory language of NRS 86.489, Defendants inexplicably insist that the purported "*essence*" of NRS 86.489 "*is that it is a 'fee sharing' statute*," and "*not a 'fee shifting' statute*." Resp. Brief, p. 64. Notably, Defendants have not and cannot identify any purported ambiguity in the plain language of NRS 86.489. Although Defendants cite to cases for support of their novel "fee sharing" argument, they do so in utter disregard for the fact that their cited cases rely primarily on "common fund" doctrine and analysis.

Under Nevada law, "*If the efforts of a litigant or his attorney create a common fund benefitting third persons, the doctrine requires these passive beneficiaries to pay their fair share of litigation expenses by allowing the litigant or attorney to recover reasonable attorneys' fees from the common fund.*" State, Dep't of Human Res., Welfare Div. v. Elcano, 794 P.2d 725, 726 (Nev. 1990). However, it is well established that the existence or non-existence of a common fund is immaterial where Nevada's "*legislature has created a complete and comprehensive*

statutory scheme..." Consumers League of Nevada v. Sw. Gas Corp., 576 P.2d 737, 739 (Nev. 1978).

Here, it is undisputed that the Nevada Limited Liability Company Act (NRS 86) specifically provides for attorney's fees where a derivative action "*is successful, in whole or in part...*" NRS 86.489. As such, Defendants' strained and narrow reading of NRS 86.489 is defeated by binding Nevada precedent, as well as the plain language of NRS 86.489. Consumers League, supra at 739.

To support their argument against the statutory fee award here, Defendants could only cite to cases from foreign jurisdictions, none of which apply factually or legally. Resp. Brief, pp. 64-67 (citing Cal X-Tra v. W.V.S.V. Holdings, L.L.C., 276 P.3d 11 (Ariz. Ct. App. 2012); Glenn v. Hoteltron Sys., Inc., 74 N.Y.2d 386, 547 N.E.2d 71, 547 N.Y.S.2d 816 (1989); and Jerue v. Millett, 66 P.3d 736 (Alaska 2003)).

In addition, Defendants' narrow and strained reading of NRS 86.489 would effectively indemnify member-manager tortfeasors who have fraudulently usurped Company assets and egregiously breached their fiduciary duties to the Company and its members. Requiring the only innocent Company member to pay any of the expenses caused by the insiders' wrongdoing is unfair and inequitable and not contemplated by NRS 86.489. Indeed, the Nebraska Supreme Court dealt with this very

issue relating to a similar statutory provision[15] and held that "*the attorney fees should be awarded* ***in addition*** *to the judgment rather than being taken out of the judgment.*" Fitzgerald v. Cmty. Redevelopment Corp., 811 N.W.2d 178, 202 (Neb. 2012) (emphasis added).

In fact, the Fitzgerald court explained that pursuant to the plain language of Neb. Rev. St. § 67-291, "*the court may award expenses, including attorney fees, as a separate component of the judgment.*" Id. "*The statute then requires that in a derivative action, the plaintiff may retain the portion of the judgment awarded as expenses, but any additional proceeds of the judgment that the plaintiff receives must be remitted to the partnership.*" Id. Accordingly, the Fitzgerald court agreed with the trial court's conclusion that "*attorney fees are properly awarded as a separate item within the overall judgment.*" Id. at 203. Given the plain language of Fitzgerald, Defendants' contention here that "*the Nebraska court made no analysis of whether the Nebraska statute was a fee-shifting or fee-sharing statute*" is patently untrue. Resp. Brief, p. 68.

