

NO. 36121-3-II.

WASHINGTON STATE COURT OF APPEALS  
DIVISION II

DENNIS SAVIANO,  
Appellant

v.

WESTPORT AMUSEMENTS, INC., an inactive Washington  
Corporation, HAROLD PRATER and DAWN PRATER, husband  
and wife, and the marital community composed thereof,  
Respondents.

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STATE COURT DIVISION II  
BY [Signature]

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APPELLANT'S OPENING BRIEF  
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## TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR .....	1
II.	ISSUES RELATING TO ASSIGNMENTS OF ERROR.....	2
III.	STATEMENT OF THE CASE.....	3
	A. <u>FACTS</u> .....	3
	1. OVERVIEW.....	3
	2. WESTPORT AMUSEMENTS, INC.....	4
	3. OPERATIONS CEASE.....	6
	4. SAVIANO’S LOANS KEEP THE CORPORATION SOLVENT .....	7
	B. <u>PROCEDURAL HISTORY</u> .....	10
IV.	ARGUMENT .....	11
	A. <u>STANDARD OF REVIEW</u> .....	11
	B. <u>OVERVIEW</u> .....	12
	C. <u>SAVIANO COMPLIED WITH THE CORPORATION’S GOVERNING DOCUMENTS AND WASHINGTON LAW IN ISSUING THE NOTES</u> .....	14
	D. <u>SAVIANO’S ACTIONS WERE, AS A MATTER OF LAW, NOT SELF-DEALING.</u> .....	16
	E. <u>THE PRATERS ARGUMENTS THAT SAVIANO SHOULD NOT BE REIMBURSED LACK MERIT</u> ..	21
	F. <u>THE TRIAL COURT’S DETERMINATION THAT SAVIANO WAS A “QUASI-RECIEVER” IS AN EQUITABLE REMEDY AND NOT AVAILABLE</u>	

	<b><u>BECAUSE THERE IS AN ADEQUATE REMEDY AT LAW.</u></b> .....	25
G.	<b><u>THE COURT ERRED IN CALCULATING THE AMOUNT OWING TO SAVIANO.</u></b> .....	26
H.	<b><u>ATTORNEY'S FEES</u></b> .....	26
V.	<b>CONCLUSION.</b> .....	27

## TABLE OF AUTHORITIES

### Cases

<i>Ballard Square Condominium Owners Ass'n v. Dynasty Const. Co.</i> , 158 Wash.2d 603, 146 P.3d 914 (2006).....	16
<i>Bayo v Davis</i> , 127 Wn. 2d 256, 897 P.2d 1239 (1995).....	27
<i>Bennett v. Computer Taskgroup</i> , 112 Wash.App. 102, 47 P.3d 594 (2002).....	25
<i>Cohen v. L. &amp; G. Inv. Co.</i> , 186 Wash. 308, 57 P.2d 1042 (1936) .....	23
<i>Corrigan v. Tompkins</i> , 67 Wash.App. 475, 836 P.2d 260 (1992) .....	25
<i>Doric Co. v. King County</i> , 57 Wash.2d 640, 358 P.2d 972 (1961) .....	23
<i>Hauser v. Arness</i> , 44 Wash.2d 358, 267 P.2d 691 (1954).....	11
<i>In re Spokane Concrete Products, Inc.</i> , 126 Wash.2d 269, 892 P.2d 98 (1995).....	24
<i>Interlake Porsche &amp; Audi, Inc., v. Bucholz</i> , 45 Wash.App. 502, 728 P.2d 597 (1986).....	18, 19, 20
<i>Landmark Development, Inc. v. City of Roy</i> , 138 Wn.2d 561, 980 P.2d 1234 (1999).....	11, 12
<i>Leppaluoto v. Eggleston</i> , 57 Wash.2d 393, 357 P.2d 725 (1960).....	18
<i>Leschi v. Highway Comm'n.</i> , 84 Wash.2d 271, 525 P.2d 774 (1974).....	12
<i>McClendon v. Callahan</i> , 46 Wash.2d 733, 284 P.2d 323 (1955) .....	11
<i>McCormick v. Cupp</i> , 106 S.W. 3d 563 (Mo.App. W.D. 2003) .....	21
<i>Moulden &amp; Sons, Inc. v. Osaka Landscaping &amp; Nursery, Inc.</i> , 21 Wash.App. 194, 584 P.2d 968 (1978).....	12
<i>Nursing Home Bldg. Corp. v. DeHart</i> , 13 Wash.App. 489, 535 P.2d 137, <i>rev. denied</i> , 86 Wash.2d 1005 (1975).....	18

### Statutes

RCW 4.16.080 .....	25
RCW 4.84.330 .....	27
RCW Chapter 23B.....	25
RCW 23B.06.400.....	16, 24
RCW 23B.08.210.....	14
RCW 23B.12.010.....	23
RCW 23B.14.050.....	16, 23, 24

### Other Authorities

2 Orland, Wash.Prac., s 311.....	11
RAP 18.1.....	27

## I. ASSIGNMENTS OF ERROR

A. The trial court erred in finding (Finding of Fact No. 8) that “Mr. Saviano’s actions on behalf of the corporation and personally were conflicting” and that “Mr. Saviano’s actions were self-dealing.” (Finding of Fact No. 8).

