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Court of Appeals No. 52945-9-II

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

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ADAM ROSEN, an individual; DAVID ROSEN, an individual; and  
MATTHEW ROSEN, an individual; individually and derivatively on  
behalf of ROSEN SUPPLY COMPANY, INC.,  
a Washington Corporation,

Appellants,

v.

HARVEY ROSEN, an individual; and DIANNE ARENSBERG,  
an individual,

-and-

ROSEN SUPPLY COMPANY, INC., a Washington corporation,

Nominal Defendant,

Respondents.

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**APPELLANTS' REPLY BRIEF**

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## I. INTRODUCTION

Under Washington corporate law, shareholders vote on a per share basis “unless the articles of incorporation provide otherwise.” RCW 23B.07.210(1). Here, RSC’s Articles “provide otherwise,” insofar as they define voting on a per shareholder basis. *See* CP 70, 192. As a result, Defendants’ purported changes in December 2017 to RSC’s board of directors and Bylaws were ineffective as a matter of law.<sup>1</sup> On that basis alone this Court should reverse.

Defendants attempt to obscure the simplicity of the parties’ dispute by disregarding the impact of their own admissions, citing inapplicable interpretive standards, and repeatedly attacking “straw men”— by, for example, mischaracterizing Plaintiffs’ argument as a demand that this Court ignore the “provide otherwise” standard. In fact, Plaintiffs have repeatedly acknowledged that standard, and shown why it is met here. If Defendants had confidence that the Articles do not “provide otherwise,” there would be no need for them to engage in obfuscation.

The statutory default of “per share” voting is simply a gap-filler that can be accepted or modified in the articles of incorporation. Contrary to Defendants’ position, a “clear and unmistakable intent” to reject per

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<sup>1</sup> Unless otherwise specified, the term “Bylaws” refers to RSC’s original bylaws, and not to those enacted over Plaintiffs’ objection in December 2017.

share voting is not necessary to depart from the statutory default. Resp. Br. at 24–25, 29. For this reason, Plaintiffs did not bear a “heavy burden” to show such a departure. *Id.* at 25. Despite Defendants’ repeated incantation of elevated standards, Plaintiffs merely had to show that the articles “provide otherwise” to defeat Defendants’ motion for summary judgment.

Not a single case cited by Defendants stands for the proposition that this Court may disregard the plain language of the Articles, which by their terms provide for per shareholder voting. Nor do any of Defendants’ cited cases (including *State ex rel. Mitchell v. Horan*, 22 Wash. 197, 60 P. 135 (1900)) hold that the language in Article VIII § 4 of the Articles is insufficient to “provide otherwise” within the meaning of RCW 23B.07.210(1). Defendants likewise fail to point this Court to a single piece of evidence showing that in the decades-long history of RSC, the shareholders ever voted on a per share basis before December 2017. In fact, none exists. For these reasons, Plaintiffs respectfully request that the Court reverse the declaratory judgment entered below and remand with directions to enter summary judgment in Plaintiffs’ favor.

## II. ARGUMENT

### A. **The Trial Court’s Grant of Summary Judgment in Defendants’ Favor Erroneously Ignored Defendants’ Admissions, Misinterpreted the Articles, and Viewed Facts in the Light Most Favorable to Defendants, Not Plaintiffs.**

RSC’s founders elected to define shareholder voting on a per shareholder basis consistent with RCW 23B.07.210(1). Defendants’ argument to the contrary is fueled by their desire to “take advantage of the market” and sell RSC or its assets to the highest bidder regardless of the consequences. CP 59. To avoid their obligations, they have manufactured a variety of different arguments about why the plain language of the Articles does not require per capita voting. Each fails.

#### 1. **Defendants’ admissions show that voting is on a per capita basis.**

Viewing Defendants’ admissions about the 1989 SPA in the light most favorable to Plaintiffs, the trial court should have granted summary judgment in Plaintiffs’ favor, or least ordered a trial on the merits. When asked to explain his refusal to abide by the terms of the 1989 SPA, Harvey testified that “[i]t’s pretty hard to live under an agreement that was done 40 years ago.” CP 120 (162:8–163:3). He did not testify that the 1989 SPA somehow allows Defendants to sell the company without Plaintiffs’ consent—instead, he simply declined to honor the 1989 SPA because it is old. Dianne testified similarly, admitting that it no longer matters to her

“whether the company stays in the Rosen family” because “I think [Harvey and I] have to take advantage of the market.” CP 59 (117:12–21).