Most egregiously, Defendants purport to rely on Interlake Porsche & Audi v. Bucholz, 45 Wn. App. 502 (1987), ignoring that it was decided almost a decade before Washington's Limited Liability Company Act was passed in 1994. Resp. Brief, pp. 67-68; see RCW 25.15.005 et seq. In

[15] See **Appendix P.**

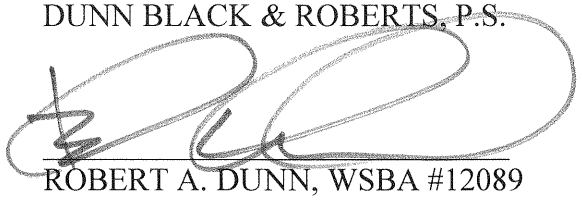
fact, the Interlake Porsche court unequivocally explained that Washington courts only apply a "common fund" analysis in the absence of a contract or a statute. Id. at 521. Here, the express statutory authority of NRS 86.489 authorized the Trial Court's fee award. As such, Interlake Porsche provides no support for Defendants' artificial statutory construction.

IV. CONCLUSION

Based upon the foregoing, Appellants Allan Holms and Roil Energy respectfully request (1) the Trial Court's errors (i) in concluding that no enforceable contract was made between brothers Allan and Val Holms and (ii) in relying upon extrinsic evidence to defeat the plain language of the notarized Mineral Deeds, be reversed and remanded for entry of an Amended Judgment; (2) the Trial Court's errors in refusing to award damages and/or impose a constructive trust be reversed and remanded for a new trial on damages; and/or (3) alternatively, the Trial Court's error in dismissing Plaintiffs' Tortious Interference claims on summary judgment be reversed and remanded for trial; and (4) that Respondents' cross-appeal be dismissed. Appellants also request an award of reasonable costs and attorney fees on appeal.

DATED this 17 day of August, 2015.

DUNN BLACK & ROBERTS, P.S.



ROBERT A. DUNN, WSBA #12089
BIL G. CHILDRESS, WSBA #45203
Attorneys for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17 day of August, 2015, I caused to be served a true and correct copy of the foregoing document to the following:

☐ HAND DELIVERY
☐ U.S. MAIL
☐ OVERNIGHT MAIL
☐ FAX TRANSMISSION
☐ EMAIL

Carl Oreskovich
Etter, McMahon, Lamberson, Clary & Oreskovich
618 W. Riverside, Ste. 210
Spokane, WA 99201

☐ HAND DELIVERY
☐ U.S. MAIL
☐ OVERNIGHT MAIL
☐ FAX TRANSMISSION
☐ EMAIL

Wesley Paul
Paul Law Group
41 Madison Avenue, 25th Floor
New York, NY 10010

☐ HAND DELIVERY
☐ U.S. MAIL
☐ OVERNIGHT MAIL
☐ FAX TRANSMISSION
☐ EMAIL

Robert F. Greer
Frank J. Gebhardt
Feltman, Gebhardt, Greer & Zeimantz, P.S.
14th Floor Paulsen Center
421 W. Riverside
Spokane, WA 99201

BIL G. CHILDRESS

RCW 64.04.010
Conveyances and encumbrances to be by deed.

Every conveyance of real estate, or any interest therein, and every contract creating or evidencing any encumbrance upon real estate, shall be by deed: PROVIDED, That when real estate, or any interest therein, is held in trust, the terms and conditions of which trust are of record, and the instrument creating such trust authorizes the issuance of certificates or written evidence of any interest in said real estate under said trust, and authorizes the transfer of such certificates or evidence of interest by assignment by the holder thereof by a simple writing or by endorsement on the back of such certificate or evidence of interest or delivery thereof to the vendee, such transfer shall be valid, and all such assignments or transfers hereby authorized and heretofore made in accordance with the provisions of this section are hereby declared to be legal and valid.

[1929 c 33 § 1; RRS § 10550. Prior: 1888 p 50 § 1; 1886 p 177 § 1; Code 1881 § 2311; 1877 p 312 § 1; 1873 p 465 § 1; 1863 p 430 § 1; 1860 p 299 § 1; 1854 p 402 § 1.]

RCW 19.36.010
Contracts, etc., void unless in writing.