B. The trial court erred in finding that Saviano, “[t]hrough his actions in running the corporation he failed to acknowledge and preserve for capital contribution purposes the investment of past labor by the Praters.” (Finding of Fact No. 9).

C. The trial court erred in finding that Saviano’s “actions did not benefit the corporation, but benefited both parties on a personal basis.” (Finding of Fact No. 10).

D. The trial court erred in finding that “Saviano undertook, for personal reasons, to wind down and sell the corporate assets” and that Saviano “became a “quasi” receiver from 2002 to present.” (Finding of Fact No. 11).

E. The trial court’s conclusion that “[t]he promissory notes and other corporate actions making Saviano a secured creditor of the corporation are unenforceable and shall not be paid” is error. (Conclusion of Law No. 3(B)).

F. The trial court's conclusion that "Mr. Saviano incurred additional debt in the amount of \$179,108 for calendar years 2003 through 2006 to preserve the assets of the corporation and further preserve personal assets of the parties" was error. (Conclusion of Law 3 (C)).

G. The trial court erred in not awarding Saviano prejudgment interest.

## **II. ISSUES RELATING TO ASSIGNMENTS OF ERROR**

A. When articles of incorporation permit it, and a corporate director loans money to a corporation, complying with statutory formalities, is the debt valid and enforceable?

B. Can a trial court ignore the provisions of Washington's Business Corporations Act and fashion an equitable remedy upon corporate dissolution?

C. Did Mr. Saviano's payment of corporate liabilities after the Praters abandoned the corporation create a conflict of interest?

D. Did Saviano's actions harm the corporation?

E. Did Saviano's actions "fail to preserve" the capital contributions to the corporation?

F. When a corporation's articles of incorporation and by-laws permit corporate officers, directors and shareholders to engage in business transactions with the corporation, is it "self-dealing" for the officer or shareholder to do so?

G. Is “self-dealing” a defense to a debt evidenced by a promissory note?

H. When a corporate officer, lends money to a corporation, is that claim subordinate to claims by shareholders claims to capital contributions?

I. Even though they were approved by the corporation’s director pursuant to Washington law and the corporation’s governing documents, were the promissory notes given from the corporation to Saviano unenforceable?

J. Did the trial court correctly calculate the amount of money Saviano contributed to the corporation from 2002 through 2006?

K. Should the trial court have awarded interest on the monies paid by Saviano for the corporation’s benefit?

### **III. STATEMENT OF THE CASE**

#### **A. FACTS**

##### **1. OVERVIEW**

From 1993 to 2002 Dennis Saviano and the Praters contributed significant assets and time to Westport Amusements, Inc. and its sole business venture – the Westport Family Fun Center amusement park. The Praters’, who lived in Westport, contributed capital and labor in managing the park’s day-to-day operations. Saviano lived out of state and

contributed capital and business expertise to start-up and maintain the company. For the most part, though, Saviano was not involved in the park's day-to-day operations.

In 2002 the Praters stopped running the park abandoning the venture entirely. Saviano then sought to sell the corporation's assets. During the next four years, while he tried to find a buyer, Saviano loaned over three hundred thousand dollars to the corporation to keep it solvent. The corporation executed secured promissory notes in exchange for these loans from Saviano. Saviano merely seeks to be paid back these amounts prior to distributions to shareholders.

## **2. WESTPORT AMUSEMENTS, INC.**

In the early 1990's Saviano and the Praters knew each other from associations in Michigan.<sup>1</sup> Saviano is an investor. He purchases failing businesses and turns them around. He also starts new businesses.<sup>2</sup>

Harold Prater was a heating and cooling contractor in Michigan.<sup>3</sup> Mrs. Prater was a bookkeeper.<sup>4</sup> The Praters planned to retire to Washington in 1992. As part of this plan they wanted to purchase a motel to run.<sup>5</sup> Because Mr. Saviano was knowledgeable about real estate, they

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<sup>1</sup> VRP at 5.

<sup>2</sup> Id.

<sup>3</sup> VRP at 6.

<sup>4</sup> VRP at 90.

<sup>5</sup> VRP at 91.

asked him to travel to Washington to evaluate the motel's prospects as a business.<sup>6</sup>

While Saviano did not think the motel would be a good investment, he believed Westport could support an amusement center. After spending time researching this option Mr. Saviano and the Praters decided upon it.<sup>7</sup> Because the Praters could not finance the amusement park's construction on their own, they persuaded Saviano to join the venture.<sup>8</sup>

In 1993 Saviano and the Praters formed Westport Amusements, Inc. The corporation's purpose was to operate the Westport Amusement Park for profit. The corporation's shares were allocated to Mr. Saviano (fifty-five percent) and the Praters (each own twenty-two and one-half percent).<sup>9</sup>

The corporation's articles of incorporation provided:

...Any director [] may be party to, or may be pecuniarily interested in, any contracts or transactions of the corporation, provided that the fact that he or such firm is so interested shall be disclosed or shall have been known to the Board of Directors or a majority thereof....<sup>10</sup>

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<sup>6</sup> VRP at 91.

