

No. 70118-5-1

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

OM ENTERPRISES V LLC, *et al.*,

Appellants,

v.

KAMAL TANDON, *et al.*,

Respondents.

BRIEF OF RESPONDENTS RAVI AND RIPU MITTAL AND
SCHIVANCHAL ENTERPRISES, LLC

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COURT OF APPEALS
STATE OF WASHINGTON
WA

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I. INTRODUCTION.

This is an action for dissolution of OM Enterprises V LLC, a Washington limited liability company (“OM”), and declaratory order approving OM’s proposed plan of liquidating distribution.

OM proposes to distribute its funds remaining after wind-up of its affairs to its members according to their pro rata share of capital contributions, with one important exception that gives rise to this appeal. OM proposes to treat the capital account of former member Kamal Tandon as \$0 (or a negative number) based on OM’s unadjudicated claims against Tandon for mismanagement, insufficient documentation of company expenditures, and using company funds for personal purposes. It is undisputed that these are claims that OM discovered in 2007 but upon which it never acted.

Ravi and Ripu Mittal and their solely owned limited liability company Schivanchal LLC (collectively referred to as “the Mittals”) object to the plan of distribution insofar as OM purports to reduce the Tandon capital account to \$0. They became owners of the Tandon interest in OM and members with respect to the Tandon units—to the extent necessary to satisfy their judgment—under a charging order issued on July 9, 2008 (the “Charging Order”) by the King County Superior Court under the Washington Limited Liability Company Act, RCW 25.15.005,

et seq. (the “LLC Act”) and the Limited Liability Company Agreement of OM (the “OM LLC Agreement”).

The Mittals obtained the Charging Order after becoming judgment creditors of Kamal and Anita Tandon under a judgment entered by the King County Superior Court in December 2007. The Tandon failed to satisfy the judgment and the Mittals moved for and obtained the Charging Order.

OM seeks to circumvent the Charging Order and the Mittals’ resulting ownership interest to satisfy OM’s unadjudicated claims for mismanagement against Tandon for alleged acts and omissions before he resigned as a manager of OM in early 2007. Instead of filing an action for damages and obtaining a money judgment against Kamal Tandon, OM filed this action in which it set the capital account associated with the Tandon units—and which would otherwise be an amount of no less than \$415,800—at an amount equal to negative \$9,601.95.

II. COUNTER-STATEMENT OF THE CASE.

A. History of OM Enterprises V LLC.

OM was formed as a Washington limited liability company on March 31, 2005. (CP 96, 364.) OM owned an Indian subsidiary, OM Pizza & Eats India Private Limited (“OM India”). (CP 96-97.)

In April 2005, OM entered into a Master Franchise Agreement with Papa John’s International authorizing OM to open and operate Papa

John's franchises in India. (CP 97, 222.) OM exercised its rights under the franchise agreement and opened and operated Papa John's restaurants in India through OM India. (CP 203, 222.)

Kamal Tandon founded OM. (CP 97, 203.) OM and Tandon raised capital to fund OM's Papa John's pizza franchises in India by recruiting investors who contributed funds and became members in OM. (CP 97; *see also* CP 203.)

Effective as of September 1, 2005, an initial group of 12 investors executed the OM LLC Agreement. (CP 272, 297-98; *see generally* CP 272-303.) Under the agreement, OM's initial Board of Managers consisted of Kamal Tandon, Appellant Amarnath Deva, and M. Venu Gopal. (CP 301.) Tandon was OM's initial President, Deva its Vice President, and Gopal its Secretary/Treasurer. (CP 302.)

Until 2007, Deva oversaw day-to-day operations of the Papa John's restaurants in India. (CP 97, 100.)

According to OM, it fell behind the development schedule required under the Franchise Agreement and Papa John's International sought to revoke the agreement. (CP 372.)

Sometime in early 2007, Tandon stopped performing his duties to OM, and on March 9, 2007, resigned from OM's Board of Managers. (CP 97, 222.)

Upon Tandon's resignation, Deva returned to the United States and took control of OM and its business, accounts and records. (CP 97.) Deva concluded that there "was not much hope in salvaging the company," and began looking for a buyer of OM India. (CP 98.) He identified JIP Fashion and Restaurants India Private Limited ("JIP") as a prospective buyer. (CP 222; *see* CP 98.)

On May 24, 2007, members of OM approved the sale of shares of OM India and its rights under the Franchise Agreement to JIP. (CP 98, 222.) Then, on September 10, 2007, Deva signed a Sale Purchase Agreement on behalf of OM transferring all of OM's rights in the Franchise Agreement and its interest in OM India to JIP for \$1,645,000. (CP 98, 203, 222, 373.)

According to OM and Deva (collectively, "OM"), it took several years (until 2011) for the sale proceeds to be transferred from India to the United States. (CP 222, 305.) On about January 31, 2011, OM's management advised its members that the proceeds had arrived and that OM intended to wind up its affairs and distribute the sale proceeds—less expenses—to members. (*See* CP 98, 222, 305.)

On November 15, 2011, OM and Deva filed this action for dissolution of OM and declaratory judgment in Snohomish County Superior Court. (CP 398, 403-21.) OM proposed to dissolve and,

following payment of all of OM's outstanding debts and expenses, distribute OM's remaining assets to its members pro rata based on total capital contributions, except as to the Tandons. (CP 375.)

B. OM's Investors and Their Capital Contributions.

OM's investors now include 51 sets of defendants named in the action for dissolution. (CP 223, 361-70.) According to OM's most recent calculations, the total capital contributions to OM were \$2,433,898.05, not including the capital contributions of the Tandons. (CP 235-37, 262, 419-21.) Tandon together with his then wife Anita Tandon contributed an amount that is disputed, but that Tandon claimed was \$513,400 (CP 99; *see* CP 137) and that OM initially calculated at \$490,800 (CP 223, 232), but later reduced to \$415,800 (CP 99-100).

The Mittals invested a total of \$55,000. (CP 202.)

Of the total sale proceeds from India of \$1,645,000, only approximately \$797,000 remained to be distributed to members as of August 2, 2011, before the dissolution action was brought. (CP 223.)

C. Actions Involving Kamal Tandon.

1. The Mittals' Judgment Against Tandon and Charging Order.

On July 6, 2006 (nearly a year before Tandon resigned as a manager of OM (and not after, as OM suggests (Appellants' Brief at 13)), the Mittals brought an action against Kamal and Anita Tandon, OM, and

several other “OM” entities for dishonor of checks, Washington State Securities Act violations, and breach of contract.¹ (CP 148-49, 202.)

On December 10, 2007, the King County Superior Court entered judgment in favor of the Mittals and against the Tandons for securities fraud and dishonor of checks in the amount of \$116,795.81 plus interest. Claims against the remaining defendants were not resolved. (CP 149, 153-57, 202, 206-09.)

On July 9, 2008, the King County Superior Court entered the Charging Order under RCW 25.15.255 charging the interest of Kamal and Anita Tandon in OM with payment of the unsatisfied amount of the judgment against them, which was then \$67,057.09 plus accrued interest of \$5,112.39. (CP 149, 162-65; *see* CP 159-60, 202, 215-18.)

Counsel for OM appeared at the hearing, but did not assert that it had any claims against Tandon. (CP 149.)

2. *Kamal Tandon’s Divorce and Bankruptcy.*

On April 23, 2009, Kamal and Anita Tandon were divorced. (CP 150, 168-69.) In the Tandon’s property division, Kamal Tandon was awarded “[a]ll corporate stock in OM Enterprises V LLC” and “any and

¹ The action was captioned *Schivanchal Enterprises LLC, a Washington limited liability company, and Ravi Mittal and Ripu Mittal v. Kamal Tandon, Anita Tandon, OM Enterprises, Inc., a Washington corporation, OM Enterprises III Inc., a Washington corporation, OM Enterprises IV LLC, a Washington limited liability company, and OM Enterprises V, LLC, a Washington limited liability company*, Case No. 06-2-21820-5 SEA (King County Superior Court). (CP 153, 159.)

all interest in the LLC.” (CP 169.)

On September 21, 2009, Kamal Tandon filed a voluntary bankruptcy petition under Chapter 7 of the Bankruptcy Code. (CP 150, 171-79.) OM never filed a claim or objected to Tandon’s discharge, or sought to have any claims excluded from discharge. (See CP 171-79.)

The Mittals moved for and obtained relief from stay to pursue their interests under the Charging Order. (CP 150, 181-82.) Tandon opposed the motion (*see* CP 178), but the bankruptcy court found that the Mittals had a perfected interest in Tandon’s interest in OM, and had satisfied the requirements for the requested relief from stay (CP 182).

On April 5, 2012, the bankruptcy court granted Tandon a discharge under 11 U.S.C. § 727. (CP 179.)

3. *Tandon’s Alleged Misfeasance at OM in 2005 and 2006.*

Upon Tandon’s resignation in March 2007, Deva concluded that “it was necessary for me to return to the United States from India where I had been operating OM India to take over the management of OM.” (CP 97.) Upon taking over, Deva “soon realized” that Tandon had not been keeping accurate records, had been using OM funds for his personal purposes, and had not kept a clear record of capital contributions and had thereby placed OM in financial distress. (CP 97.)

According to OM, Tandon’s questionable transactions occurred

from March 25, 2005, to June 2, 2006. (CP 143-47, 233-34.) OM identifies 62 alleged undocumented or unauthorized transactions. Approximately one-third of them occurred before the September 1, 2005 effective date of the OM LLC Agreement. (CP 143-47, 233-34; *see also* CP 18-20.) Deva believed some were for Tandon's "personal purposes" and others were undocumented and unknown transactions. (CP 143-47, 223-34.)

OM and Deva did not bring an action against Tandon, obtain judgment against him, or seek to exclude any claims OM might have from Tandon's discharge in bankruptcy. (*See* CP 171-79.) OM continued to issue tax reports to Tandon on Internal Revenue Service Form K-1 through 2011, based on Tandon's stated capital account and percentage interest without deduction for alleged distributions for personal expenses or withdrawals. (CP 184-95.) The K-1s reflected Tandon's capital account in 2006 as \$383,524 with a 15.53 percent ownership interest in OM and thereafter with a 13.021 percent interest in OM. (CP 184-95.) Based on contributions OM reluctantly acknowledges of \$415,800, the percentage interest is approximately 14.6. (CP 329-31.)

D. Procedural History.

On November 15, 2011, OM and Deva filed a complaint for dissolution of OM under RCW 25.15.275 and for a declaratory order

directing the company's board of managers to wind up the affairs of the company, and authorizing the company to dispense proceeds of the sale of the company's assets "to each member according to their pro rata share of capital contributions as set forth on Exhibit A to the complaint."

(CP 398-421.) Exhibit A listed Tandon's capital account as \$398.05.

(CP 419.)

On January 26, 2012, OM filed an amended complaint that corrected Deva's whereabouts at the time of Tandon's resignation and further reduced Tandon's capital contributions to a negative \$9,601.95. (CP 268, 361-82.) Contrary to OM's assertion (Appellants' Brief at 1), neither the complaint nor the amended complaint stated a claim for an accounting. (*See* CP 361-82, 403-21.) Instead, OM and Deva requested a declaratory order approving its self-help "exercise" described in a letter to members that explained OM's reducing the Tandon capital account to \$0 or lower. (CP 223.)

On March 15, 2012, the Mittals answered the first amended complaint and set forth affirmative defenses, and a counterclaim for declaratory relief. (CP 348-60.) On March 26, 2012, the Mittals filed an amended answer, affirmative defenses and counterclaim which described the Mittals' interest in the Tandon account and objected to OM's proposed liquidating distribution insofar as it proposed not to make a distribution on

that account. (CP 339-47.)