In the following cases, specified in this section, any agreement, contract, and promise shall be void, unless such agreement, contract, or promise, or some note or memorandum thereof, be in writing, and signed by the party to be charged therewith, or by some person thereunto by him or her lawfully authorized, that is to say: (1) Every agreement that by its terms is not to be performed in one year from the making thereof; (2) every special promise to answer for the debt, default, or misdoings of another person; (3) every agreement, promise, or undertaking made upon consideration of marriage, except mutual promises to marry; (4) every special promise made by an executor or administrator to answer damages out of his or her own estate; (5) an agreement authorizing or employing an agent or broker to sell or purchase real estate for compensation or a commission.

[2011 c 336 § 540; 1905 c 58 § 1; RRS § 5825. Prior: Code 1881 § 2325; 1863 p 412 § 2; 1860 p 298 § 2; 1854 p 403 § 2.]

RCW 64.04.020
Requisites of a deed.

Every deed shall be in writing, signed by the party bound thereby, and acknowledged by the party before some person authorized by *this act to take acknowledgments of deeds.

[1929 c 33 § 2; RRS § 10551. Prior: 1915 c 172 § 1; 1888 p 50 § 2; 1886 p 177 § 2; Code 1881 § 2312; 1854 p 402 § 2.]

NDCC 47-09-08. Delivery in escrow.

A grant may be deposited by the grantor with a third person to be delivered on the performance of a condition, and on delivery by the depositary it will take effect. While in the possession of the third person and subject to condition, it is called an escrow.

NDCC 47-09-07. Delivery must be absolute – Conditional delivery ineffective, becomes absolute.

A grant cannot be delivered to the grantee conditionally. Delivery to the grantee or to the grantee's agent as such is necessarily absolute and the instrument takes effect thereupon, discharged of any condition on which the delivery was made.

NDCC 47-09-03. Voluntary transfer defined – Consideration unnecessary.

A voluntary transfer is an executed contract, subject to all rules of law concerning contracts in general except that a consideration is not necessary to its validity.

RAP 1.2(a) and (c)
Interpretation and Waiver of Rules by Court

(a) Interpretation. These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b).

(c) Waiver. The appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice, subject to the restrictions in rule 18.8(b) and (c).

RAP 10.3(g)
Content of Brief

(g) Special Provision for Assignments of Error. A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.

APPENDIX H

RAP 10.4(c)
Preparation and filing of Brief by Party

(c) Text of Statute, Rule, Jury Instruction, or the Like. If a party presents an issue which requires study of a statute, rule, regulation, jury instruction, finding of fact, exhibit, or the like, the party should type the material portions of the text out verbatim or include them by copy in the text or in an appendix to the brief.

APPENDIX I

RCW 25.15.310(1)(a)
Law governing.

(1) Subject to the Constitution of the state of Washington:

(a) The laws of the state, territory, possession, or other jurisdiction or country under which a foreign limited liability company is organized govern its organization and internal affairs and the liability of its members and managers; and

[1995 c 337 § 21; 1994 c 211 § 901.]

NRS 86.201(1), (3) Commencement of organizational existence.

1. A limited-liability company is considered legally organized pursuant to this chapter:

(a) At the time of the filing of the articles of organization with the Secretary of State, upon a later date and time as specified in the articles, which date must not be more than 90 days after the date on which the articles are filed or, if the articles specify a later effective date but do not specify an effective time, at 12:01 a.m. in the Pacific time zone on the specified later date, whichever is applicable; and

3. A limited-liability company is an entity distinct from its managers and members.

(Added to NRS by 1991, 1294; A 1993, 1014; 1995, 1127, 2108; 2001, 1388, 3199; 2007, 2424, 2670; 2011, 2798)

NRS 86.326(1)(a) Admission of members; member has no preemptive right to acquire certain interests; exception.

1. A person is admitted as an initial member of a limited-liability company:

(a) If the company is a limited-liability company managed by its members, upon the filing of the articles of organization with the Secretary of State or upon a later date specified in the articles of organization; or

(Added to NRS by 2009, 1692; A 2013, 1278)

NRS 86.081 "Member" defined.

