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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

No. 49815-4-II

BY  DEPUTY

# THE COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON

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2<sup>ND</sup> HALF LLC,

APPELLANT

Vs.

HEATHER RANKOS and GEORGERANKOS and  
BARBARA WEBSTER,

RESPONDENTS,

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## APPELLANT'S OPENING BRIEF

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## **ASSIGNMENTS OF ERROR**

The Superior Court erred in determining as a matter of law that plaintiff was owed no duties directly by the defendants as elected members of the Board of the Condominium Association, and that only derivative actions could properly be maintained.

The Superior Court erred in summarily dismissing 2<sup>nd</sup> Half's claims because taking the evidence in a light most favorable to 2<sup>nd</sup> Half, the defendants breached a duty to reasonably collect dues owed by the Betournays when they refused to accept even the services of a lawyer to be paid by 2<sup>nd</sup> Half and sent no lawyer to the trial, thus precipitating a dismissal of the Association's claims for dues owed.

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

Does an elected member of the Board of a Condominium owe a direct duty to current unit owners to act reasonably to advance the interests of the Condominium Association?

If, after receiving a critical vote from one unit owner to secure election in a contested election, board members refuse to collect dues owed by the member supplying a critical vote, have the board members breached their duty to act reasonably to advance the Association's interest?

## **STATEMENT OF THE CASE**

### **STANDARD OF REVIEW**

This case calls upon the court to review a trial court's summary dismissal of the case. Appellate courts review a summary judgment order de novo, engaging in the same inquiry as the trial court. *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976); *Mahoney v. Shinpoch*, 107 Wn.2d 679, 683, 732 P.2d 510 (1987).

Summary judgment is designed to do away with unnecessary trials when there is no genuine issue of material fact. *LaPlante v. State*, 85 Wn.2d 154, 531 P.2d 299 (1975). The moving party faces a heavy burden in obtaining a summary judgment; the moving party must prove the absence of a genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Jacobson v. State*, 89 Wn. 2d 104, 569 P.2d 1152 (1977).

In ruling on a motion for summary judgment, the Court must consider all the material evidence and all inferences therefrom most favorably to the non-moving party and, when so considered, if reasonable persons might reach different conclusions, the motion should be denied. *Wood v. Seattle*, 57 Wn.2d 469, 358 P.2d 140 (1960); *Jacobson v. State*, supra.

#### **IMPORTANT FACTS**

This case is part of long-running disputes between various owners of condominium units at the North Oakes Condominium in North Tacoma. See also this court's files nos. 49128-1-II, and 47651- 7- II.

This particular case involves a dispute between 2<sup>nd</sup> Half LLC, which owns two units, and the board about whether the board of the condominium has been self-dealing and otherwise acting improperly. CP 1-11.

Jeff Graham is not a party to this lawsuit, but he is the manager of 2<sup>nd</sup> Half LLC, which is owned by his mother, Geraldine Ward. CP 308. At one point, Jeff Graham was the president of the condominium. CP 308. He was ousted as president in a disputed election. CP 309. This court,

however, has determined that he was properly ousted as president. See this court's file No. 47651- 7- II.

The defendants, Heather Rankos, George Rankos and Barbara Webster are individuals, all of whom own companies that own units at the condominium. These three currently comprise the Board of the condo and were successors to the board when Mr. Graham was president. 308-09.

In this lawsuit, 2<sup>nd</sup> Half, LLC asserts that after taking over as the board, the three defendants engaged in various acts of self-dealing and improper behavior, in part by dropping claims for dues against a unit owner named Betournay in exchange for the Betournay's vote to oust Mr. Graham. CP 1-11.

There are other claims, but partly for brevity and partly because 2<sup>nd</sup> Half believes this claim is the clearest and simplest claim, it bases this appeal on that claim. If the court reversed the summary judgment, obviously, additional claims could be made prior to the trial.

The trial court dismissed this case on the basis that no action is recognized at law by a condominium owner directly against the board and that only "derivative" actions could be brought. See TR 3/35/2016 at page 29, lines 19-25.

