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Court of Appeals No. 837010

King County Superior Court Cause No. 19-2-31698-5 KNT

SUPREME COURT
OF THE STATE OF WASHINGTON

CALLUM HERDSON, an individual,

Plaintiff/Respondent,

v.

RICHARD FORTIN, ROBERT ENSLEN, XCAR INC., FTW SERVICES, INC., XCAR REMARKETING INC., CROSS BORDER VEHICLE SERVICES, INC. , and CROSSBORDER VEHICLE SALES, LTD.,

Defendants/Appellants.

APPELLANTS' PETITION FOR REVIEW

Daniel A. Brown, WSBA #22028
Sean D. Leake, WSBA #52658
WILLIAMS, KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Tel: (206) 628-6600
Fax: (206) 628-6611
Email:dbrown@williamskastner.com
sleake@williamskastner.com
Attorneys for Defendants/Appellants

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I. IDENTITY OF PETITIONERS

Petitioners are Richard Fortin, Robert Enslen, XCar Inc., FTW Services, Inc., XCar Remarketing Inc., Cross Border Vehicle Services, Inc., and Crossborder Vehicle Sales, Ltd., ("Defendants"), Appellants in the Court of Appeals under Cause No. 837010-I, and Defendants in the Superior Court for King County, Cause No. 19-2-31698-5 KNT.

II. CITATION TO COURT OF APPEALS

Defendants seek review of the Division One published opinion *Herdson v. Fortin et. al.,* 530 P.3d 220, No. 83701-0-I filed May 30, 2023 (Appendix A). Defendants moved for reconsideration pursuant to RAP 12.4, which Division One denied by Order filed July 31, 2023 (Appendix B).

III. ISSUES PRESENTED FOR REVIEW

1. Is review appropriate to resolve the question of whether proof of damages is a necessary element of a minority shareholder oppression claim under the statutory claim?

The Superior Court found damages were not a necessary element of a minority shareholder oppression claim, going so far as to dismiss all of Plaintiff's/Respondent's causes of action with the exception of minority shareholder oppression expressly because plaintiff had failed to prove damages. Division I of the Court of Appeals upheld the Superior Court's verdict. This is inconsistent with *Scott v. Trans-System*, 148 Wn.2d 701, 717 (2003), which holds minority shareholder oppression arises from shareholders fiduciary duties, and creates a split amongst the Court of Appeals, as Division III has expressly held otherwise in *Roil Energy, LLC v. Edington*, 195 Wn. App. 1030, No. 32577-6-III (2016) ("Because an action for shareholder oppression is linked to a breach of fiduciary duty, we hold that damages is an element of the cause of action for oppression of a minority owner").[1]

[1] Recognizing that *Roil* is an unpublished case, this still creates a split as to how appellate judges are handling these important statutory matters in two different divisions within the state. Indeed, the *Roil* court collected cases from across the country and

2. Is review appropriate to resolve whether the Court of Appeals and Superior Court erred in conflating "damages" as a necessary element of a minority shareholder oppression claim with the types of remedies available *after* proving all elements of that claim, which includes damages as a remedy (as stated in *Scott v. Trans-System*, 148 Wn.2d 701, 717 (2003)?

3. Is review appropriate to resolve whether the Court of Appeals and Superior Court erred in permitting a "do-over" on damages alleged but not proven at trial?

IV. STATEMENT OF THE CASE

A. Factual Background

1. The Parties

Defendants are a business group of companies and their principals that operate an automobile import business that imports and sell Canadian vehicles into the United States. Crossborder Vehicle Sales ("CB Sales") is a Canadian

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applied Washington law as to the minority shareholder oppression/breach of fiduciary duty questions.

corporation which purchases, or obtains on consignment, Canadian-registered vehicles and prepares them for import into the U.S. for sale. FTW is a NHTSA licensed automobile importer. The groups Canadian parent company is Crossborder Vehicle Services, which directly owns CB Sales and FTW. Fortin and Enslen are Canadian citizens who are the sole shareholders in these companies and direct the group's operations from British Columbia.

XCar was a licensed motor vehicle dealership that sold FTW/CB Sales' imports. XCar was sold and ceased operations in February 2023, thus Respondent/Plaintiff has no further shareholder interests of concern thereafter.

Respondent began working for CB Sales as an independent contractor in 2013, was later hired by XCar as an employee, and gifted 1/3 of its shares from Enslen and Fortin in April 2014. Unlike Fortin and Enslen, who owned voting shares, Respondent's shares were common, non-voting shares. No shareholders agreement existed. Findings of Fact ¶16. Likewise,

Respondent did not pay for his gifted shares because XCar "was incurring significant losses and had minimal to no value" at the time of transfer and thereafter. Respondent Trial Testimony at Pg., 307, ll:10 – 13, 380, ll:15 – 381, ll:4.

Unlike Fortin and Enslen, Respondent never made any capital contributions to XCar (amounting to "millions of dollars"), nor did he ever sign a personal guaranty of XCar's debts as Fortin and Enslen did repeatedly. *Id.* 382, ll:3 – 22; 597, ll:8 – 598, ll:2, 397, ll:17 – 25. Throughout his employment with XCar, Respondent received a six-figure salary as well as periodic profit sharing payments as part of his employment package. Respondent was fired in early 2017 and refused a buyout offer of his shares.

2. The Claims

Respondent filed a complaint alleging "Fortin and Enslen failed to pay [Herdson] dividends to which he was entitled, failed to pay Plaintiff all compensation owing, mischaracterized his promised salary as an advance on dividends, failed to honor

promises made to lure Plaintiff from his prior business, and violated Plaintiff's employment agreement." CP 1. He further claimed Fortin and Enslen breached fiduciary duties owed by misallocating costs and expenses of XCar to depress XCar's profit to avoid paying Respondent profit-sharing. *Id*.

Respondent sought specific injunctive relief (prohibiting XCar from transferring assets and requiring it to return unspecified "improperly taken" assets), the judicial dissolution of XCar pursuant to RCW 12B.14.300 and/or the alternative equitable remedy of a forced buy-back/redemption of Respondent's shares in XCar, and, most importantly for this petition, *damages* "**in an amount to be proven at trial.**" CP 18 (emphasis added).

B. Pre-Trial Pleadings

In numerous pre-trial pleadings, Respondent claimed he would prove how Fortin and Enslen harmed his minority shareholder interest in XCar and caused him damages. For example, he opposed Defendants' motion for summary judgment

arguing damages could not yet be assessed as "discovery on Defendants' expense allocation scheme [wa]s just beginning, and Herdson's experts have not had the opportunity to analyze the propriety of this scheme under proper accounting principles." CP 704.

Likewise, his experts stated they would "perform a forensic accounting review of the financial activity of XCar." CP 921 – 926. *See also* CP 1677 – 1681. Defendants were ordered to provide access to XCar's accounting software to Respondent's accountants. CP 457 at ¶7.

Respondent was ultimately ordered to quantify his damages. CP 1560 – 1562. He did not do so, instead arguing his damages were somehow limited to the "value of his shares in XCar." CP 1563 – 1578.

C. <u>Trial</u>

This action was heard in a bench trial beginning in November 2021. At trial, Respondent abandoned all theories of damages, and instead focused all efforts on the value of his shares

in XCar. CP 1317 – 1337. Respondent claimed his minority shareholder interest was harmed because Fortin and Enslen failed to pay him dividends, management fees, or profit-sharing, and by them overpaying themselves from XCar. Respondent did not quantify these:

> Q. Now isn't it true, Mr. Herdson, with regards to the lost value of dividends, or management fees or profit-sharing, you're not able to quantify any value for those figures, are you?
>
> A. That is correct.

Herdson Trial Testimony, 837, ll:1 – 5.

Respondent also could not identify any alleged overcharge of service assigned to XCar, claimed he would need "more time to prepare" to present any actual evidence of these types of damages. Herdson Trial Testimony, 609, ll:20 – 610, ll:14.

The Superior Court, over Defendants' objections and despite Defendants submitting a pre-trial witness list of thirteen witnesses (and submitting pre-trial motions to narrow the scope of trial), permitted less than two hours (110 minutes) to

Defendants' case-in-chief, forcing Defendants to limit the witnesses called from 13 to 3. CP 1823, Trial Transcript 1441, ll:13 – 14; 1553 ll, 23 – 24.