"Member" means the owner of a member's interest in a limited-liability company or a noneconomic member.

(Added to NRS by 1991, 1293; A 1997, 715; 2001, 1388, 3199)

NRS 86.286(5)-(7). Operating agreement.

5. If, and to the extent that, a member or manager or other person has duties to a limited-liability company, to another member or manager, or to another person that is a party to or is otherwise bound by the operating agreement, such duties may be expanded, restricted or eliminated by provisions in the operating agreement, except that an operating agreement may not eliminate the implied contractual covenant of good faith and fair dealing.

6. Unless otherwise provided in an operating agreement, a member, manager or other person is not liable for breach of duties, if any, to a limited-liability company, to any of the members or managers or to another person that is a party to or otherwise bound by the operating agreement for conduct undertaken in the member's, manager's or other person's good faith reliance on the provisions of the operating agreement.

7. An operating agreement may provide for the limitation or elimination of any and all liabilities for breach of contract and breach of duties, if any, of a member, manager or other person to a limited-liability company, to any of the members or managers, or to another person that is a party to or is otherwise bound by the operating agreement. An operating agreement may not limit or eliminate liability for any conduct that constitutes a bad faith violation of the implied contractual covenant of good faith and fair dealing.

(Added to NRS by 1995, 2106; A 1997, 718; 2001, 1391, 3199; 2007, 2425; 2009, 1696; 2011, 779; 2013, 1276)

RCW 25.15.385
Expenses.

If a derivative action is successful, in whole or in part, as a result of a judgment, compromise, or settlement of any such action, the court may award the plaintiff reasonable expenses, including reasonable attorneys' fees, from any recovery in any such action or from a limited liability company.

[1994 c 211 § 1004.]

Neb. Rev. St. § 67-291.
Derivative action; expenses; attorney's fees.

If a derivative action is successful, in whole or in part, or if anything is received by the plaintiff as a result of a judgment, compromise, or settlement of an action or claim, the court may award the plaintiff reasonable expenses, including reasonable attorney's fees, and shall direct him or her to remit to the limited partnership the remainder of those proceeds received by him or her.

Source: Laws 1981, LB 272, § 59.

FINDINGS OF FACT

Finding of Fact No. 15

During the period December 2009 through early March 2010, the three parties, Allan Holms, Val Holms and Jay Edington, discussed entering into a joint enterprise for the development of a project using Val Holms' McKenzie County Mineral Interests. Val Holms would contribute his mineral interests; Allan Holms would provide the seed capital in the amount of $200,000.00 to $250,000.00, and raise approximately $2,000,000.00 in private equity from investors who would purchase stock in the public shell corporation; and Jay Edington would provide the public shell corporation and bring his skill and experience in capitalizing and marketing companies by means of a reverse merger. **No written agreement was executed**, but the responsibilities of each were outlined in an action item and timeline chart prepared by Jay Edington and presented to Val and Allan on February 13, 2010. On or before March 1, 2010, Allan Holms was to "provide $200,000 as Starting Equity for LLC" and on or before March 8, 2010, Val Holms was to "Assign Mineral Rights to Roil and properly record and file". (Exhibit 101) Later, Jay Edington was of the opinion that Val Holms' mineral interests were insufficient upon which to base the reverse merger, and suggested that Allan Holms approach his step sister, Evenette Greenfield, and her husband Rocky to see if they were interested in participating in the possible merger. There were discussions but no agreement between APD or Roil Energy and Evenette Greenfield and her husband to purchase the Greenfield's mineral interests. Any mineral interests owned, or that had been owned, by Evenette and Rocky Greenfield are not part of this litigation.

Finding of Fact No. 16

Of the $200,000 in seed money that Allan Holms said he would provide, he only provided $10,000.00 to open a corporate bank account. Allan Holms never raised any of the two million dollars that he said he could raise from investors. Allan Holms did not approach any potential investors, except for a telephone conversation with an unidentified individual at Morgan Stanley.