<sup>7</sup> VRP at 8 and 92.

<sup>8</sup> VRP at 8.

<sup>9</sup> CP 3-5, 14-16, 184 (Complaint at ¶¶1.2-2.3, Answer at ¶ 2).

<sup>10</sup> CP 6-9 (Exhibit 11, Articles of Incorporation, Article 11).

Mr. Saviano did not participate in the business's day-to-day operations. He visited occasionally.<sup>11</sup> The Praters' role was managing the amusement park's operations, including its finances.<sup>12</sup> They also provided some start-up and operations capital.<sup>13</sup> Additionally, for many years they did not take wages, deciding instead to reinvest profits by improving the facility.<sup>14</sup> They intended these forgone wages to be capital contributions – Mrs. Prater characterized them as “sweat equity.”<sup>15</sup>

The park operated for about ten years. All profits were re-invested in the business.<sup>16</sup> In 2002 the park was having a difficult time, and was not able to pay its bills. Unknown to Saviano, the corporation was deeply in debt.

### **3. OPERATIONS CEASE**

The Praters became unwilling to operate the park in 2002.<sup>17</sup> Mr. Prater could no longer physically handle the challenges, and Ms. Prater was employed elsewhere.

The Praters, while willing to “help out,” decided it was time to move on to other endeavors:

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<sup>11</sup> VRP 100.

<sup>12</sup> VRP 78.

<sup>13</sup> CP 184.

<sup>14</sup> VRP at 100.

<sup>15</sup> VRP 123.

<sup>16</sup> VRP at 121.

<sup>17</sup> CP 21-23, 185.

We both feel that it is time to make a change. The Fun Center is a good thing for the community. We are very encouraged that you will find the right person for the position. If you need us on a consultant, technical or accounting basis, we will be available and supportive. If you find someone that you want to start prior to October 31, 2002, don't hesitate to tell us. We would be glad to work with them if that is what you want.

All in all, we have enjoyed the experience, but it is time for Harold to enjoy some time of his own and for me to concentrate on the commitment that I have made to my employer. If there is anything that we can do to help in this transition, please don't hesitate to let us know.<sup>18</sup>

Operations came to a halt.<sup>19</sup> The corporation planned to sell the assets as soon as possible.<sup>20</sup> But the corporation continued to incur liabilities even though there were no earnings.<sup>21</sup>

#### **4. SAVIANO'S LOANS KEEP THE CORPORATION SOLVENT**

After the Praters resigned, Mr. Saviano learned for the first time, that the corporation was deeply in debt, owing over one-hundred thousand dollars to various creditors.<sup>22</sup> Even though the corporation had no income, it had considerable expenses. For example, the corporation had to pay:

- Lease payments to the Port of Grays Harbor
- Payments on secured loans to the corporation

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<sup>18</sup> CP 6-9 (Exhibit 1, p. 65).

<sup>19</sup> CP 185.

<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> VRP at 23.

- Insurance premiums
- Accounting fees
- Licensing and regulatory fees
- Taxes
- Utility bills
- Legal fees
- Marketing expenses (to sell the assets)
- Other miscellaneous expenses

The corporation leased its business location from the Port of Grays Harbor it had to make lease payments to avoid defaulting. To avoid defaulting it had to make payments on its commercial loan.<sup>23</sup> It had to pay taxes, insurance, legal fees and other ordinary expenses. Both the Praters and Saviano were contacted by creditors, as they were both personal guarantors of the obligations.<sup>24</sup> Dennis Saviano paid these creditors. The Praters stipulated that Saviano made these payments for the corporation.<sup>25</sup> Mrs. Prater told Mr. Saviano she would not put any more money into the corporation<sup>26</sup> – leaving Mr. Saviano to protect the corporation’s assets and both parties’ personal guarantees.<sup>27</sup>

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<sup>23</sup> VRP 44.

<sup>24</sup> VRP 44,

<sup>25</sup> VRP 28-28, CP 6-9(Exhibit 4).

<sup>26</sup> VRP at 110.

<sup>27</sup> VRP 121.

For the next few years, as Saviano tried to sell the corporation's assets, the Praters did not involve themselves in the corporation's operations, or pay the corporation's expenses.<sup>28</sup>

At the April 14, 2003 shareholders meeting the corporation's structure was changed to allow for only one director, and Mr. Saviano was elected director.<sup>29</sup> On April 5, 2004 Saviano, as the corporation's sole director, executed a Written Consent of Director without a Meeting that authorized the corporate borrowing from Saviano and ratified the previous loans.<sup>30</sup>

By corporate resolution, these payments were loans to the corporation.<sup>31</sup> Later, a secured promissory note for three hundred thousand dollars evidenced the loans.<sup>32</sup> Saviano filed UCC financing statements.<sup>33</sup> There is no dispute that Saviano paid over three hundred thousand dollars towards the corporation's debts from 2002-2006.<sup>34</sup> These amounts were stipulated to by the Praters.