On April 11, 2012, OM and Deva replied to the Mittals' counterclaim. (CP 334-38.)

On November 6, 2012, the Mittals filed a motion for summary judgment and other relief, requesting that OM be required to recompute distributions on the Tandon LLC interest to reflect his capital contributions and that the trial court deny OM's request for an order of disbursement in accordance with their amended complaint. (CP 306-33.) The Mittals argued that OM could not unilaterally reduce the Tandon capital account for OM's unadjudicated claims against him. (CP 320-22.) The Mittals also asserted that OM's claims against Tandon for mismanagement and breach of duty were barred by applicable statutes of limitation. (CP 323-27.) The Mittals argued that OM's self-help "exercise" was not a lawful set-off or recoupment, and that in any event, OM was precluded from set-off or recoupment by Tandon's intervening bankruptcy and discharge. (CP 76-79, 325-29.)

OM responded by claiming that Tandon's capital account was "automatically" reduced to zero by Tandon's questionable expenditures (CP 88-90), and that OM was justified in setting-off the questioned expenditures (CP 91-92). OM also argued that its alleged set-off right survived discharge in bankruptcy. (CP 94.) OM did not contest the fact

that the statute of limitations had run on all of its affirmative claims against Tandon. (*See* CP 80-95.) It argued only that its purported right of set-off was not subject to any statute of limitation. (CP 92-93.)

OM declared:

[R]ather than bringing an affirmative cause of action against Mr. Tandon, who has since been discharged in bankruptcy, OM is proposing to set-off, or reduce, the capital contributions attributed to the Tandon interest for purposes of calculating the pro rata distribution to OM's members by the amounts Mr. Tandon spent or withdrew from OM accounts for his own purposes.

(CP 84.)

By order dated January 12, 2013, the Snohomish County Superior Court granted the Mittals' motion and denied OM's request for an offset.

(CP 388-91.) In pertinent part, the court ordered:

Plaintiffs shall make returns of capital or distributions, as appropriate, to the Mittals based on the entire capital account associated with the Tandon share that is subject to the King County Charging Order. Plaintiff's request for approval of proposed disbursements as set forth in the First Amended Complaint is denied.

(CP 391.) The trial court noted that the amount of Tandon's capital contributions remained to be resolved. (CP 389.)

On February 1, 2013, OM moved for reconsideration, arguing for the first time that alleged unauthorized payments to or for the benefit of Tandon were "distributions" by which OM could reduce the account.

(CP 33-57.) The trial court denied OM's Motion for Reconsideration on February 27, 2013. (CP 10-11.)

On March 27, 2013, OM and Deva filed their notice of appeal of the order denying their motion for reconsideration and the order granting the Mittals' motion for summary judgment. (CP 1-9.)

III. SUMMARY OF ARGUMENT.

OM's unilateral self-help reduction of the Tandon capital account is not authorized by the OM LLC Agreement, the LLC Act, RCW 25.15.005, *et seq.*, or other applicable law. OM did not dispute below, and has not contested on appeal, that applicable statutes of limitation have run on OM's claims against Tandon. In addition, any liability Tandon had for the claimed funds as distributions was extinguished under RCW 25.15.235(3).

OM's principal theory on appeal—raised for the first time in its motion for reconsideration of the trial court's summary judgment decision—is that the amounts by which it seeks now to reduce the Tandon capital account were “distributions” from OM to him. To this theory, OM now adds for the first time on appeal its assertion that this action is one for an accounting comparable to a partnership accounting upon windup and dissolution. However, any liability Tandon had for unlawful “distributions” was extinguished under RCW 25.15.235(3). Moreover, this is *not* an action for an accounting, and a claim for declaratory judgment declaring the present rights of the parties should not be treated

as an accounting or used to declare rights of the parties that might have been different were the factual and procedural history other than what it is. In any event, OM's request for declaratory judgment should be rejected because it had a perfectly adequate remedy at law.

OM complains that it will have to "pay twice" if it is required to make distributions on the Tandon capital account along with those of other members. But this is not so. Tandon made capital contributions to OM of at least \$415,800. OM's liquidating distribution will be substantially less than the contributions made, and thus, OM *received* net capital that will not be returned on a liquidating distribution. If Tandon injured OM in 2005 and 2006, then OM may have suffered damages *once*. However, OM slept on any rights it had and now cannot recover for alleged claims it never made against Tandon by unilaterally reducing what is now the Mittal interest in the Tandon capital account.

IV. ARGUMENT.

A. Preservation of Issues and Standards of Review.

Preservation of Issues. OM assigns as error the trial court's Conclusions of Law Nos. 2 through 6 in its Order Granting Summary Judgment. However, OM misstates the court's conclusions, modifying them so as to encompass OM's theory raised for the first time on reconsideration rather than the issues actually addressed in the summary judgment order—namely, the running of statutes of limitation on OM's

claims against Tandon and the impropriety of OM's purported unilateral set-off of its unadjudicated claims against him.

OM declares that the "Trial Court erred in holding that Appellant had no grounds in law or equity to conduct an adjustment to the Tandon Capital Account. (Conclusions of Law 2-4.)" (Appellants' Brief at 2.) However, the trial court held only that there was no statutory, case law, or equitable basis for off-set, thereby addressing the only arguments OM raised in opposition to the Mittals' motion for summary judgment. (CP 390; *see also* CP 80-95.)

Similarly, OM declares that the "Trial Court erred in holding that Appellant was required to bring an action against a resigned manager to recover unauthorized distributions. (Conclusion of Law 3.)" (Appellants' Brief at 2.) Actually, the trial court concluded that "RCW 25.15.180 does not allow an automatic offset with respect to distribution." (CP 390.) In other words, a company must bring an action and recover damages before it can make offsets against distributions. The trial court observed that OM could not bring such a claim for damages because applicable statutes of limitation had expired. (CP 390.)

OM's third assignment of error is that the "Trial Court erred in holding that, as holders of a charging order on ownership interests, the Respondents are not subject to the same defenses as the owner of the

interests. (Conclusions of Law 5-6.)” (Appellants’ Brief at 2.) Instead, the trial court’s actual conclusions addressed when equitable offsets are permitted, concluding that this is not such a circumstance. (CP 390.)

OM has not assigned error as to any of the trial court’s factual findings and certain conclusions of law. Thus, for example, OM did not assign as error the trial court’s finding or conclusion that “the statute of limitations ran for any kind of action that could have been brought against Mr. Tandon.” (CP 389.) It did not assign as error the trial court’s conclusion that the Mittals have an Economic Interest in OM because of their own investment and because of the Charging Order. (CP 390; *see* Appellants’ Brief at 3.) Unchallenged findings are accepted as verities on appeal. *E.g.*, *Taliesen Corp. v. Razore Land Co.*, 135 Wn. App. 106, 130, 144 P.3d 1185 (2006); *Halvorsen v. Ferguson*, 46 Wn. App. 708, 722, 735 P.2d 675 (1986). Failure to assign error to the trial court’s conclusions of law precludes consideration on appeal. *Bank of Wash. v. Burgraff*, 38 Wn. App. 492, 500, 687 P.2d 236 (1984).

OM also has not challenged the trial court’s actual conclusions of law nos. 2-6 with respect to set-off.² Moreover, with the exception of OM’s argument that the Mittals “stand in the shoes” of Tandon, OM has

² OM did not designate the Order on Summary Judgment for inclusion in the Clerk’s Papers; it appears in OM’s Clerk’s Papers only as an attachment to its notice of appeal. (CP 1-9.)

not briefed any issues pertaining to the trial court’s conclusions on set-off or offset. Consequently, they should be deemed abandoned.

RAP 10.3(a)(5); *Pappas v. Herschberger*, 85 Wn.2d 152, 153, 530 P.2d 642 (1975).

Instead, OM devotes most of its argument to the trial court’s denial of its motion for reconsideration and its contentions that the allegedly questionable Tandon transactions should be deemed “distributions” to him and that OM is therefore entitled to deduct those distributions from the Tandon capital account under Sections 17.3 and 10.2.1 of the OM LLC Agreement. (*See* Appellants’ Brief at 15-29.) However, OM did not assign error to the trial court’s conclusions in the Order on Motion for Reconsideration. (*See* Appellants’ Brief at 2.) Instead, OM crafts its Issues Pertaining to Assignment of Error on the summary judgment order to suggest the issues it raised for the first time in its Motion for Reconsideration. (*Compare* Appellants’ Brief at 3 *with* CP 33-57.) Failure to comply with the requirements of assigning error may preclude review of any challenge to the findings. *Murphy v. Lint*, 135 Wn.2d 518, 531-32, 957 P.2d 755 (1998) (“Strict adherence to [RAP 10.3] is not merely a technical nicety.”).

Standards of Review. OM’s principal argument on appeal—that Tandon took certain unauthorized “distributions” and that OM is entitled

to reduce the Tandon capital account by the total of those “distributions”—was made only in its motion for reconsideration. Consequently, the applicable standard of review of the trial court’s denial of the motion is abuse of discretion. *See August v. U.S. Bancorp*, 146 Wn. App. 328, 339, 190 P.3d 86 (2008); *Wilcox v. Lexington Eye Inst.*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005); *Chen v. State*, 86 Wn. App. 183, 192, 937 P.2d 612 (1997).

An abuse of discretion exists only if no reasonable person would have taken the view adopted by the trial court, the trial court applied the wrong legal standard, or it relied on unsupported facts. *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010). In a motion for reconsideration, a party cannot propose new case theories that could have been raised before entry of an adverse decision. *Wilcox*, 130 Wn. App. at 241. An appellate court may decline to consider an argument or issue that was raised for the first time in a motion for reconsideration. *Id.*

Having ignored the applicable standard of review, OM has not suggested that the trial court applied the wrong legal standard or that it relied on unsupported facts. OM has not suggested that no reasonable person would have taken the view adopted by the trial court.

Instead, OM blends its late “distribution” theory with a newly-manufactured theory that it is seeking an accounting. (Appellants’ Brief at

20-24; *see also id.* at 19.) In fact, OM did not bring an action for an accounting or argue in the trial court that it was entitled to one. It brought only an action for dissolution under RCW 25.15.275 and for a declaratory order authorizing it to distribute OM's remaining assets according to a self-help "exercise." (CP 375.) Generally, an appellate court will not consider arguments raised for the first time on appeal. *Wilson v. Steinbach*, 98 Wn.2d 434, 440, 656 P.2d 1030 (1982). OM has not suggested any reason to depart from that rule in this case. *See* RAP 2.5(a).

To the extent OM addresses the order on summary judgment, this Court engages in the same inquiry as the trial court and reviews its decision *de novo*. *Auto. United Trades Org. v. State*, 175 Wn.2d 537, 541, 286 P.3d 377 (2012); *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c); *Auto. United Trades Org.*, 175 Wn.2d at 541; *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997).

This Court may affirm a summary judgment order on any ground that the record and pleadings support, regardless of whether the trial court

relied on that ground. *LaMon v. Butler*, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989); *East Wind Express, Inc. v. Airborne Freight Corp.*, 95 Wn. App. 98, 102, 974 P.2d 369 (1999).

Conclusions of law are reviewed *de novo*. *Sunnyside Valley Irr. Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Conclusions of law erroneously described as findings of fact are reviewed as conclusions of law. *Woodruff v. McClellan*, 95 Wn.2d 394, 396-97, 622 P.2d 1268 (1980).

B. The Trial Court Correctly Concluded and OM Does Not Contest that the Mittals Are Members and Economic Interest Owners with Respect to the Tandon Units.