Finding of Fact No. 19

On or around February 3, 2010, Jay Edington commenced a plan for Allan Holms to purchase up to 2.5 million shares of common stock of the public shell corporation, APD.

Finding of Fact No. 20

The purchase price of such 2.5 million shares from APD by Allan Homs (sic) was intended to be $0.02 per share.

Finding of Fact No. 21

The purchase price of the 2.5 million shares from APD by Allan Holms was intended to be made through certain "nominees" to be designated by Allan Holms (the "APD Nominee Transaction"). Allan Holms did not understand the concept of nominees acquiring shares of APD prior to the reverse merger.

Finding of Fact No. 22

In addition to the purchase of shares from APD by Allan Holms, Jay Edington made arrangements with certain shareholders of APD to sell their respective shares of APD common stock to Allan Holms.

Finding of Fact No. 23

The number of shares Allan Holms was to purchase from such shareholders of APD was approximately 1.3 million shares. The purchase price for such shares ranged from $0.02 to $0.045 per share.

Finding of Fact No. 24

The purchase by Allan Holms of the 1.3 million shares form APD shareholders was suggested by Jay Edington to be accomplished through various nominee shareholders designated by Allan Holms (the "Shareholder Nominee Transaction").

Finding of Fact No. 25

The use of nominee shareholders in the APD Nominee Transaction and the Shareholder Nominee Transaction was intended so that no shareholder in name only was the holder of more than 9.9% of the issued and outstanding common stock of APD.

Finding of Fact No. 26

Allan Holms would retain beneficial ownership and control of all shares purchased through the use of nominees in the APD Nominee Transaction and the Shareholder Nominee Transaction.

Finding of Fact No. 27

Allan Holms did purchase some shares from APD shareholders.

Finding of Fact No. 28

The plan enabled Allan Holms to have low-priced stock which he could later sell and recoup his investment.

Finding of Fact No. 31

Following Allan Holms' purchase of shares contemplated by the Shareholder Nominee Transaction, Allan Holms would own nearly 1,356,654 shares of APD common stock.

Finding of Fact No. 32

1,356,654 shares of APD common stock is approximately 55% of APD's common stock. The parties testified that at times the agreement was for Val and Allan to split the shares 50-50, or 40-40 with Jay Edington to hold a 20% corporate interest. By mid-February, Jay Edington was communicating other private ideas and arrangements with each of the brothers separately.

Finding of Fact No. 34

On February 19, 2010, Val Holms met with Allan Holms in Butte, Montana. **Val Holms was expecting to receive a check for $200,000.00**, which had been under discussion as the minimum amount that Allan Holms needed to provide as seed capital. However, as early as February 13, 2010, Jay expressed privately to Val his concerns about Allan's timely provision of "the money". **(Exhibit 102)** On the 19th, Allan Holms only gave Val Holms a check in the amount of $10,000.00 to open the bank account for Roil Energy, LLC.

Finding of Fact No. 35

Prior to the February 19, 2010 meeting in Butte, Val Holms caused to be prepared two mineral deeds for the McKenzie County Mineral Interests, naming Toll Reserve Consortium, Inc. as the grantor and Roil Energy, LLC as the grantee. **It was Val Holms' intent to record these mineral deeds and transfer title to Roil Energy only upon receipt of the $200,000.00 seed money and the performance of other commitments from Allan Holms.** The mineral deeds had not been recorded on February 19, 2010, and only unrecorded copies were shown by Val Holms to Allan Holms at that meeting. **Because Val Holms never received from Allan Holms the $200,000.00 seed money to be deposited into Roil Energy, LLC, Val Holms did not record the mineral deeds conveying the McKenzie County Mineral Interests to Roil Energy, LLC**; however, he represented to Allan that he had actually sent the originals for filing.