D. <u>The Superior Court's Decision</u>

After trial, the Superior Court issued both an oral ruling and written findings of fact and conclusions of law incorporating the oral ruling. The Superior Court noted that the Plaintiff failed to present any evidence of damages:

> The defense had mentioned that there were no clear damages proven in many of the cases, many of the claims because there was no expert or no information other than the valuation expert Ms. White from the plaintiffs about the valuation of the shareholders. **And I sort of agree with the defense, that there <u>wasn't any precise damages proven</u> to the court** of the other claims that require a specific amount of damages.

Oral Opinion, pg. 18:21-25, 19:1-4. (emphasis added).

The Superior Court then dismissed the causes of action for breach of shareholder agreement (Findings of Fact and Conclusions of Law at ¶98, 99), fraudulent inducement (*Id*. at ¶100, 101), promissory estoppel (*Id*. at ¶102, 103), unjust

enrichment (*Id*. ¶104-106), and accounting (*Id*. at ¶107). The court also rejected Plaintiff's *alter ego* claim. *Id*. at ¶106.

The trial court only found for Herdson on the single claim of minority shareholder oppression (*Id*. at ¶75-97), but noted Respondent had failed to meet an essential element of an independent claim for breach of fiduciary duty:

> That to the extent that there's a fiduciary duty violation and it was the basis of the oppressive conduct, the court is finding that, that there was a breach of fiduciary duty. As in terms of independent damages for the fiduciary duty I'm not finding that, because there was no damages shown on that front.

Id. at Pg. 25:6-12.

The Superior Court faulted Defendants' for presenting "limited testimony about how …profits are accounted for and how they were re-invested" despite preventing Defendants from putting on evidence of precisely that type (for example, Defendants could not call accounting staff due to draconian time constraints). Findings of Fact at 58.

E. The Superior Court's Equitable Remedies

The Superior Court denied all requested remedies by refusing to order (1) a forced buyout/redemption, (2) a judicial dissolution of XCar, (3) an award of damages, and (4) any specific injunctive relief.

Instead, the trial court appointed a receiver with the authority and responsibility to, not only manage XCar's finances indefinitely going forward (ostensibly a type of injunctive relief), but pertinent to this petition, also to go back in time to conduct a forensic audit of XCar from March 2014 to the present "to determine if the costs and fees allocated to XCar … were accurately reflected" – in other words to prove *damages* for Respondent after-the-fact. This would include both pre-trial events and future events. Conclusion of Law 125.

The trial court then made it clear that there would be no due process on this do-over on damages:

> **Defendants' Counsel:** Are you envisioning a trial then down the road again, Your Honor? I'm not quite sure how this is ever going to be effectuated. I can understand you hiring a -- the court appoints a

> receiver to go in there and do this accounting and comes up with its recommendations and then we're going to what? Have another trial somewhere six months down the road, is that the court's intention?
>
> **The Court:** No, I don't think so. I think the court's, you know, a receiver would answer the court's questions and come up with a recommendation and then indicate how the rules that it appeared to get to that. And then the court will adopt the receiver's determination and then move forward from there.

Trial Court's Oral Opinion at Pg. 26 ll: 4-25, pg. 27 ll:1.

The Superior Court later modified its order appointing a receiver by instead appointing a "special fiscal agent" with the impact still being it would (1) conduct a forensic accounting to determine if costs and fees allocated to XCar were appropriate and if there is additional profits that should have been distributed to Respondent, and (2) "oversee XCar's financial operations and accounting records on a continuing basis" until the court is satisfied no further oppression was happening. CP 1762.

F. Post-Trial

The Superior Court appointed a special discovery master to manage the special fiscal agent, and later replaced the entity

serving as special fiscal agent. Defendants sought discretionary review of both orders under Cause No. 848003-I.

Prior to the Court of Appeals handing down its published opinion, XCar's assets were sold to a third-party dealership group. XCar subsequently ceased operations prior to any receiver/special fiscal agent doing any "going forward" work or analysis to protect Respondent from future potential oppression. Thus, with the only type of potential injunctive relief now moot, the only issue remaining in this case (and when the Court of Appeals issued its opinion) is the issue of a backwards-looking damages analysis (essentially a "do-over" on damages that Plaintiff failed to prove at trial). That is the crux of this petition.

G. The Court of Appeals Decision

On May 30, 2023, Division I of the Court of Appeals handed down its published opinion, *Herdson v. Fortin et. al.*, – Wn.2d –, 530 P.3d 220 (2023). The Court affirmed in part and reversed in part. With regards to Defendants challenge to the sufficiency of findings of minority shareholder oppression, the

Court affirmed, holding the Superior Court's finding that (1) Fortin and Enslen refusal to provide XCar's accounting records to Respondent after he was fired, (2) Fortin and Enslen failing to list Respondent on PPP loans during the COVID-19 pandemic, and (3) XCar's failure to comply with transfer-pricing regulations were sufficiently supported by the evidence. *Id*. at 231. This Court should note that, although the Court of Appeals found these three to be actionable oppressive conduct, neither it nor Superior Court ever ordered any injunctive or equitable relief to address this conduct. While a receiver ensure such conduct did not take place again, none of these justify a "do-over" on damages under a retrospective analysis.[2]

With regard to Respondent's failure to prove any damages, the Court held that, while a minority shareholder oppression

[2] Even though the Court of Appeal's Opinion understood Defendants use of the words "second bite at the apple", it then proceeded to ignore the result of that problem, choosing instead to simply void the Superior Court's appointment of the special fiscal agent. It did not address the issues pertaining to a "do-over" on damages after-the-fact. *Herdson*, 530 P.3d at 234-35.

claim is based on breach of fiduciary duty claims, a minority shareholder is not required to prove all elements – including damages – of a breach of fiduciary duty claim.

With regards to Defendants' challenge to the remedies chosen by the Superior Court, the Court largely agreed with Defendants. While the Court noted appointing a receiver is a remedy permitted under precedent, the Superior Court "lacked authority" to appoint a special fiscal agent at the time it did (while review was pending), reversing and remanding this matter to the trial court for further proceedings.

Important here is that, due to XCar's sale and cessation of business operations, any prospective injunctive relief anticipated by the Court (or the trial court) is and was, at the time of the Opinion, no longer possible. Defendants moved for reconsideration of the Court's decision on several grounds; a request that was denied after further briefing on July 31, 2023.

V. ARGUMENT

RAP 13.4(b) provides that a petition for review will be granted by the Washington Supreme Court:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

Multiple grounds exist in this case and Defendants submit that review should be accepted pursuant to its arguments below.

A. Failing to Require a Plaintiff to Prove Damages in a Tort Action is Error

Minority shareholder oppression is the only claim on which Respondent prevailed. While the Court of Appeals focused on the availability of appropriate equitable remedies for that tort which are not limited to monetary damages, this ignores the predicate requirement of proving injury and damages.

It is axiomatic that all tort actions require that the plaintiff to prove duty, breach, causation, and damages. The essential

elements to establish liability for breach of fiduciary duty are duty, breach, causation, and damages. 29 David K. DeWolf, *Washington Elements of an Action: Breach of Fiduciary Duties*, § 11:1 at 313–14 (2010–2011 ed.), *Senn v. Nw. Underwriters, Inc*., 74 Wn. App. 408, 414, 875 P.2d 647 (1994), *In re Cray, Inc*., 431 F. Supp. 2d 1114, 1132-33 (W.D. Wash. 2006). It is a basic principle of tort law that, if any of these four elements are not proved, there can be no liability for breach of fiduciary duty. *J & J Celcom v. AT & T Wireless Servs., Inc.*, 215 F. App'x 616, 620 (9th Cir. 2006) (applying Washington law and affirming summary judgment dismissal because, "[b]y presenting no evidence of damages, the minority owners failed to support an essential element of their [breach of fiduciary duty] claim").

A minority owner's claim for oppression arises from a majority owner's fiduciary duties. "Oppressive conduct by majority shareholders is closely related to the fiduciary duty of good faith and fair dealing owed by them to the minority

shareholders." *Scott v. Trans-System*, 148 Wn.2d 701, 711. 65 P.3d 1 (2003).

In *Roil Energy, LLC v. Edington*, 194 Wn. App. 1030 (2016) (unpublished), Division III collected cases from across the country that hold to the principle explained in *Scott*. *Baur v. Baur Farms, Inc.*, 832 N.W.2d 663, 670 (Iowa 2013); *McLaughlin v. Schenk*, 2009, UT 64, 20 P.3d 146, 156; *Hayes v. Olmsted & Assocs., Inc.*, 173 Or. App. 259, 21 P.3d 178, 181 (2001); *Hollis v. Hill*, 232 F.3d 460, 470 (5th Cir. 2000).