RCW 25.15.255 provides in relevant part:

On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the limited liability company interest of the member with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of the limited liability company interest.

Having “only the rights of an assignee of a limited liability company interest,” means that the judgment creditor receives the economic interest, but not a right to participate in governance of the LLC. RCW 25.15.250.

Under the LLC Act (and the OM LLC Agreement), there are two components of a member’s interest in a limited liability company. One is the “right to participate in the management of the business and affairs of a

limited liability company.” *See, e.g.*, RCW 25.15.250(1). (CP 273.) The other is the economic interest; that is, the right to “share in such profits and losses, to receive distributions, and to receive such allocation of income, gain, loss, deduction, or credit or similar item.” *See* RCW 25.15.250(2)(a). (CP 273.)

Upon assignment, an assignee receives the economic interest but not the right to participate in the company’s governance unless all members other than the assignee approve or the LLC agreement so provides. RCW 25.15.250(1). (*See also* CP 273.)³

Thus, the trial court correctly concluded that the Mittals “have an economic interest in two ways: (1) by reason of their investment of \$55,000; and (2) by reason of the Charging Order entered by the King County Superior Court on July 9, 2008.” (CP 390.)

The OM LLC Agreement provides: “If a Person is a Member immediately prior to the acquisition by such Person of an Economic Interest, such Person shall have all the rights of a Member with respect to such Economic Interest.” (CP 273.) Thus, because the Mittals were already Members of OM (CP 202), they became not only Economic Interest Owners, but also acquired rights of Members with respect to the

³ An Economic Interest Owner is not a mere pledgee or holder of a security interest, lien or other encumbrance. A lienor or pledgee of a LLC interest attains the status of assignee only upon foreclosure or execution sale or similar exercise of such rights. RCW 25.15.250(3).

Tandon units.

Upon assignment, a member ceases to be a member with governance rights. RCW 25.15.250(2)(b). Thus, Tandon ceased to be a member when the Mittals obtained the Charging Order on July 9, 2008.

C. The Trial Court Did Not Abuse its Discretion in Concluding that OM’s Proposed Self-Help “Exercise” Is Not Authorized by the OM LLC Agreement and Precluded by RCW 25.15.235(3).

1. Sections 17.3 and 10.2 of the OM LLC Agreement Do Not Authorize OM’s Reduction of the Tandon Capital Account.

While members of an LLC “may agree among themselves to any otherwise lawful provision governing the company which is not in conflict with this chapter [RCW 25.15],” RCW 25.15.005 *et seq.*, Sections 17.3 and 10.2 of the OM LLC Agreement do not supply OM with the authority unilaterally to reduce the Tandon capital account by the amount of alleged questionable transactions that occurred in 2005 and 2006 by treating them as “distributions.”

There is no provision in either the LLC Act or the OM LLC Agreement for treating unauthorized or questionable transactions as “distributions.” Distributions are required to be made “in accordance with [Members’] relative Percentage Interests” or “pro rata based on

[Members'] relative Capital Accounts.” (CP 285-86.)⁴

In any event, characterizing the transactions as “distributions” and “adjustments” does not help OM because the purported “adjustments” are beyond the temporal scope of adjustment permitted by the OM LLC Agreement and the LLC Act. Section 17.3.3 of the OM LLC Agreement provides that upon dissolution, company assets remaining after payment of OM’s creditors are paid and a contingency reserve established are to be distributed to unit holders “after taking into account all Capital Account adjustments *for the taxable year during which the liquidation occurs.*” (CP 294 (emphasis added).) It is undisputed that the purported “distributions” OM now claims occurred more than five and one-half years before it initiated this proceeding, from March 25, 2005 to June 2, 2006. (CP 233-34.) Section 17.3.3 does not provide for reaching back that far to make “adjustments.”

OM suggests that United States Treasury Regulation § 1.704-1 addresses “the multitude of issues that relate[] to a partnership’s determination of a partner’s share,” 26 C.F.R. 1.704-1, and “the

⁴ RCW 25.15.205 provides that distributions of cash or other assets of an LLC shall be in the manner provided in an LLC agreement or if the agreement does not so provide, in proportion to the value of the contributions made by each member. Upon the winding up of an LLC, after payment of liabilities, distributions are to be made as follows: “Unless otherwise provided in a limited liability company agreement, to members first for the return of their contributions and second respecting their limited liability company interests, in the proportions in which the members share in distributions.” RCW 25.15.300(c).

circumstances where corrective allocations must be made to a partner's capital account. 1.704-(b)(4)(x).” (Appellants’ Brief at 19.) However, subsection 1.704(b)(4)(x) is “[Reserved]” and has no text. OM does not identify any other pertinent section or explain how it bears on the relief OM seeks. (See Appellants’ Brief at 19.) The presumption therefore should be that it does not. See RAP 10.3(a)(6) (requiring appellant to provide argument supported by legal authority in support of issues presented for review).

Moreover, while the provisions of Section 10.2.1 of the OM LLC Agreement are intended to comply with the capital account maintenance provision of Treasury Regulation 1.704-1(b), OM and its management are not free to modify the manner in which capital accounts, or any debits or credits thereto, are computed. Section 10.2.1 of the OM LLC Agreement permits management to make modifications, but only to the extent that they are “not likely to have a material effect on the amounts distributable to any Unit Holder or on the obligations of any Unit Holder to restore a deficit balance in its Capital Account.” (CP 284-85.) Plainly, the modifications OM proposes would have a material effect on amounts distributable on the Tandon capital account. Consequently, the modifications are not permissible under Section 10.2.1 to comply with Treasury Regulation 1.704-1(b).

2. *The Trial Court Correctly Concluded that Tandon Has No Liability for Unauthorized Distributions Because Any Such Liability Was Extinguished Under RCW 25.15.235(3).*

Under RCW 25.15.235(3), Tandon has **no liability** for distributions by which OM seeks to reduce his capital contributions.

RCW 25.15.235(3) provides:

Unless otherwise agreed, a member who receives a distribution from a limited liability company shall have **no liability** under this chapter or other applicable law for the amount of a distribution **after the expiration of three years from the date of the distribution** unless an action to recover the distribution from such member is commenced prior to the expiration of the said three-year period and an adjudication of liability against such member is made in the said action.

(Emphasis added.)

RCW 25.15.235(3) extinguishes liability not only under RCW 25.15, the LLC Act, but also under “other applicable law” unless two things occur: (1) an action to recover the distribution is commenced “prior to the expiration of the [] three-year period;” and (2) an adjudication of liability against the member is made in the action.⁵

Under the plain language of RCW 25.15.235(3), an action on the first of the claimed distributions to Tandon (on March 25, 2005) would

⁵ RCW 25.15.235(3) thus appears to be a statute of nonclaim where the limitation inheres in the right or obligation rather than the remedy. “When the limitation period expires, the right or obligation is extinguished and cannot be revived.” *Lane v. Dep’t of Labor & Indus.*, 21 Wn.2d 420, 425, 151 P.2d 440 (1944).

have had to have been brought by no later than March 25, 2008. An action on the last of the claimed distributions would have had to have been brought by no later than June 2, 2009. Having discovered the distributions in 2007, OM could have brought a timely action to recover any or all of the distributions, but did not. There was no adjudication of liability against Tandon. (See CP 80-95.) Consequently, there is no debt or obligation for distributions by which OM can reduce the Tandon capital account.

The phrase “[u]nless otherwise agreed” at the beginning of RCW 25.15.235(3) does not aid OM. OM’s members did not agree in the OM LLC Agreement to waive RCW 25.15.235(3) or the requirement to bring an action within the specified three-year period.

OM seeks to avoid the clear language of RCW 25.15.235(3) by suggesting that it is not bringing an affirmative action to recover the distributions. However, filing a declaratory judgment action rather than one for affirmative relief does not avoid the limitations period.

The Uniform Declaratory Judgment Act (UDJA), RCW 7.24, does not have an explicit statute of limitations. Lawsuits under the UDJA must be brought within a “reasonable time.” *Auto. United Trades Org. v. State*, 175 Wn.2d at 541-42. “What constitutes a reasonable time is determined by analogy to the time allowed for . . . a similar [action] as prescribed by

statute, rule of court, or other provision.” *Cary v. Mason Cnty.*, 132 Wn. App. 495, 501, 132 P.3d 157 (2006) (quoting *Brutsche v. City of Kent*, 78 Wn. App. 370, 376-77, 898 P.2d 319 (1995)). “The right to declaratory relief should be barred when [the] right to coercive relief is barred.” *City of Federal Way v. King Cnty.*, 62 Wn. App. 530, 537, 815 P.2d 790 (1991) (citing 15 LEWIS H. ORLAND & KARL B. TEGLUND, WASH. PRAC.: TRIAL PRAC.: CIVIL § 613 (4th ed. 1986)). See *Reid v. Dalton*, 124 Wn. App. 113, 122, 100 P.3d 349 (2004) (“Filing an action for declaratory judgment, rather than one for direct relief, did not avoid the statute of limitation.”).

OM also seeks to avoid RCW 25.15.235(3) by limiting its application only to distributions made in the circumstances expressed in subsections (1) and (2) of RCW 25.15.235. But subsection (3) is not so limited. By its terms, it applies generally to any distribution for which an LLC might claim a member is liable. Subsection (2) is expressly “subject to subsection (3),” but the reverse is not true, demonstrating that the legislature could and did link the subsections where it intended to. Subsection (3) is not so limited.

3. *No Other Provision of the OM LLC Agreement Authorizes OM's Unilateral Reduction of the Tandon Capital Account.*

No other provision of the OM LLC Agreement authorizes OM's unilateral reduction of the Tandon capital account. No provision

authorizes the company to set-off or offset its claims against a Manager/Member's capital account. No provision gives OM a lien against its former Manager/Member's LLC interest for mismanagement or breach of duty.

RCW 25.15.170 provides that an LLC agreement may provide for specified penalties or consequences for its breach. However, OM has not alleged a breach of the OM LLC Agreement and, in any event, the OM LLC Agreement does not provide for any such penalties or consequences.

RCW 25.15.180 provides that if a manager violates an LLC agreement by resigning, the LLC can recover damages for the breach and "offset the damages against the amount otherwise distributable to the resigning manager." However, the OM LLC Agreement does not provide that a resignation is a breach; on the contrary, it provides expressly that "[e]ach Manager may resign from the position as Manager at any time." (CP 278.) Moreover, as the trial court determined, even if resigning were a breach, OM would nevertheless be obliged under RCW 25.15.180 to bring a timely action "to recover damages" and only then would have a right to "offset the damages against the amount otherwise distributable to the resigning manager." (CP 278.)

In arguing that the trial court erred as a matter of law in ruling that RCW 25.15.180 was OM's exclusive remedy, OM misstates the Order.

(See Appellants' Brief at 24-26.) The Order reflects the court's exploration of whether there was any statutory authority for the offset OM purported to make. The trial court recognized RCW 25.15.180 as authority for offset in one specific circumstance—when a manager wrongfully resigns and thereby injures an LLC. But in that circumstance, the LLC is required to bring an action to recover damages before it can offset the damages against amounts otherwise distributable—something OM has not done and cannot do because of the running of applicable statutes of limitation. RCW 25.15.180 plainly offers no support for its self-help set-off. Consequently, as the trial court correctly concluded, RCW 25.15.180 offers *no* remedy to OM, not an *exclusive* remedy.

RCW 25.15.195(3) permits an LLC agreement to subject “the interest of any member who fails to make any contribution that the member is obligated to make” to specified penalties for, or specified consequences of, such failure. “Such penalty or consequence may take the form of reducing or eliminating the defaulting member’s proportionate interest in a limited liability company,” and other statutorily specified penalties or consequences. RCW 25.15.195(3). But OM does not allege that Tandon failed to make a required contribution and in any event, the OM LLC Agreement does not subject a member’s interests to a penalty or other consequence.

