

NO. 36121-3-II.

WASHINGTON STATE COURT OF APPEALS  
DIVISION II

BY *sw*

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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APPELLANT'S REPLY BRIEF  
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**ORIGINAL**

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## **I. INTRODUCTION**

Respondents fail to address Saviano's core argument – that the court circumvented Saviano's authority to incur debt for the corporation as its sole director. Respondents fail to address or cite to a single authority in response to the fact that Saviano followed Washington's statutory prerequisites and complied with the corporation's governing documents when incurring debt on behalf of the corporation.

Respondents claim the court found that Saviano's actions diluted their shares – but there was no such finding. And, there is no evidence supporting this claim. Respondents allege that Saviano was unjustly enriched by requesting reimbursement for monies he lent to the corporation for payables while he was running the corporation's affairs. But the respondents admit they engaged in this practice when they were running the corporation's affairs. Finally, respondents claim that Saviano failed to argue he was entitled to the approximately \$120,000.00 in dispute. But Saviano explicitly claimed these funds through testimony and argument.

## **II. THE PRATERS MISAPPLY THE CASES THEY CITE AND CITE NO CONTROLLING AUTHORITY FOR THE COURT'S DECISION.**

Saviano takes no issue with the general principles stated in the cases and authority cited by respondents. But the conclusions they draw from those general principles are not supported by the facts or authority cited. They cite to 19 CJS Corporations, Section 556 for the

proposition that a corporation may perform corporate acts only in the manner allowed by statute or controlling law. But they do not rebut the facts, as identified in his opening brief, that Saviano complied with Washington’s Business Corporations Act. They fail to address the fact that the promissory note was executed with the authority of the corporation under this controlling law. They cite no authority allowing a court to invalidate a properly authorized and executed promissory note.

They state that Saviano “misses the point” by arguing that because Saviano’s actions benefited the corporation there was no “self-dealing.”<sup>1</sup> But this is not the point Saviano makes. The point is that self-dealing is not in itself actionable. In order to be actionable self-dealing must cause harm or damage. This is the holding in *Interlake Porsche & Audi, Inc. v. Bucholz*.<sup>2</sup> This is the point. Saviano cannot be liable for “self-dealing” if the “self-dealing” causes no harm.

The Praters then cite a litany of cases from other jurisdictions that all stand for the general proposition that a shareholder/director owes a fiduciary duty to the corporation and must not engage in actions that benefit the shareholder to the detriment of the corporation.<sup>3</sup> This is undisputed. But here the corporation was not harmed. It was helped. Because there is no harm these cases are irrelevant.

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<sup>1</sup> Reply Brief of Respondent Prater at 9.

<sup>2</sup> 45 Wn. App. 502, 728 P. 2d 597 (1987).

<sup>3</sup> Reply Brief of Respondent Prater at 9.

The Praters argue that the court correctly ignored Washington statutes governing corporate dissolution and instead considered Saviano a quasi receiver. For authority they cite to a Georgia case.<sup>4</sup> In that case a court refused to appoint a receiver when ownership of property was disputed. The case has no bearing on the issue here – the enforceability of a properly executed promissory note. And the Praters cite to no Washington authority for this principle. The statutory framework cited in Saviano’s opening brief is therefore controlling.

### **III. SAVIANO PRESERVED HIS ARGUMENT REGARDING THE DISPUTED \$122,699.78.**

The Praters claim that Saviano failed to preserve his argument that the trial court failed to consider the \$122,699.78 Saviano advanced to the corporation in late 2002, after the Praters abandoned the corporation. The court’s award to Saviano only included funds Saviano paid from 2003 forward. It did not include the dispute sum which paid by Saviano at the end of 2002 *after* the Praters resigned and Saviano was forced to step in and manage the corporation’s affairs. It was only then that he learned that there were over one hundred twenty thousand dollars in deferred payables.