In other words, both Defendants have admitted that although the 1989 SPA plainly requires them to sell their stock to RSC’s other shareholders pursuant to the “Fred Axe” formula, they are unwilling to do so because they would get less money. And because the 1989 SPA cannot be modified except by unanimous shareholder consent, Defendants recognized that the only way for them to sell RSC over Plaintiffs’ objection was to seize control of the company, reconstitute the board of directors, and revise the Bylaws. Accordingly, in December 2017 Defendants alleged for the first time that shareholders vote on a per share basis and not per shareholder. That is also why Defendants tried in December 2017 to insert a provision into the Bylaws providing for per share voting—thereby conceding that no such rule previously existed. Evidence of that attempted revision should have prompted the trial court to infer that per shareholder voting was the rule. *See State ex rel. Starkey v. Alaska Airlines, Inc.*, 68 Wn.2d 337, 345, 413 P.2d 363, 367 (1966) (drawing negative inference against defendant in light of a bylaw amendment). At a minimum a jury should weigh such evidence.

Defendants try mightily to avoid the impact of Harvey’s testimony that “[i]t’s pretty hard to live under” the 1989 SPA. They argue that “while

the 1989 SPA prohibits the sale of Rosen Supply stock to third parties, ‘[n]othing contained’ in the 1989 SPA limits Rosen Supply’s right to sell ‘substantially all of its assets’ to a third party.” Resp. Br. at 48 (quoting CP 81). But that makes no sense. If Defendants could sell the company without Plaintiffs’ consent, the restrictions in the 1989 SPA would be pointless. More specifically, the 1989 SPA does *not* say that owners must transfer their stock only to Rosen family members at a price determined by a specific formula (Fred Axe) unless they own more than 50% of the company’s outstanding shares. To the contrary, it applies to all RSC stockholders, and thereby honors the intent of Max and Sara Rosen that the company would—in *Harvey*’s words—“remain[] a company owned by [the] Rosens.” CP 121 (166:21–25). None of the cases cited by Defendants present admissions comparable to those here.

The trial court disregarded Harvey’s admissions, which alone overcome Defendants’ motion for summary judgment. Indeed, if Defendants actually believed in December 2017 what their lawyers have argued in this lawsuit—i.e., that Defendants have always controlled RSC through per share voting—then Defendants would long ago have sold RSC to the highest bidder. But they did not. Instead, they offered to sell their stock to the other stockholders in *violation* of the 1989 SPA, by ignoring the Fred Axe method, ignoring the contractually defined payment

schedule, and demanding all cash upon closing. CP 235–46, 462. Then, when Plaintiffs did not immediately accept that improper “offer,” Defendants tried to change the voting rules.<sup>2</sup>

Defendants continue to pretend that Section 16 of the 1989 SPA somehow licenses Defendants to do whatever they wish with RSC. That is wrong. Under Washington corporate law, the sale of “a corporation’s property and assets” requires approval by the Board *and* RSC’s shareholders. RCW 23B.12.020(1), (5). And because the Bylaws specifically prevent a sale of RSC stock to any third party unless *all* of the existing RSC shareholders decline to exercise rights of first refusal first, such approval must be unanimous. CP 197–98 (Art. XI §§ a, d). Section 16 does not change that, and merely confirms the company may take certain actions, including a sale of its assets, so long as such actions are consistent with Washington law. *See* App. Op. Br. § IV(B)(2)(b).

In light of Defendants’ admissions and course of conduct, the trial court should have drawn all reasonable inferences in Plaintiffs’ favor, as is required on summary judgment. *See, e.g., Margoles v. Hubbart*, 111 Wn.2d 195, 211, 760 P.2d 324 (1988) (on summary judgment, “[t]he evidence of the non-movant is to be believed, and all justifiable inferences

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<sup>2</sup> Notably, Defendants describe their offer without making any mention of the fact that it violated the terms of the 1989 SPA.

are to be drawn in his favor”) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)). Instead, the court disregarded evidence that Defendants’ theory about per shareholder voting was simply an ad-hoc attempt to justify a power-grab, in derogation of RSC’s governing rules and long history as a family business.