No other provision gives OM a right to offset from amounts otherwise distributable to an Economic Interest Owner amounts for claims OM had against a former member and OM does not suggest any.

4. *The Partnership Accounting Cases that OM Cites Are Inapposite.*

OM cites several Washington cases which it describes as “examples of the winding up and accounting process.” (See Appellants’ Brief at 20-23.) These cases are of little utility here, however, because this action does not involve a partnership and there is no claim for an accounting. None of the cited cases involves interpretation of the LLC Act or a LLC agreement with terms comparable to the OM LLC Agreement. Moreover, none reflects court approval of a unilateral adjustment of capital accounts.

Further, each of the Washington partnership cases OM cites was decided under old law—the Uniform Partnership Act, RCW 25.04.010 *et seq.*, which was in effect from 1945 until it was repealed and replaced by the Revised Uniform Partnership Act (“RUPA”), Title 25.05 RCW, in 1998 (Laws of 1998, ch. 103).⁶ Unlike the LLC Act which governs here, the UPA provided expressly for accountings, RCW 25.04.220, and under

⁶See *Simpson v. Thorlund*, 151 Wn. App. 276, 281-82, 211 P.3d 469 (2009); *Blanchard v. Energy Assocs. Nw.*, 43 Wn. App. 716, 718 P.2d 803 (1986). See also *Guntle v. Barnett*, 73 Wn. App. 825, 833, 871 P.2d 627 (1994) (“[S]ince 1945 [a court’s] ‘equitable powers’ have been subject to partnership statutes.”).

the UPA, an accounting was a prerequisite to an action against a partner. *Simpson v. Thorslund*, 151 Wn. App. 276, 278, 211 P.3d 464 (2009). Since Washington's adoption of the RUPA in 1998, a full accounting of partnership assets and liabilities is no longer required. *Simpson*, 151 Wn. App. at 278. The LLC Act also does not require an accounting prior to bringing an action against a LLC manager. *See* RCW 25.15.

Rules pertaining to statutes of limitation and their accrual differ under the repealed UPA and the LLC Act. While the UPA expressly provided that in the absence of an agreement to the contrary, the "right to an account of his interest shall accrue to any partner . . . at the date of dissolution," RCW 25.04.430, there is no comparable accrual provision in the LLC Act.⁷ There is nothing in the LLC Act (or otherwise) that places accrual of any cause of action OM had against Tandon at dissolution or required OM to wait until dissolution to take action against him. OM's causes of action accrued when they otherwise accrued by law; that is, when OM had a right to apply to a court for relief. *See U.S. Oil & Ref. Co. v. Dep't of Ecology*, 96 Wn.2d 85, 91, 633 P.2d 1329 (1981). OM could have sued Tandon when OM and Deva discovered in 2007 what they claim were unauthorized transactions, mismanagement and breach of

⁷ There also is no comparable provision in the Revised Uniform Partnership Act, RCW ch. 25.05. *See* Disposition Table re formerly codified sections repealed by Laws 1998, ch. 103, eff. Jan. 1, 1999.

duty. Consequently, *Laue v. Estate of Elder*, 106 Wn. App. 699, 25 P.3d 1032 (2001) and *Malnar v. Carlson*, 128 Wn.2d 521, 910 P.2d 455 (1996) (Appellants' Brief at 21-22 n.2) are both irrelevant and misleading.

Finally, none of OM's cited Washington cases involved a provision like RCW 25.15.235(3) extinguishing stale claims for distributions. (*See pp. 23-26 supra.*)

OM also relies on several out-of-state cases which are, for similar reasons, inapposite. They are partnership cases that involve accountings and do not address Washington's LLC Act. In addition, none address the nonclaim and statute of limitation issues that limit OM's ability to proceed against the Tandon capital account. (*See pp. 15,23-26 supra.*)

OM characterizes *O.C. P'ship v. Owrutsky Assocs., P.A.*, 88 Md. App. 507, 510, 596 A.2d 76 (1991), as having "similar facts" to this case, but, in fact, there are critical distinctions that warrant different outcomes. *O.C. P'ship* was a partnership accounting decided under the Maryland Corporations & Associations Article. 88 Md. App. at 508. Unlike OM, the partnership had obtained a judgment against the partner whose capital account it sought to decrease and had done so before the charging order in question was entered. *O.C. P'ship*, 88 Md. App. at 508. In addition, a receiver already had conducted an accounting and independently adjusted the partner's account. *O.C. P'ship*, 88 Md. App. at

509. The Maryland court's comment that it was unnecessary for the Partnership to obtain a judgment was plainly *dicta*, as the Partnership had in fact obtained a judgment, and also is explained by the fact that there also had been a full accounting of partnership interests. Here, OM never made a claim against Tandon, obtained a judgment or sought an accounting.

Schoeller v. Schoeller, 497 S.W.2d 860 (1973) was an action for a partnership accounting under Missouri's Uniform Partnership Act, and held that a partner would not receive credit in an accounting for contributions he never actually made.

In *Sebring Assocs. v. Coyle*, 347 N.J. Super. 414, 429-30, 790 A.2d 225 (2002) (not for publication), the principal question was whether a partner's refusal to contribute necessary capital to the partnership constituted misconduct sufficient to warrant judicial dissolution. The court affirmed the trial court's exclusion of the partner, but remanded for determination of damages. The "aggregate cash distribution" language to which the court referred and which OM quotes, pertained to an interpretation of that specific phrase in the partnership agreement in question. *Sebring Assocs.*, 347 N.J. Super. at 426-27. The phrase does not appear in the OM LLC Agreement. Moreover, exclusion of the partner was not based upon the meaning of the phrase but on the New Jersey

Uniform Partnership Law. *Sebring Assocs.*, 347 N.J. Super, at 428-29.

In *Williams v. Richey*, 948 A.2d 564, 569 (2008), the court's conclusion that "the capital accounts must be brought up to date" did not represent a determination that the dissolving partnership had the authority unilaterally to adjust the capital accounts for claims it had as OM suggests. (See Appellants' Brief at 24.) At an earlier stage of litigation, the parties had had a binding arbitration determining how the capital accounts stood in 1999. Several years had passed since the arbitration. Consequently, the appellate court remanded for an accounting of changes in the partners' capital accounts based on activity since the arbitration. *Williams*, 948 A.2d at 569.

In short, none of OM's authorities support the proposition that OM had the authority unilaterally to define the OM membership interests that were Tandon's or to reduce the Tandon capital account amounts for alleged distributions from March 25, 2005, to June 2, 2006.

D. The Mittals Do Not "Stand in Tandon's Shoes" As to OM's Unadjudicated Tort Claims Against Tandon, And Even if They Did, OM's Claims Are Barred by Applicable Limitations Periods.

OM argues that the Mittals "step into the shoes of the assignor [Tandon]." (Appellants' Brief at 31; *see also* CP 81.) However, accepting this as a fair statement of contract law does not leave the assignee liable

for the assignor's separate tort claims and OM offers no authority for that result.

“[A]n assignment carries with it the rights and liabilities as **identified in the assigned contract** [and] also all applicable statutory rights and liabilities.” *Puget Sound Nat'l Bank v. State Dep't of Revenue*, 123 Wn.2d 284, 292, 868 P.2d 127 (1994) (emphasis added). Nothing in the Charging Order, the OM LLC Agreement or the LLC Act identifies member liabilities other than those for capital contribution. (CP 284 (“[E]ach member shall contribute such Member's share of the Members' Capital Contribution.”).) Any liability Tandon has to OM is not identified to the assigned membership interest.

As a matter of statute, the Mittals did not take on liability as members as a result of the Charging Order. *See* RCW 25.15.250(4) (unless an LLC agreement provides otherwise or except to the extent assumed by agreement, an assignee “shall have no liability as a member solely as a result of the assignment”). There is no agreement providing for assumption of Tandon's liability and the OM LLC Agreement does not provide for liability upon assignment under a charging order or otherwise. (*See* CP 272-303.)

OM cites *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 662 P.2d 385 (1983) for the proposition that an assignee takes subject to defenses

assertable against the assignor. But OM's claims are not mere defenses; rather, they are unsecured tort claims against Tandon personally.

In any event, the Mittals do not stand in Tandon's shoes as defendants against whom OM can assert its tort claims for mismanagement and breach of duty. The Mittals are not joint tortfeasors or co-conspirators. On the contrary, as their judgment reflects, they were victims of Tandon's securities fraud and check dishonor. They timely pursued their claims, obtained a judgment and acted upon it to obtain the Charging Order and Economic Ownership of the Tandon units. (*See pp. 5-6, 19-21 supra.*) By contrast, OM sat on its rights and did not bring a timely claim against Tandon. OM also waited to assert its claim against the Mittals' interest in the Tandon units for more than three years after the Mittals acquired that interest.

Moreover, even if OM could assert its claims against the Mittals and their interest in the Tandon OM units, OM's claims are subject to the statute of limitations and nonclaim defenses. OM never contested the running of these periods of limitation. It argued only that the limitations periods did not run because it was not asserting affirmative claims. (CP 92-93.) However, as set forth above, OM was nonetheless required to bring any claims for declaratory relief within the periods applicable on the underlying affirmative claims. (*See pp. 25-26 supra.*)

E. The Court May Affirm The Trial Court’s Grant of Summary Judgment Requiring Return of Capital or Distributions on the Entire Capital Account Associated with the Tandon Interest on the Ground that OM’s Unadjudicated and Stale Tort Claims Cannot Be Resolved by Declaratory Judgment.

The Court may affirm a summary judgment order on any ground that the record and pleadings support, regardless of whether the trial court relied on that ground. *East Wind Express*, 95 Wn. App. at 102.

The relief that OM and Deva seek is not appropriate for declaratory judgment because they had an adequate remedy at law for resolving their unadjudicated tort claims against Tandon; namely, an action at law for the alleged mismanagement and breach of duty claims.

The purpose of the Uniform Declaratory Judgments Act “is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.” RCW 7.24.120. *See also Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973). The statutory purpose of the UDJA and the legislative declaration that it should be liberally construed does not make issuance of a declaratory judgment mandatory. Instead, a declaratory judgment is discretionary. *King Cnty. v. Boeing Co.*, 18 Wn. App. 595, 601-02, 570 P.2d 713 (1977).

In Washington, “a plaintiff is not entitled to relief by way of a declaratory judgment if, otherwise, he has a completely adequate remedy

available to him.” *Reeder v. King Cnty.*, 57 Wn.2d 563, 564, 358 P.2d 810 (1961). *Accord, Stafne v. Snohomish Cnty.*, 156 Wn. App. 667, 688, 234 P.3d 225 (2010); *Lu v. King Cnty.*, 110 Wn. App. 92, 98-99, 38 P.3d 1040 (2002). *See also Thompson v. Wilson*, 142 Wn. App. 803, 819, 175 P.3d 1149 (2008) (The Washington Supreme Court has historically “limited the operation of the uniform declaratory judgment act to cases where there is no satisfactory remedy at law available.”) (quoting *Hawk v. Mayer*, 36 Wn.2d 858, 866, 220 P.2d 885 (1950)).

In this case, OM and Deva had a perfectly adequate remedy at law to address any mismanagement or breach of duty claims they may have had against Tandon. They could have brought an action against him for damages for negligence or breach of duty or initiated an action for recovery of any wrongful “distributions” and obtained a determination of liability and damages. As judgment creditors, they could have obtained a charging order under RCW 25.15.255 but they did not. Thus, their request for a declaratory judgment approving their unilateral reduction of the Tandon capital account as though they already had such a judgment is wholly inappropriate.