Finding of Fact No. 36

Jay Edington later stated that under his reverse merger plan, the transfer of the mineral interests to Roil Energy, LLC was not scheduled to happen until five or six steps down the road, and was based upon the completion of a deal and closing. There were contingent obligations and responsibilities to raise money, provide seed capital, and do a private placement.

Finding of Fact No. 38

The respective percentage ownership interests that Val Holms, Allan Holms and Jay Edington would have in Roil Energy, LLC was discussed among them. Val Holms described the ownership percentages as being "all over the place". Jay Edington described the ownership percentages as "still up in the air". Allan testified that in late December, 2009, Val offered to share his mineral interests on a 50-50 basis. Later, upon Jay Edington's request for his own interest, Allan testified the parties agreed to a 40-40-20 split.

Finding of Fact No. 39

Val Holms became concerned upon hearing that Allan was boasting about getting control of Val's minerals. Val stated at all times he intended that he would have the controlling interest in both Roil Energy, LLC and in the public shell corporation (APD), because the value he brought to the proposed deal - his mineral interests - was substantially greater than the value proposed

to be brought by either Allan Holms or Jay Edington. Val Holms said he was always going to have control - at least 51 percent. Tom Greenfield, son of Evenette Greenfield and nephew of both Allan Holms and Val Holms, who was present with Allan Holms and Val Holms at the meeting in Butte on February 19, 2010, understood that Val Holms was to have the majority interest, but did not know the exact percentage split in Val's favor. **Val Holms, Allan Holms and Jay Edington never reached agreement about their respective percentage ownership interests in Roil Energy, LLC.**

Finding of Fact No. 40

Jay Edington drafted an operating agreement for Roil Energy, LLC and sent a copy of the draft operating agreement to Val Holms and Allan Holms. The draft operating agreement contained blanks where the respective ownership interests of the members of Roil Energy, LLC were to be inserted. **No percentage ownership interests were inserted, and although Jay Edington characterized the operating agreement as critical, no operating agreement was ever finalized or signed regarding Roil Energy, LLC.**

Finding of Fact No. 41

Jay Edington's reverse merger plan contemplated that he, Val Holms and Allan Holms would not be the only members of Roil Energy, LLC, but that an additional member or members would participate to the extent of an undetermined percentage ownership interest in that limited liability company. Neither Val nor Allan Holms knew the identity of the additional member or members, and no percentage membership interest was ever assigned to those unidentified members.

Finding of Fact No. 42

The plan provided for the public shell corporation to purchase Val Holms' McKenzie County Mineral Interests. However, APD, the public shell, needed funds from investors in order to provide the money to purchase those assets. **As a prelude to seeking investors for APD, APD had to acquire the right to purchase those mineral interests, by means of an option to purchase agreement, so potential investors would know that such a right existed. No option to purchase agreement was ever drafted.**

Finding of Fact No. 44

A valuation of Val Holms' mineral interests was a necessary component of the reverse merger. Boyd Hennimen, the petroleum geologist who was a friend of Allan Holms, and from whom Val Holms, Allan Holms and Jay Edington sought advice and an opinion regarding a valuation of Val's mineral interests, would not provide a valuation of those mineral interests because there had been no actual drilling, and stated he was not a proponent of public companies.

Finding of Fact No. 46

No document was ever signed by Allan Holms, Val Holms and Jay Edington setting forth their agreement to enter into and fulfill the terms of the reverse merger transaction that Jay Edington had proposed.

Finding of Fact No. 47

No document was ever signed by Val Holms, Jay Edington and Allan Holms, setting forth the terms of the marketing of Val's mineral interests by means of a reverse merger with a public shell company, or by any other means.