In a reconsideration, it was pointed out that the decision was squarely at odds with *Alexander v. Sanford*, 325 P.3d 341, 181 Wn.App. 135 (Wash.App. Div. 1 2014). CP 521-25.

The gravamen of the discussion at the reconsideration hearing was, naturally, the significance of *Alexander v. Sanford*, although mostly everyone pretty much conceded that the case vitiated the basis for the original summary judgment. There was some discussion of the core disputes, and in the end, the court decided:

I did review at some length *Alexander v. Sanford*. I think there may be standing, for lack of a better term, to assert some kind of a claim against Ms. Webster. I don't think there are any facts or more reasonable inference that shows she breached any duty individually owed to 2nd Half, LLC, an individual member of the condominium association.

See TR hearing held 4/39/2016 at 42.

Basically, because it seems that *Alexander v. Sanford* undermined the original basis for summary judgment, that there was a dismissal based on the court's conclusion that the underlying facts didn't support any claim.

At the time that decision was made, only Ms. Webster had sought a dismissal; the defendants Rankos did not join

in the motion brought by Ms. Webster. The court granted Ms. Webster's motion and dismissed her alone.

Because that decision did not resolve all of the claims of all of the parties, at the request of Ms. Webster, the trial court certified its partial summary judgment as final under CR 54(b). See this court's file No. 49128-1-II.

That certification was deemed improper and the case remanded. *Id.*

By the time that remand occurred, the original trial judge had retired and the case came before a different department.

Defendants Rankos filed a request for dismissal, and the trial court, in a perfunctory hearing, simply adopted the ruling of the trial court as to Ms. Webster, but fairly it really adopted not the decision on reconsideration, but rather the court's ruling that conflicts with *Alexander v. Sanford*. The court ruled:

MR. MILLS: Well, the conduct isn't different.

Judge Culpepper said -- and the basis for his decision was that there can be no direct action against a --

THE COURT: The individuals --

MR. MILLS: -- Board member, and that therefore this had to be brought as some kind of a derivative action

--

THE COURT: Correct.

MR. MILLS: -- and therefore he dismissed it on that basis.

THE COURT: All right. And how is --

MR. MILLS: And if the Court -- and if the Court wants to dismiss it on that basis today, that would be a decision which is consistent with Judge Culpepper's decision.

THE COURT: Thank you for that concession.

MR. MILLS: Yeah -- no, I mean, I think that's important for you to know if you want to make the same decision; it would be the same decision.

THE COURT: Okay.

MR. MILLS: My problem with that decision is that it is directly in conflict with the Andrews case which says there is in fact a direct action. Now the Court may disagree with that.

THE COURT: Yes, I do.

MR. MILLS: And that's okay. I get that. And if so, and if the Court wants to make the same decision as Judge Culpepper then we can draft that order that would end the case here and would send it to the Court of Appeals to determine whether or not we're correct.

THE COURT: Right. And of course on summary judgment, Court of Appeals is completely de novo --

See TR hearing 121/23/2016.

In short, the Rankos were dismissed based on a trial court determination that *Alexander v. Sanford* doesn't give a unit owner any direct cause of action against board misconduct. That position had really been abandoned by the

original department, but it's not clear the new department to which the case was assigned understood that when a final dismissal was entered.

In all events, as the court knows, a trial court decision may be affirmed on any basis that's apparent from the record and the law supports. *State v. Kelley*, 64 Wash.App. 755, 764, 828 P.2d 1106 (1992). So, ultimately, while it seems that the final dismissal entered in November of 2016 was pretty confusing, the question remains whether 2<sup>nd</sup> Half LLC has any cognizable claim against the defendants given the summary judgment standard, which requires the court to resolve all facts and inferences in favor of the 2<sup>nd</sup> Half LLC.

