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Court of Appeal No. 73448-2-I

King County Superior Court No. 15-2-05326-4 SEA

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

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JAY FRIET, an individual,

Appellant,

v.

KATHERINE GAISER, an individual; GUARDIANSHIP SERVICES OF SEATTLE, a non-profit organization; LANDON ENTERPRISES, LLC, a limited liability company; and CAROL GAISER, an individual for the purposes of petitioning to appoint a guardian,

Respondents.

COURT OF APPEALS DIV I
STATE OF WASHINGTON
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**BRIEF OF APPELLANT**

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Peter M. Vial, WSBA #6408
Jehiel I. Baer, WSBA #46951
McNAUL EBEL NAWROT & HELGREN PLLC
One Union Square
600 University Street, Suite 2700
Seattle, WA 98101
(206) 467-1816

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## I. INTRODUCTION

Appellant commenced this action to request a declaratory judgment construing a contract that binds him and his co-owners of Landon Enterprises, LLC (the "LLC"). Respondents argued that Appellant lacks standing to make such a request. In doing so, Respondents mischaracterized Appellant's Amended Complaint (labeling Appellant's claims derivative, when they are not), disregarded the purpose and authority of Washington's Uniform Declaratory Judgment Act (the "UDJA"). RCW 7.24, *et seq.*, and ignored material issues of fact. The trial court accepted Respondents' mistaken arguments and entered Respondents' proposed summary judgment order dismissing Appellant's case with prejudice. Appellant asks the Court to reverse and remand with directions that Appellant's case proceed on its merits.

The contract Appellant asked the trial court to interpret is the Operating Agreement (the "Agreement") of Landon Enterprises, LLC (the "LLC"). Appellant owns 50 percent of the LLC's Governance Units and Financial Units—the company's shares—and he requested the trial court determination of his and his co-owners' rights, status, and legal relations under the contract. Respondent Carol Gaiser ("Carol") owns 27.5 percent of the LLC's Units.[1] The Verah Landon Trust (the "Trust") owns the remaining 22.5 percent for the benefit of Carol. Respondent

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[1] Because many of the actors in this case have the same surnames, this brief often uses first names for clarity, not out of disrespect.

Guardianship Services of Seattle ("GSS") is its new, court-appointed trustee. Respondent Katherine Gaiser ("Katherine") has no ownership interest but, in violation of the Agreement, exercises her mother's, Carol's, Member perquisites and has seized control of the LLC.

Without producing a page of discovery or sitting for a single deposition, the Gaiser Respondents moved for summary judgment, which Respondent GSS belatedly joined. Respondents argued that Appellant is not a Member and therefore has no authority to bring a ***derivative*** action on behalf of the LLC. But Appellant had not brought a derivative action. Appellant invoked neither Civil Rule 23.1 (derivative actions), nor RCW 25.15.370 (authorizing derivative actions on behalf of limited liability companies). Rather, he requested declaratory relief under the UDJA.

The UDJA states that "[a] person . . . whose rights, status or other legal relations are affected by a . . . contract . . . may have determined any question of construction or validity arising under the . . . contract . . . ." RCW 7.24.020. Courts interpret the UDJA liberally, *Grandmaster Sheng-Len Lu v. King Cnty.*, 110 Wn. App. 92, 98, 38 P. 3d 1040, 1043 (2002), but Appellant has standing based on any interpretation of the UDJA's plain language, liberal or restrictive.

Regardless of his Member status within the company,[2] Appellant is undisputedly a Unit Holder. He and the other owners are expressly bound

[2] Appellant believes outstanding discovery that Respondents evaded may show he is a Member, but that status is not necessary for the declaratory relief he seeks.

by the terms of Agreement. The UDJA thus authorizes Appellant to ask the Court to determine their respective rights, status, and legal relations under the Agreement.

Respondents' summary judgment motion ignored the UDJA entirely. Respondents' ***one*** mention of Appellant's declaratory judgment claims was a single conclusory and illogical statement:

> Jay's cause of action for a declaratory judgment, the only cause of action asserted that could arguably provide a basis for the first three prayers for relief, must be dismissed and should be dismissed with prejudice since Carol will not consent to Jay's admission as a member of the LLC . . . .

Respondents' sentence is illogical because Appellant's status (as a Member or a merely a Unit Holder) is not determinative of his standing under the UDJA. Respondents' argument is also a Catch 22. Appellant's only rights with respect to the LLC arise under the Agreement. He has no other interest in the LLC's Wallingford properties, which are worth over ten million dollars and which have been in his family for nearly a century. But that same Agreement (Respondents mistakenly argue) precludes him from seeking a judicial determination of his and his co-owners' rights, status, and legal relations under the Agreement. They wield the Agreement as both a sword (to give them rights) and a shield (to bar Appellant from asking the Court to determine the parties' respective rights). Respondents would leave non-Members no recourse to seek judicial relief concerning their ownership interests in limited liability companies.

In similar fashion, Respondents prepared a proposed order granting summary judgment, but the proposed order contained the same non-sequitur:

> [Appellant]'s claims are derivative inasmuch as the [Appellant] is not a member of Landon Enterprises, LLC. . . .

Respondents' proposed order makes no sense. Whether claims are derivative instead of direct, turns on ***the relief sought***—is the claimant seeking judgment for the LLC (*i.e.*, derivatively) or for him or herself (*i.e.*, directly)—not on ***the status*** of the claimant as an owner, member, or manager.

Unfortunately, the trial court accepted Respondents' faulty logic without amendment. Without more, and despite the fact that the Agreement directly affects the "rights, status [and] other legal relations" of all Unit Holders; despite genuine issues of material fact as to whether Appellant and Carol satisfy the Agreement's requirements for Membership; despite the Gaiser Respondents' evasion of Appellant's discovery requests, which predated Respondents' summary judgment motion; and despite Appellant's Civil Rule 56(f) prayer, the trial court dismissed as derivative all claims in Appellant's Amended Complaint with prejudice, including claims for an adjudication that Carol is incapacitated as to her estate and for injunctive relief.

Even if Appellant's right to request judicial construction of the Agreement were to hinge on his or Carol's status as Members (it does not), the trial court should have reserved until after discovery questions of

Membership. Instead, the trial court made the findings by summary judgment. Each of the trial court's actions—ignoring the UDJA, concluding Appellant's claims are derivative, and deciding genuine issues of material fact—is error and necessitates reversal of the summary judgment. Appellant therefore respectfully asks that this Court reverse the trial court's order and remand the case with directions that the trial court (1) permit discovery, (2) determine the owners' respective rights , status, and legal relations under the Agreement, and (3) determine whether injunctive relief is warranted to enjoin operation of the LLC in violation of the Agreement.

## II. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that Appellant lacked standing to bring a declaratory judgment action to determine the owners' rights, status, and legal relations under the Agreement.

2. The trial court erred in granting summary judgment for Respondents despite the existence of genuine issues of material fact regarding Appellant's and Carol's Member status, and despite the Gaiser Respondents' refusals to respond to Appellant's pending discovery requests.

3. The trial court erred in dismissing Appellant's requests for adjudication of Carol's incapacity as to her estate and for injunctive relief to enjoin LLC operations in violation of the Agreement.

## III. ISSUES PRESENTED

1. Whether a limited liability company's owner can bring a declaratory judgment action to interpret the company's operating agreement that expressly binds all owners, regardless of Member status? (Assignment of Error No. 1.)

2. Whether a trial court can grant summary judgment where the moving parties refused to produce requested documents and participate in scheduled depositions, exacerbating existing genuine issues of material fact, and despite the non-moving party's Civil Rule 56(f) plea? (Assignment of Error No. 2)

3. Whether a limited liability company's owner has standing to seek the adjudication of another owner's Membership status as contemplated in the company's operating agreement? (Assignment of Error No. 3)

4. Whether a limited liability company's owner has standing to request injunctive relief, based on declaratory relief, to enjoin violations of the company's operating agreement? (Assignment of Error No. 3.)