Since 1967, CR 57 has provided in part that “[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate.” Nevertheless, Washington courts

continue to hold that a plaintiff is not entitled to relief by way of declaratory judgment if he has an adequate remedy available. One decision has harmonized the court rule and case law as follows: “Ordinarily where a plaintiff has another adequate remedy, he or she should not proceed by way of a declaratory judgment action; but declaratory relief may be ‘appropriate’ in some situations, notwithstanding the availability of another remedy.” *Wagers v. Goodwin*, 92 Wn. App. 876, 880, 964 P.2d 1214 (1998) (citing *City of Federal Way v. King Cnty*, 62 Wn. App. 530, 535 n.3, 815 P.2d 790 (1991)).

This is not a case in which declaratory relief, avoiding the necessity of an action for damages, is appropriate. An action for damages against Tandon would have focused OM’s claims and Tandon’s defenses. Tandon could have made all of his direct defenses. It is fundamentally unfair to require the Mittals—who have been Tandon’s adversaries and do not have access to all of the information Tandon presumably has about his prior transactions—to establish his defenses, particularly when there are no direct claims made against Tandon. In addition, there would have been a clear and final determination of liability and damages, rather than computations that have evolved during this action (*compare* CP 419 *with* CP 377) and mere averments from OM and Deva about “questionable” expenditures, and “unknown” transferees. (CP 143-47.)

A declaratory judgment does not become “appropriate” because too much time has passed to bring an affirmative claim. The periods of limitation applicable to the affirmative claims also apply in a declaratory judgment context. (*See pp. 25-26, supra.*) It is also not enough to assert as OM has that “OM has decided not to pursue and [sic] affirmative claim against Tandon because the minimal amount of recovery would not justify the expense and time spent for litigation.” (CP 102.) A declaratory judgment action should not be used as a vehicle to enable OM to avoid the proof it would otherwise be required to make. Moreover, OM now seeks to affect the substantial and already adjudicated rights of the Mittals.

Traditionally, a distinctive characteristic of a declaratory judgment action is that it determines the rights of parties to a justiciable controversy before a wrong is committed or a loss incurred. Here, OM claims that the wrong already has been committed and the loss incurred. Consequently, there is no good reason to treat a declaratory judgment as appropriate when there was an adequate remedy at law available.

CONCLUSION.

Unlike the Mittals, OM is not a judgment creditor, but a mere claimant, with stale, unadjudicated claims against Kamal Tandon. Further, OM does not have a security interest, a lien or a charging order with respect to the Tandon LLC interest. It also does not have a statutory

or contractual right to set-off or self-help, and therefore cannot unilaterally reduce the capital account associated with the Mittal Economic Interest for OM's benefit or those of its members generally.

RCW 25.15.255 sets forth the manner in which a creditor may claim an LLC member's interest. The Mittals have followed that prescription. OM has not. Thus, there is no sound basis for OM's claims to come ahead of those of the Mittals.

For the reasons set forth above, the Superior Court's Summary Judgment Order and its denial of OM's motion for reconsideration should be affirmed. OM and Deva should be required to make distributions to the Mittals on the entire capital account associated with the OM Economic Interests they received under the July 9, 2008, Charging Order of the King County Superior Court. OM and Deva should not be permitted to windup the affairs of OM without making such distributions to the Mittals.

DATED this 2nd day of August, 2013.

Respectfully Submitted,

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APPENDIX TO:

BRIEF OF RESPONDENTS RAVI
AND RIPU MITTAL AND
SCHIVANCHAL ENTERPRISES, LLC

11 U.S.C.

United States Code, 2012 Edition

Title 11 - BANKRUPTCY

CHAPTER 7 - LIQUIDATION

SUBCHAPTER II - COLLECTION, LIQUIDATION, AND DISTRIBUTION OF THE ESTATE

Sec. 727 - Discharge

From the U.S. Government Printing Office, www.gpo.gov**§727. Discharge**

(a) The court shall grant the debtor a discharge, unless—

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

(3) the debtor has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any recorded information, including books, documents, records, and papers, from which the debtor's financial condition or business transactions might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case;

(4) the debtor knowingly and fraudulently, in or in connection with the case—

(A) made a false oath or account;

(B) presented or used a false claim;

(C) gave, offered, received, or attempted to obtain money, property, or advantage, or a promise of money, property, or advantage, for acting or forbearing to act; or

(D) withheld from an officer of the estate entitled to possession under this title, any recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs;

(5) the debtor has failed to explain satisfactorily, before determination of denial of discharge under this paragraph, any loss of assets or deficiency of assets to meet the debtor's liabilities;

(6) the debtor has refused, in the case—

(A) to obey any lawful order of the court, other than an order to respond to a material question or to testify;

(B) on the ground of privilege against self-incrimination, to respond to a material question approved by the court or to testify, after the debtor has been granted immunity with respect to the matter concerning which such privilege was invoked; or

(C) on a ground other than the properly invoked privilege against self-incrimination, to respond to a material question approved by the court or to testify;

(7) the debtor has committed any act specified in paragraph (2), (3), (4), (5), or (6) of this subsection, on or within one year before the date of the filing of the petition, or during the case, in connection with another case, under this title or under the Bankruptcy Act, concerning an insider;

(8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within 8 years before the date of the filing of the petition;

(9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least—

- (A) 100 percent of the allowed unsecured claims in such case; or
- (B)(i) 70 percent of such claims; and
- (ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort;

(10) the court approves a written waiver of discharge executed by the debtor after the order for relief under this chapter;

(11) after filing the petition, the debtor failed to complete an instructional course concerning personal financial management described in section 111, except that this paragraph shall not apply with respect to a debtor who is a person described in section 109(h)(4) or who resides in a district for which the United States trustee (or the bankruptcy administrator, if any) determines that the approved instructional courses are not adequate to service the additional individuals who would otherwise be required to complete such instructional courses under this section (The United States trustee (or the bankruptcy administrator, if any) who makes a determination described in this paragraph shall review such determination not later than 1 year after the date of such determination, and not less frequently than annually thereafter.); or

(12) the court after notice and a hearing held not more than 10 days before the date of the entry of the order granting the discharge finds that there is reasonable cause to believe that—

- (A) section 522(q)(1) may be applicable to the debtor; and
- (B) there is pending any proceeding in which the debtor may be found guilty of a felony of the kind described in section 522(q)(1)(A) or liable for a debt of the kind described in section 522(q)(1)(B).

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

(c)(1) The trustee, a creditor, or the United States trustee may object to the granting of a discharge under subsection (a) of this section.

(2) On request of a party in interest, the court may order the trustee to examine the acts and conduct of the debtor to determine whether a ground exists for denial of discharge.

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if—

- (1) such discharge was obtained through the fraud of the debtor, and the requesting party did not know of such fraud until after the granting of such discharge;
- (2) the debtor acquired property that is property of the estate, or became entitled to acquire property that would be property of the estate, and knowingly and fraudulently failed to report the acquisition of or entitlement to such property, or to deliver or surrender such property to the trustee;
- (3) the debtor committed an act specified in subsection (a)(6) of this section; or
- (4) the debtor has failed to explain satisfactorily—
 - (A) a material misstatement in an audit referred to in section 586(f) of title 28; or
 - (B) a failure to make available for inspection all necessary accounts, papers, documents, financial records, files, and all other papers, things, or property belonging to the debtor that are requested for an audit referred to in section 586(f) of title 28.

(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge—

- (1) under subsection (d)(1) of this section within one year after such discharge is granted; or
- (2) under subsection (d)(2) or (d)(3) of this section before the later of—
 - (A) one year after the granting of such discharge; and
 - (B) the date the case is closed.

(Pub. L. 95–598, Nov. 6, 1978, 92 Stat. 2609; Pub. L. 98–353, title III, §480, July 10, 1984, 98 Stat. 382; Pub. L. 99–554, title II, §§220, 257(s), Oct. 27, 1986, 100 Stat. 3101, 3116; Pub. L. 109–8, title I, §106(b), title III, §§312(1), 330(a), title VI, §603(d), Apr. 20, 2005, 119 Stat. 38, 86, 101, 123.)



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Notes:

Rules of court: Cf. CR 57.

7.24.010

Authority of courts to render.

Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. An action or proceeding shall not be open to objection on the ground that a declaratory judgment or decree is prayed for. 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.

[1937 c 14 § 1; 1935 c 113 § 1; RRS § 784-1.]

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Construction of chapter.

This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations; and is to be liberally construed and administered.

[1935 c 113 § 12; RRS § 784-12.]



PARTNERSHIPS

Jurisdiction	Statutory Citation
New Mexico	NMSA 1978, §§ 54-1-1 to 54-1-43.
New York	McKinney's Partnership Law, §§ 1 to 74.
North Carolina	G.S. §§ 59-31 to 59-73.
North Dakota	NDCC 45-05-01 to 45-09-15, 45-12-04.
Ohio	R.C. §§ 1775.01 to 1775.42.
Oklahoma	54 Okl.St. Ann. §§ 201 to 243.
Oregon	ORS 68.010 to 68.650.
Pennsylvania	15 Pa.C.S.A. §§ 8301 to 8365.
Rhode Island	Gen. Laws 1956, §§ 7-12-12 to 7-12-55.
South Carolina	Code 1976, §§ 33-41-10 to 33-41-1090.
South Dakota	SDCL 48-1-1 to 48-5-56.
Tennessee	T.C.A. §§ 61-1-101 to 61-1-142.
Texas	Vernon's Ann. Texas Civ. St. art. 6132b. ¹
Utah	U.C.A. 1953, 48-1-1 to 48-1-40.
Vermont	11 V.S.A. §§ 1121 to 1335.
Virgin Islands	26 V.I.C. §§ 1 to 135.
Virginia	Code 1950, §§ 50-1 to 50-43.
Washington	West's RCWA 25.04.010 to 25.04.430.
West Virginia	Code, 47-8A-1 to 47-8A-45.
Wisconsin	W.S.A. 178.01 to 178.39.

¹ Enacted 1993 Act without repealing the 1914 Act.

Law Review Commentaries

Regulation of real estate syndications. Use of partnerships in farm estate planning.
49 Wash.L.Rev. 137 (1973). Gerald A. Rein and William D. Hyslop, 14 Gonzaga L.Rev. 701 (1980).

Library References

Corporations ¶391, 592, 615½. C.J.S. Corporations §§ 580, 583, 811 to
WESTLAW Topic No. 101. 831, 860.

WESTLAW Electronic Research

See WESTLAW Electronic Research Guide following the Preface.

PART I. PRELIMINARY PROVISIONS

25.04.010. Name of chapter

This chapter may be cited as the uniform partnership act.
Enacted by Laws 1955, ch. 15, § 25.04.010.

Historical and Statutory Notes

Source:

Laws 1945, ch. 137, § 1.
RRS § 9975-40.

Law Review Commentaries

Uniform Laws in Washington. 31
Wash.L.Rev. 195 (1956).

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Note 13

Where partners have agreed on settlement and struck a balance, settlement is binding and may be made basis of action without resort to action for accounting. *Kilbourne v. Rathbun* (1916) 91 Wash. 121, 157 P. 457.

Where one of two concerns that had been doing business as partners ceased to do business and gave demand note for amount of balance struck, assigning all accounts as collateral security, other partner may sue on note as upon settlement without necessity of accounting. *Kilbourne v. Rathbun* (1916) 91 Wash. 121, 157 P. 457.