### **ADDITIONAL FACTS, APPLICABLE LAW and ARGUMENT**

***2<sup>nd</sup> Half LLC may maintain an action directly against the board members and need not couch its claims as “derivative” claims.***

It's not entirely clear whether any of the defendants continue to assert that there are no duties owed directly to 2<sup>nd</sup> Half by the board. Department 14 ruled on that basis apparently and invited an appeal to determine the correctness of that decision.

However, Ms. Webster's attorney didn't concede the issue on reconsideration.

The Rankos', in their motion for summary judgment asserted "2<sup>nd</sup> Half cannot demonstrate that the Rankos as individuals have a duty to 2<sup>nd</sup> Half, . . ." So, it's not clear that this is an issue abandoned by the Rankos, and as indicated when the claims against defendants Rankos were dismissed, the court clearly felt that *Alexander v. Sanford* did not apply.

However, we think that this issue has been decided at the appellate level and that the boards' duties are direct; violations give rise to a direct, not merely derivative, action. The *Alexander v. Sanford* court indicated:

In the alternative, Respondents contend that Homeowners' claims fail as a matter of law because the board members did not owe a duty to Homeowners. This is so, Respondents assert, because board members owe a duty only to the Association. Respondents further assert that in the event that the board members do owe a duty to unit owners, the duty does not apply to future purchasers. We disagree to the extent that the board members' duties do extend to current unit owners.

*Alexander v. Sanford*, 181 Wn.App. at 169.

***The board has a duty to, within reason, collect all dues owed by all unit owners.***

RCW 64.34.308 provides that “the board of directors shall act in all instances on behalf of the association.” It also provides that (for those elected by owners) board members must use “ordinary and reasonable care.”

The condominium obviously levies dues for a reason, which is to pay for the care and maintenance of common areas, and to meet the obligations of the condominium. Collection of dues is an important function of anyone acting “on behalf of the association.”

***Prospective board members have a right to promise anything in furtherance of an election campaign.***

One of 2<sup>nd</sup> Half’s core claims is that the defendants sold the Betournay’s on a deal by which the board, if supported by the Betournay’s vote, would release the Betournays from outstanding dues.

It should be crystal clear at the outset that 2<sup>nd</sup> Half does not assert any duties are owed to anyone by a person seeking election to the board of directors. A person can make any campaign promise that seems effective in trying to gain a seat on the board.

There can be no action against even an elected board member arising solely from having made campaign promises, even a promise to cancel or release dues owed by an owner at the vote.

***Elected board members violate a duty of care if, however, a campaign promise is fulfilled after election by actual release from the obligation to pay dues.***

2<sup>nd</sup> Half's claim here is that, after successfully ousting Mr. Graham, based in part on the Betournay's having delivered a vote against him, that the defendants paid off the Betournay's by simply refusing to take action to collect the dues owed. Specifically, the board declined to send any attorney to represent the board on the date of trial where a judgment for dues could be collected. CP 307-311.

Worse, they refused the assistance of counsel that would have been paid for by 2<sup>nd</sup> Half LLC. CP 311.

And, importantly, although it's not disputed that the defendants refused even the assistance of a free attorney, no explanation at all has ever been given, and no explanation has been provided for why the board would do nothing at the time of trial to collect the dues owed by the Betournays.

A reasonable juror is entitled to rely on the evidence, and sometimes on the lack of evidence. *See* comment to WPIC 5.01 “It is the general rule that failure to call a witness under a party's control who could testify to material facts justifies an inference that the witness would have testified adversely to such party. Our courts, however, have held that the general rule is of limited application. . . . A court or jury may draw such inference only when under all the circumstances of the case the failure to produce such witness or witnesses, unexplained, creates a suspicion that the failure to produce was a willful attempt to withhold competent testimony. *State v. Nelson*, *supra*; *State v. Baker*, *supra*; *Wright v. Safeway Stores*, *supra*.”

Here, of course, there might be explanations for why no effort was made to collect the dues owed by Betournays. It might be, for example, that the costs did not justify the likely amounts to be collected, although that seems unlikely since dues owed would be a lien on the unit.