## IV. STATEMENT OF THE CASE

### A. Legal Framework

The UDJA grants courts the power to "declare rights, status and other legal relations whether or not further relief is or could be claimed. . . . The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final

judgment or decree." RCW 7.24.010. A person "whose ***rights***, ***status***, *or* ***other legal relations are affected by a . . . contract***" may seek relief under the UDJA to "have determined ***any*** question of construction or validity arising under the . . . contract . . . and obtain a declaration of rights, status or other legal relations thereunder." RCW 7.24.020. Not only is the UDJA's language broad and permissive, but the UDJA expressly requires liberal construction and administration of its provisions "to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." RCW 7.24.120; *see also Grandmaster Sheng-Yen Lu v. King Cnty.*, 110 Wn. App. 92, 98, 38 P.3d 1040, 1043 (2002). It necessarily grants standing to any person "whose financial interests are affected by the outcome of a declaratory judgment action . . . ." *Casey v. Chapman,* 123 Wn. App. 670, 676, 98 P.3d 1246, 1249 (2004), *as amended* (Oct. 25, 2004). But financial interests are only one method of determining whether a claimant's rights, status, or other legal relations are affected by a contract. Moreover, a person may commence his or her declaratory judgment action "either before or after there has been a breach thereof." RCW 7.24.030.

Respondents mistakenly looked to the Limited Liability Companies Act's (the "LLC Act"), RCW 25.15, *et seq.*, provision authorizing derivative actions. CP 554–55. The LLC Act does indeed authorize LLC members to "bring an action in the superior courts in the right of a limited liability company ***to recover a judgment in its favor*** if managers or members with authority to do so have refused to bring the

action or if an effort to cause those managers or members to bring the action is not likely to succeed." RCW 25.15.370 (emphasis added). Here, however, Appellant was not seeking to recover a judgment in the LLC's favor. CP 11.

The LLC Act's provision authorizing derivative actions neither conflicts with nor overrides the UDJA. The LLC Act permits derivative actions on behalf of a limited liability company to recover damages owed to the company, as opposed to the company's individual owners. It ensures that owners can ***enforce rights belonging to their company***, where the company's management refuses to enforce them.[3] The UDJA, meanwhile, permits any ***person affected by a contract to interpret any provision*** within the contract. RCW 7.24.020. The two statutes can work together—such as when a member derivatively brings a declaratory judgment action to interpret a contract between his or her company and a third party—but the statutes do not, by their terms, work against each other.

## B. Background and Procedural Facts

### 1. Landon Enterprises, LLC

The LLC was formed on November 30, 2006, replacing a family-owned partnership. CP 223. The LLC owns property, consisting mostly of two apartment buildings and one corner of small retail establishments in

[3] For example, the LLC Act authorizes a non-managing member to sue in the name of the company for breach of a contract between the company and a third party, even though the member is not a party to the contract.

the heart of Wallingford, Seattle. CP 157–58. Appellant's great-grandfather, Jack Landon, a retired Seattle policeman, originally acquired and developed the properties in the late 1920s. *Id.* Landon's wife (and Appellant's great-grandmother), Verah Landon, directed in her Will that the properties provide financial benefit to her son, grandchildren, great-grandchildren, and "possible other, more distant descendants." CP 174. The properties have done so for four generations. CP 158–59. That is, until Carol, Verah's granddaughter, slid into dementia, CP 677–78, and Carol's daughter, Katherine, with sad animus to all things Landon orchestrated the removal of the LLC's longtime CPA and manager and urged sale of the LLC's properties, CP 262–63; CP 265; CP 277–78; CP 281.

The LLC's management is governed by the Agreement, the provisions of which supersede most of the default rules provided in the LLC Act. CP 192. The Agreement defines the rights and responsibilities inhering in LLC ownership. CP 193–210.

**2. Ownership Rights**

"Ownership rights in the [LLC] are reflected in Governance Units and Financial Units, . . ." CP 193. Governance Units and Financial Units are identical in all respects except that Financial Units are entitled to vote only in limited circumstances. *Id.* Any person owning ***at least*** one Governance Unit or one Financial Unit is a Unit Holder. *Id.* The Agreement expressly "binds all Unit Holders . . . claiming a right or

benefit under or covered by [the] Agreement." CP 217.

### 3. Members, Transferees, and Managers

Unit Holders fall into one of two categories: Members and Transferees. CP 188; CP 191. Both can own Governance and/or Financial Units, *id.*, but only Members have rights to manage the LLC (with restrictions discussed below), *e.g.*, CP 202–10. Transferees have more limited rights. *E.g.*, CP 211–15. The original Members structured the LLC this way largely for tax purposes: the Member-Transferee distinction increases the Unit Holders' lawful claim to lack of control and marketability discounts when Governance and Financial Units are transferred.

Transferees do not become Members automatically. They must be admitted by other Members. If existing Members hold at least 50 percent of the outstanding Units, then unanimous consent among Members is required to admit a Transferee as a Member. CP 212–13. Such consent must be in writing. CP 212. ***The Agreement does not specify the form of the written consent or require that the writing be signed.*** *Id.*

Similarly, an individual can involuntarily lose Member status. CP 187. The Agreement defines this as an event of "Dissociation." *Id.* One way a Member dissociates is by "the entry of an order by a court of competent jurisdiction adjudicating such Member incapacitated, as used and defined under RCW 11.88, as to his or her estate." *Id.*

Although the LLC is Member-managed, the Members can appoint

a Manager to assume management duties. CP 202. When they do, the Manager is responsible for hiring and firing LLC employees. CP 203. And, Members cannot thereafter fire the Manager unless they hold more than 50 percent of the Governance Units then outstanding. CP 207; CP 209. In forming the LLC, the original Members unanimously selected Jeffrey Wilson ("Wilson"), the Landon family's longstanding accountant and trustee of the Trust, to serve as the Manager. CP 188. In 2008, after the death of Appellant's mother (Carol's sister), Wilson, in turn, hired Appellant as the LLC's property manager with the approval of Carol and her husband, Graham Gaiser ("Graham"). CP 270.

**4. Limitations on Transfers of Member Rights**

The Agreement permits only one instance in which a Member may transfer Member rights—voting by proxy. And the Agreement strictly limits the manner in which a Member may do so. The Member must (a) file a revocable proxy with the Manager, (b) at or before the meeting in which the proxy is to be used, (c) with information sufficient for the Manager to determine that the Member authorized that proxy. CP 209.

The Agreement does not allow Members to use a power of attorney or "any transfer" to preserve a Unit Holder's Member status in the face of incapacitation. The Agreement bars transfers, actual or constructive, incident to Dissociation:

> "Transfer" includes an assignment, conveyance . . . and for certainty shall also include any transfer, actual or ***constructive***, resulting from or ***incident to an event of Dissociation***.

CP 191 (emphasis added).

The Agreement also bars other attempts to transfer Units and the rights that go with them. The Agreement renders such attempts void:

> Without the prior written consent of a Majority of the Members, no Unit Holder may directly or ***indirectly*** Transfer any Governance or Financial Units, except as provided in Section 12.02 [not applicable here]. Any other Transfer of Governance or Financial Units ***shall be void***.

CP 211 (emphasis added).

The Agreement's express and limited grant of authority for transfer of that single Member right (voting by a meeting-specific, revocable, authorized proxy) and the Agreement's broad prohibitions of other transfers, establishes that the Agreement does not authorize Members to transfer other Member rights, such as calling meetings, specifying purposes of meetings, and acting by consent without meetings. A non-Member cannot wield a Member's power of attorney to exercise rights reserved for Members, any more than a non-member of a gym could use a member's power of attorney to use the gym's exercise equipment. Such use of a power of attorney to override the Agreement's restrictions and prohibitions would also jeopardize the lawful tax reduction benefits for which the restrictions and prohibitions were designed.