One partner cannot sue his copartner in court of law for recovery upon unsettled copartnership indebtedness. *Stevens v. Baker* (1871) 1 Wash.Terr. 315.

14. — Joint ventures, actions between partners

An action for breach of a joint venture may be brought without first bringing an equitable action for dissolution and obtaining an accounting when the venture has been terminated by written agreement of the parties. *Dulien Steel, Inc. v.*

25.04.220. Right to an account

Any partner shall have the right to a formal account as to partnership affairs:

- (1) If he is wrongfully excluded from the partnership business or possession of its property by his copartners,
- (2) If the right exists under the terms of any agreement,
- (3) As provided by RCW 25.04.210,
- (4) Whenever other circumstances render it just and reasonable.

Enacted by Laws 1955, ch. 15, § 25.04.220.

Historical and Statutory Notes

Source:

Laws 1945, ch. 137, § 22.
RRS § 9975-61.

Library References

Partnership ⇨ 80, 81.
WESTLAW Topic No. 289.
C.J.S. Partnership §§ 91, 92, 378, 384.

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Lampson Railroad Contractors, Inc. (1974) 12 Wash.App. 232, 529 P.2d 848.

15. — Findings, actions between partners

In action for accounting brought by plaintiff, who agreed to purchase stand of timber which was to be logged by defendant, with both sharing equally in profits and losses resulting from venture, findings that partners were to share equally in profits and losses was inconsistent with findings that defendant had not agreed to contribute to plaintiff for his investment in timber in event of loss and were insufficient to support judgment for defendant for one-half of unexpended gross revenues. *Richert v. Handly* (1957) 50 Wash.2d 356, 311 P.2d 417.

16. Attorney fees

Where court found that dissolution of partnership was in compliance with law and that there was no fraud in connection with transfer of certain assets, partner who successfully brought action for accounting against remaining partners was not entitled to award of attorney fees. *Brougham v. Swarva* (1983) 34 Wash. App. 68, 661 P.2d 138.

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1. In general

Where accounting is had, it is duty of partner who manages business to render complete and accurate accounts of such business, since he is acting as trustee for his firm. *Simich v. Culjak* (1947) 27 Wash.2d 403, 178 P.2d 336; *Tembreull Estate* (1950) 37 Wash.2d 93, 221 P.2d 821; *Waagen v. Gerde* (1950) 36 Wash.2d 563, 219 P.2d 595.

Under Washington law, it is obligation of continuing partners to provide information and to render accounting with respect to partnership profits accumulated during one's tenure as an equal partner. *In re Norquist* (Bkrtcy.1984) 43 B.R. 224.

Partner has right to formal accounting of partnership affairs, inter alia, if right exists under terms of agreement, if another partner secures profit derived from any transaction connected with conduct of partnership or from any use of partnership property, and whenever other circumstances render it just and reasonable. *Rains v. Walby* (1975) 13 Wash.App. 712, 537 P.2d 833.

It is duty of partner who manages partnership business to render complete and accurate accounts of it, where accounting

is had. *Wilson Estate* (1957) 50 Wash.2d 840, 315 P.2d 287.

Party to partnership agreement was entitled to accounting and share of profits, where agreement contemplated acquisition of apartment house by foreclosure of second mortgage which he owned or controlled, other partner so acquired apartment house and operated it for several years, and, while partner seeking accounting did not put up any money for expenses, he was liable under agreement for one-half of any losses that might accrue. *Hatupin v. Smith* (1944) 21 Wash.2d 132, 150 P.2d 675.

Statement of one partner to another for purpose of showing profit or loss did not amount to an account stated, even though assented to by other partners. *Sayer v. MacKinnon* (1929) 151 Wash. 538, 276 P. 880.

Items in partnership account cannot be complained of by partner who was bookkeeper and accountant for partnership and whose statement has been accepted in settling account. *Sprague v. McDonald* (1928) 147 Wash. 451, 266 P. 191.

In suit for accounting, finding that on trip of plaintiff on firm's business he was also engaged in business of large and substantial character for himself justified conclusion that partnership should bear only one-half of expense of such trip. *Quigley v. Barash* (1925) 135 Wash. 338, 237 P. 732.

2. Purpose

Purpose of partnership accounting is to place partners in same position they would have occupied if affairs of partnership had been properly conducted. *Wilson Estate* (1959) 53 Wash.2d 762, 337 P.2d 56.

3. Remedies, generally

Only valid partnership agreements are subject to rule that there is no cause of action between partners prior to accounting. *Ferguson v. Jeanes* (1980) 27 Wash. App. 558, 619 P.2d 369.

Action between partners for dissolution and accounting is of equitable cognizance. *Watson v. Matchett* (1935) 182 Wash. 544, 47 P.2d 1001.

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Note 3

Fraud or mistake was sufficient ground for setting aside partnership settlement and retaking account. *Elmore v. McConaghy* (1916) 92 Wash. 263, 159 P. 108.

Where one of two concerns that had been doing business as partners ceased to do business and gave demand notes for amount of balance struck, assigning all accounts as collateral security, other partner could sue on note as on settlement without necessity of account. *Kilbourne v. Rathbun* (1916) 91 Wash. 121, 157 P. 457.

Injunction restraining partner liable to accounting from disposing of alleged partnership property is properly extended to enjoin certain codefendants alleged to be his friends and relatives, in whom defendant had placed property in furtherance of attempt to defraud plaintiff. *Causten v. Barnette* (1908) 49 Wash. 659, 96 P. 225.

4. Receiverships

In action between partners for accounting of partnership property and profits from city contract for hauling of garbage, plaintiff is entitled to appointment or receiver, where there were undivided profits up to time of ending of contract; partners cannot agree as to amount; and defendants will not pay plaintiff his proportionate share of profits, refuse to comply with demand for accounting and have arbitrarily taken partnership property, rented it to themselves, and continued garbage-hauling business for their individual profit, there being utter inability to agree upon any matter concerning partnership business. *Bank v. Nelson* (1939) 199 Wash. 631, 92 P.2d 711.

Appointment of temporary receiver is warranted in action for accounting between law partners, where parties are so hostile that there can be no reconciliation; one of firm, by his control of books, excludes other from participation in their affairs; accounts are due firm; and there are debts to be paid and property to be cared for. *Martin v. Wilson* (1915) 84 Wash. 625, 147 P. 404.

Appointment of receiver was not warranted, in suit by partner against copartner for accounting, where it appeared that partnership to publish book had been formed by partner and copartner and two others, that the two transferred their interests to third person, that copartner in-

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sisted that such transfer terminated partnership, and that he subsequently took business into his own hands and refused to recognize the partner; there was nothing to show that copartner was insolvent, nor that receiver would aid in determining amount due partner, should it be ascertained that he was entitled to a share in enterprise; and appointment of receiver would work positive injury to enterprise. *Smith v. Brown* (1908) 50 Wash. 240, 96 P. 1077.

Where plaintiff and defendant held as partners a contract whereby defendant company was to sell them land at \$150 per acre, the firm to plat and sell the land, paying all proceeds to company until it had received \$150 per acre, and thereafter defendant, conspiring with company, which he controlled, wrongfully endeavored to exclude plaintiff from his interest in land and in partnership, plaintiff was entitled to receiver to take charge of realty and partnership interests. *Whipple v. Lee* (1907) 46 Wash. 266, 89 P. 712.

Where, in suit to dissolve partnership, its existence was established on application for receiver, and defendant denied same and had assumed entire management of business and had wrongfully excluded plaintiff from all participation therein, plaintiff was entitled to appointment of receiver pendente lite. *Redding v. Anderson* (1905) 37 Wash. 209, 79 P. 628.

In an action between partners, where fraudulent conduct is alleged, where a partner has been wrongfully excluded from participating in the management of the firm's business, and where from the nature of the partnership agreement, it is apparent that a dissolution must ultimately be decreed, a court is warranted in appointing a receiver during pendency of the action, though complaint contains no allegation of the defendant's insolvency. *Cole v. Price* (1900) 22 Wash. 18, 60 P. 153.

5. Income tax return

Income tax return of partnership could not be made basis of account stated between one partner and other members of firm. *Sayer v. MacKinnon* (1929) 151 Wash. 538, 276 P. 880.

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6. Accrual of action

Trial court does not have discretion to determine when an action for partnership accounting accrues, under statute providing that any partner has right to a formal account as to partnership affairs "whenever other circumstances render it just and reasonable." *Taplett v. Khela* (1991) 60 Wash.App. 751, 807 P.2d 885.

7. Standing

There is no occasion for further accounting when one partner buys out interest of other on specified terms, in absence of fraud of special agreement, especially where buyer knows facts which might otherwise require such accounting. *Zedrick v. Kosenski* (1963) 62 Wash.2d 50, 380 P.2d 870.

Where there was merely agreement to form partnership which was never consummated, action for accounting of partnership profits must fail. *Lucopoulos v. Sotriopoulos* (1920) 111 Wash. 400, 191 P. 149.

Where there are no partnership assets or liabilities, no indebtedness is due to plaintiff from partnership or other partner, and accounting will be of no benefit to anyone, accounting between partners will not be decreed. *Baker v. Tennant* (1919) 108 Wash. 663, 185 P. 576.

Where partner's mother lent money to firm on notes, she had right to sue firm on its obligation; but her son could not on her behalf maintain against his partner a suit for accounting to secure payment of firm's notes to his mother. *Baker v. Tennant* (1919) 108 Wash. 663, 185 P. 576.

When one partner sold out his interest in the firm to third party whose notes were indorsed by the other partner and the partnership affairs were adjusted, indorser could not in suit on notes set up counterclaim growing out of partnership business and demand accounting. *Lunn v. Hellgren* (1917) 97 Wash. 458, 166 P. 1147.

Partnership accounting for half-interest in mining claim, alleged to have been acquired by defendant in trade for partnership boat, which was made upon trial or approval, was properly denied where boat was returned to defendant, and, title to it not having passed, it never became consideration for claim. *McIntyre v.*

Johnston (1911) 63 Wash. 323, 115 P. 509.

8. Pleadings

Fact that complaint in action by partner for accounting of profits alleges partnership in either business and that proof shows interest in only part does not constitute fatal variance. *Hopkins v. Craib* (1918) 101 Wash. 309, 172 P. 201.

9. Presumptions and burden of proof

In action for partnership accounting, plaintiff must make out prima facie case of partnership before being allowed to inspect books of firm of which he alleges he was partner. *Corbett v. Wingard* (1948) 29 Wash.2d 890, 189 P.2d 972, 190 P.2d 107.

When managing partner who keeps books is sued for settlement, he must sustain burden of proof or correctness of account, and in so doing, he will be held to strict proof of items of his account, which must be by way of books of firm, showing income and expenses, together with necessary vouchers and checks, and amounts of various items. *Simich v. Culjak* (1947) 27 Wash.2d 403, 178 P.2d 336.

10. Evidence

It was proper to consider charge for maintenance of caterpillar tractor belonging to partnership in determining earnings of partnership from rental of tractor in action for partnership accounting. *Wilson Estate* (1959) 53 Wash.2d 762, 337 P.2d 56.

In action for partnership accounting, evidence was insufficient to prove partnership activities for two years after that in which partnership contract was made. *Corbett v. Wingard* (1948) 29 Wash.2d 890, 189 P.2d 972, 190 P.2d 107.

In action for partnership accounting where plaintiff claimed to be partner in firm engaged in fishing business, he had right to prove such interest, and evidence was properly admitted to show history of business and interests of various parties. *Corbett v. Wingard* (1948) 29 Wash.2d 890, 189 P.2d 972, 190 P.2d 107.