Finding of Fact No. 48

No document was ever signed by Val Holms, Jay Edington, and Allan Holms setting forth their respective ownership percentages as members of Roil Energy, LLC, including how to allocate the 30,000,000 to 35,000,000 shares anticipated to be received from APD by Roil Energy, LLC in the reverse merger. **The respective ownership interests of Jay Edington, Val Holms, Allan Holms and the other member(s) in Roil Energy, LLC, although never determined, would have likely been based upon each members' ownership (by themselves or through nominees) in the shares of APD, the target public shell corporation.**

Finding of Fact No. 49

Jay Edington prepared a draft of a letter of intent regarding the reverse merger that was being discussed and on February 23, 2010 he e-mailed that draft letter of intent to Allan Holms and Val Holms. No letter of intent was ever finalized or signed.

Finding of Fact No. 50

Jay Edington testified that in a reverse-merger situation using an asset purchase as the strategy, a two-step process is followed. First, an option to purchase is prepared and executed, and then an asset purchase agreement is prepared and executed. An option is necessary to show to investors that the public shell has a binding option to acquire assets. No option agreement or asset purchase agreement was ever finalized or executed.

Finding of Fact No. 52

Between late February and early March, 2010, Val Holms came to the belief that his brother, Allan Holms, intended to gain control of Val Holms' McKenzie County Mineral Interests. That was confirmed by Jay Edington in an email to Val Holms dated February 24, 2010, wherein Jay Edington explained that under the plan that was being discussed, Allan Holms would have control of Val Holms' mineral interests.

Finding of Fact No. 53

In a February 24, 2010 phone conversation, Jay Edington advised Val Holms that if the deal under discussion went together, Val would not have control of Roil Energy, LLC or APD, since Allan Holms would control 3.8 million shares of APD out of a total of 5.2 million shares outstanding. By this time, Jay Edington was expressing to Val his own displeasure with Allan, reporting that Allan Holms insisted that Val Holms not be involved in the APD stock acquisition. Jay outlined a plan to "unwind" and "cut this deal off with Allan", before Allan wired any funds to APD. Jay suggested he might utilize a different public company and later advised a "Plan B" would be feasible to move forward themselves and "use 2,000,000 of shares that were going to Allan and get done what we want." **(Exhibit 687, 154)**

Finding of Fact No. 59

Val Holms and Jay Edington formed a new private company, Holms Energy, LLC and completed a reverse merger utilizing the public MLS shell. The two worked together to form **Bakken Resources, Inc. (BRI), the public corporation ultimately owning the mineral interests which were previously deeded to Roil Energy, LLC, but unrecorded.**

CONCLUSIONS OF LAW

Conclusion of Law No. 4

A contract cannot be enforced if it lacks definite material terms. **In addition to other items listed below, the material terms of valuation of the minerals, timing, amount and form of the provision of seed capital and subsequent equity investment, and percent of ownership between two and later three joint venturers were never sufficiently definite and fixed before Allan Holms acquiesced to Val's communication and termination of the joint activities between the two of them.**

Conclusion of Law No. 7

The parties' contemplation that several written agreements and other documents needed to be drafted and filed with state and federal agencies is evidence that they did not intend their discussions and negotiations to amount to a binding agreement.

Conclusion of Law No. 8

Several material terms of the proposed joint enterprise among Allan Holms, Val Holms and Jay Edington had not been agreed upon by those parties. One of those essential terms upon which agreement had not been reached was the percentage ownership interests that Allan Holms, Val Holms and Jay Edington would each have in Roil Energy, LLC; the number of members that that limited liability company would have; and the percentage ownership interests of those other members. The percentage ownership interests in Roil Energy, LLC were an essential element of the contract that Plaintiffs allege was formed.

Conclusion of Law No. 9

Other terms of the proposed joint enterprise, and of the contemplated reverse merger, which were not agreed upon by Allan Holms, Jay Edington and Val Holms, included: completion and execution of an operating agreement for the limited liability company (which would have listed the percentage ownerships of each of the members of Roil Energy, LLC); a valuation of Val Holms' mineral interests; the amount of the capital contribution made by Allan Holms, if any, to Roil Energy, LLC and to the merger target, APD; an option to purchase the mineral interests; and an asset purchase agreement for APD to acquire Val Holms' mineral interests.