**C. Katherine's Attempts to Usurp Owner Rights**

In August 2012, Katherine campaigned to bring down the LLC against the Unit Holders' best interests. CP 257. She complained that Appellant was using his position as property manager to make decisions

about property (in which she had no ownership interest). *Id.* Katherine also harassed LLC staff, demanding that they listen to her and not the LLC's property manager. CP 267–68.

Wilson expressed his support of Appellant's work in the face of Katherine's complaints:

> Jay has been appointed manager of the Landon Enterprises, he has been in this position for several years and ***has done a great job***. The properties are in good condition, ***rents and profits are solid***. The financial situation is also very solid. ***I support Jay continuing as the manager*** of Landon Enterprises.

CP 270 (emphasis added).

Katherine's father, Graham, agreed with Wilson's endorsement:

> Thank you for your sage advice -- ***with which I heartily agree***! It is what I have wanted to say, but feared it would be perceived as biased.

CP 273 (emphasis added).

The same sad drama replayed in September 2012. In an email to Wilson, Katherine demanded: "Have you suggested to Jay that he step down as Manager of Landon Enterprises?" CP 262. During the month prior, she had pressed Appellant and Wilson until she obtained a rent-free apartment unit from the LLC. She then refused to sign a lease unless Appellant relinquished his managerial position. *Id.* Katherine suggested she had a right to select the new manager, despite having no interest whatsoever in the LLC or its properties. *Id.*

Again, Wilson refused to give way to Katherine's demands:

> I am sorry you are unhappy with the management of Landon Enterprises. As trustee for the Verah Landon Trust,

> my position is ***Jay has done a great job as manager. I strongly support him remaining in the position as the manager of Landon Enterprises***. I am unwilling to fire him or hire another company to do that job. Landon Enterprises is doing very well financially and ***Jay has played a major role in the company's financial success***.

CP 278 (emphasis added). Wilson also urged Katherine to abide by company procedures:

> Landon Enterprises is a business, it has guidelines and procedures it operates under like any business. All tenants of Landon Enterprises need to follow those procedures and guidelines. That includes signing a lease, having reasonable access granted to your apartment and the other conditions any other tenant would agree to. The only difference in your case is you are not paying rent, your rent is being subsidized by your parents.

*Id.* For his support of Appellant, Wilson earned Katherine's enmity. Not long thereafter, she began seeking his removal, too.

Katherine was undeterred by Wilson's and her parents' support of Appellant. First, she emailed Appellant, and demanded his resignation: "Jay you need to resign or ***I will rip it apart***. My daddy wont [sic] stop me from feeling safe in my ***own fucking home***." CP 281 (emphasis added). Katherine's animus appeared rooted in events that occurred when she was two years old. *Id.*

Katherine wrote a similar email to Wilson: "I would ***rather sell off everything*** than be forced to continue a relationship where he has any basis for believe [sic] he is my superior." CP 277 (emphasis added). Disturbingly, she proclaimed her animus toward the LLC and her disregard of her parents: "[My dad] won't stop me from ***destroying everything landon*** [sic] and ***won't make me wait until until*** [sic] ***they die***

[referring to her parents]." *Id.* (emphasis added). Her reference to her parents was apparently because of their support of Appellant.

Her determination to sell off everything contrasted with all Unit Holders' financial interests and Carol's stated wishes. While still able to manage her own affairs, Carol received a third-party offer to purchase the properties. CP 251. She unilaterally declined, and when reporting the matter to Appellant, she expressed her hope that the properties would remain in the family for the benefit of the next generation, including Appellants's young son. *Id.*

Carol and Graham (a lawyer), who had endorsed Appellant as property manager, tried to calm down their daughter. In an e-mail to Wilson, Graham reported:

> Carol and I had a lengthy telephone conversation with Kate shortly after the time of her 3:42 e-mail (but before receiving it from you.) I doubt we did much good. . . . ***I don't think she fully appreciates the lack of a legal position she has***. I don't know that there is anything more either of us can do for now except to await her next actions, if any.

CP 697 (emphasis added).

Those next actions came the following year. Carol's Alzheimer's progressed and Graham's health declined until cancer took his life in February 2013. In May, Katherine obtained Carol's power of attorney,[4] which she attempted to misuse to transfer to herself Carol's LLC Member perquisites. CP 307–12. Despite her recent single-minded yet unsuccessful

[4] It remains unclear whether Carol had the capacity to execute such an instrument at that time.

efforts to control the LLC, the five-page, single-space power of attorney nowhere mentions the LLC, much less Carol's Member rights. *Id.*

Katherine renewed her attempts to "destroy[] everything landon" and "sell off everything" rather than allow Appellant to continue in a position where he was prospering to the benefit of all Unit Holders. In response, the LLC's attorney, Tim Austin ("Austin"), sent her (and other interested parties) an email saying she could not use Carol's power of attorney as a proxy to vote Carol's Units. "[S]ince the Operating Agreement does not recognize irrevocable proxies, ***a Member's interest cannot be voted pursuant to a General Power of Attorney***." CP 716 (emphasis added).

In August 2014, Katherine misused Carol's power of attorney to (1) demand a special meeting; and (2) move to (a) remove Wilson as Manager; (b) fire Appellant as property manager; and (c) dissolve the LLC. CP 294. Wilson, then still trustee of the Verah Landon Trust, opposed Kate's motions. CP 296.

In hope of an amicable resolution that preserved at least a part of his family's legacy, Appellant offered his agreement to a distribution in kind of the LLC's property between himself and Carol. CP 712. Katherine remonstrated and demanded (purportedly on behalf of Carol but against her prior express wishes) nothing short of "complete liquidation of the properties." CP 943.

On February 20, 2015, after Wilson resigned as trustee of the Verah Landon Trust and the TEDRA commissioner appointed GSS to

succeed him, Katherine purported to use her power of attorney to appoint herself as Carol's general proxy agent:

> with full discretion to vote as her proxy all of her units in the Company with respect to all matters submitted to the members at all general and special meetings of the members, or any adjournments thereof, and in all written consents to any actions taken without a meeting, which may occur during the period of this General Proxy.

CP 724.

Katherine followed this by leading efforts to remove Wilson as LLC Manager via a "Unanimous Vote and Consent of Members." CP 726. The "Consent" failed to comply with the Agreement in multiple ways. ***First***, the Agreement requires a Quorum of more than 50 percent of the outstanding Governance Units before Members can take any action at a meeting. CP 209. Members must satisfy that same Quorum requirement to take any written action without a meeting, such as a Unanimous Written Consent. CP 210. The only Member to sign the resolution (the Trust through its trustee, GSS) owned only 22.5 percent of the outstanding Governance Units. CP 726. The Trust's 22.5 percent fell well below the Agreement's Quorum requirement of Governance Units. Katherine is not a Member, and Carol's Member status is questionable in light of her documented inability to manage her affairs—for a year now she has neither appeared nor weighed in to these proceedings, and those who have met with her recount her incapacity. *E.g.* CP 677–78.

***Second***, even if Katherine could speak for Carol's Governance Units (which she cannot), Carol and the Trust combined would still only

account for 50 percent of the Governance Units, which would not satisfy the Quorum requirement. CP 209–10; CP 550.