Thus, since damages are a necessary element of breach of fiduciary duty claims, and minority shareholder oppression arises from a fiduciary duty claim, it follows that damages are also necessary to prove minority shareholder oppression "because an action for shareholder oppression is linked to a breach of fiduciary duty, we hold that damages is an element of the cause of action for oppression of a minority owner." *Roil Energy, LLC v. Edington*, 195 Wn. App. 1030, 2016 WL 4132471 (2016) (unpublished).

Other jurisdictions have concurred that a plaintiff must prove a nexus between the harm they suffered and the oppressive conduct. *See, e.g., Goldberg v. First Holding Management Co.*, 2016 WL 3429851 at *6 (Mich. Ct. App. 2016) (unpublished); *In re Ionosphere Clubs, Inc.*, 17 F.3d 600, 605 (2d Cir. 1994) (applying Connecticut law) (oppressive conduct must be directed at the plaintiff personally and not generally harm the corporation); *Tarquinio v. Tarquinio*, 2016 WL 6560280 at *19 (N.J. Super. Ct. Ch. Div. 2016) (must be a nexus between the defendants' misconduct and the plaintiff's harm and interest in the company); *Weiner v. Weiner*, 2008 WL 746960 at *6 (W.D. Mich. 2008) (proving injury in minority shareholder oppression claims should be done with expert testimony).

The mere fact that minority shareholder oppression contemplates equitable remedies in addition to monetary damages does not eliminate the necessity for a plaintiff asserting one or more of those claims to prove they were actually injured. Division I recognized this in *Hudson v. Ardent Law Group,*

PLLC, 26 Wn. App.2d 1013 (2023) (explaining a plaintiff must prove *actual* injury to prevail on a breach of fiduciary duty claim, including for injunctive, i.e. equitable, relief), *citing Miller v. U.S. Bank of Wash., N.A.*, 72 Wn. App. 416, 426, 865 P.2d 536 (1994), *Kucera v. Dep't of Transp.*, 140 Wn.2d 200, 209, 995 P.2d 63 (2000). This is consistent with Supreme Court precedent in *Scott*, 148 Wn.2d at 717.

Because a minority shareholders interest in a corporation may be oppressed in ways that do not implicate monetary damages, the Supreme Court in *Scott* has set forth various ways which a court may remedy that oppression which are less drastic than dissolving the corporation. *Id*. For instance, one equitable alternative to dissolution is appointing a "receiver" (which was done here), or "an award of damages to the minority stockholders as compensation for any injury suffered by them as the result of "oppressive" conduct by the majority." *Id*. This simply recognized that one who is injured by another (a breach of

fiduciary duty) is entitled to monetary damages if the same can be proven at trial.

To be sure, a minority shareholder claiming their interest is oppressed can seek, *in addition to* damages to compensate them for the oppression, injunctive relief to prevent the oppression from happening in the future. But in each instance, a plaintiff must actually prove he was damaged in a way that can be remedied. *Scott* merely states that after doing so, a superior court need not always dissolve the offending corporation, but instead may also craft certain remedies to make the minority shareholder whole. Since Respondent failed to prove he was harmed (i.e. damaged in any way), the Superior Court and Court of Appeals both recognized this failure but nonetheless did not reverse. Review of this issue should be accepted pursuant to RAP 13.4(b)(1) and (3).

B. Requiring a Plaintiff to Prove Injury as a Predicate to Damages as a Remedy is Consistent with Other Areas of Substantive Law

The Court of Appeals focuses on the fact damages are merely one type of equitable remedy available in *Scott*, thereby holding that proving damages are not a necessary predicate to minority shareholder oppression. *Herdson*, 530 P.3d 233 – 34, *citing Scott*, 148 Wn.2d 711. This creates an unworkable framework wherein a plaintiff need only prove minority shareholder oppression (i.e, duty and breach) without proving any resulting injury while retaining the full panoply of equitable remedies available in *Scott*. Moreover, it is inconsistent with other areas of law which distinguish between monetary damages as a remedy and damages as an element of a claim.

For example, in consumer protection act claims, "[t]he "injury" element of a CPA claim is distinct from "damages" or other types of remedies." *Bunch v. Nationwide Mut. Ins. Co.*, 180 Wn. App. 37, 45, 321 P.3d 266 (2014), *citing Panag v.*

Farmers Ins. Co. of Wash., 166 Wn.2d 27, 37, 204 P.3d 885 (2009).

Like minority shareholder oppression, a violation of the CPA permits courts to award a myriad of remedies including injunctive relief (and monetary damages if proven at trial). However, even before a court select a remedy, a plaintiff must first establish a violation. "A plaintiff must first establish a CPA violation before a court may order any CPA remedies." *Bunch*, 180 Wn. App. at 45, *citing* RCW 19.86.090; *see also* 16 David K. DeWolf, Washington Practice: Consumer Protection Act Remedies § 8.10 (3d ed. 2013) ("Upon proof of a violation of the CPA, the plaintiff may receive remedies including actual damages.... In addition to the recovery of damages, a plaintiff may also ask the court to enjoin future violations.").

Because Respondent failed to prove any damages, the trial court cannot maintain and assist in creating a post-trial fishing expedition through the course of a forensic audit what Respondent and his own experts failed to do in pretrial discovery

and then at trial – showing the Plaintiff suffered an amount of compensable damages. Since the decision conflicts with established law, review is appropriate under RAP 13.4(b)(1)-(2).

C. The Court of Appeals Conflicts with Precedent in *Scott* and *Interlake*

The Court of Appeals decision here also conflicts with prior precedent in *Scott v. Trans-System, infra* and *Interlake Porsche & Audi v. Blackburn*, 45 Wn. App. 502, 728 P.2d 597 (1986) and pursuant to RAP 13.4(b)(1) and (2) review should be accepted.

Scott adheres to the tenet that only after a plaintiff has proven "overreaching conduct" is the burden shifted "to the majority shareholder or shareholders to show there were legitimate business justifications for the conduct" at issue. *Scott*, 148 Wn.2d at 709. This is due to the "backdrop of established deference to corporate governance." *Id*. The focus is on a specific interplay between plaintiff and defendant whereby the court considers business operations in a framework where the plaintiff must first demonstrate a particular act or omission was

wrong, and the defendant is then afforded the opportunity to explain the act. *Id*.

In *Interlake*, the Court of Appeals held it is reversible error to require a defendant to justify every corporate decision without tying any allegedly wrongful act to a specific transaction or business decision. In *Interlake*, a minority shareholder sued the majority shareholder alleging the majority shareholder breached his fiduciary duties to the corporation. *Id*. at 503 – 505. The trial court concluded defendants breached their fiduciary duties after concluding that a "substantial" portion of the corporations expenditures during the relevant time period personally benefited the majority shareholder, and the majority shareholder had not met its burden in justifying the legitimate nature of those expenses. *Id*. at 510.

Interlake found it reversible error to shift the burden to defendant to prove expenditures were appropriate: "it was error to impose upon [defendant] the burden of proving the legitimate

nature of all of the corporate expenditures during the given period:

> Such a holding would impose upon corporate fiduciaries a higher burden than the law requires and would expose corporate fiduciaries to liability many times in excess of the damage their own actions may have caused.

Id., citations omitted.

The Opinion's analysis affirming the verdict rejects the central tenant of *Scott* and *Interlake* in favor of holding a generalized "course of conduct can properly serve as the basis for minority shareholder oppression." *Herdson*, 530 P.3d at 232. The Appellate Court rejected out-of-hand Defendants' argument that *Scott* and *Interlake* require the opportunity to justify or explain specific transactions or business decisions.

Under *Scott's* clear mandate, Respondent was required to establish what particular acts were oppressive and then Defendants should have been afforded the opportunity to explain or justify their reasoning. This is one reason why tying acts to quantifiable injury/damages is so important as a way of proving

their oppressive impact.[3] The Court's affirmation of the Superior Court's decision does not and could not follow this framework, and so the Opinion fails to follow binding precedent. Review is warranted.

D. The Supreme Court Should Still Rule on the Retrospective "Do-Over" of a Damages Trial

The Superior Court envisioned both prospective and retrospective relief. While the Court of Appeals correctly reversed and remanded the Superior Court's appointment of a special fiscal agent, the Opinion did not address the portion of the Superior Court's order which envisioned a retrospective analysis of XCar's year-by-year accounting to uncover damages not proven at trial. This is concerning as the Superior Court's prior statements implicate that the trial court, if convinced by a court-appointed expert's report in any given past year claiming there were after-tax profits that should have subject to a

[3] If the oppression was so egregious that specific examples cannot be proven, then frankly the now moot remedy of dissolution was the only appropriate remedy.

mandatory dividend, will simply order such amounts paid without the benefit of a trial.