Conclusion of Law No. 10

Based on the above, no enforceable agreement or contract was made by and between Allan Holms and Val Holms by which Allan Holms was to contribute seed capital and private equity funding and Val Holms was to contribute his mineral interests.

Conclusion of Law No. 11

Because of the side arrangements being negotiated to the exclusion of the other venturers and growing distrust among them, neither common purpose, community of interest nor equal right of control was established.

Conclusion of Law No. 12

When Val Holms learned he would not hold majority right of control, all collaborative activity with Allan ceased except for the ruse of retaining his minerals solely for himself and his family.

Conclusion of Law No. 13

No enforceable contract for joint venture was established between Allan and Val Holms.

Conclusion of Law No. 14

Any agreement by Toll Reserve Consortium, Inc. to transfer the mineral interests to Roil Energy, LLC would have been an oral agreement unenforceable under the Statute of Frauds (RCW 64.04.010). The Statute of Frauds provides that contracts for the purchase and sale of an interest in realty are unenforceable against either the purchaser or the seller, absent a sufficient memorandum signed by the party to be charged. The writing must identify the subject matter of the contract, be sufficient to indicate that a contract between the parties had been made, and state with reasonable certainty the essential terms of the performance promises in the contract. To satisfy the Statute of Frauds, the writing must contain all terms of the contract.

Conclusion of Law No. 15

Essential elements of the alleged joint enterprise agreement to complete a reverse merger, were not agreed upon as noted above, therefore no enforceable contract was been formed. The mineral deeds themselves contain no language setting forth the terms upon which the transfer of the mineral interests were to be made, the consideration to be received by Toll Reserve in exchange for any such transfer, and whether there were any conditions to the transfer. The fact that two mineral deeds were prepared in anticipation of reaching agreement, and copies given to Allan Holms, is insufficient to establish the terms upon which Val Holms would agree to have his mineral interests transferred to Roil Energy, LLC, and therefore: (1) the mineral deeds do not satisfy the Statute of Frauds; and (2) there was no enforceable agreement between Roil Energy, LLC and Toll Reserve upon the essential terms of any such transfer of mineral interests.

Conclusion of Law No. 16

The duty of good faith and fair dealing is implied in every contract and arises in connection with terms actually agreed upon by the parties. **Since material terms were not agreed to by the parties there is no enforceable contract between Val Holms and Allan Holms as well as the corporate entities.**

Conclusion of Law No. 18

Since no enforceable contract had been entered into between Allan Holms and Val Holms regarding the joint venture and/or reverse merger, Val Holms had the right to withdraw from the negotiations, and further had the right to develop his mineral interests by means of another transaction.

Conclusion of Law No. 21

The measure of damages proximately caused by the fraud in terms of "benefit of the bargain' (sic) is not definable by the subsequent BRI capitalization plan, given significant differences and variables in the ultimate structures of Holms Energy, LLC and BRI. In the absence of ascertainable damages, declaratory relief is provided below.

Conclusion of Law No. 25

Conclusion of Law 24 also supports liability for breach of fiduciary duties by Jay Edington and Val Holms and minority shareholder oppression. **Damages however are limited to declaratory relief, below.**

Conclusion of Law No. 26

Constructive trust is an equitable remedy and is only available if there is no adequate remedy at law available to the Plaintiffs. **As noted above, such adequate remedy is not available since any income of BRI/Holms Energy, LLC is based on a completely different corporate structure than that developed with Allan Holms as a joint venturer. For that reason, computation of any equitable amount to allocate in trust for the benefit of Allan Holms is impossible.**

Conclusion of Law No. 27

Although Plaintiffs have established that Defendants are liable for fraud and civil conspiracy, **"benefit of the bargain" damages are not fairly computable from the financial status of the new entities, Holms Energy, LLC and BRI.**

Conclusion of Law No. 30.a.

However the contributions and share of earnings are not sufficiently comparable between Allan Holmes and Jay Edington to form a fair basis for damages.