***Third***, Katherine took the purported action without advance notice to Wilson, the founding and continuing Manager (and without information sufficient for him to determine whether Carol knowingly authorized the proxy—it was by then apparent she lacks the capacity to do so) or ***any*** notice to Appellant who owns 50 percent of the LLC's Governance Units and Financial Units. Despite multiple fatal deficiencies in her attempted action to remove and replace Wilson, Katherine also demanded that Wilson immediately turn over all LLC records and assets in his control. CP 908; CP 911–12. Following the trial court's mistaken summary judgment, and weary of Katherine's continuing attacks and threats, Wilson ultimately resigned.

On March 11, 2015, Katherine led a similar effort to fire Jay as property manager.[5] CP 728; CP 730. Katherine had no authority to fire Appellant, but after the trial court's summary judgment, Appellant ceded his position to Katherine's selection, pending appeal from dismissal of his claims.

**1. Procedural History**

Using Carol's power of attorney, Katherine sued Appellant, the LLC, the Trust, and Wilson in a TEDRA proceeding on November 10,

[5] Surprisingly, GSS, which controlled the Trust's Units, refused to communicate with either Appellant or Wilson (or their respective counsel), despite acting in concert with Katherine to terminate their services. In fact, GSS did not communicate with either until after it was named a defendant in this lawsuit. CP 917–18.

2014. CP 763–68. Katherine tried to unlawfully force Wilson as trustee to distribute Trust property (Appellant's mother's beneficial interests in the LLC) to Appellant.[6] *Id.* Katherine's goal was to have the Trust thus hold only Carol's 22.5 percent beneficial interest so that Katherine could "control" the trustee. In an effort to reach peace and stop Katherine's attacks on him, Wilson and the LLC, Appellant authorized Wilson to distribute Appellant's mother's trust property. CP 656. Wilson also notified the TEDRA court of Wilson's decision to resign as trustee as soon as the court appointed a successor. *See* CP 772–73.

Instead of mirroring Appellant's and Wilson's goodwill, Katherine continued her attack on Wilson. CP 580–81. She dismissed Jay from her lawsuit (without notice), and pursued Wilson personally for alleged (and unfounded) breach of fiduciary duty and attorney fees. *Id.* Appellant moved to intervene to prevent waste of LLC funds and to help defend Wilson. *Id.* Katherine opposed Appellant's motion, representing that proceedings in the TEDRA matter would not impact Appellant's interests in the LLC." CP 732–39. After Katherine's representations, the

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[6] RCW 11.94.050 prohibits an attorney-in-fact—like Katherine— from "exercis[ing] the principal's rights to . . . caus[e] a trustee to distribute property in trust" "unless specifically provided otherwise in the document . . . ."RCW 11.94.050. This is true even if the "designated attorney-in-fact or agent has all powers of absolute ownership of the principal, or the document has language to indicate that the attorney-in-fact or agent has all the powers the principal would have if alive and competent, . . ." *Id.* Carol's power of attorney contains no express provision granting Katherine the authority to cause any trustee to distribute any Trust property. Even if it had, Katherine had no right to force the distribution of Appellant's mother's Trust property to Appellant because, by the express terms of the trust instrument, Carol's and Appellant's mother's trusts were to "constitute separate trusts."

Commissioner denied Appellant's Motion to Intervene, denied Katherine's demand for attorney fees from Wilson, and appointed GSS as the replacement trustee. CP 770–71.

Appellant commenced the present action on March 3, 2015, seeking declaratory and injunctive relief to redress Katherine's misuse of Carol's power of attorney to wield her Member interests in violation of the Agreement. CP 1–12. Appellant sought a temporary restraining order. CP 139–51. The Ex Parte Commissioner denied Appellant's motion, citing insufficient time to review the materials, and instead directed him to seek a preliminary injunction relief before the trial court. CP 947.

On March 12, 2015, following Katherine's and GSS's attempt to fire him, Appellant amended his Complaint to (among other things) name other interested parties as defendants. CP 376–90.

Although the trial court offered the parties an April date for the preliminary injunction hearing, all counsel then in the case agreed to a May 22 hearing date to accommodate (among other things) discovery for an informed hearing. RP 15:3–5; RP 25:23–26:10. On March 23, counsel for the Gaisers, Wilson, and Appellant[7] agreed to a schedule of prehearing document production and depositions. CP 920–21; CP 951–52. The schedule included document production by and depositions for Carol, Katherine, Appellant, and GSS, and non-parties Wilson and Austin. *Id.*

[7] GSS was formally served with the amended complaint on March 12, 2015, CP 1014–15, and later with discovery requests, but delayed appearing by counsel until March 25, CP 1016–17, when its counsel was given the March 23 discovery schedule. CP 920–21.

After agreeing to the discovery schedule, the Gaiser Respondents scheduled a summary judgment hearing for April 30, before the May 22 preliminary injunction hearing and before the agreed upon dates for Respondents' depositions.[8] CP 548–61. Then, on April 24, the due date for the Gaisers' document production, counsel for the Gaisers advised that the Gaisers were having difficulty, but he gave assurances that the Gaisers would produce their documents by April 28. On the evening of April 28, the Gaisers' counsel advised that technical difficulties prevented production, but that Appellant would receive the documents "soon." *See* RP 14:14–18. On April 29, 2015, Katherine's counsel advised Appellant that the technical issue had been resolved and that the Gaisers would be delivering 1,500 pages of documents. *Id.* However, by April 30, the documents had not arrived, and never did. *Id.* Appellant was forced to oppose Respondents' summary judgment motion without any documents or deposition testimony from Carol or Katherine. RP 14:14–15:9; CP 587–88. Appellant appropriately included a Civil Rule 56(f) prayer in his opposition papers identifying the pending discovery and what it might adduce. *Id.*

On April 30, the trial court heard Respondents' Motion for Summary Judgment with oral argument. RP 1. Roughly an hour later, the trial court entered and emailed Respondents' proposed summary judgment:

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[8] The deposition of Austin, the LLC's attorney and author of the Agreement, was scheduled for the following day.

> Plaintiff's claims are derivative inasmuch as Plaintiff is not a member of Landon Enterprises, LLC., per statute found at RCW 25.15.375 and by the wording of the LLC agreement. Accordingly, as a matter of law, Plaintiff lacks standing to bring the claims stated in his Amended Complaint.

CP 1008–09. The trial court ordered that "all of the claims stated in the Amended Complaint are dismissed with prejudice." *Id.*

Appellant filed a timely Notice of Appeal, seeking review of the trial court's summary judgment of his claims. CP 1006–09.

## V. ARGUMENT

### A. Standard of Review

The standard of review is de novo. The Court reviews an order granting summary judgment de novo and engages in the same inquiry as the trial court. *Enter. Leasing, Inc. v. City of Tacoma*, 139 Wn.2d 546, 551, 988 P.2d 961, 964 (1999) (citing *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 625, 911 P.2d 1319 (1996)). The Court should only affirm an order granting summary judgment if "the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Reid v. Pierce Cnty.*, 136 Wn.2d 195, 201, 961 P.2d 333, 336 (1998). The reviewing court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. *Id.* (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030, 1032 (1982)). In this case, Appellant is the nonmoving party with respect to the motion for summary judgment.

### B. The Trial Court Erred in Concluding That Appellant Lacked Standing to Bring a Declaratory Judgment Action to Interpret the Agreement

The trial court erred in finding that Appellant, a party bound by the terms of a contract, had no standing to request judicial interpretation of that contract under the UDJA. The UDJA is unambiguous as to who can bring a claim for declaratory judgment, and Appellant falls squarely within its parameters. The trial court ignored the plain language of the UDJA, however, and held that Appellant could not bring his claims, which the trial court mistakenly concluded were derivative. Appellant's claims are not derivative—he is not seeking a judgment for the LLC. But more to the point, neither the UDJA nor the courts interpreting it impose a requirement that a person—whose rights are affected by an organization's governing agreement, and who wants the court to construe that contract—must be a member, manager, partner, officer or director of the organization.