**2. The plain language of Article VIII § 4 “provides otherwise,” and does not conflict with any other Article.**

The Articles provide that “[a]ny contract, transaction, or act of the corporation or of the directors or of any officers of the corporation which shall be ratified by a majority or a quorum of the stockholders . . . shall . . . be as valid and as binding as though ratified by every stockholder of the corporation.” CP 70. The significance of that provision is obvious: if a “contract, transaction, or act of the corporation” is *not* “ratified by a majority or a quorum of the stockholders” then it is *not* “valid” or “as binding as though ratified by every stockholder of the corporation.” Put differently, to be “valid” and “binding,” a “contract, transaction, or act of the corporation” must be “ratified by a majority or a quorum of the stockholders.” Equally obvious is that “stockholders” are individuals—not shares. Likewise, a “quorum” consists of individuals—not shares. And unlike the situation presented in *Horan*, the case Defendants claim is dispositive, RSC’s Articles are not a statutory scheme that contains

conflicting references to shareholder voting that this Court must somehow reconcile. To the contrary, they are clear and internally consistent. This Court need look no further than Article VIII § 4 to reverse the trial court.

The language used in Article VIII § 4—“majority or quorum of the *stockholders*” (emphasis added)—is not a “mere implication or inference,” as Defendants claim. Resp. Br. at 24. Nor is it ambiguous or otherwise unclear, as Defendants suggest, when read in context.

Defendants claim Article II § 3(C) references voting on a per share basis, and thus creates ambiguity when interpreted in conjunction with Article VIII § 4. That is wrong. Article II § 3(C) limits RSC’s ability to finance the redemption of its own stock. In so doing, it prohibits RSC itself from voting “either directly or indirectly, *on* any shares of its own stock which it may hold” (emphasis added). Voting “on” something means voting “about” something (e.g., voting “on” a referendum). Article II § 3(C) prohibits the corporation *itself* from voting “on” the disposition of its own shares. That has nothing to do with how shareholder votes are tallied.

Defendants’ argument regarding a statutory “presumption” of per share voting might be persuasive if there were no language in the Articles specifying how RSC’s shareholders vote, but that is not the case.<sup>3</sup> Indeed,

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<sup>3</sup> Even if the language were ambiguous (it is not), the presumption would only apply if there was no other extrinsic evidence confirming the per shareholder

RCW 23B.07.210(1) merely provides a gap-filler in case articles of incorporation do not address shareholder voting at all. Here, they do. Under Defendants' own logic, the asserted presumption does not apply.

**a. RCW 23B.07.210(1) does not require Plaintiffs to use any magic language to “provide otherwise.”**

Defendants argue that Article VIII § 4 is insufficient to “provide otherwise” with respect to shareholder voting. But nothing in Washington law required RSC’s founders to use any particular “magic” language in the Articles to provide for per shareholder voting.

Nor was there some special, elevated burden beyond the statute itself that Plaintiffs had to satisfy. Contrary to Defendants’ argument, *Reece v. Good Samaritan Hospital* does **not** suggest that overcoming a statutory presumption always involves satisfying a “heavy burden.” 90 Wn. App. 574, 579, 953 P.2d 117 (1998). *Reece* referred only to the “heavy burden” borne by a “party claiming *federal preemption*” under the Supremacy Clause. *Id.* at 579 (emphasis added). Neither preemption nor any other bedrock principles of constitutional law are at issue here.

Defendants similarly cite to family law cases, which they claim required Plaintiffs to demonstrate a “clear manifestation of intent” for RSC to provide for per shareholder voting. Resp. Br. at 24–25 (citing

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voting regime. Here, however, ample extrinsic evidence supports Plaintiffs’ position. *See infra* § II.A.3; App. Op. Br. at § IV.B.2.

cases). But those cases do not involve a statute like the one at issue here, which itself defines the standard by which the existence of an alternative voting mechanism should be assessed (i.e., by determining simply whether the articles of incorporation “provide otherwise”). Further, only one of those family law cases involved summary judgment. *In re Sagner*, 159 Wn. App. 741, 247 P.3d 444 (2011). The others were post-dissolution matters and cases in which the court found no clear expression of intent to overcome the statutory presumption that spousal maintenance terminates upon remarriage “unless the decree contains ‘specific or manifestly clear and unmistakable’ language indicating that the maintenance is to survive these events.” *In re Marriage of Allen*, 78 Wn. App. 672, 676, 898 P.2d 1390 (1995); *In re Marriage of Rufener*, 52 Wn. App. 788, 791, 764 P.2d 655 (1988). Here, Plaintiffs are under no such burden. They must simply show that the Articles “provide otherwise,” and have done so.