The purpose of a trial is to discover the truth. To this end, parties' conduct discovery before trial to determine what evidence will support their claims and defenses, and present that evidence to an unbiased trier-of-fact, who ultimately decides what did and did not happen. At trial, Defendants have a constitutional right to confront witness and subject them to the "crucible" of cross-examination. *In re Marriage of Rideout*, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003). It should not have to wait and go through yet another round of appeals to obtain justice.

When trial came, however, Respondent unexpectedly and utterly failed to meet his burden or even attempt to meet it. He did not identify any specific transaction or amount that he alleged caused him specific, measurable harm, stating he would need an accountant to do that for him. Defendants should not now be burdened by Respondent's litigation strategies.

The Superior Court properly found Respondent had failed

to meet his burden on proving damages, dismissing the claims that require damages as an element. Nonetheless, it then decided to appoint a receiver with the authority and responsibility to, not only manage XCar's finances indefinitely (now irrelevant), but also to go back in time to conduct a forensic audit of XCar from March 2014 to present "to determine if the costs and fees allocated to XCar … were accurately reflected." Conclusion of Law 125.

That the Court of Appeals failed to reverse this conclusion of law is error by allowing Respondent a second bite at the apple, to have a third-party prove, at XCar's expense, what he had the opportunity to do, said he would do, and did not even try to do at the trial. This upends the very purpose of a trial and turns the trial court at its leisure into both the judge, jury, and plaintiff, since even the real Plaintiff here did not even try to prove any damages.

This type of unquantifiable error, which effectively deprives a party of its very theory of the case, is "structural error"

warranting review and reversal. *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993); *Conde v. Henry*, 198 F.3d 734, 740-741 (9th Cir. 1999); *United States v. Sarno*, 73 F.3d 1470, 1485 (9th Cir. 1485); *In re Detention of D.F.F.*, 172 Wn.2d 37, 43 and n. 6, 256 P.3d 357 (2011) (applying structural error to a commitment proceeding and citing with approval multiple state court cases applying structural error in civil matters). This was not harmless error and the Court, in affirming the verdict ignored this precedent.

VI. CONCLUSION

For the reasons set forth, Defendants submits that Review should be accepted. This case presents an important opportunity for this Court to shape the bounds of causes of action and the interplay between elements and remedies in minority oppression cases. This case does not exist in a vacuum, but rather sets forth the scope of responsibility of majority shareholders, the rights of minority shareholders, and the justice system's role in adjudicating disputes between them. Denying review would

allow minority shareholders the ability to impose liability on corporations without proving managerial harm to the corporation or themselves, and would create – for the first time – the right of plaintiffs to conduct a do-over of damages trials after failing to prove damages at trial.

Pursuant to RAP 18.17(c)(10), Defendants certify this Pleading contains 4,933 words.

RESPECTFULLY SUBMITTED this 30th day of August, 2023.

s/ Daniel A. Brown
Daniel A. Brown, WSBA #22028
Sean D. Leake, WSBA #52658
WILLIAMS, KASTNER & GIBBS PLLC
601 Union Street, Suite 4100
Seattle, WA 98101-2380
Tel: (206) 628-6600
Fax: (206) 628-6611
Email: dbrown@williamskastner.com
sleake@williamskastner.com
Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date we caused to be served upon certain counsel of record at the address and in the manner indicated below a copy of the foregoing:

Attorneys for Plaintiff: Rylan Weythman Devra R. Cohen FOSTER GARVEY 1111 Third Avenue, Suite 3000 Seattle, WA 98101 (206) 447-4400 rylan.weythman@foster.com devra.cohen@foster.com	VIA ☐ Via Legal Messenger ☑ Via Email ☑ Via Washington Supreme Court Efiling Portal
Darren McCarty, *Pro Hac Vice* MCCARTY LAW PLLC 1410B W. 51st Street Austin, TX 78756 (512) 827-2902 darren@mccartylawpllc.com	VIA ☐ Via Legal Messenger ☑ Via Email ☑ Via Washington Supreme Court Efiling Portal

Signed at Seattle, Washington this 30th day of August, 2023.

s/ Rachel Nelson
Rachel Nelson, Legal Assistant

WILLIAMS KASTNER

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Filing Petition for Review

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- litdocket@foster.com
- rnelson@williamskastner.com
- rylan.weythman@foster.com
- sandra.lonon@foster.com
- sleake@williamskastner.com

Comments:

Sender Name: Rachel Nelson - Email: rnelson@williamskastner.com
Filing on Behalf of: Daniel Andrew Brown - Email: dbrown@williamskastner.com (Alternate Email:)

Address:
601 UNION STREET
SUITE 4100
SEATTLE, WA, 98101
Phone: (206) 233-2964

Note: The Filing Id is 20230830142759SC358923

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CALLUM HERDSON, an individual, Respondent, v. RICHARD FORTIN, ROBERT ENSLEN, XCAR, INC., FTW SERVICES, INC., XCAR REMARKETING, INC., CROSSBORDER VEHICLE SERVICES, INC., and CROSSBORDER VEHICLES SALES, LTD., Appellants.	No. 83701-0-I DIVISION ONE PUBLISHED OPINION

HAZELRIGG, A.C.J. — Richard Fortin, Robert Enslen, XCar, Inc., FTW Services, Inc., XCar Remarketing, Inc., Crossborder Vehicle Services, Inc., and Crossborder Vehicle Sales, Ltd. appeal from findings of fact and conclusions of law entered after a bench trial, as well as an order appointing special fiscal agents and a forensic auditor. Because the court's findings as to minority shareholder oppression are supported by substantial evidence and the court did not abuse its discretion in fashioning an equitable remedy, we affirm. However, we reverse the court's order appointing special fiscal agents and a forensic auditor due to its failure to comply with RAP 7.2.

FACTS

Callum Herdson was hired as president of XCar, Inc. in 2014 and given one-third of its stock as common, non-voting shares. Richard Fortin and Robert Enslen own the remaining preferred, voting shares equally. Herdson received a share of profits in addition to his salary, as did several other employees.[1] Fortin and Enslen also own and operate several other related companies: Crossborder Vehicle Services, Inc., Crossborder Vehicle Sales, Ltd., XCar Remarketing, Inc., and FTW Services, Inc. (collectively, "Crossborder-owned companies"). XCar is not a subsidiary of any of these companies.

Herdson was terminated from XCar in February 2017 but retained his shares. Herdson subsequently filed suit against Fortin, Enslen, and their various other business entities (collectively, Fortin), and alleged a number of claims, including failure to distribute dividends to which he was entitled, breach of fiduciary duties, and minority shareholder oppression. Herdson sought monetary damages, and several forms of injunctive relief, including an order to require either the purchase of Herdson's shares or the dissolution of XCar. After Herdson abandoned some of his original claims, the parties proceeded to a bench trial. On January 13, 2022, the court entered extensive findings of fact and conclusions of law (FFCL). The Court expressly found Herdson proved Fortin and Enslen had engaged in minority shareholder oppression, dismissed all

[1] Herdson testified that he was paid dividends that ceased after his termination from XCar, while evidence submitted by Fortin suggested Herdson was only paid profit sharing during his employment, in addition to his salary, which then ceased after he was terminated, and XCar in fact never declared dividends. The trial court found that "[t]he agreement between Herdson, Fortin, and Enslen, included an agreement that each owner would receive 1/3 of XCar's after-tax net profits" but the court never explicitly characterized these profits as dividends.

of Herdson's remaining claims except regarding minority shareholder oppression, rejected Herdson's desired remedy of the judicial dissolution of XCar, and appointed a receiver in lieu of dissolving the company.

Fortin appealed on February 11, 2022, and a perfection letter was issued by this court on February 18, 2022. On February 25, 2022, after this court accepted review, the trial court entered an order appointing special fiscal agents and a forensic auditor "in lieu of appointing a traditional receiver" as an "exercise[] [of] its discretion." Fortin filed an amended notice of appeal designating the February 25 order along with the FFCL.