A person's standing to bring a declaratory judgment case involving an organization's governing contract turns on whether the contract affects the person's rights, status or other legal relations, not on the person's status within the organization. Nor does the fact that Appellant seeks construction of the LLC's operating Agreement transform his UDJA claims into derivative claims, *i.e.*, claims seeking a judgment on behalf of the LLC. To the contrary, in company governance jurisprudence, the courts have held just the opposite: a company does ***not*** have an interest in ***who*** (as among managers, members, owners, or other interested persons) is making management decisions. Claims regarding an interested individual's rights under a governing agreement are direct, not derivative.

Regrettably, the trial court erred in finding that Appellant lacked standing to seek a declaratory judgment. CP 1008–09.

### 1. Appellant Has Standing to Request Judicial Determination of Any Question of Construction Arising Under the Agreement

Appellant brought his claim under the UDJA to ask for the judicial determination of multiple questions of construction arising under the Agreement, and he was well within his rights to do so. The UDJA states that "[a] person . . . whose ***rights***, ***status*** or ***other legal relations*** are ***affected*** by a . . . contract . . . may have determined ***any question of construction*** or validity arising under the . . . contract . . . ." RCW 7.24.020 (emphasis added). Moreover, the UDJA is to be liberally construed and administered to further its stated purpose of settling "uncertainty and insecurity with respect to rights, status and other legal relations." RCW 7.24.120; *see also Grandmaster Sheng-Yen Lu*, 110 Wn. App. at 98. Under any tenable reading of the statute, Appellant qualifies as a person eligible to request the judicial determination of a question pertaining to the interpretation of the Agreement.

A limited liability company's operating agreement is undoubtedly a contract. *See Bishop of Victoria Corp. Sole v. Corporate Bus. Park, LLC*, 138 Wn. App. 443, 460, 158 P.3d 1183, 1192 (2007) (discussing breach of contract claims arising out of LLC's operating agreement); *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 573, 161 P.3d 473, 481 (2007) (same). The Agreement also affects Appellant's "rights, status or other legal relations," regardless of whether he is a Member or Transferee. RCW 7.24.020. For example, the Agreement defines the parameters for a Unit Holder's ***status*** as either a Member or Transferee. CP 212–13. Both

have ***rights*** based on their ownership of Units, CP 193; *see also, e.g.*, CP 202–08; CP 213, and the Agreement expressly "binds all Unit Holders," CP 217. The Agreement also outlines the ***legal relations*** among Members, Transferees, and the LLC, including the requirement that more than 50 percent of the outstanding Governing Units are needed for the Members to act, CP 202; CP 209–10, failing which either Transferees must be made Members, CP 212, or the LLC must be dissolved, CP 214.

The language of the UDJA is unambiguous, and the Agreement defines and affects Appellant's rights, status, and legal relations vis-à-vis the Respondents. But if this were not enough to grant Appellant standing (it is), Appellant's standing would be solidified by the fact his financial interests are at stake. "Parties whose financial interests are affected by the outcome of a declaratory judgment action have standing." *Casey v. Chapman*, 123 Wn. App. 670, 676, 98 P.3d 1246, 1249 (2004), *as amended* (Oct. 25, 2004). Katherine's unauthorized takeover of the LLC's operations have eliminated Appellant's distributions, salary, and health insurance, and may adversely affect Appellant's tax liability. CP 584. Considering the purpose of the UDJA, the binding nature of the Agreement on all Unit Holders, and the declaratory judgment action's obvious effects on Appellant's financial interests and legal rights, Appellant has standing to seek declaratory relief relating to the Agreement. RCW 7.24.020; *see Casey*, 123 Wn. App. at 676.

Because Appellant is eligible to bring a declaratory judgment action concerning the Agreement, he "may have determined ***any*** question of construction or validity arising under the" Agreement. RCW 7.24.020 (emphasis added). Such questions include whether: (i) the Agreement

precludes a non-Member from exercising a Member's LLC rights through a power of attorney; (ii) the Agreement requires a Quorum of more than 50 percent of total ***outstanding*** Governance Units—not simply those held by Members—to take an action with or without a meeting; and (iii) the Agreement defines Majority as more than 50 percent of total ***outstanding*** Governance Units. Such questions of construction are proper declaratory judgment claims.

In applying the UDJA, courts "steadfastly adhere" to the rule that, to invoke the act, there must be a justiciable controversy:

> (1) which is an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic,[9] and (4) a judicial determination of which will be final and conclusive.

*Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 814-15, 514 P.2d 137, 139 (1973); *see also Osborn v. Grant Cnty. By & Through Grant Cnty. Comm'rs*, 130 Wn.2d 615, 631, 926 P.2d 911, 919 (1996). "These elements must coalesce, otherwise the court steps into the prohibited area of advisory opinions." *Diversified*, 82 Wn.2d at 815. All four elements are satisfied.

***First***, there is an actual dispute concerning the governance of the LLC. Katherine has acted in violation of the examples of LLC principles

[9] The "direct" language in the UDJA contrasts direct interests with "potential, theoretical, abstract or academic" interests not with "derivative" interests. There is nothing "potential, theoretical, abstract or academic" about an individual's 50 percent ownership in a limited liability company.

for which Appellant seeks judicial clarification. CP 726; CP 728; CP 730. But Appellant would have a right to invoke the UDJA even if she had not. As a contract, the Agreement "may be construed [under the UDJA] either before or after there has been a breach thereof." RCW 7.24.030.

***Second***, Appellant and Respondents have opposing interests. Respondents have taken positions that: (i) the Agreement authorizes Katherine to exercise Carol's Member rights; (ii) Katherine and GSS can take actions on behalf of the LLC despite controlling between them at most 50 percent of the total outstanding Governance Units and, (iii) a Member incapacitated as to her estate as defined in RCW can evade dissociation through a power of attorney. *See, e.g.* CP 726; CP 728; CP 730. All are contrary to Appellant's interpretation of the Agreement.

***Third***, as described above, the interests involved in this dispute are not "potential, theoretical, abstract, or academic." *Diversified Indus. Dev. Corp*, 82 Wn.2d at 815. Rather, the Agreement prescribes the contractual rights, interests, and statuses of all Unit Holders with respect to the LLC, including, but not limited to, who is entitled to vote and the total outstanding Governance Units required to act. *E.g.* CP 202; CP 209–10. Appellant's declaratory judgment claims concern these concrete interests.

***Fourth***, a judicial determination of Appellant's claims would end the dispute. Both Appellant and Respondents claim to rely on the Agreement to support their positions. Accordingly, a judicial determination of the Agreement's correct interpretation would resolve the conflicts arising out of the Agreement.

Based on the clear language of the UDJA and the cases interpreting it, Appellant was entitled to bring a claim for declaratory judgment concerning the Agreement. RCW 7.24.020. Accordingly, the trial court erred in dismissing his claims for lack of standing.

**2. Appellant's Claims Were Not Derivative**

Notwithstanding the clear and liberally-construed language of the UDJA, the trial court dismissed Appellant's claims for lack of standing. In reaching this conclusion, the trial court mistakenly accepted Respondents' arguments that Appellant's claims were derivative.[10] CP 1008–09. Respondents untenably argued in their Reply (they declined to address Appellant's declaratory judgment claim in their original Motion) that declaratory judgment claims concerning an organization's operating documents can ***only*** be derivative. CP 833. But Respondents' argument is not supported by the UDJA, the LLC Act, or case law. Instead, both statutes and the courts show that one owner's claims that other owners', members', or managers' acts violate the LLCs governance Agreement are direct, not derivative.