**b. The plain language of the Articles specifying voting by stockholder displaces any presumption of “one share, one vote”.**

Defendants also argue that the “Articles do not contain the sort of language that the courts have recognized to be necessary to express a clear intent.” Resp. Br. at 26. Defendants erroneously rely on holdings finding language *sufficient* to establish per-shareholder voting as enunciating a standard of language that is *necessary* to provide for such voting. To the

contrary, these foreign authorities—*Sagusa*, *Groves*, and *Deskins*—merely furnish examples of sufficient language. None of them proclaim a threshold standard. Resp. Br. at 27–29.

*Sagusa* held that the per capita voting provisions were valid. *Sagusa, Inc. v. Magellan Petroleum Corp.*, Civ. A. No. 12, 977, 1993 WL 512487, at \*3 (Del. Ch. Dec. 1, 1993). *Sagusa* did not suggest any particular language is required to provide for per capita voting. Like *Sagusa*, *Groves* held that specific language was sufficient, but did not address what is necessary to establish per shareholder voting. *Groves v. Rosemound Improvement Asso’c, Inc.*, 413 So.2d 925 (La. Ct. App. 1982). And *Deskins* completely undermines Defendants’ argument. *Deskins v. Lawrence Cnty. Fair & Dev. Corp.*, 321 S.W.2d 408 (Ky. Ct. App. 1959). In *Deskins*, the Kentucky Court of Appeals held that a provision in the articles providing that no person shall have more than four votes, regardless of the number of shares they owned, applied to the plaintiffs, who at the time owned approximately 60% of the company’s outstanding stock. *Deskins* thus confirms that shareholders are bound by a provision providing for per shareholder voting regardless of the consequences.

Defendants protest that per shareholder voting would “disenfranchise” them or “lead to inequitable and anomalous results.” But it was neither inequitable nor anomalous for RSC’s founders to intend that

each shareholder—i.e. family member—in a small family business would have an equal say in the operation of the company. Under this regime, Harvey, Dianne, and Devin would still have three of the six votes and are therefore not “disenfranchised.”

Defendants cite *Taylor* in support of their argument that per shareholder voting would be inequitable, but that case is readily distinguishable. 200 S.W.3d 387, 396 (2004). In *Taylor*, the Supreme Court of Arkansas upheld the lower court’s finding that voting was per share where the bylaws expressly stated that “[e]ach share of common stock shall have one (1) vote.” *Id.* at 395.<sup>4</sup> In dicta, the *Taylor* court noted that finding otherwise could lead to an “absurd result.” *Id.* at 396. Likewise, the cases Defendants cite about disenfranchising shareholders are inapposite (Resp. Br. at 50–51) because here there is no ambiguity about whether the Articles provide for per shareholder voting. They do.

While the original RSC shareholders could have used language similar to that in *Sagusa*, *Groves*, and *Deskens*, Defendants have not cited a single case—much less a binding Washington case—requiring them to do so. Even if the language in the Articles were ambiguous, extrinsic evidence should have prompted the trial court to order a trial.

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<sup>4</sup> Here, of course, the Bylaws are consistent with the Articles on the issue of shareholder voting. *See infra* § II.A.3.a.

**c. “Shareholder” does not always mean “share.”**

Defendants devote significant attention to the argument that “shareholder” or “stockholder” means “share” or “shareholder in interest.” But the authorities Defendants cite conclude that “shareholder” means “share” only when other language showed the drafter intended for “shareholder” to mean “share.” Here, no such evidence exists.

For example, in *Horan*, the operative statute provided that “two-thirds of the stockholders” of a corporation could vote to remove a trustee. *Horan*, 22 Wash. at 200. The Court only concluded that the legislature had contemplated two-thirds of the actual shares held because the statutory scheme explicitly referenced voting by share. *Id.* at 200–01. Thus the Court found itself in the familiar position of having to reconcile an internally inconsistent statute. Here, the Articles contain no such internal conflict, and no such harmonizing is needed.