ANALYSIS

I. Appealability

Herdson contends that this appeal should be dismissed as there is no basis for an appeal as a matter of right or for discretionary review. Parties may appeal from "[t]he final judgment entered in any action or proceeding." RAP 2.2(a)(1). Additionally, under RAP 2.2(a)(3), "[a]ny written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action" may be appealed. "We look to the effect of a judgment to determine whether it is appealable," and the substance of a document, rather than the title, controls. Wachovia SBA Lending, Inc. v. Kraft, 165 Wn.2d 481, 487, 200 P.3d 683 (2009); Rhodes v. D & D Enters., Inc., 16 Wn. App. 175, 177, 554 P.2d 390 (1976). "[D]etermination of finality is a matter of substance and not form." Gazin v. Hieber, 8 Wn. App. 104, 113, 504 P.2d 1178 (1972). "A final judgment is a judgment that ends the litigation, leaving

nothing for the court to do but execute the judgment." Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 79 Wn. App. 221, 225, 901 P.2d 1060 (1995). It "concludes the action by resolving the plaintiff's entitlement to the requested relief." Bank of Am., NA v. Owens, 153 Wn. App. 115, 126, 221 P.3d 917 (2009), rev'd in part on other grounds, 173 Wn.2d 40, 266 P.3d 211 (2011).

Here, the court resolved all of Herdson's claims on the merits. It concluded that Herdson met his burden to demonstrate minority shareholder oppression as a matter of law and dismissed all other claims. The trial court determined that Fortin was not entitled to immunity under the business judgment rule, and that Herdson was entitled to relief because he had "established a probable right in the XCar profits from the time [he] became an owner . . . through the present." This concluded the action by resolving Herdson's entitlement to relief, leaving nothing for the court to do but execute its judgment after calculating the amount owed to Herdson as the remedy. As such, the document entered at the conclusion of trial, captioned "Court's Findings of Fact and Conclusions of Law," is appealable as a matter of right.

After we accepted review of the FFCL, Fortin filed an amended notice of appeal in this case that added the February 25 order, appointing special fiscal agents and a forensic auditor in lieu of the receiver previously ordered, to the orders on review. While the February 25 order is not appealable as a matter of right, we exercise our authority to grant discretionary review as it is related to and

impacts the FFCL under RAP 2.3(b)(2).[2] See City of Bothell v. Barnhart, 156 Wn. App. 531, 538 n.2, 234 P.3d 264 (2010) (explaining that the appellate court has the authority to determine the scope of discretionary review), aff'd, 172 Wn.2d 223, 257 P.3d 648 (2011).

II. Substantial Evidence

In this appeal, Fortin assigns error to numerous findings of fact. When considering such a challenge, we "review findings of fact for substantial evidence" and "conclusions of law de novo." Blackburn v. Dep't of Soc. & Health Servs., 186 Wn.2d 250, 256, 375 P.3d 1076 (2016). "Substantial evidence to support a finding of fact exists where there is sufficient evidence in the record 'to persuade a rational, fair-minded person of the truth of the finding.'" Hegwine v. Longview Fibre Co., Inc., 162 Wn.2d 340, 353, 172 P.3d 688 (2007) (quoting In re Est. of Jones, 152 Wn.2d 1, 8, 93 P.3d 147 (2004)). We "view the evidence in the light most favorable to the prevailing party" and do not "reassess the credibility of trial court witnesses." Garza v. Perry, __ Wn. App. 2d __, 523 P.3d 822, 834 (2023).

As a preliminary matter, Fortin urges this panel to look to the trial court's oral ruling, rather than its written order. "When findings are incomplete" or ambiguous, "appellate courts may look to the trial court's oral decision to interpret the judgment." City of Lakewood v. Pierce County, 144 Wn.2d 118, 127, 30 P.3d 446 (2001). Fortin raises this issue for the first time in its reply brief, does not

[2] "A notice of appeal of a decision which is not appealable will be given the same effect as a notice for discretionary review." RAP 5.1(c).

cite any authority in support, and does not explain how the oral ruling sheds light on the allegedly contradictory conclusions of law. Accordingly, we decline that invitation and focus our analysis on the court's written ruling.

Several of the findings Fortin challenges are solely credibility determinations made by the trial court, or explicitly rest on the court's findings on credibility; we do not review such determinations. As such, we decline to evaluate findings: 16, 19, 22, 39-45, 52, 60, 62, and 70-71. Several other findings are set out in Fortin's assignments of error but no further argument is provided in briefing. These challenges are abandoned[3] and, as such, we decline to reach findings: 26-29, 36, and 53-58. We further decline to review finding 37 as the nature of Fortin's challenge is unclear—the assignment of error merely states, "this finding fails to acknowledge that XCar's accounting practices."

The remaining findings Fortin sets out in the assignments of error (38, 47, 50-51, 59, 61, 63-64, 67-69, 72-74) are each supported by substantial evidence. Finding 38, that Fortin failed to ensure XCar received market rate fees for arms-length transactions, is supported by Fortin's admission in his deposition. Finding 47, that Fortin obscured XCar's profitability and shifted profits away, is supported by Exhibit 18 and trial testimony by Nick Nicholson, chief financial officer for all the Crossborder-owned companies and XCar. Finding 50, that Fortin and Enslen continue to receive management fees to draw profits from XCar is supported by Nicholson's and Fortin's testimony at trial. Viewing the evidence adduced at trial in the light most favorable to Herdson, Fortin fails to meet its burden to

[3] An assignment of error not argued in a party's brief is abandoned. Pappas v. Hershberger, 85 Wn.2d 152, 153, 530 P.2d 642 (1975).

demonstrate that the trial court's finding that these management fees were used to draw profits, is unsupported by substantial evidence. Our sole inquiry when presented with this sort of appellate challenge is whether substantial evidence supports the findings made by the trial court; "we will not substitute our judgment for the court's" even if this court might have reached a different result. Parkridge v. City of Seattle, 89 Wn.2d 454, 464, 573 P.2d 359 (1978). Findings 51 and 59, that Fortin did not conduct a transfer pricing analysis to ensure that the management fees were market rate, as required, are both supported by Exhibit 45 and Nicholson's deposition testimony. Findings 61, 63, and 64, that, by avoiding a transfer pricing analysis, Fortin failed to ensure XCar's profits were accurately captured and failed to ensure transactions were at arm's length, are supported by Nicholson's and Fortin's deposition testimony. Findings 67-69, that Fortin applied for a Paycheck Protection Program (PPP) loan and falsely claimed the ownership of XCar was held equally by only Fortin and Enslen, are supported by Exhibit 59. Finding 72, that XCar's profitability was clouded by obscuring profits, is a factual conclusion supported by evidence set out in testimony and exhibits that Fortin retroactively changed costs between companies to shift taxable net income, as reported to the Internal Revenue Service (IRS), and thus drastically changed the profits (and, therefore, tax liability). The court further found that Fortin purposefully concealed XCar's profits and financially manipulated XCar's accounting records in a later, unchallenged, finding. Finding 73, that some of XCar's profits were shifted to Crossborder-owned companies and withdrawn by Fortin and Enslen, is supported by Exhibits 12, 18, and

Enslen's testimony at trial. Finding 74, that Fortin and Enslen paid themselves constructive dividends, is supported by testimony at trial by Herdson, Fortin, and Enslen. While there is conflicting testimony as to whether the management fees were constructive dividends, the court found the defense witnesses to not be credible in this regard, and we do not reweigh the evidence on appeal.[4] Without a more specificity from Fortin's challenge, this finding is sufficiently supported. In turn, the challenged findings discussed herein support the trial court's broader conclusions of law that Herdson demonstrated minority shareholder oppression.

III. Minority Shareholder Oppression and Statutory Remedies

Fortin asserts the court erred in a variety of ways with regard to its ultimate conclusion that Herdson demonstrated minority shareholder oppression and to the remedy applied.[5] We disagree and affirm the trial court.

"It is a recognized principle that majority shareholders 'must, at all times, exercise good faith toward the minority stockholders.'" Real Carriage Door Company, Inc. ex rel. Rees v. Rees, 17 Wn. App. 2d 449, 458, 486 P.3d 955 (quoting Hay v. Big Bend Land Co., 32 Wn.2d 887, 897, 204 P.2d 488 (1949)), review denied, 198 Wn.2d 1025 (2021). One potential remedy for wronged minority shareholders authorized under our statutory scheme is for the superior court to dissolve a corporation "[i]n a proceeding by a shareholder if it is established that . . . [t]he directors or those in control of the corporation have

[4] Mangan v. Lamar, 18 Wn. App. 2d 93, 95, 496 P.3d 1213 (2021).