[10] The Order—that the Court executed in the form proposed by Respondents—concludes that Appellant's claims are derivative ***because*** he is not a member. The Order is logically flawed. A plaintiff's status within an organization has no bearing on whether the nature of his claim is direct (*i.e.*, seeking a judgment for himself) or derivative (*i.e.*, seeking judgment on behalf of the LLC). The two are independent concepts.

Respondents want a Catch-22. Under their interpretation, the Agreement defines the rights of all Unit Holders, but it allows only some Unit Holders (that is, Members) to request the court's clarification of those rights. CP 832–83. That simply is not so, especially where, as here, a Transferee owns half of the company and a non-owner has seized control and is bent on "destroying everything landon."

In their Motion for Summary Judgment, Respondents argued that the LLC Act's provision authorizing derivative claims precluded Appellant's request for declaratory relief. CP 554–55. The LLC Act's provision for derivative suit states:

> A member may bring an action in the superior courts in the right of a limited liability company to recover a judgment in its favor if managers or members with authority to do so have refused to bring the action or if an effort to cause those managers or members to bring the action is not likely to succeed.

RCW § 25.15.370. The problem with Respondents argument, and the trial court's Order, is that Appellant did not "bring an action . . . in the right of [the LLC] to recover a judgment in [the LLC's] favor." *Id.* Appellant's UDJA case sought instead to ***interpret*** his and Respondents' rights under the LLC's Agreement. In fact, Appellant named the LLC as a defendant;[11] how could he recover a judgment in its favor?

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[11] Respondent named the LLC as a defendant so its manager and/or management—whether Katherine and those acting in concert with her or others—would be bound to abide by the court's interpretations of the LLC's Agreement.

Respondents mischaracterized Appellant's claims by excerpting sound bites from his Amended Complaint containing the phrase "LLC affairs." This, Respondents argued, proved that Appellant's claims "referr[ed] to affairs belonging to the LLC, not affairs belonging to [Appellant]." CP 555 (emphasis original). Respondents then mistakenly argue that the "threatened" injuries to Appellant arose "solely as a result of an injury to the LLC and the LLC's property." *Id.* Respondents' arguments are factually and legally inaccurate and irrelevant: a UDJA claimant is not required to plead ***injury***. The purpose of the UDJA is to settle "uncertainty and insecurity with respect to rights, status and other legal relations," and a plaintiff can bring a declaratory judgment claim to interpret a contract before there is a violation of it (and therefore an injury). RCW 7.24.030. Here violations are ongoing, but Appellant did not sue for damages for breach of contract; he instead sued for a judgment determining his and Respondents' rights to "settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations" under the Agreement. RCW 7.24.120.

Contrary to Respondents' arguments, and the trial court's conclusions, Appellant's claims are not derivative. A claim concerning governance rights in an organization is direct, not derivative. *Cf. Guenther v. Fariss*, 66 Wn. App. 691, 698, 833 P.2d 417, 421 (1992) (finding that

the partners, and not the limited partnership, have interests in the operation of the limited partnership). In *Guenther*, the appellants (defendants below) argued that the limited partnership was wrongly excluded as a plaintiff because its interests would be affected by the outcome of the declaratory judgment action. Therefore, the appellants/defendants argued, respondents/plaintiffs should have made a derivative claim on the limited partnership's behalf.[12] *Id.* The respondents/plaintiffs had sought a declaratory judgment as to ownership interests in the partnership after the death of one general partner. *Id.* at 695. The court concluded that the respondent/plaintiffs' case was direct, not derivative. *Id.* at 698. It found that the interests at stake—ownership percentages—were "purely the individual interests of the [parties]. [The partnership] had no separate interest in the action." *Id.* The court acknowledged that respondents/plaintiffs' UDJA case might affect ***operation*** of the partnership, but said that was not the same as affecting an ***interest*** of the partnership. *Id.*

As in *Guenther*, the interests involved in this declaratory judgment action belong to Appellant and the other Unit Holders, ***not*** to the LLC. For

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[12] Partnerships, like limited liability companies, distinguish between direct and derivative actions. RCW 25.10.701. And, because limited liability companies are hybrids of partnerships and corporations, courts often look to partnership law to fill gaps in the LLC Act. *Sherron Associates Loan Fund V (Mars Hotel) LLC v. Saucier*, 157 Wn. App. 357, 363, 237 P.3d 338, 341 (2010).

example, Appellant has an interest in his Governance Units being counted towards the Quorum and Majority requirements prescribed in the Agreement. *E.g.,* CP 202; CP 209. Similarly, Appellant has an interest in ensuring the other Unit Holders do not exceed the scope of their authority under the Agreement. *Id.* The declaratory relief Appellant requested would impact the LLC's operations, but this relief is direct, not derivative. *Guenther*, 66 Wn. App. at 698.

The analysis in *Guenther* is consistent with Delaware law, which Washington courts often find helpful because the Delaware courts have significant experience with the law of business entities. *E.g., In re F5Networks, Inc., Derivative Litig.*, 166 Wn.2d 229, 239–40, 207 P.3d 433 (2009). Under Delaware law, rights pertaining to a company's management belong to the individual owners, not the company. *See, e.g., Polak v. Kobayashi*, CIV. 05-330-SLR, 2008 WL 4905519, at *8 (D. Del. Nov. 13, 2008) (50 percent member defendant's unilateral decision-making for limited liability company, which impaired 50 percent member plaintiff's right to jointly manage the limited liability company, harmed plaintiff, not limited liability company).

*Guenther* is also consistent with other cases in which owners sue a limited liability company for a declaratory judgment that a provision in the company's operating agreement is unenforceable. *E.g. Dragt v.*

*Dragt/DeTray, LLC*, 139 Wn. App. 560, 568, 161 P.3d 473, 478 (2007) (members sought a declaratory judgment against manager and limited liability company arguing a provision in the company's operating agreement was unenforceable). If a declaratory judgment action arising out of a limited liability company's operating agreement must be derivative (as Respondents argue), then a limited liability company could not be a defendant in such an action.

Respondents did not address the UDJA once in their Motion for Summary Judgment, and Appellant's claim for declaratory relief was only mentioned in a single, conclusory sentence:

> Jay's cause of action for a declaratory judgment, the only cause of action asserted that could arguably provide a basis for the first three prayers for relief, must be dismissed and should be dismissed with prejudice since Carol will not consent to Jay's admission as a member of the LLC (and has the absolute discretion under the LLC Agreement to withhold consent, even if withholding that consent is determined to be unreasonable). Therefore, Jay can never attain member status necessary to bring a derivative action and dismissal with prejudice is appropriate.

CP 559. After Appellant responded by articulating distinctions between claims for declaratory relief and derivative suits to recover a judgment for a limited liability company, CP 582–84, Respondents replied by citing two cases that they contended supported the proposition that Appellant's claims were derivative, and that he lacked standing. CP 832–33. Both are inapposite.

***First***, Respondents cited *Touchet Valley Grain Growers, Inc. v. Opp & Seibold Gen. Const., Inc*, 119 Wn.2d 334, 831 P.2d 724 (1992), as authority for the assertion that a non-party to a contract cannot enforce ***or interpret*** the contract. CP 832. Respondents inaccurately state the holding in the case, which is simply that a non-party who is not an intended third-party beneficiary cannot seek the benefit of (*i.e.*, enforce) a contract. *Touchet Valley,* 119 Wn.2d at 342–43. The case is a garden variety contract case, not a UDJA case.[13] Moreover, even if Appellant were not a Member, he is expressly bound by the Agreement, so the *Touchet Valley* analysis does not apply. A Transferee under the LLC's Agreement is at least an intended third-party beneficiary because Transferees are entitled to share in profits and receive distributions and income. CP 213. Under *Touchet Valley*, third-party beneficiaries ***can*** seek to benefit from a contract. *Id.* at 350.