After a long process of attempting to sell the assets, and several failed transactions, in 2006, the corporation negotiated a sale. The total

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<sup>28</sup> VRP at 36-37.

<sup>29</sup> VRP 40, CP 6-9 (Exhibit 14.).

<sup>30</sup> VRP 40-42, CP 6-9 (Exhibit 16).

<sup>31</sup> Id at ¶ 11.

<sup>32</sup> VRP 38, 42, CP 6-9 (Exhibit 17, 18).

<sup>33</sup> Id at ¶ 13.

<sup>34</sup> Id at ¶ 14 CP 6-9 (Exhibit. 4).

sale price was \$585,000.00. After paying other creditors at closing, the corporation is due to receive \$350,000.00 on a note in August 2007.<sup>35</sup>

**B. PROCEDURAL HISTORY**

Initially, the shareholders could not agree on terms to sell the corporate assets. As such, Saviano commenced this action to dissolve the corporation and asked the court to sell the corporate assets on the terms he had negotiated with the purchaser.

Once the action was filed, the Praters consented to the sale. The Praters also agreed the corporation should be dissolved. But Saviano sought to be reimbursed for the loans he made to the corporation. The Praters disputed his right to recover these sums. The parties both moved for summary judgment on this issue. The court denied both motions.

After a two-day bench trial, the court first opined that it would prefer to have the parties submit the case to the court for “binding arbitration.”<sup>36</sup> The parties having rejected that option, the court determined that Saviano acted as a “quasi-receiver” and held that he was entitled to be reimbursed for expenses made on the corporation’s behalf. The court calculated the amount owing to Saviano as \$179,108.00,<sup>37</sup> far less than the amounts actually paid. The court’s calculation excluded

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<sup>35</sup> VRP 49-50, CP 6-9 (Exhibit. 5-9).

<sup>36</sup> VRP (February 15, 2007) at 9.

<sup>37</sup> CP 187.

payments made in 2002 -- even though the parties stipulated that Saviano paid over three hundred thousand dollars from the time the Praters resigned.<sup>38</sup> Although in its initial comments before taking the case under advisement the court opined that a quasi-receiver would be entitled to interest at approximately four percent, and a fee for winding up the corporation,<sup>39</sup> there was no such award.<sup>40</sup>

The court issued a memorandum decision on March 9, 2007 and findings of fact and conclusions of law were entered on March 19, 2007. This appeal was timely filed on March 28, 2007.<sup>41</sup>

#### IV. ARGUMENT

##### A. STANDARD OF REVIEW

This court must determine if the trial court's challenged findings of fact were supported by substantial evidence in the record.<sup>42</sup> If so, the court must next decide whether those findings of fact support the trial court's conclusions of law.<sup>43</sup>

But simply because the trial court designates something as a “finding” does not make it so if it is in reality a conclusion of law. A

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<sup>38</sup> *McClendon v. Callahan*, 46 Wash.2d 733, 284 P.2d 323 (1955); *Hauser v. Arness*, 44 Wash.2d 358, 267 P.2d 691 (1954); 2 *Orland*, Wash.Prac., s 311, p. 338, n. 38 (1972).

<sup>39</sup> VRP (February 15, 2007) at 9.

<sup>40</sup> CP 169.

<sup>41</sup> CP 181.

<sup>42</sup> *Landmark Development, Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999).

<sup>43</sup> *Id* at 138.

conclusion of law mislabeled as a finding, will be treated as a conclusion.<sup>44</sup>

**B. OVERVIEW**

The trial court's decision rests on a faulty premise – that Saviano's payment of corporate expenses and issuing promissory notes to document those expenses was "self-dealing." Self-dealing only occurs when a fiduciary takes actions that benefit him personally to the detriment of the party to whom a duty is owed.

Here, Saviano's loans were not detrimental to the corporation. It is undisputed that without the loans the corporation would have defaulted on its obligations. The court's finding that Saviano's actions failed to preserve the parties' capital contributions is contrary to the evidence.

Without Saviano's actions the corporate assets would have been lost. The court determined that Saviano's subjective motives were personal, and because he had his best interests (keeping his credit clean) in mind in lending the corporation money while he tried to sell it, that his actions as the sole director of the corporation were invalid.

But the Washington Business Corporation Act, the law the court was required follow, does not invalidate corporate acts done under its

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<sup>44</sup> *Moulden & Sons, Inc. v. Osaka Landscaping & Nursery, Inc.*, 21 Wash.App. 194, 584 P.2d 968 (1978). See also *Leschi v. Highway Comm'n.*, 84 Wash.2d 271, 283, 525 P.2d 774, 783 (1974). (A finding of fact is an assertion that a phenomenon has happened or is or will be happening independent of or anterior to any assertion as to its legal effect.)

provisions for this reason. Indeed, corporate directors are not required to ignore their own personal interests in the success of a corporation while acting on its behalf so long as the personal interests are not detrimental to the corporation.