As to liens, the Heather Rankos inexplicably signed off on a release of a recorded lien also. CP 310.

At a summary judgment, all inferences must be taken in a light most favorable to the non-moving party – here, that's 2<sup>nd</sup> Half LLC. A reasonable juror could conclude that,

after being elected, the Betournays were given a pay-off for their vote to oust Jeff Graham, and if so, that would be a violation of an elected board member's duty to act in the interest of the Association.

### **CONCLUSION**

The trial court erred in concluding that dismissal was warranted because no duties were owed by any board member directly to 2<sup>nd</sup> Half, LLC which owns two of the units. The Alexander v. Sanford case resolves this against the defendants.

The evidence shows that, after casting the Betournay's critical vote to oust Jeff Graham and elect the defendants to the Board of the Association, that the defendants simply dropped the case against the Betournays for collection of dues, refusing even the services of a lawyer to be paid for by 2<sup>nd</sup> Half, LLC.

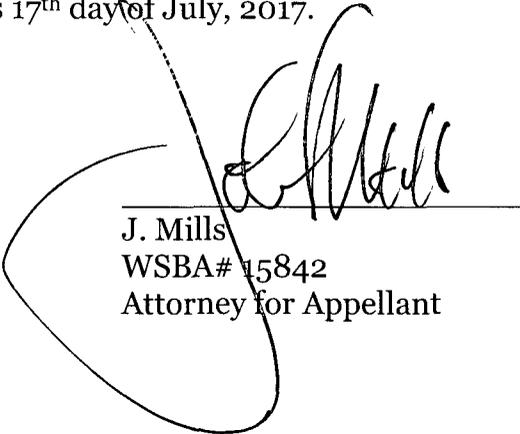
Without any explanation for why that made sense, a reasonable jury could conclude that release from dues was merely a pay-off for the crucial vote.

Although a prospective board member is entitled to make any campaign promise no matter how far-fetched or

illegal, once elected, if the member acts contrary to the Association's interest in fulfilling that promise, then liability attaches.

Accordingly, the trial court erred by summarily dismissing this case and the decision should be reversed.

DATED this 17<sup>th</sup> day of July, 2017.



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STATE OF WASHINGTON

BY \_\_\_\_\_  
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**WASHINGTON STATE COURT OF APPEALS**  
**Division Two**

2<sup>nd</sup> HALF LLC,  
Appellants,

Vs.

HEATHER RANKOS, ET AL,  
Respondents.

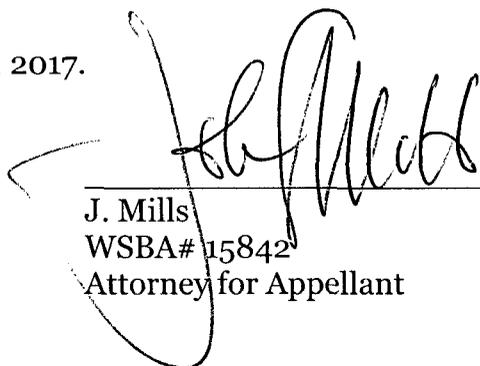
No. 49815-4-II

DECLARATION OF SERVICE of  
APPELLANT'S OPENING BRIEF

The undersigned declares under penalty of perjury that APPELLANT'S OPENING BRIEF and this Declaration of Service were served on all parties as follows:

1. Russell Knight, by email to Russell Knight at [knight@smithalling.com](mailto:knight@smithalling.com) and email is our customary means of communication;
2. Elizabeth Powell, by email to [powelllaw@comcast.net](mailto:powelllaw@comcast.net), and email is our customary means of communication.
3. Shellie McGaughey, (recently appeared) by email at [shellie@mcbdlaw.com](mailto:shellie@mcbdlaw.com) and also by placing a copy of the brief and this document with ABC messenger for delivery to Ms. McGaughey at her business address: 3131 Western Avenue, Suite 410, Seattle, WA 98121.

DATED this 17<sup>th</sup> day of July, 2017.

  
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DECLARATION OF SERVICE OF  
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