***Second***, Respondents cited *Carey v. Howard*, 950 So. 2d 1131 (Ala. 2006), an Alabama case, but their reliance thereon was also in error. CP 832–33. In *Carey*, the Alabama Supreme Court held that members of a limited liability company could not personally bring a declaratory judgment action to invalidate an agreement between two third-parties

[13] There was a claim for declaratory judgment early in the proceedings, but that issue was not before the court. *Touchet Valley*, 119 Wn.2d at 339.

which affected property owned by the LLC. *Id.* at 1135. The court ruled that the plaintiffs' stated interest was too attenuated to grant standing under Alabama's declaratory judgment statute. *Id.* This holding, even if binding or persuasive in Washington (and Respondents cited no authority to that effect), has no bearing on the present case. Appellant did not seek declaratory relief relating to an agreement between two third parties, or relating to a contract as to which his interests were remote; rather, he asked the trial court to interpret the Agreement that defines his rights as a 50 percent owner and by which he is expressly bound. CP 217.

Despite their adamancy, Respondents are wrong in arguing that Appellant brought a derivative claim to enforce rights or recover a judgment belonging to the LLC. Appellant brought a UDJA case to interpret the Agreement. CP 183–218; CP 376–90. He is an intended beneficiary. CP 193; CP 213. The possible collateral effects of Appellant's UDJA claim on other individuals do not transform his case into a derivative action.

### C. The Trial Court Erred in Concluding Appellant Lacked Standing to Request Injunctive Relief

Although Respondents failed to address Appellant's claim for injunctive relief in their Motion for Summary Judgment papers or oral argument, see CP 548–61; CP 829–34; RP 1–29, the trial court, also

without comment, dismissed the claim for lack of standing. CP 1008–09. The dismissal was in error. As with Appellant's claim for declaratory relief, his request for an injunction was not derivative in nature. To the contrary, it was a logically and legally proper part of the declaratory judgment action.

The UDJA contemplates such relief. It provides:

> ***Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper.*** The application therefor shall be by petition to a court having jurisdiction to grant the relief. When the application is deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

RCW 7.24.080 (emphasis added).

Case law is clear that injunctive relief is the sort of "further relief" the UDJA contemplates. The Washington Supreme Court has held that injunctions enforcing a declaratory judgment are proper "and common" and part of every court's inherent power to enforce its decrees to render them effective.

> However, continuing abusive practices by Snohomish County, violative of the statutory mandate, caused the trial court to find it necessary to impose injunctive relief and to retain jurisdiction to assure that the practices cease. That the combining of declaratory and coercive relief is proper and even common, is clear from *Borchard*. This merely carries out the principle that ***every court has inherent power to enforce its decrees and to make such orders as may be necessary to render them effective.*** This principle is also codified in RCW 7.24.080.

*Ronken v. Bd. Of Cnty. Comm'rs of Snohomish Cnty.*, 89 Wn.2d 304, 311-312, 572 P.2d 1, 6 (1977) (emphasis added) (internal citations omitted).

As previously discussed, a limited liability company does not have an interest in who has a right to manage. *Cf. Guenther*, 66 Wn. App. at 698. If an individual makes company decisions outside his or her scope of authority, the injured party is not the company, but the other owners, personally. *See, e.g., Polak*, 2008 WL 4905519, at *8.

Turning for a moment from declaratory judgment jurisprudence to injunction law, the result is the same. When a person bound by an agreement acts beyond his or her authority under the agreement, other similarly-bound persons have standing to personally request injunctive relief. *See Wimberly v. Caravello*, 136 Wn. App. 327, 334, 149 P.3d 402, 406 (2006) (individual homeowners had standing to sue other homeowners for injunctive relief under community association bylaws without joining association); *Day v. Inland Empire Optical, Inc.*, 76 Wn.2d 407, 417, 456 P.2d 1011, 1017 (1969) (licensed members of a profession, when a license is required to engage in it, have standing to maintain suit for injunctive relief to require others similarly licensed to abide by ethics and laws governing profession). Appellant, as a Unit Holder bound by the Agreement, has standing to ask the court to enjoin other Unit Holders from operating the LLC in derogation of its Agreement

as further relief in connection with his UDJA claim. *See Ronken*, 89 Wn.2d at 311–12; *Wimberly*, 136 Wn. App. at 334.

### D. The Trial Court Erred in Concluding Appellant Lacked Standing to Request Adjudication of Carol's Incapacity as to Her Estate

Respondents assert that Appellant lacked standing to challenge Carol's capacity to manage her estate.[14] They argued that whether a Unit Holder (Carol) lacks the requisite capacity to remain a Member is an issue of governance that a Transferee Unit Holder (Appellant) has no standing or basis to challenge. CP 833. But Appellant, as a Unit Holder bound by the Agreement, has a direct interest in whether others similarly bound are abiding by the Agreement's requirements. This is especially true where that other individual (Carol) has been conspicuously absent; where disinterested evidence shows she is incapacitated within the Agreement's definition,[15] *e.g.*, CP 677–78; and where a non-owner claims the right to exercise her Member perquisites and does so in ways—like threatening Wilson, firing Appellant, and orchestrating sale of the family heritage—irreconcilable with Carol's stated views when she was able to articulate them, CP 251; CP 697.

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[14] The Amended Complaint says Appellant seeks appointment of a guardian. Such appointment is not necessary in this action, only an adjudication for purposes of this case as urged in the summary judgment hearing. RP 15:10–17:1.

[15] *See, e.g.*, *infra* at 42.

Katherine untenably asserts that she is exercising Carol's LLC Member rights. Through this action, Appellant sought to adjudicate whether Katherine's conduct violates the Agreement. It does, and there are two ways to reach this conclusion: (1) by analyzing the Agreement and determining that a Member—even one in good health and of unquestioned capacity—cannot transfer Member perquisites by a power of attorney, and (2) by confirming in a dignified (and confidential, if Respondents request) adjudication that the Member is dissociated, so the attorney-in-fact has no perquisites to exercise.

Under the LLC's governance document, a Member "dissociates" when a court of competent jurisdiction adjudicates her incapacitated as to her estate using the definition contained in RCW 11.88.[16] CP 187. Nothing in the Agreement or the law requires guardianship proceedings commenced under that statute. *Id.* Indeed, it would be more dignified and sensitive (as well as efficient) to have the adjudication done quietly as part of this case. If dissociated, Carol would still receive all financial benefits of LLC ownership, CP 213, but—under the Agreement by which all

[16] RCW 11.88.010(1)(b) provides: "For purposes of this chapter, a person may be deemed incapacitated as to the person's estate when the superior court determines the individual is at significant risk of financial harm based upon a demonstrated inability to adequately manage property or financial affairs."

owners are bound and to which she consented—her Member rights would end. *Id.* There would be no Member rights for Katherine to misuse.

Whether through an adjudication by the trial court for the limited purpose of establishing Carol's dissociation—after a short, sealed video deposition, a Civil Rule 35 independent medical examination, or a Civil Rule 36 admission—Appellant has an interest in the outcome, and his claims were erroneously dismissed.

### E. The Trial Court Erred in Granting Summary Judgment Despite the Existence of Genuine Issues of Material Fact

This Court should also reverse the trial court's summary judgment because genuine issues of material fact exist. Summary judgment is proper only if there is no genuine issue of material fact. CR 56(c). The party moving for summary judgment bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharm., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). In reviewing a motion for summary judgment, courts construe the facts and draw all factual inferences in the light most favorable to the nonmoving party. *See Kofmehl v. Baseline Lake, LLC*, 177 Wn.2d 584, 594, 305 P.3d 230, 236 (2013). The nonmoving party in this case is Appellant. Applying these standards, Appellant demonstrated genuine issues of material fact that necessitated denial of summary judgment.