[5] At oral argument before this court, Fortin appears to have conceded that minority shareholder oppression occurred. Wash. Court of Appeals oral argument, Herdson v. Fortin, No. 83701-0-I (Mar. 9, 2023), at 6 min., 15 sec., video recording by TVW, Washington State's Public Affairs Network, https://tvw.org/video/division-1-court-of-appeals-2023031240.

acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent." RCW 23B.14.300(2)(b). Because courts are reluctant to dissolve corporations, courts "rigorously require[] that plaintiffs meet their burden." Scott v. Trans-Sys., Inc., 148 Wn.2d 701, 712, 64 P.3d 1 (2003). Once the plaintiff demonstrates illegal, oppressive, or fraudulent conduct, "the burden shifts to the majority shareholder or shareholders to show there were legitimate business justifications for the conduct." Id. at 709. In addition to dissolving a company, "courts also may consider alternative remedies that are less severe than dissolution." Real Carriage Door, 17 Wn. App. 2d at 458.

A. Determining Whether Minority Shareholder Oppression Occurred

"Courts have adopted two tests for determining oppressive conduct toward minority shareholders under RCW 23B.14.300(2)(b)." Real Carriage Door, 17 Wn. App. 2d at 458. The "tests are not mutually exclusive and one or both may be used in the same case." Scott, 148 Wn.2d at 711. The first test focuses on the reasonable expectations of the minority shareholder; oppressive conduct is that which violates "'those spoken and unspoken understandings on which the founders of a venture rely when commencing the venture.'" Real Carriage Door, 17 Wn. App. 2d at 458 (internal quotation marks omitted) (quoting Scott, 148 Wn.2d at 711). This test "is most appropriate in situations where the complaining shareholder was one of the original participants in the venture—one who would have committed capital and resources." Scott, 148 Wn.2d at 711. The second test analyzes whether there was:

> "burdensome, harsh and wrongful conduct; a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members; or a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely."

Real Carriage Door, 17 Wn. App. at 458-59 (internal quotations marks omitted) (quoting Scott 148 Wn.2d at 711). In Scott, our State Supreme Court quoted an Oregon case that defined oppressive conduct as an "'abuse of corporate position for private gain at the expense of the stockholders,'" and "'the plundering of a close corporation by the siphoning off of profits by excessive salaries or bonus payments.'" Scott, 148 Wn.2d at 713 (internal quotation marks omitted) (quoting Baker v. Com. Body Builders, 264 Or. 614, 629-30, 507 P.2d 387 (1973)). Here, we apply the second test as it is undisputed that Herdson was not an original founder of XCar and that he did not commit any significant capital into the venture, paying just one dollar as his "initial contribution."[6]

The trial court concluded that Fortin engaged in oppressive conduct toward Herdson by hiding financial information related to XCar, "subordinating XCar's independent interests to . . . the interests of their wholly-owned companies" and the personal interests of Fortin and Enslen, "manipulating XCar's finances" through "obscuring XCar's profitability" and "shifting profits from XCar to Crossborder-owned companies," "withdrawing profits from XCar vis-à-vis

[6] Fortin urges this panel to follow Roil Energy, LLC v. Edington in our consideration of the issues presented on appeal. 195 Wn. App. 1030 (2016) (unpublished).

However, in addition to the fact that it is an unpublished opinion and, therefore, not controlling authority, Roil Energy considered minority shareholder oppression under Nevada law. Roil Energy, LLC v. Edington, No. 32577-6-III, slip op. at 43 (Wash. Ct. App. Aug. 2, 2016) (unpublished), https://www.courts.wa.gov/opinions/pdf/325776.unp.pdf; see also GR 14.1(a) (stating that unpublished opinions of the Court of Appeals are not binding). For both of these reasons, we reject Roil Energy as inapplicable and instead follow the published cases from our Court of Appeals and Supreme Court that analyze Washington law.

management fees," "not accounting and not distributing 1/3 of XCar's net profits to Herdson," "knowingly and intentionally failing to conduct a transfer pricing analysis," and intentionally misrepresenting information on a PPP loan application "which was done under penalty of perjury."

Fortin argues its acts in managing XCar were not oppressive because it had no duty to pay dividends and no duty to include Herdson in corporate decision-making. While the court did find that Fortin and Enslen had excluded Herdson from decision-making after he was terminated,[7] the court never tied this finding to breach of any fiduciary duty or considered it as a basis for its conclusion on minority shareholder oppression. None of the court's FFCL specific to minority shareholder oppression mention the exclusion of Herdson from decisions, rather it appears in the general findings of fact as finding 27. Fortin concedes the underlying facts in finding 27 and, as such, substantial evidence supports it. No error of law occurred.

Fortin further alleges the court erred in finding oppression based on its refusal to produce financial statements to Herdson after his termination. It contends Herdson failed to follow the proper procedure to request documents under RCW 23B.16.200 and, therefore, it was not oppressive to decline to produce the statements. As a preliminary matter, Fortin relies on an incorrect version of RCW 23B.16.200. Herdson made his requests for records in July 2017, while Fortin relies on the version of the statute that became effective in 2020.

[7] Herdson held non-voting shares.

The version of RCW 23B.16.200 in effect at the time of Herdson's request required a corporation to deliver "a copy of the most recent balance sheet and income statement" to a shareholder upon request. Former RCW 23B.16.200(2) (2002). Fortin's other argument, that Herdson failed to comply with subsection (1) of RCW 23B.16.200, is unsupported by law because that procedure was not mandated until the 2020 version of the statute.[8]

In response, Herdson contends he was entitled to the financial documents under RCW 23B.16.020. At the time of Herdson's request, RCW 23B.16.020 permitted a shareholder to inspect and copy certain corporate records, including accounting records, so long as:

> (a) The shareholder's demand is made in good faith and for a proper purpose;
> (b) The shareholder describes with reasonable particularity the shareholder's purpose and the records the shareholder desires to inspect; and
> (c) The records are directly connected with the shareholder's purpose.

Former RCW 23B.16.020(3) (2009).

Fortin argues Herdson was not entitled to specific types of financial documents, but cites no authority for this contention. While Fortin asserts a shareholder has a right to inspect only "certain records," the language of the applicable statute made no such qualification. The express statutory language reflected that a shareholder may inspect "any of the following records . . . [a]ccounting records of the corporation." Former RCW 23B.16.020(2)(b). The statutory scheme did not provide a definition for "accounting records." Black's

[8] It is unclear if Fortin's argument that relies on RCW 23B.16.200(1) is a typo, as the attributed quote is found not in RCW 23B.16.200(1) but in RCW 23B.16.020(1).

Law Dictionary defines "accounting," in part, as "[t]he act, practice, or system of establishing or settling financial accounts; esp., the process of recording transactions in the financial records of a business and periodically extracting, sorting, and summarizing the recorded transactions to produce a set of financial records." BLACK'S LAW DICTIONARY 25 (11th ed. 2019). Webster's Third New International Dictionary defines "accounting" as "the system of classifying, recording, and summarizing business and financial transactions in books of account and analyzing, verifying, and reporting the results." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 13 (2002). Neither definition supports Fortin's narrow reading of "accounting records." Without authority to support its interpretation of former RCW 23B.16.020, Fortin's claim as to this aspect of the trial court's ruling fails on this basis.

Next, Fortin argues the fact that Herdson is the only shareholder who owns stock in XCar but not in the other Crossborder-owned companies is not in itself oppression. Fortin fails to tie this argument to any specific finding or conclusion by the trial court. Nowhere in the FFCL does the trial court find oppression based only on the fact that Herdson did not own stock in the other Crossborder-owned companies. Rather, it finds oppressive conduct based on Fortin's use of the other Crossborder-owned companies to funnel profits to only Fortin and Enslen, and on Fortin's failure to consider XCar's legal independence from the other Crossborder-owned companies. Fortin's challenges to the court's conclusion that it engaged in minority shareholder oppression against Herdson on this basis fails.

Fortin also alleges Herdson failed to submit evidence that XCar did not comply with relevant transfer pricing regulations. IRS "regulations require that arm's length prices be charged" for intercompany transactions. U.S. Tobacco Sales & Marketing Co., Inc. v. Dep't of Revenue, 96 Wn. App. 932, 942 n.17, 982 P.2d 652 (1999). "A price is arm's length if 'the results of the transaction are consistent with the results that would have been realized if [unaffiliated] taxpayers had engaged in the same transaction under the same circumstances.'" Id. (alteration in original) (quoting 26 C.F.R. § 1.482-1(b)). A taxpayer must conduct an analysis to provide "the most reliable measure of an arm's length result." 26 C.F.R. § 1.482-1(c).