In partner's action for accounting as to her share of proceeds of sale of restaurant, conflicting evidence sustained findings that oral partnership agreement provided that one of the defendants was to put up the money for establishment of

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restaurant to be managed by plaintiff and that, after such investment had been repaid out of profits, the property should belong one-half to plaintiff and one-half to the two defendants, and that original investment by defendant had been repaid from profits, and hence warranted entry of judgment for plaintiff for one-half of proceeds of sale less amount expended by defendants for taxes and upkeep. *Bender v. Mills* (1941) 8 Wash.2d 275, 111 P.2d 989.

Evidence in action for accounting and half of profits realized from city sewer construction contract showed that no partnership for performance of contract ever came into existence between plaintiff and defendant. *Von Herberg v. Nelson* (1938) 195 Wash. 63, 79 P.2d 703.

Evidence was sufficient to support judgment dismissing suit for partnership accounting on ground that partnership had been dissolved and that partners had made their own accounting. *Belmont v. Hamann* (1936) 186 Wash. 123, 56 P.2d 1311.

Accounting between brothers of their partnership transactions and liabilities and interests in mill business and corporation organized by them, and in hands of receiver at time of suit, should not be confined to time since corporation was organized, on theory that account was struck at that time when each took proportion of capital stock, where statement of business as made out at that time for financing purposes was not such as became binding upon parties as to their prior relations as partners and there was no element of estoppel therein. *Mentzer v. Mentzer Bros. Lbr. Co.* (1930) 155 Wash. 417, 284 P. 749.

Notes executed long prior, and in no way related, to formation of partnership, and one of which was outlawed, are properly excluded from consideration on partnership accounting as not germane to or growing out of matter of equitable jurisdiction. *Sprague v. McDonald* (1928) 147 Wash. 451, 266 P. 191.

Findings that in partnership in which accounts were kept in crude manner for 20 years partners struck balance on certain date are not sustained, where books clearly indicate that surviving partner had overdrawn on that date, overdraft does not appear to have been paid, and testimony as to offsets is not convincing.

PARTNERSHIPS

Grecorin Estate (1922) 122 Wash. 446, 210 P. 785.

In action between partners for accounting, evidence supported trial court's finding respecting profits. *Pederson v. Parke* (1912) 68 Wash. 482, 123 P. 777.

In action between partners for an accounting, where referee found that profit on construction of building by partnership was \$55,000, and trial court found that it was only \$22,000, evidence was sufficient to support trial court's finding. *Pederson v. Parke* (1912) 68 Wash. 482, 123 P. 777.

In action between alleged partners for an accounting evidence showed that no partnership existed. *Chlopeck v. Chlopeck* (1907) 47 Wash. 256, 91 P. 966.

11. Laches

Lapse of seven years, after abandonment of partnership, and continued exclusive use for that time of some of property by partner who had furnished most of money, may be sufficient to bar action for accounting by other partner. *McIntyre v. Johnston* (1911) 63 Wash. 323, 115 P. 509.

12. Waiver and estoppel

Partner is estopped to object to account rendered to him, where his delay in objecting thereto caused injury to other party in that he relied thereon and destroyed material evidence consisting of books and records. *Boozer v. Boozer* (1926) 139 Wash. 34, 245 P. 403.

13. Judgments—In general

In action in equity for accounting and for dissolution of partnership court could enter money judgment against defendant for amount of indebtedness disclosed by accounting, although complaint did not request such relief. *Holman v. Cape* (1954) 45 Wash.2d 205, 273 P.2d 664.

Partners bringing suit for accounting was not entitled to judgment for amount due on note representing balance of proceeds of partnership nor balance due on transactions occurring subsequent to date of note, where they did not seek to amend complaint to cover such matters. *Belmont v. Hamann* (1936) 186 Wash. 123, 56 P.2d 1311.

Partner is properly credited with amount of liability which he had incurred to release tax lien against steam shovel

GENERAL

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outfit belonging to his copartner and to be used on job, such equipment being intimately connected with partnership undertaking. *Brewster v. Mattson* (1927) 142 Wash. 196, 252 P. 689.

Partner should not be charged with amount in which he discounted warrants on partnership accounting between contractors, where it was necessary to finance work and other finance would have been at same expense. *Brewster v. Mattson* (1927) 142 Wash. 196, 252 P. 689.

Partner was not entitled to allowance for board if not included within express terms of contract. *Marks v. Reed* (1917) 94 Wash. 446, 162 P. 546.

Where partners had agreed to own share in mine, share and share alike, and one of them gave his note in payment therefor, upon accounting one-half of sum, with interest, should be charged to other partner and credited to maker of note. *Klesattel v. Orr* (1914) 80 Wash. 191, 141 P. 355.

Where suit is in equity for accounting and for partition of personal property between partners, and is not action at law for conversion, refusal of court to enter judgment in favor of plaintiff for value of property is not error, although defendants refused to acknowledge his right of possession when demand was made upon them. *Yarwood v. Billings* (1903) 31 Wash. 542, 72 P. 104.

Court of equity is empowered not only to state account between partners, but also to enter money judgment in favor of one partner and against other, as state of account may require. *Yarwood v. Billings* (1903) 31 Wash. 542, 72 P. 104.

Where plaintiff procured his partner to become one of his sureties upon appeal bond, and pledged property which had been loaned to partnership by plaintiff of such partner of indemnify him, in action for accounting between partners court was without authority to provide for sale of property and its application to judgment for which bond had been given. *Jose v. Lynch* (1896) 15 Wash. 654, 47 P. 105.

14. — Costs, judgments

Upon accounting between surviving widow and partner of deceased, widow was not entitled to fees and expenses as

administratrix, or her attorney to fees for services, in administration of estate of deceased, where neither she nor her attorney performed any services in management or administration of partnership property, all of which was turned over to new partnership between surviving widow and partner. *Hamilton v. Johnson* (1928) 150 Wash. 312, 272 P. 986.

Partner is not entitled to credit for cost of auditing partnership books, where audit was made at his instance alone for purpose of preparing for trial. *Brewster v. Mattson* (1927) 142 Wash. 196, 252 P. 689.

15. — Distribution of assets, judgments

Advances and loans to clients and fees collected prior to dissolution of partnership are partnership assets to be apportioned between partners in accounting between them. *Levinson v. Vanderveer* (1932) 169 Wash. 254, 13 P.2d 448.

16. — Damages, judgments

Where one partner in sheep raising business sued the other in equity for an accounting in good faith, though knowing that a third person claimed some interest in a band of ewes turned in by defendant partner with the firm sheep and regarded as partnership property, the superior court, of general, equitable, and legal jurisdiction, on finding that such sheep in fact belonged to the third person, another firm of which defendant partner was a member, properly retained jurisdiction to award plaintiff partner damages as for defendant partner's misrepresentations of title to the sheep to extent of plaintiff's expenditures in money and services. *Williams v. Snow* (1920) 109 Wash. 329, 186 P. 861.

In action for accounting brought by partner against copartner who had falsified partnership accounts and misappropriated funds, defrauded partner was entitled to judgment for one-half sum, with interest thereon, which court found firm had been damaged by reason of misconduct of defendant and misappropriation by him of funds of firm, where defendant's services, as well as those of plaintiff, were of appreciable and substantial value to firm over and above damages sustained by reason of his misconduct. *Bingham v. Keylor* (1901) 25 Wash. 156, 64 P. 942.

25.04.220

Note 17

17. — Interest, judgments

Interest should not be allowed partner on capital invested, where interest on withdrawals of money from partnership

funds completely offset interest that would otherwise be due. *Hopkins v. Craib* (1918) 101 Wash. 309, 172 P. 201.

PARTNERSHIPS

25.04.230. Continuation of partnership beyond fixed term

(1) When a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking without any express agreement, the rights and duties of the partners remain the same as they were at such termination, so far as is consistent with a partnership at will.

(2) A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is prima facie evidence of a continuation of the partnership.

Enacted by Laws 1955, ch. 15, § 25.04.230.

Historical and Statutory Notes

Source:

Laws 1945, ch. 137, § 23.
RRS § 9975-62.

Library References

Partnership ¶60.
WESTLAW Topic No. 289.
C.J.S. Partnership § 64.

PART V. PROPERTY RIGHTS OF A PARTNER

25.04.240. Extent of property rights of partner

The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management.

Enacted by Laws 1955, ch. 15, § 25.04.240.

Historical and Statutory Notes

Source:

Laws 1945, ch. 137, § 24.
RRS § 9975-63.

Law Review Commentaries

Sale of partnership interest. 4 J. Corp. Law (Iowa) 749 (1979).

Library References

Partnership ¶67.
WESTLAW Topic No. 289.
C.J.S. Partnership §§ 69 to 71.

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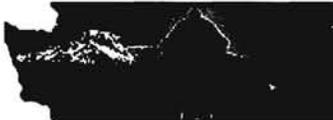
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Chapter 25.05 RCW

REVISED UNIFORM PARTNERSHIP ACT

[Chapter Listing](#)**RCW Sections**

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- [25.05.010](#) Knowledge and notice.
- [25.05.015](#) Effect of partnership agreement -- Nonwaivable provisions.
- [25.05.020](#) Supplemental principles of law.
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25.05.005

Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise:

(1) "Business" includes every trade, occupation, and profession.

(2) "Debtor in bankruptcy" means a person who is the subject of:

(a) An order for relief under Title 11 of the United States Code or a comparable order under a successor statute of general application; or

(b) A comparable order under federal, state, or foreign law governing insolvency.

(3) "Distribution" means a transfer of money or other property from a partnership to a partner in the partner's capacity as a partner or to the partner's transferee.

(4) "Foreign limited liability partnership" means a partnership that:

(a) Is formed under laws other than the laws of this state; and

(b) Has the status of a limited liability partnership under those laws.

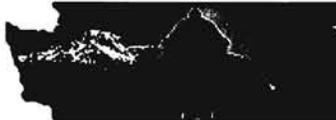
(5) "Limited liability partnership" means a partnership that has filed an application under RCW 25.05.500 and does not have a similar statement in effect in any other jurisdiction.

(6) "Partnership" means an association of two or more persons to carry on as co-owners a business for profit formed under RCW 25.05.055, predecessor law, or comparable law of another jurisdiction.

(7) "Partnership agreement" means the agreement, whether written, oral, or implied, among the partners concerning the partnership, including amendments to the partnership agreement.

(8) "Partnership at will" means a partnership in which the partners have not agreed to remain partners until the expiration of a definite term or the completion of a particular undertaking.

(9) "Partnership interest" or "partner's interest in the partnership" means all of a partner's interests in the partnership, including the partner's transferable interest and all management



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RCW 25.15.005 Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

- (1) "Certificate of formation" means the certificate referred to in RCW [25.15.070](#), and the certificate as amended.
- (2) "Event of dissociation" means an event that causes a person to cease to be a member as provided in RCW [25.15.130](#).
- (3) "Foreign limited liability company" means an entity that is formed under:
- (a) The limited liability company laws of any state other than this state; or
 - (b) The laws of any foreign country that is: (i) An unincorporated association, (ii) formed under a statute pursuant to which an association may be formed that affords to each of its members limited liability with respect to the liabilities of the entity, and (iii) not required, in order to transact business or conduct affairs in this state, to be registered or qualified under Title [23B](#) or [24](#) RCW, or any other chapter of the Revised Code of Washington authorizing the formation of a domestic entity and the registration or qualification in this state of similar entities formed under the laws of a jurisdiction other than this state.
- (4) "Limited liability company" and "domestic limited liability company" means a limited liability company having one or more members that is organized and existing under this chapter.
- (5) "Limited liability company agreement" means any written agreement of the members, or any written statement of the sole member, as to the affairs of a limited liability company and the conduct of its business which is binding upon the member or members.
- (6) "Limited liability company interest" means a member's share of the profits and losses of a limited liability company and a member's right to receive distributions of the limited liability company's assets.
- (7) "Manager" or "managers" means, with respect to a limited liability company that has set forth in its certificate of formation that it is to be managed by managers, the person, or persons designated in accordance with RCW [25.15.150\(2\)](#).
- (8) "Member" means a person who has been admitted to a limited liability company as a member as provided in RCW [25.15.115](#) and who has not been dissociated from the limited liability company.
- (9) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision, agency, or instrumentality, or a separate legal entity comprised of two or more of these entities, or any other legal or commercial entity.
- (10) "Professional limited liability company" means a limited liability company which is organized for the purpose of rendering professional service and whose certificate of formation sets forth that it is a professional limited liability company subject to RCW [25.15.045](#).