Respondents based their Motion for Summary Judgment, in part, on allegations that Appellant is not a Member and that Carol is. But Respondents were required to show that these allegations are undisputed in their favor, and do so with all inferences drawn in Appellant's favor. *Kofmehl*, 177 Wn.2d at 594. They failed to do so.

The evidence construed in Appellant's favor shows genuine issues of material fact regarding Appellant's and Carol's Member statuses. Appellant submitted LLC records that identify him to the Washington Department of State as a Member. CP 664–65. The records were signed by one Member (the Trustee), and presumably all Members reviewed the filings. *Id.* The records named them all. Additionally, e-mails from and copying Carol, the only other Member beyond Appellant and the Trust, demonstrate the Members' acceptance of Appellant's Member status. *See* CP 251; CP 660; CP 662.

The evidence overcomes the low threshold for a genuine issue of material fact, especially when viewed in the light most favorable to Appellant, and in consideration of Respondents' discovery evasions. *See*, *infra* at 44–45. Under the Agreement, if existing Members hold at least 50 percent of the outstanding Units, then unanimous consent among Members is required to admit a Transferee as a Member. CP 212. Such consent must be in writing, but the Agreement does not specify the form

of the written consent or require that the writing be signed. *Id.* Multiple filings with the State and emails acknowledging Appellant's rights to exercise Member perquisites (calling meetings, setting agendas, and so on) could satisfy the Agreement's admission requirements, and that is what Appellant showed. CP 251; CP 660; CP 662; CP 664–65.

There was also ample evidence that Carol no longer qualifies as a Member. *E.g.,* CP 677–78. Respondents proffered and relied on an excerpt of a police report for one purpose, CP 352, which report in its entirety demonstrated that Carol is no longer capable of managing her estate. CP 677–78. (Carol "is ***incapable of making financial decisions that have any consequences***") (emphasis added). Similarly, in a declaration to prevent Carol's video deposition, GSS's owner testified, "it is beyond dispute that Carol Gaiser ***is in fact not competent to be a witness. Her span of memory can be measured in minutes***. . . . [I]t is plain almost immediately that she is overwhelmingly affected by a dementing condition, and in particular has very impaired memory." CP 870. Carol's counsel provided a note from her treating physician stating Carol suffers from dementia and Alzheimer's. CP 868.

An Event of Dissociation with respect to a Member requires only that the LLC receive notice of "the entry of an order by a court of competent jurisdiction adjudicating such Member incapacitated, ***as used***

***and defined*** under RCW 11.88, as to his or her estate." CP 187. The Agreement does not require an adjudication made pursuant to RCW 11.88. *Id.* It elevates form over substance for Respondents to argue there has been no adjudication, RP 22:19–23, while both bending every effort to prevent one,[17] and simultaneously claiming to be acting for Carol as though there were no question of her competency. *E.g.*, CP 724. The evidence and inferences drawn therefrom, when viewed in Appellant's favor, support the conclusion that if the case proceeds, Carol should be dissociated. CP 187.

Carol's Member status is genuinely material to this case because Respondents moved to dismiss Appellant's action, at least in part, based on Katherine's assertion that she can exercise Carol's Member perquisites. If Carol can no longer qualify as a Member, an essential element of Respondents' motion would be extinguished.

Appellant pointed to distinct, actual evidence demonstrating genuine issues of material fact as to his and Carol's LLC Member status. Trial court erroneously decided those factual issues at summary judgment. CP 1008–09.

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[17] Despite stipulating on March 23 to a date certain for Carol's deposition, CP 920 -21, shortly before the summary judgment hearing her counsel moved to prevent it. CP 856–63. He did so only after GSS, which does not represent Carol in this case but had visited with her and knows her incompetency, filed its own motion to prevent the deposition. CP 968–73.

### F. The Trial Court Erred in Granting Summary Judgment Despite Respondents' Refusal to Respond to Appellant's Discovery Requests or Sit for Depositions, and Despite Appellant's Civil Rule 56 Plea

The Court should also reverse the Order dismissing Appellant's case because Respondents failed to meet their discovery obligations, which Appellant timely raised in a CR 56(f) plea. CP 587; RP 15:3–9. Civil Rule 56(f) provides:

> Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

CR 56(f). Civil Rule 56(f) protects a nonmoving party who knows of the existence of material evidence and shows why he cannot obtain the evidence in time for the hearing on summary judgment. *Lewis v. Bell*, 45 Wn. App. 192, 196, 724 P.2d 425, 427 (1986) (citing *Cofer v. County of Pierce*, 8 Wn. App. 258, 505 P.2d 476 (1973)). Appellant was unable to obtain necessary discovery because of Respondents' discovery evasions.

Before Respondents' moved for Summary Judgment, the parties agreed to a discovery schedule. CP 920–21. The schedule included document production and deposition dates for, among others, Carol, Katherine, and GSS. *Id.* Appellant timely served requests for production and noted depositions in accordance with this schedule. *E.g.*, CP 804–06; CP 808–10. Under the Civil Rules and the schedule, Respondents were required to respond to Appellant's requests on April 24 and appear for depositions on May 8. *E.g.*, CP 920.

After agreeing to the discovery schedule, Respondents scheduled the summary judgment hearing for April 30. CP 548–61. On April 24, counsel for the Gaisers reported difficulty in complying with Appellant's requests for production, but assured Appellant that the Gaisers would produce their documents by April 28, two days before the summary judgment hearing. *See* RP 14:14–18. On the evening of April 28, counsel advised Appellant of unspecified technical difficulties, but he again assured the Gaisers' production would be soon. *Id.* On April 29, 2015, the day before the hearing (but over a week after Appellant's written opposition to summary judgment had been due) counsel advised Appellant that the Gaisers would be sending him 1,500 pages of documents. *Id.* Those documents were never sent, and Appellant has yet to receive a single page of discovery from the Gaisers. *Id.*

Dismissing Appellant's case on summary judgment without the movant responding to document requests or sitting for depositions—particularly when they were situated to have Carol's written assent to Appellant's Membership—was error. Carol was the only Member who Katherine asserts did not consent to Jay's admission as a Member, CP 559, but Appellant could not obtain testimony or documents from her. *See* RP 14:14–18. Accordingly, the Court should reverse the trial court's Order because Appellant could not obtain necessary discovery from Respondents despite persistent efforts. CR 56(f).

## VI. CONCLUSION

For the foregoing reasons, Appellant asks the Court to (1) reverse the trial court's summary judgment of his claims; and (2) remand this case to the trial court for further proceedings on the merits.

RESPECTFULLY SUBMITTED this 28th day of September, 2015.

McNAUL EBEL NAWROT & HELGREN PLLC

By: _____
Peter M. Vial, WSBA #6408
Jehiel I. Baer, WSBA #46951

*Attorneys for Appellant*

## DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on September 28, 2015, a copy of the foregoing **Brief of Appellant** was served by electronic mail to:

David C. Tingstad, WSBA #26152
Matthew J. Cruz, WSBA #22345
Beresford Booth PLLC
145 Third Avenue South, Suite 200
Edmonds, WA 98020
davidt@beresfordlaw.com
mattc@beresfordlaw.com
*Attorneys for Carol L. Gaiser and Katherine Gaiser*

Timothy L. Austin, WSBA #2939
Betts Austin Johnson
11120 NE 2nd Street, Suite 200
Bellevue, WA 98004-8337
taustin@nwtaxlaw.com
*Registered Agent for Landon Enterprises, LLC*

Pauline V. Smetka, WSBA #11183
Jonathan M. Minear, WSBA #41377
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154-1154
psmetka@helsell.com
jminear@helsell.com
*Attorneys for Guardianship Services of Seattle*

DATED this 28th day of September, 2015, at Seattle, Washington.

By: _____
Katie Walker, *Legal Assistant*