The trial court found that Fortin "failed to ensure that XCar received fees commensurate with market rates for arms-length transactions." It also found that "[t]here was no credible evidence that showed how the transactions between XCar and Fortin's and Enslen's other companies were conducted at arms-length," and that Fortin "fail[ed] to follow rules regarding transfer pricing." The court largely relied on concessions from Nicholson that XCar had not done a transfer pricing analysis or any other review to determine whether its transactions were conducted at arm's length. The court also relied on Exhibit 8, an email from CPA Gary Traher to Nicholson, that explained what was required in a transfer pricing analysis. Nicholson conceded in his deposition and at trial that he understood the failure to do a transfer pricing analysis was "a risk concerning [XCar's] tax status in the United States." He also stated "it's important that we

have our documentation and methodology in place" in regard to transfer pricing analyses.

This testimony and exhibit are sufficient to support the trial court's findings that XCar failed to ensure it was conducting arm's-length transactions and complying with regulations for transfer pricing analyses. Fortin provides no authority for the contention that Herdson was required to submit particular evidence of what the prices should be—substantial evidence demonstrates that Fortin was required to conduct a transfer pricing study, and did not do so.

Substantial evidence supports the court's findings, which in turn support the court's conclusion that Herdson met his burden to prove minority shareholder oppression.

1. Types of Wrongful Acts That May Prove Oppression

Fortin next contends the court erred because Herdson alleged "generalized courses of conduct rather than identifying" specific interactions that were wrongful and/or contested. But Fortin again fails to provide any authority that suggests a plaintiff in a minority shareholder oppression claim must bring forth evidence of specific transactions rather than relying on wrongful "courses of conduct." Fortin's argument is directly contradicted by Scott, which relied on a statement by the Oregon Supreme Court that explained a single act breaching a fiduciary duty must be "'extremely serious in nature'" in order to constitute oppressive conduct. Scott, 148 Wn.2d at 716 (quoting Baker, 264 Or. at 630). In contrast, a plaintiff relying on a "'continuing course of oppressive conduct'" faces a lower bar of demonstrating the conduct results in "'a disproportionate loss to

the minority or that those in control of the corporation are so incorrigible that they can no longer be trusted to manage it fairly.'" Id. (internal quotation marks omitted). Thus, a course of conduct can properly serve as the basis for minority shareholder oppression.

Fortin next alleges Herdson did not prove illegal conduct. It argues that the findings "do not identify any actual illegal conduct and do not point with specificity to any act except possibly Defendants not listing Herdson . . . on XCar's PPP loan." Fortin contends that because Herdson identified no harm as a result of this arguably illegal act, it cannot serve as evidence of oppressive conduct. RCW 23B.14.300(2)(b) permits dissolution of a corporation if the majority shareholders "have acted, are acting, or will act in a manner that is illegal, oppressive or fraudulent." Here, the court found that Fortin and Enslen's conduct was "oppressive, fraudulent, and possibly illegal." This finding of fact is not challenged. The court also found that Fortin "intentionally misrepresented their [PPP] loan application which was done under penalty of perjury" "[b]y knowingly omitting information about Herdson's ownership." This finding is also not challenged. Unchallenged findings of fact are verities on appeal. Pierce v. Bill & Melinda Gates Foundation, 15 Wn. App. 2d 419, 429, 475 P.3d 1011 (2020).

Under the plain language of the statute, a plaintiff can succeed on a minority shareholder oppression claim by demonstrating "illegal, oppressive, or fraudulent" conduct. RCW 23B.14.300(2)(b). "'Or' is most commonly used in the disjunctive and employed to indicate an alternative." Black v. Nat'l Merit Ins. Co.,

154 Wn. App. 674, 688, 226 P.3d 175 (2010). Based on the plain language of the statute, a plaintiff may prove a minority shareholder oppression claim by demonstrating illegal conduct or oppressive conduct or fraudulent conduct. Here, the unchallenged findings of fact demonstrate that Fortin knowingly omitted information in a government loan application, made under penalty of perjury under 18 U.S.C. § 1001 and 15 U.S.C. § 645. This conclusion of law flows directly from the unchallenged findings.

2. Immunity Under the Business Judgment Rule

Fortin next argues that, "The trial court erred by finding Defendants' failed to justify every allocation of cost and expense across the group of companies, and by concluding Defendants' trial testimony regarding financial statements were not sufficient." It avers the court improperly shifted the burden to Fortin or, alternatively, that Fortin provided a reasonable explanation for its transactions and therefore the court's findings to the contrary are unsupported.

Once a plaintiff meets their "burden to prove oppressive conduct by a preponderance of the evidence," the burden then "'shifts to the majority shareholder . . . to show there were legitimate business justifications for the conduct.'" Real Carriage Door, 17 Wn. App. 2d at 459 (quoting Scott, 148 Wn.2d at 709). The defendant can avoid liability by demonstrating "'legitimate business justifications for the conduct,'" or that the "decision was reasonable and made in good faith." Id. at 462 (quoting Scott, 148 Wn.2d at 709).

Here, Fortin alleges the trial court improperly shifted the burden, and required it to justify business decisions, but that is exactly what the law required

after the court determined that Herdson had met his burden to show oppressive conduct. After finding Herdson had demonstrated oppression, the court then analyzed whether Fortin was "entitled to immunity under the business judgment rule."[9] The court found Fortin had not "exercised good faith," "proper care, skill, or diligence in the management or operation of XCar." These findings were largely rooted in the court's determinations that Fortin, Enslen, and Nicholson were not credible in their testimony. We do not disturb the trial court's credibility determinations, and the record establishes that there was substantial evidence to support the factual findings in this regard. The trial court did not err with regard to its application of the business judgment rule and conclusion that Fortin was not entitled to immunity.

B. Proof of Damages and Available Remedies

Fortin argues the court erred by finding minority shareholder oppression despite dismissing Herdson's separate claim for breach of fiduciary duty based on Herdson's failure to produce sufficient evidence as to damages. Fortin contends that damages are a necessary element of Herdson's minority shareholder oppression claim because they are a necessary element of a breach of fiduciary duty claim.[10] In reply, Fortin concedes that proving damages is not necessary in all minority shareholder oppression claims, but asserts that, in this

[9] "Under the 'business judgment rule,' corporate management is immunized from liability in a corporate transaction where (1) the decision to undertake the transaction is within the power of the corporation and the authority of management, and (2) there is a reasonable basis to indicate that the transaction was made in good faith." Scott, 148 Wn.2d at 709 (quoting Nursing Home Bldg. Corp. v. DeHart, 13 Wn. App. 489, 498, 535 P.2d 137 (1975)).

[10] The elements of a claim for breach of fiduciary duty are: (1) duty, (2) breach, (3) injury, and (4) proximate cause. Miller v. U.S. Bank of Wash., N.A., 72 Wn. App. 416, 426, 865 P.2d 536 (1994).

case, because the trial court's basis for finding minority shareholder oppression was a breach of fiduciary duties, a finding of damages was required. It contends that Herdson failed to identify a transaction or expert opinion demonstrating harm to XCar's profitability or to him as a shareholder.

Fortin overstates the extent to which the court's finding, that it engaged in minority shareholder oppression, rests on a claim of breach of fiduciary duty. Fortin is correct that oppressive conduct constituting minority shareholder oppression "is closely related to the fiduciary duty of good faith and fair dealing" owed by majority shareholders to minority shareholders. Scott, 148 Wn.2d at 711. However, a common law claim for breach of fiduciary duty is distinct from the statutory claim for minority shareholder oppression. The court appears to rely on the actions by Fortin that constitute a breach of fiduciary duty as evidence of oppressive conduct; this is proper under Scott. Id. at 716 ("'[A] single act in breach of such a fiduciary duty may not constitute such oppressive conduct as to authorize the dissolution of a corporation unless extremely serious in nature.'" (Alteration in original) (internal quotation marks omitted) (quoting Baker, 264 Or. at 630)).

Fortin further avers that Herdson did not specify any amounts or charges to which he objected and which caused "calculable harm." It concedes that Herdson "objected to certain areas of alleged mismanagement, including accounting costs, service fees, and lost profits" but faults Herdson for not specifying amounts related to this alleged misconduct. Fortin cites no authority

to support the contention that Herdson had this specific burden at trial;[11] in fact Fortin does not even allege that Herdson was required to do so. As the appellant, Fortin bears the burden to demonstrate the trial court erred and that the findings of fact are unsupported by substantial evidence. It fails to tie this allegation to any purported legal error or unsupported finding. As such, Fortin has failed to meet its burden as to this challenge.