The trial court seems to have made the logical error that because Saviano's actions benefited him (and the Praters) personally – by protecting their personal guarantees on corporate debts – that these actions were detrimental to the corporation. There was no evidence that the loans were commercially unreasonable. And the articles of incorporation permit a director or shareholder to engage in a transaction with the corporation. Here, the loans were mutually beneficial to the corporation and its shareholders. The corporate debts were paid, and the shareholders personal guarantees were protected.

The trial court provides no statutory authority or other rationale for its determination that the promissory notes are not enforceable, and does not address the Washington statutes, and corporate documents that establish the propriety of the notes.

**C. SAVIANO COMPLIED WITH THE CORPORATION'S GOVERNING DOCUMENTS AND WASHINGTON LAW IN ISSUING THE NOTES**

It is undisputed that at after the shareholder meeting in 2003, Saviano controlled the corporation as its sole director.<sup>45</sup> RCW 23B.08.210 provides that actions may be taken by a corporation's directors without a meeting so long as all the directors consent and be evidenced by a signed document in the corporations records:

(1) Unless the articles of incorporation or bylaws provide otherwise, action required or permitted by this title to be taken at a board of directors' meeting may be taken without a meeting if the action is taken by all members of the board. The action must be evidenced by one or more written consents describing the action taken, signed by each director either before or after the action taken, and delivered to the corporation for inclusion in the minutes or filing with the corporate records....

...(3) A consent signed under this section has the effect of a meeting vote and may be described as such in any document.<sup>46</sup>

Even if meeting was held, Saviano was the majority shareholder and could have voted his shares to approve the transaction.

A corporation's board of directors has the authority to incur indebtedness on behalf of the corporation:

1) A corporation may on the terms and conditions and for the consideration determined by the board of directors:

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<sup>45</sup> CP 6-9 (Exhibit 14).

<sup>46</sup> RCW 23B.08.210.

...(b) Mortgage, pledge, dedicate to the repayment of indebtedness, whether with or without recourse, or otherwise encumber any or all of its property whether or not any of these actions are in the usual course of business.<sup>47</sup>

Following this statutory framework Saviano executed a Written Consent of the Director without a Meeting where he authorized the corporation to borrow money from him.<sup>48</sup>

He issued a promissory note, bearing interest at eight percent, with the corporation as borrower and him as creditor. Saviano had to borrow this money on a line of credit at eight percent interest. The total amount owing under the note was \$300,000.00. The note was a line of credit to be borrowed, repaid and reborrowed as necessary.<sup>49</sup>

This note superseded the first note that was issued (without the formalities required as listed above) and incorporated the amounts already borrowed. And there is no dispute (per the defendants' stipulation) that the amounts paid by Saviano were paid to the corporation's creditors.

As such, there is no dispute that Saviano was the sole director and had the authority incur indebtedness and to execute the note in April 2006. It follows that the promissory note is valid and enforceable, and had to be paid upon dissolution under RCW 23B.14.050 and RCW 23B.06.400.

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<sup>47</sup> RCW 23B.12.010.

<sup>48</sup> VRP at 40, CP 6-9 (Exhibit 16).

<sup>49</sup> VRP at 41-43, CP 6-9 (Exhibits 17, 18).

Neither the trial court nor the defendants cited any legal authority for the premise that the notes were unenforceable. The court ignored the statutory scheme. But a court may not construe a statute in a way that renders statutory language meaningless or superfluous.<sup>50</sup>

The trial court found, that because Saviano was self-dealing, the notes were unenforceable. Not only is this conclusion legally unsupportable, it is not based on any facts.

**D. SAVIANO'S ACTIONS WERE, AS A MATTER OF LAW, NOT SELF-DEALING.**

First, what was designated as a finding of fact, that Saviano was self-dealing, is a conclusion. That conclusion is not supported by any evidence.

Generally, self-dealing occurs when a person puts his interests before the corporation's. But if personal and corporate interests are the same, taking action that benefits both is not self-dealing. It is only self-dealing if the personal interest conflicts with the corporate interest and leads to a personal benefit to the corporation's detriment.

Second, because this circumstance often arises in the context of closely-held corporations, Westport Amusements, Inc.'s Articles of Incorporation, Article 10, creates a presumption against a determination

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<sup>50</sup> *Ballard Square Condominium Owners Ass'n v. Dynasty Const. Co.*, 158 Wash.2d 603, 610, 146 P.3d 914, 918 (2006).

that a transaction between a shareholder/director and the corporation is self-dealing.<sup>51</sup>

Here, the corporation's interests were the same as Saviano's and the Praters – keep the corporation solvent until a buyer could be found for its assets. Unfortunately, because the local economy was failing, it was not operating, was on leased property, with a two-hundred thousand dollar mortgage, financial statements showing several years of losses, it took longer than expected to sell the corporation – greatly increasing the sums Saviano paid to keep the corporation solvent, and diminishing the amount available for distributions to shareholders.