The Praters’ argument that Saviano failed to preserve this argument is contradicted by testimony, argument of counsel and their

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<sup>4</sup> Id at 11.

own stipulation to the admissibility and veracity of Saviano's accounting.<sup>5</sup> Saviano testified, based on his accounting that:

- 1) After October, in 2002 he paid \$122,699.78 on behalf of the corporation because that was what was due when the Praters resigned.<sup>6</sup>
- 2) He was not aware that the corporation owed the \$122,699.78 to creditors when the Praters resigned.<sup>7</sup>
- 3) The amounts paid after the Praters resigned in October 2002 were intended to be loans so the corporation could be sold or leased.<sup>8</sup>
- 4) The amounts were unchallenged.<sup>9</sup>

Further, at the close of argument, the court asked Saviano's counsel what amounts were paid on behalf of the corporation. In response, counsel stated:

Exhibit 4, which was admitted and stipulated to, shows the amounts that were paid. ***And they include the \$122 from 2002.*** So the amount from 2002 forward was, with interest, over \$350,000. I think without interest it's just short of \$300,000.<sup>10</sup>

Praters' arguments that this issue was not raised or preserved have no merit.

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<sup>5</sup> VRP 28, CP 6-9(Exhibit 4).

<sup>6</sup> VRP 28.

<sup>7</sup> Id.

<sup>8</sup> VRP 38.

<sup>9</sup> VRP 31.

<sup>10</sup> February 15, 2007 - VRP at 2.

#### IV. THE DIVIDING LINE CHOSEN BY THE TRIAL COURT WAS NOT RATIONAL.

The trial court's decision effectively reimbursed Saviano for his loans from 2003 forward, but arbitrarily did not allow the \$122,000.00 from October 2002. It appears the court arbitrarily chose 2003 cut-off because the business operated until late 2002 when the Praters resigned.

The Praters argue that "even if [Saviano] had preserved this argument it is refuted by Saviano's representation to the Port of Grays Harbor County that '[a]ll the money we have put into the Fun Center was not for any payables.'"<sup>11</sup> But this argument ignores when the statement was made. The statement was made on April 28, 2002, six months *before* the Praters resigned and Saviano found out about the huge deferred payables. So while it was a correct statement that Saviano and the Praters' equity contributions on April 28, 2002 were roughly equivalent to their respective shares this statement does not address the situation in October 2002, when Saviano took over responsibility for the corporation's books. He then learned for the first time that the corporation was over one hundred and twenty thousand dollars in debt, and had to get the corporation solvent.<sup>12</sup>

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<sup>11</sup> Reply Brief of Respondents Prater at 7, *citing* Ex. 2, p. 49.

<sup>12</sup> VRP 28.

**V. THE TRIAL COURT DID NOT FIND THAT SAVIANO'S LOANS DILUTED THE PRATERS' EQUITY, AND IF IT DID, THAT FINDING WAS NOT SUPPORTED BY ANY EVIDENCE.**

**a. The court did not find that Saviano diluted equity.**

The Praters summarize their “self-dealing” argument by stating that “substantial evidence supports the Trial Court’s finding that the \$300,000.00 promissory note amounted to unenforceable [sic] as an illegal dilution of the Praters’ equity.”<sup>13</sup> But this finding is not contained in the court’s written findings or in its oral comments at the close of the case. There was no “finding” regarding dilution. The only finding was that the promissory note was a result of “self-dealing.”

There's no question in my mind Mr. Saviano was self-dealing and therefore that invades the issue of his notes and his acquiescence on behalf of the corporation of these notes and vitiates, in my opinion, the priority of those notes.<sup>14</sup>

So without making any findings regarding the actual effect of the “self-dealing” on the corporation, the court simply throws out the note – without any reference to statutory or other authority. Saviano had no need to address this issue in his opening brief<sup>15</sup> because it was not a

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<sup>13</sup> Reply Brief of Respondents Prater at 10.

<sup>14</sup> VRP, February 15, 2007 at 13.

<sup>15</sup> See Id at 8.

finding made by the court. But even if the court made this finding it is not supported by *any* evidence. It is contrary to the evidence.

**b. Saviano did not “dilute” the Praters’ equity.**

The Praters argue that by expecting to be reimbursed for monies he paid on behalf of the corporation to keep it solvent he diluted their equity. Once the Praters ceased the corporation’s operations the only source to pay payables was from the corporation’s equity, because the corporation was not earning any income. These payables would have to be made from some source, whether it was from a loan from a third party or from a shareholder. But who would loan money to a defunct corporation with a large debt load and no income?

The Praters are right – a director has an “obligation to refrain from conduct which would injure the corporation or its stockholders or deprive them of profit or advantage.”<sup>16</sup> How did lending money to the corporation (and expecting repayment) injure the corporation or its stockholders? How did it deprive them of profit or advantage? It was the only method of maintaining the corporation’s accounts while it was sold.