Contrary to Fortin's assertion at oral argument before this court, Herdson did seek an equitable remedy under the statute.[12] This argument is further undercut by the plain language of Herdson's complaint, particularly items 6-8 in his prayer for relief, that explicitly ask the following of the trial court:

> 6. For an injunction prohibiting any transfer of assets from XCar to XCar Remarketing or any other third parties;
> 7. For an injunction requiring Defendants to return any assets improperly taken from XCar;
> 8. For an order requiring either a buy-back of Mr. Herdson's shares in XCar at a fair value or dissolution of XCar pursuant to RCW 23B.14.300.

(Emphasis added.) An injunction is an order to act (or refrain from acting). Garland v. Aleman Gonzalez, ___ U.S. ___, 142 S. Ct. 2057, 2063-64, 213 L. Ed. 2d 102 (2022). Each of these remedies in the prayer for relief is injunctive in nature. To put a finer point on it, item 8 expressly seeks judicial dissolution of XCar as an alternate remedy available to the court under the statute.

Our State Supreme Court was clear in Scott that "[d]issolution suits under Washington's dissolution statute are fundamentally equitable in nature." 148

[11] At oral argument, Fortin asserted that Interlake Porsche & Audi, Inc. v. Bucholz, 45 Wn. App. 502, 728 P.2d 597 (1986) controls here and requires a plaintiff to make such a showing. Wash. Court of Appeals oral argument, supra, at 8 min., 4 sec.

[12] Wash. Court of Appeals oral argument, supra, at 9 min., 47 sec.

Wn.2d at 716. Scott quoted from a summary of equitable remedies available in such suits, as set out in Baker, but qualified that it listed only those remedies "most relevant" to the facts of the case before it. 148 Wn.2d at 717 (quoting Baker, 264 Or. at 632-33). The full list in Baker additionally includes "[t]he ordering of affirmative relief by the required declaration of a dividend or a reduction and distribution of capital," and "entry of an order requiring the corporation or a majority of its stockholders to purchase the stock of the minority stockholders." 264 Or. at 633. Herdson sought "an order requiring either a buy-back of Mr. Herdson's shares in XCar at a fair value or dissolution of XCar pursuant to RCW 23B.14.300." Herdson presented expert testimony from certified public accountant (CPA) Laura Lee White who conducted a valuation of Herdson's interest in XCar. She ultimately valued Herdson's shares at $4.23 million at the time of trial. The court further found that "Herdson has established a probable right in the XCar profits" that "have been taken by the Defendants, which has materially impaired Herdson's rights to his portion of such profits." This was sufficient evidence to support the relief requested.

Fortin provides no authority for its contention that utilizing the act of breach of a fiduciary duty as evidence of oppressive conduct imposes all elements of a common law fiduciary duty claim into the statutory claim of minority shareholder oppression.[13] Further, Herdson met his burden to demonstrate entitlement to an equitable remedy under the statute based on his showing of minority shareholder oppression. As such, the court did not err.

[13] "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." DeHeer v. Seattle Post-Intelligencer, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

IV. Post-Trial Order Appointing Special Fiscal Agent in Lieu of Receivership

Fortin filed an amended notice of appeal in order to include the trial court's order that appointed special fiscal agents and a forensic auditor, asserting such action is contrary to law. It alleges the court is improperly permitting a "second bite at the apple" for Herdson to demonstrate damages after failing to do so during trial. It also contends the trial court "will not permit Defendants to challenge any findings" from the forensic audit.[14] Finally, it argues Herdson cannot benefit from an equitable remedy under the unclean hands doctrine.[15] This court reviews "the fashioning of equitable remedies for an abuse of discretion," while "'the question of whether equitable relief is appropriate is a question of law'" and therefore reviewed de novo. Borton & Sons, Inc. v. Burbank Props., LLC, 196 Wn.2d 199, 206, 471 P.3d 871 (2020) (quoting Niemann v. Vaughn Cmty. Church, 154 Wn.2d 365, 374, 113 P.3d 463 (2005)).

Here, the trial court appointed a receiver in the FFCL issued after the conclusion of trial. This is a remedy plainly permitted under Scott. 148 Wn.2d at 717 (quoting Baker, 264 Or. at 632-33). However, when the court changed course,[16] it abandoned the order appointing a receiver and instead appointed

[14] Fortin also assigns error to the trial court's later decision to appoint a special master to manage the receivership. This order is not designated in the Notice of Appeal at issue here and is the subject of the subsequent case before this court (No. 84800-3-I) that is pending a ruling on discretionary review. As such, we disregard Fortin's numerous arguments about the order.

[15] We likewise decline to reach Fortin's argument regarding unclean hands. "Unclean hands" is an equitable defense. Crafts v. Pitts, 161 Wn.2d 16, 24 n.4, 162 P.3d 382 (2007). Fortin brought forward no evidence regarding unclean hands during trial, simply arguing once in closing that "Mr. Herdson does not have clean hands." This is not sufficient to raise the defense, much less preserve the issue for appeal. Accordingly, the argument is waived.

[16] This panel finds it noteworthy that while Fortin filed an amended notice of appeal to include this order, and assigned error in briefing, the challenged order was originally entered at Fortin's request. At oral argument before the trial court, Fortin contended that appointing the

special fiscal agents "in lieu of appointing a traditional receiver." The court lacked authority to do so. Once this court accepts review of a decision, a trial court may only modify that decision after receiving permission from this court. See RAP 7.2(e).

The record establishes that no party brought a motion seeking permission from this court. Fortin timely appealed the court's FFCL on February 11, and a perfection letter was issued by the clerk of this court on February 18. The trial court issued an order appointing special fiscal agents on February 25, after review was accepted by this court. Where an order is entered in violation of RAP 7.2, the order is voidable. See State v. Edwards, 23 Wn. App. 2d 118, 121-22, 514 P.3d 692 (2022) (citing Tinsley v. Monson & Sons Cattle Co., 2 Wn. App. 675, 677, 472 P.2d 546 (1970)).

While the court generally enjoys broad discretion as to the fashioning of equitable remedies, and the manner by which those remedies are identified, that discretion is not without procedural limitations when an appeal has been initiated and accepted. Accordingly, we do not reach the propriety of the choice to appoint special fiscal agents and a financial auditor over a receiver, but rather conclude that the order before us is void based on the failure to comply with RAP 7.2.[17]

Because the court lacked authority to enter the February 25 order, we reverse on this issue. We further note that our authority in this case terminates

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accounting firm Ernst & Young in lieu of a traditional receiver would allow the company to continue operating while still providing financial transparency.

[17] This issue was not raised in the parties' briefing. Prior to oral argument, they submitted supplemental briefing on the applicability of RAP 7.2 to the February 25 order at the direction of the panel.

upon issuance of the mandate. At that point, the trial court has the authority to order a remedy it deems equitable based on the record before it.

V. Trial Court Management of Proceedings and Due Process

As a final assignment of error, Fortin claims the trial court violated its constitutional right to due process by imposing a strict trial schedule limiting the number of witnesses. While it is true that parties to litigation are entitled to due process, it is also true that trial courts enjoy significant discretion as to the management of proceedings. In re Marriage of Zigler, 154 Wn. App. 803, 815, 226 P.3d 202 (2010).

Fortin fails to provide any legal authority at all in the two paragraphs of its opening brief dedicated to this assignment of error. It does not identify the appropriate constitutional test for us to apply, or suggest a remedy should we agree with this challenge. Further, Fortin does not even argue, much less demonstrate, how its case was prejudiced by the judge's management of proceedings, describe what evidence it was prevented from introducing, or note any offers of proof it made to the trial court. Ultimately, Fortin offers nothing more than "naked castings into the constitutional sea." In re Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (quoting United States v Phillips, 433 F.2d 1364, 1366 (8th Cir. 1970)). Without more, we decline to reach this issue.

VI. Conclusion

The court's findings after trial are supported by substantial evidence, or are credibility determinations that will not be disturbed on appeal, and its

conclusions of law logically flow from the findings. The court did not err by pursuing an equitable remedy short of judicial dissolution after concluding Fortin engaged in minority shareholder oppression. However, because it lacked authority to enter the February 25 order, we reverse on that sole issue.

Affirmed in part, reversed in part, and remanded.[18]

WE CONCUR:

[18] On March 7, 2023, Fortin filed a supplemental designation of Clerk's Papers. On March 8, Herdson filed a motion to strike it. The motion is rendered moot by the issuance of this opinion and is denied.

On February 27, 2023, Fortin moved to modify the January 26, 2023 ruling by a Commissioner of this court that denied its second motion for an emergency stay. Herdson filed an answer in opposition to the motion to modify on March 15. Fortin filed a reply on March 20. The motion to modify is denied.