What other choice did Saviano have?

- He could have done as the Praters did and walk away. If he had done that the corporation would have been insolvent and its assets would have been subject to execution or liens from the creditors.
- He could have attempted to borrow more money on behalf of the corporation from a third-party creditor to keep it afloat. But because the business was not operating, there were no funds available to pay the loans.

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<sup>51</sup> See CP 6-9 (Exhibit 11).

“Self-dealing” connotes a breach of a duty to the corporation that benefited Saviano to the detriment of the corporation. But Saviano and the corporation’s interests were the same – to pay corporate creditors to maintain the corporation’s assets.

Directors and officers stand in a fiduciary relation to the corporation they serve and are not permitted to retain any personal profit or advantage gleaned “on the side.” *Leppaluoto v. Eggleston*, 57 Wash.2d 393, 402, 357 P.2d 725 (1960). The “business judgment” rule immunizes management from liability in a corporate transaction undertaken within the corporation’s power and management’s authority where a reasonable basis exists to indicate that the transaction was made in good faith. Such immunity from liability is absent where a corporate director or officer is shown to have acted in bad faith and with a corrupt motive. *Nursing Home Bldg. Corp. v. DeHart*, 13 Wash.App. 489, 498-99, 535 P.2d 137, *rev. denied*, 86 Wash.2d 1005 (1975).<sup>52</sup>

*Interlake Porsche & Audi, Inc., v. Bucholz*<sup>53</sup> addresses a corporate fiduciary’s self-dealing. In that case the facts were egregious. The majority shareholder managed the corporation’s business operations and made personal use of corporate funds. Here, defendants stipulated that Saviano’s expenditures were for the benefit of the corporation.

*Interlake Porsche* also holds that even when a breach of fiduciary duty is proven, resulting damages must be proven by the party asserting

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<sup>52</sup> *Interlake Porsche & Audi, Inc., v. Bucholz*, 45 Wash.App. 502, 508-509, 728 P.2d 597 (1986).

<sup>53</sup> *Id.*

the claim.<sup>54</sup> Here there was no evidence 1) that Saviano made expenditures for his own benefit; or 2) that the corporation was harmed by the loans he made to the corporation to pay creditors.

The only findings regarding “damage” resulting from Mr. Saviano’s actions were that his actions “failed to acknowledge and preserve for capital contribution purposes the investment of past labor by the Praters.” But this finding is not supported by any evidence. There is no evidence that the Praters’ contributions would have been preserved but-for Saviano’s loans.

The only evidence is that the corporation could not have paid its debts absent the loans from Saviano. The only evidence is that Saviano alone attempted to lease or sell the business from the time the Praters resigned. The only argument the Praters can make is that Saviano should have liquidated the corporation’s assets sooner. But this after-the-fact second-guessing is speculation. There was no evidence that a sale was possible before the one that closed. The only evidence is that Saviano engaged in diligent efforts to sell the assets.

This second-guessing is also contrary to the business judgment rule which immunizes management from liability in a corporate transaction undertaken within the corporation’s power and authority where a

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<sup>54</sup> *Id* at 510.

reasonable basis exists to indicate that the transaction was made in good faith. Such immunity is unavailable where a corporate officer acted in bad faith and with a corrupt motive.<sup>55</sup> There is no evidence of bad faith or corrupt motive.

Further, even if Saviano was self-dealing, the burden is not on Saviano to prove each action he took was proper. Rather the burden is on the other party to prove Saviano incurred a personal benefit:

Nevertheless, once a fiduciary's self-dealing or personal benefit in one transaction has been shown, the burden does not shift to the fiduciary to prove the fairness of all transactions complained of, regardless of whether any evidence has been presented that such transactions involved self-dealing or personal benefit.

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.

*Bellis v. Thal, supra* at 124. The duty of reimbursement is limited to those losses that were proximately caused by the fiduciary's misconduct. *Bellis v. Thal, supra*. Thus it was error to impose upon Bucholz the burden of proving the legitimate nature of all of the corporate expenditures during the given period, and Bucholz could be liable for only those expenditures of corporate funds that were shown to have been for his personal benefit. The trial court abused its discretion in holding otherwise. *Holland v. Boeing Co., supra*.<sup>56</sup>

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<sup>55</sup> *Id* at 509.

<sup>56</sup> *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wash.App. 502, 512-513, 728 P.2d 597, 605 (1986).

The Praters did not prove any damages.

**E. THE PRATERS ARGUMENTS THAT SAVIANO SHOULD NOT BE REIMBURSED LACK MERIT**

The Praters seek a windfall. If, when they abandoned the corporation, Saviano had not stepped in to pay the corporations debts and sell the assets there would be no assets to now distribute. Saviano only seeks to recover the monies he spent to keep the corporation solvent while it sold. Should the trial court's order be followed the Praters will receive back some of their capital contributions. But Saviano will receive no benefit from his capital contributions because he will not fully recover the monies he lent the corporation after the Praters abandoned it. The Praters, on the other hand, will receive a sizable portion of their investment.