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(11) "Professional service" means the same as defined under RCW 18.100.030.

(12) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

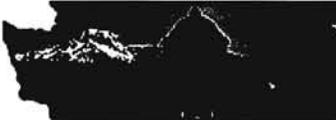
(13) "State" means the District of Columbia or the Commonwealth of Puerto Rico or any state, territory, possession, or other jurisdiction of the United States other than the state of Washington.

[2010 c 196 § 1; 2008 c 198 § 4; 2002 c 296 § 3; 2000 c 169 § 1; 1995 c 337 § 13; 1994 c 211 § 101.]

Notes:

Finding -- 2008 c 198: See note following RCW 39.34.030.

Effective date -- 1995 c 337: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1995." [1995 c 337 § 23.]



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RCW 25.15.050

Member agreements.

In addition to agreeing among themselves with respect to the provisions of this chapter, the members of a limited liability company or professional limited liability company may agree among themselves to any otherwise lawful provision governing the company which is not in conflict with this chapter. Such agreements include, but are not limited to, buy-sell agreements among the members and agreements relating to expulsion of members.

[1994 c 211 § 110.]

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RCW 25.15.170

Remedies for breach of limited liability company agreement by manager.

A limited liability company agreement may provide that (1) a manager who fails to perform in accordance with, or to comply with the terms and conditions of, the limited liability company agreement shall be subject to specified penalties or specified consequences, and (2) at the time or upon the happening of events specified in the limited liability company agreement, a manager shall be subject to specified penalties or specified consequences.

[1994 c 211 § 405.]

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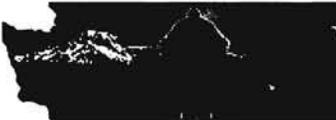
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RCW 25.15.180 Resignation of manager.

A manager may resign as a manager of a limited liability company at the time or upon the happening of events specified in a limited liability company agreement and in accordance with the limited liability company agreement. A limited liability company agreement may provide that a manager shall not have the right to resign as a manager of a limited liability company. Notwithstanding that a limited liability company agreement provides that a manager does not have the right to resign as a manager of a limited liability company, a manager may resign as a manager of a limited liability company at any time by giving written notice to the members and other managers. If the resignation of a manager violates a limited liability company agreement, in addition to any remedies otherwise available under applicable law, a limited liability company may recover from the resigning manager damages for breach of the limited liability company agreement and offset the damages against the amount otherwise distributable to the resigning manager.

[1994 c 211 § 407.]





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RCW 25.15.195

Liability for contribution.

(1) Except as provided in a limited liability company agreement, a member is obligated to a limited liability company to perform any promise to contribute cash or property or to perform services, even if the member is unable to perform because of death, disability, or any other reason. If a member does not make the required contribution of property or services, the member is obligated at the option of the limited liability company to contribute cash equal to that portion of the agreed value (as stated in the records of the limited liability company required to be kept pursuant to RCW [25.15.135](#)) of the contribution that has not been made. This option shall be in addition to, and not in lieu of, any other rights, including the right to specific performance, that the limited liability company may have against such member under the limited liability company agreement or applicable law.

(2) Unless otherwise provided in a limited liability company agreement, the obligation of a member to make a contribution or return money or other property paid or distributed in violation of this chapter may be compromised only by consent of all the members. Notwithstanding the compromise, a creditor of a limited liability company who extends credit, after either the certificate of formation, limited liability company agreement or an amendment thereto, or records required to be kept under RCW [25.15.135](#) reflect the obligation, and before the amendment of any thereof to reflect the compromise, may enforce the original obligation to the extent that, in extending credit, the creditor reasonably relied on the obligation of a member to make a contribution or return. A conditional obligation of a member to make a contribution or return money or other property to a limited liability company may not be enforced unless the conditions of the obligation have been satisfied or waived as to or by such member. Conditional obligations include contributions payable upon a discretionary call of a limited liability company prior to the time the call occurs.

(3) A limited liability company agreement may provide that the interest of any member who fails to make any contribution that the member is obligated to make shall be subject to specified penalties for, or specified consequences of, such failure. Such penalty or consequence may take the form of reducing or eliminating the defaulting member's proportionate interest in a limited liability company, subordinating the member's limited liability company interest to that of nondefaulting members, a forced sale of the member's limited liability company interest, forfeiture of the member's limited liability company interest, the lending by other members of the amount necessary to meet the member's commitment, a fixing of the value of the member's limited liability company interest by appraisal or by formula and redemption or sale of the member's limited liability company interest at such value, or other penalty or consequence.

[1994 c 211 § 502.]

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RCW 25.15.205

Allocation of distributions.

Distributions of cash or other assets of a limited liability company shall be allocated among the members, and among classes or groups of members, in the manner provided in a limited liability company agreement. If the limited liability company agreement does not so provide, distributions shall be made in proportion to the agreed value (as stated in the records of the limited liability company required to be kept pursuant to RCW [25.15.135](#)) of the contributions made, or required to be made, by each member.

[1994 c 211 § 504.]

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RCW 25.15.235

Limitations on distribution.

(1) A limited liability company shall not make a distribution to a member to the extent that at the time of the distribution, after giving effect to the distribution (a) the limited liability company would not be able to pay its debts as they became due in the usual course of business, or (b) all liabilities of the limited liability company, other than liabilities to members on account of their limited liability company interests and liabilities for which the recourse of creditors is limited to specified property of the limited liability company, exceed the fair value of the assets of the limited liability company, except that the fair value of property that is subject to a liability for which the recourse of creditors is limited shall be included in the assets of the limited liability company only to the extent that the fair value of that property exceeds that liability.

(2) A member who receives a distribution in violation of subsection (1) of this section, and who knew at the time of the distribution that the distribution violated subsection (1) of this section, shall be liable to a limited liability company for the amount of the distribution. A member who receives a distribution in violation of subsection (1) of this section, and who did not know at the time of the distribution that the distribution violated subsection (1) of this section, shall not be liable for the amount of the distribution. Subject to subsection (3) of this section, this subsection (2) shall not affect any obligation or liability of a member under a limited liability company agreement or other applicable law for the amount of a distribution.

(3) Unless otherwise agreed, a member who receives a distribution from a limited liability company shall have no liability under this chapter or other applicable law for the amount of the distribution after the expiration of three years from the date of the distribution unless an action to recover the distribution from such member is commenced prior to the expiration of the said three-year period and an adjudication of liability against such member is made in the said action.

[1994 c 211 § 605.]

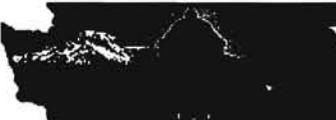
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RCW 25.15.250

Assignment of limited liability company interest.

(1) A limited liability company interest is assignable in whole or in part except as provided in a limited liability company agreement. The assignee of a member's limited liability company interest shall have no right to participate in the management of the business and affairs of a limited liability company except:

(a) Upon the approval of all of the members of the limited liability company other than the member assigning his or her limited liability company interest; or

(b) As provided in a limited liability company agreement.

(2) Unless otherwise provided in a limited liability company agreement:

(a) An assignment entitles the assignee to share in such profits and losses, to receive such distributions, and to receive such allocation of income, gain, loss, deduction, or credit or similar item to which the assignor was entitled, to the extent assigned; and

(b) A member ceases to be a member and to have the power to exercise any rights or powers of a member upon assignment of all of his or her limited liability company interest.

(3) For the purposes of this chapter, unless otherwise provided in a limited liability company agreement:

(a) The pledge of, or granting of a security interest, lien, or other encumbrance in or against, any or all of the limited liability company interest of a member shall not be deemed to be an assignment of the member's limited liability company interest, but a foreclosure or execution sale or exercise of similar rights with respect to all of a member's limited liability company interest shall be deemed to be an assignment of the member's limited liability company interest to the transferee pursuant to such foreclosure or execution sale or exercise of similar rights;

(b) Where a limited liability company interest is held in a trust or estate, or is held by a trustee, personal representative, or other fiduciary, the transfer of the limited liability company interest, whether to a beneficiary of the trust or estate or otherwise, shall be deemed to be an assignment of such limited liability company interest, but the mere substitution or replacement of the trustee, personal representative, or other fiduciary shall not constitute an assignment of any portion of such limited liability company interest.

(4) Unless otherwise provided in a limited liability company agreement and except to the extent assumed by agreement, until an assignee of a limited liability company interest becomes a member, the assignee shall have no liability as a member solely as a result of the assignment.

[1995 c 337 § 19; 1994 c 211 § 702.]

Notes:

Effective date -- 1995 c 337: See note following RCW [25.15.005](#).

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RCW 25.15.255

Rights of judgment creditor.

On application to a court of competent jurisdiction by any judgment creditor of a member, the court may charge the limited liability company interest of the member with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of the limited liability company interest. This chapter does not deprive any member of the benefit of any exemption laws applicable to the member's limited liability company interest.

[1994 c 211 § 703.]

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RCW 25.15.275

Judicial dissolution.

On application by or for a member or manager the superior courts may decree dissolution of a limited liability company whenever: (1) It is not reasonably practicable to carry on the business in conformity with a limited liability company agreement; or (2) other circumstances render dissolution equitable.

[1994 c 211 § 802.]

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RCW 25.15.300

Distribution of assets.

(1) Upon the winding up of a limited liability company, the assets shall be distributed as follows:

(a) To creditors, including members and managers who are creditors, to the extent otherwise permitted by law, in satisfaction of liabilities of the limited liability company (whether by payment or the making of reasonable provision for payment thereof) other than liabilities for which reasonable provision for payment has been made and liabilities for distributions to members under RCW [25.15.215](#) or [25.15.230](#);

(b) Unless otherwise provided in a limited liability company agreement, to members and former members in satisfaction of liabilities for distributions under RCW [25.15.215](#) or [25.15.230](#); and

(c) Unless otherwise provided in a limited liability company agreement, to members first for the return of their contributions and second respecting their limited liability company interests, in the proportions in which the members share in distributions.

(2) A limited liability company which has dissolved shall pay or make reasonable provision to pay all claims and obligations, including all contingent, conditional, or unmatured claims and obligations, known to the limited liability company and all claims and obligations which are known to the limited liability company but for which the identity of the claimant is unknown. If there are sufficient assets, such claims and obligations shall be paid in full and any such provision for payment made shall be made in full. If there are insufficient assets, such claims and obligations shall be paid or provided for according to their priority and, among claims and obligations of equal priority, ratably to the extent of assets available therefor. Unless otherwise provided in a limited liability company agreement, any remaining assets shall be distributed as provided in this chapter. Any person winding up a limited liability company's affairs who has complied with this section is not personally liable to the claimants of the dissolved limited liability company by reason of such person's actions in winding up the limited liability company.

[1994 c 211 § 807.]

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