Defendants’ reliance on *Fredericks v. Pennsylvania Canal Co.*, 2 A. 48, 55 (Pa. 1885), does not alter this conclusion. There, the court considered whether a company had abandoned its canal under a statute that enabled a company to abandon its canal line for public use provided “at least two-thirds of the stockholders” consented. *Id.* While observing that “the approval and consent of any number of the stockholders who own two-thirds of the whole stock of the company is within the meaning

and spirit of the act,” the court never held that such would in fact meet the strictures of the statute. *Id.* Instead, the court held the requirement was met regardless because in the years after the Pennsylvania Railroad Company (which held more than two-thirds of the stock) assented in writing to abandonment, *all* the remaining stockholders also approved. *Id.* at 56 (“[N]o stockholder has ever questioned the regularity of the proceedings or the validity of the abandonment. It may safely be presumed that all of them . . . have approved and consented thereto.”).

While a New Jersey court concluded that bylaws requiring a “majority of stockholders” meant majority in interest, it did so only after determining that that was the only plausible interpretation when looking at the entirety of the bylaws: “[A] majority in interest of the stockholders . . . is the *only* construction which will allow *all* of the provisions of the bylaws to become effective.” *Weinburgh v. Union Street-Ry. Advertising Co.*, 37 A. 1026, 1029 (N.J. Ch. 1897) (emphasis added). That case does not apply here, where there is no contention that an interpretation that “shareholder” means an individual would render other provisions of RSC’s Articles useless or ineffective.

For similar reasons, it is simply not true that the “overwhelming weight of authority has validated” that “majority of the stockholders” means majority in interest” as Defendants contend. Resp. Br. at 32.

Although the Fletcher Encyclopedia of the Law of Corporations provides that a majority of shareholders can mean a majority in interest (5 Fletcher on Corporations § 2020), the cases it cites for that proposition either lack analysis (*Bank of Los Banos v. Jordan*, 167 Cal. 327, 328, 139 P. 691 (1914)) or make clear that whether it means a majority in interest is a nuanced inquiry and there is no blanket rule. *See, e.g., Seward v. Am. Hardware Co.*, 161 Va. 610, 636, 171 S.E. 650 (1933); *Weinburgh*, 37 A. at 1029. Here, by contrast, a plain reading of the Articles shows that the drafters' intent was to provide for per share voting. Moreover, if "shareholder" means "share" or "shareholder in interest" in Washington, our Legislature would not allow per shareholder voting to be implemented by simply "providing otherwise."

**3. All extrinsic evidence supports per capita voting.**

Because the plain language of the Articles is clear that voting is per shareholder, there is no need to look to extrinsic evidence. Even if resort to extrinsic evidence were appropriate, all of it supports Plaintiffs.

**a. Because both the Bylaws and Articles provided for per shareholder voting, in 2017 Defendants attempted to add a provision to the Bylaws changing the rules.**

RSC's Bylaws explicitly refer to a "majority vote of shareholders present." CP 192 (Art. III § 2). Defendants argue on the one hand that

because the Bylaw provision is “not materially different” from Article VIII § 4, it requires voting on a per share basis (Resp. Br. at 40); and on the other hand that the Bylaws cannot “establish a voting regime that ‘conflicts with its articles,’” suggesting that that the Bylaws *are* materially different from the Articles. *Id.* at 41. Because both documents reference per shareholder voting, and there is no conflict between the two, Defendants’ arguments fail.

The Articles provide for voting per shareholder, and the Bylaws confirm that was the founders’ intent. Defendants ask this Court to contort the plain meaning of the Articles and then ignore language in the Bylaws—which *also* refer to voting by shareholder—as somehow “inconsistent” with that contorted reading.<sup>5</sup> The correct interpretation gives the Articles their plain, ordinary meaning, a meaning that is supported by a parallel reference in the Bylaws to voting by shareholder.

The Bylaws are consistent with the per shareholder voting rule in the Articles. The understanding that both documents provided for per shareholder voting further explains Defendants’ own effort to amend RSC’s Bylaws to include a “per share” voting provision. Resp. Br. at 41–

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<sup>5</sup> Defendants go even further than this in arguing that the Bylaws—which refer to voting “by a majority vote of shareholders *present*”—actually refer to “a majority vote of shares.” CP 192 (emphasis added). The idea that “shares” can be “present” at a meeting of the board of directors, however, fails as a matter of basic logic. People can be present. Shares cannot.

42. This attempted amendment amounts to a dispositive admission: Defendants attempted to amend the Bylaws to provide for “per share” voting because neither they nor the Articles had done so.