For authority for their claims the Praters cited to *McCormick v. Cupp*<sup>57</sup> The Praters rely on this Missouri case<sup>58</sup> for the proposition that Saviano's claims as a creditor do not entitle him to collect on those debts prior to distributing assets. In that case the trial court found that:

- There were no corporate minutes or Board resolutions or promissory notes acknowledging or treating the advances as debts;

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<sup>57</sup> 106 S.W. 3d 563 (Mo.App. W.D. 2003).

<sup>58</sup> CP 18-2. Motion of Defendants Harold and Dawn Prater for Summary Judgment at 6, citing *McCormick v. Cupp*, 106 S.W. 3d 563 (Mo.App. W.D. 2003).

- The debts might be barred by the statute of limitations;
- The advances were denominated as debts for tax benefits purposes only; and
- The corporation never authorized the money to be treated as a debt.

Here, these factors are not present. In fact, the opposite is true.

- There *are* corporate resolutions authorizing the loans from Saviano to the corporation.
- There *are* secured promissory notes acknowledging the advances and treating them as debts.
- The loans in this case are all post 2002, and in writing. They are not barred by the statute of limitations.
- The advances were not only shown as debts for tax purposes.
- The corporation, through its sole director and president, authorized the loans.

Saviano, as the sole director, had the statutory authority to bind the corporation to these loans without shareholder approval under RCW 23B.12.010. The notes are enforceable and must be paid upon dissolution prior to distributions to shareholders.

For the proposition that the Praters are entitled to a distribution they have cited to RCW 23B.14.050, which governs how a corporations assets should be distributed on dissolution:

Subject to the limitations imposed by RCW 23B.06.400, distributing its remaining property among its shareholders according to their interests...<sup>59</sup>

But RCW 23B.06.400, then provides, in part:

...(2) No distribution may be made if, after giving it effect:

(a) The corporation would not be able to pay its liabilities as they become due in the usual course of business; or

(b) The corporation's total assets would be less than the sum of its total liabilities....

It is almost a truism that a dissolving corporation must pay its debts before it makes a distribution.<sup>60</sup> As such, Westport Amusements, Inc. must pay its creditors upon dissolution before the distribution. Because Saviano is the corporation's creditor, the note must be paid.

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<sup>59</sup> RCW 23B.14.050, as cited in Motion of Defendants Harold and Dawn Prater for Summary Judgment.

<sup>60</sup> See *In re Spokane Concrete Products, Inc.*, 126 Wash.2d 269, 892 P.2d 98 (1995), (A corporation has broad power to encumber its assets, so long as creditors of corporation are not prejudiced thereby.); *Doric Co. v. King County*, 57 Wash.2d 640, 358 P.2d 972 (1961); (The right of shareholders to share in the assets of a corporation in the process of dissolution comes after creditor claims are paid); *Cohen v. L. & G. Inv. Co.*, 186 Wash. 308, 57 P.2d 1042 (1936); (It is the well-established rule that, "upon dissolution, the property of a corporation passes to the stockholders, subject to corporate liabilities).

The Praters made no argument, and the court cited no reason, factually or legally, that the \$300,000.00 promissory note was not enforceable.

The Praters disputed Saviano's right to recover monies he paid on the corporation's behalf because, they claim, Saviano did not comply with necessary formalities to characterize the payments as loans. They put forth this argument despite the fact that when they were operating the corporation they frequently loaned the corporation money and paid themselves back, but never documented those loans with notes, corporate resolutions, or other affirmation of the loans by the corporation.<sup>61</sup>

When they resigned, the Praters even noted that the corporation owed them money for wages, and loans:

Since 1993, Harold & I have done our best to build & manage Westport Family Fun Center. We have deferred our wages of \$40,000.00 per year in an effort to promote growth and make ends meet. Besides our initial investment, as stockholders, we have "lived" Westport Family Fun Center for the past 10 years without any compensation. There are also several thousands of dollars that we have loaned for debts that we are personally paying back with interest until the company can reimburse us.<sup>62</sup>

But the corporation never authorized any loans from the Prater's.<sup>63</sup>

And by the time this action was commenced, the limitations period for

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<sup>61</sup> VRP 125-128, CP 6-9 (Exhibit 33).

<sup>62</sup> CP 6-9 (Exhibit 1 p. 65).

<sup>63</sup> VRP 125.

past wages had expired.<sup>64</sup> Now, the Praters correctly characterize their foregone wages as capital contributions. Indeed, the parties seem to agree that all the contributions to the corporation before the Praters resigned were capital contributions.

**F. THE TRIAL COURT'S DETERMINATION THAT SAVIANO WAS A "QUASI-RECEIVER" IS AN EQUITABLE REMEDY AND NOT AVAILABLE BECAUSE THERE IS AN ADEQUATE REMEDY AT LAW.**

In order to obtain equitable relief there must be a showing of inadequate remedy at law.<sup>65</sup> In *Corrigan* the plaintiff sought equitable relief against judicial officers. But the plaintiff (a litigant) had an adequate remedy at law because each of the judicial acts complained of were subject to review on appeal or by a petition for review. That is, there was a comprehensive legal scheme to adjudicate his claims.