The Praters argue that Saviano had a “clear conflict of interest” but fail to identify how his loaning money to the corporation creates a conflict of interest. Should this court find that a director cannot loan money to a corporation, on commercially reasonable terms, without

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<sup>16</sup> Reply Brief of Respondents at 9.

creating a conflict of interest, it will make it very difficult for closely held corporations to operate. Indeed, this is why the corporate documents permit these transactions.

The Praters' argument in this regard is also disingenuous. They engaged in the same conduct as Saviano prior to their resignation. They did not, however, comply with the necessary formalities as Saviano did. When they operated the corporation they would make loans to the corporation to pay payables.<sup>17</sup> These loans were not reduced to promissory notes. They were not approved by a resolution or any act by the board of directors. The Praters would, without any note or corporate action, pay themselves back, with interest.<sup>18</sup>

## **VI. UNJUST ENRICHMENT**

The Praters claim that Saviano will be unjustly enriched if he is entitled to recover the monies he fronted to pay corporate debt. This argument, however, is a substantial reason for Saviano *to* recover the full amount owing under the promissory note. The elements of unjust enrichment, as stated by the Praters are:

- 1) A benefit conferred by one party on the other;
- 2) An appreciation or knowledge by the party who receives the benefit; and

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<sup>17</sup> VRP 125.

<sup>18</sup> Id at 125-126.

- 3) The acceptance or retention by the recipient of the benefit under such circumstances as make it inequitable for the defendant to retain the benefit.<sup>19</sup>

Applying these criteria to Saviano:

- 1) Saviano conferred a benefit by paying approximately \$300,000 to the corporation's creditors after the Praters abandoned the corporation.
- 2) The corporation acknowledged the payments by official corporate actions pursuant to Washington statute.
- 3) It would be inequitable for Saviano to not be able to recover the monies he fronted for the corporation.

There is nothing unjust about expecting to be paid back money advanced to the corporation to pay debts. The Praters engaged in the same practices, reimbursing themselves, with interest, when they loaned money to the corporation. Failing to pay Saviano back unjustly encircles the corporation to Saviano's detriment.

## VII. CONCLUSION

The error in the court's decision is evident in the flawed logic of respondents' arguments:

Saviano contended that "after really October of '02, I began making loans to the corporation. RP 87. However, the Court rejected this contention, and found that after 2002 Saviano undertook a course of action

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<sup>19</sup> Reply Brief of Respondents Prater at 13, citing *Dailie Communications, Ltd. V. Trend Bus. Sys., Inc.*, 61 Wn.App. 151, 159-60, 810 P.2d 12 (1991).

that involved self-dealing to “further enhance his ability to recover all of his future and past investments by executing promissory notes on behalf of the corporation...” Finding of Fact No. 8.<sup>20</sup>

This statement shows the flawed logic in at least three ways. First, the court found Saviano was “self-dealing” but ordered that he be reimbursed the principle amounts he paid on behalf of the corporation from January 1, 2003 forward. The only difference between what the court allowed, and what Saviano is seeking is that Saviano wants a reasonable interest rate return on these monies and to draw the line at October 2002 instead of the arbitrary January 1, 2003.

Second, Saviano did not enhance his ability to recover past investments any more than the Praters were enhanced. If there was \$350,000.00 in equity in the corporation on October 1, 2002 -- the parties were both entitled to their shares of that equity. But because the corporation had to borrow against that equity (because it was not earning income) both parties lost the ability to recover their investments proportionally to their shares. The note merely documented Saviano’s intention that the monies he fronted from the time the Praters resigned was not intended to be a capital contribution.

Finally, the court’s ruling effectively makes Saviano’s \$122,699.78 that he paid to the corporation’s creditors after the Praters resigned and operations ceased a capital contribution. This was not intended and is

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<sup>20</sup> Reply Brief of Respondents Prater at 4.

not supported by any evidence. Saviano should be entitled to full reimbursement, with interest.

DATED this 15<sup>th</sup> day of October 2007.

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



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Counsel for Appellant

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

DENNIS SAVIANO,  
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WASHINGTON STATE COURT OF  
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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 16<sup>th</sup> day of October 2007, and in the manner indicated below, I caused a copy of the Appellant's Reply Brief and a copy of this Declaration of Service, to be mailed to:

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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 16<sup>th</sup> of October, 2007, at Silverdale, Washington.

  
Jannifer Rose

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