Here, the court determined that it was equitable to treat Mr. Saviano as if he were a quasi-receiver and divide the corporate assets accordingly.

But the court, and defendants, had adequate remedies at law under the Washington Business Corporation Act, RCW Chapter 23B. This chapter provides a comprehensive scheme for the regulation and operation of corporations. The court was required to determine the rights and

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<sup>64</sup> See RCW 4.16.080, *Bennett v. Computer Taskgroup*, 112 Wash.App. 102, 47 P.3d 594 (2002).

<sup>65</sup> *Corrigan v. Tompkins*, 67 Wash.App. 475, 477, 836 P.2d 260, 261 (1992).

obligations of the corporation and its shareholders upon dissolution based on the rules established by the legislature. But the court failed to make any finding or conclusion under the Act's provisions. The court simply did what it thought was fair or equitable with no regard for the rules established by the legislature – rules that were relied upon by Saviano in making the loans.

Saviano followed those rules – and relied on those rules and that they would be applied – in taking the actions he did. The trial court cannot decide on its own to ignore that statutory authority and craft its own remedy. If the court affirms the trial court it will make it difficult for a corporation's directors to operate. If a court can (without stating any reason) ignore statutes' plain text, make a finding of "self-dealing" and then impose an equitable remedy, in spite of the statutory framework there will be no certainty in corporate operations.

**G. THE COURT ERRED IN CALCULATING THE AMOUNT OWING TO SAVIANO.**

The parties stipulated that Saviano's accounting of the amounts paid on behalf of the corporation, subsequent to the Praters' abandoning the corporation was correct. At Exhibit Four, page eight<sup>66</sup> is a chart showing the amounts paid by Saviano, including \$122,699.78 in 2002 (to

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<sup>66</sup> CP 6-9. (Exhibit 4).

pay the deferred payables owing when the Praters abandoned the corporation).

The court gave no rationale for disallowing these expenses, even though they were of the same character and nature as the amounts paid by Saviano subsequent to 2002 that the court did allow.

Saviano should be entitled to the full amount stipulated to by the parties.

#### **H. ATTORNEY'S FEES**

A prevailing party is entitled to fees on appeal if permitted by contract.<sup>67</sup>

The promissory note provided:

Borrower shall reimburse holder for all expenses, including reasonable attorney fees and legal expenses, that the holder pays or incurs in protecting and enforcing the rights and obligations to the holder under any provision of this note or any security document.<sup>68</sup>

If appellant prevails he should, therefore, under RAP 18.1, be entitled to his reasonable attorneys' fees on this appeal and on the proceedings in the trial court.

#### **V. CONCLUSION**

Saviano simply seeks to be reimbursed for the actual expenses he incurred in keeping the corporation solvent after the Praters abandoned it.

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<sup>67</sup> RAP 18.1; *Bayo v Davis*, 127 Wn. 2d 256, 264, 897 P.2d 1239 (1995); RCW 4.84.330.

<sup>68</sup> CP 6-9 (Exhibit 17).

The trial court's findings were not supported by substantial evidence. Its conclusions were not based on the facts and ignored Washington statutory and case law. The judgment should be modified so that Saviano can collect on the full amount owed on the promissory note, \$286,290.68 plus interest and attorney's fees.

DATED this 14<sup>th</sup> day of August 2007.

LAW OFFICE OF DAVID P.  
HORTON, INC. P.S.

A handwritten signature in black ink, appearing to read 'D. Horton', is written over a horizontal line.

David P. Horton, WSBA #27123  
Counsel for Appellant

COURT OF APPEALS  
DIVISION II  
07 AUG 15 PM 2:00  
STATE OF WASHINGTON  
BY JW  
DEPUTY

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

DENNIS SAVIANO,  
Appellant,

WASHINGTON STATE COURT OF  
APPEALS DIVISION II

v.

No. 36121-3-11

WESTPORT AMUSEMENTS, INC., an  
inactive Washington Corporation, HAROLD  
PRATER and DAWN PRATER, husband and  
wife, and the marital community composed  
thereof,

DECLARATION OF SERVICE

Respondent.

I hereby declare that on the 15<sup>th</sup> day of August 2007, and in the manner indicated  
below, I caused a copy of the Appellant's Opening Brief and a copy of this Declaration of  
Service, to be mailed to:

J. Michael Morgan  
West Hills Ofc PK Bldg 11  
1800 Cooper Point Rd. SW  
Olympia, WA 98502-1178

David D. Cullen  
West Hills Ofc PK Bldg 11  
1800 Cooper Point Rd. SW  
Olympia, WA 98502-1178

By US Mail

I declare under penalty of perjury under the laws of the State of Washington that the  
foregoing is true and correct.

Dated this 15<sup>th</sup> of August, 2007, at Silverdale, Washington.

Jannifer Rose  
Jannifer Rose

**ORIGINAL**