Defendants attempt to downplay the significance of their amendment by claiming it was merely a “responsible act of corporate governance.” *Id.* at 42. That post-hoc justification rings hollow. The timing was no coincidence, and when viewed in the light most favorable to Plaintiffs should have led the trial court to grant Plaintiffs’ motion for summary judgment or, at a minimum, to allow the case to proceed to trial.

**b. The 1989 Stock Purchase Agreement supports per shareholder voting.**

Although Defendants suggest otherwise, the 1989 SPA provides for only one valuation formula: “The stock . . . *shall be* valued . . . in accordance with the method of valuation set forth in the [Fred Axe letter], a copy of which is attached to this Stock Purchase Agreement and by this reference incorporated herein.” CP 79 (¶ 7) (emphasis added). One narrow exception to that valuation method exists if the stockholders agree “by unanimous consent” to use a different valuation. CP 80 (¶ 7). Although it is true that the shareholders unanimously agreed on a different valuation

for the buyout of Aaron's shares in 2012, not even Harvey claims that the vote was on a per share as opposed to per shareholder basis. CP 328.<sup>6</sup>

The 1989 SPA supports Plaintiffs' position by referring to voting by "stockholder." CP 81 (p. 5 § 12). Section 16, which allows the corporation to sell corporate assets, does not change that. CP 81. The shareholders can certainly exercise the rights identified in Section 16, but they must do so consistent with the voting regime set forth in the Articles. In other words, there can be an asset sale as long as a majority of the shareholders in number vote to approve one. *Id.* Section 16 is entirely consistent with preserving RSC as a family business because it allows the majority of all of the shareholders to sell corporate assets while preventing a minority of shareholders from selling the family business out from under the others. Defendants' argument that Section 16 provides an unfettered right for majority shareholders to sell corporate assets fails, and their citations to *Willard*, *Checani*, and *Hill* are inapposite because Plaintiffs do not claim that Harvey and Dianne should be disqualified from voting or restrained from exercising their rights. Resp. Br. at 49–50.

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<sup>6</sup> In paragraph 24 of Harvey's declaration he testified that the shareholders unanimously agreed on a different valuation but did not claim that the unanimous vote was made on a per share basis.

Defendants argue that a reference in in the 1989 SPA to preserving their majority stake in RSC “belies the claim that Rosen Supply’s Articles were intended to provide for per-capita voting.” Resp. Br. at 42; CP 77, 79. It does not. That provision simply addresses the issue of dilution, and makes no reference to shareholder voting. In asking the Court to read language into the 1989 SPA that does not exist, Defendants ignore black letter law on contract interpretation, which prevents courts from reading into contracts language that is not there. *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 891, 167 P.3d 610 (2007). If the drafters of the 1989 SPA actually intended for Defendants’ majority ownership position to translate into control over RSC’s very existence, they would have amended the Articles to reflect as much. Instead, they left the Articles untouched, along with the language in Article VIII § 4 that defines voting on a per shareholder basis. Whatever they may have had in mind with respect to preventing dilution, the drafters of the 1989 SPA did not impose per share voting on RSC. If Defendants believed otherwise, they would not have tried to change the voting rules 18 years later.

**c. Other extrinsic evidence**

Other extrinsic evidence supports per shareholder voting. Defendants argue RSC’s status as a family business is not relevant or admissible. But they have themselves testified that RSC was established

to remain a closely-held family business. *E.g.*, CP 121 (166:21–25). Moreover, it is entirely consistent with the fact that the founders put in place a per shareholder voting system. When Adam, Matt, and David testified about RSC being a family business, they were not speculating about anyone’s intent—they were testifying about their own observations and understandings—something they are certainly allowed to do. *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990) (“[E]xtrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties’ intent.”).

Defendants are similarly mistaken about the Grandchildren’s Trust. Resp. Br. at 44. This document, which was created ten years after the Articles, is not relevant to the interpretation of the Articles. Even if it were, it would be improper to point to language in the document to contradict the language in the Articles. *Ross v. Bennett*, 148 Wn. App. 40, 46, 203 P.3d 383 (2008). What is more, the language Defendants discuss about the voting of stock held in trust does not support per share voting. Resp. Br. at 44–45. Instead, it outlines a process for who gets to vote if shares are held in the Grandchildren’s Trust. CP 91.

Defendants’ claim that Plaintiffs’ course of conduct reflects the drafters’ intent lacks merit. Resp. Br. at 45–46. Course of conduct is relevant to determining the intent of the parties engaging in the conduct.

*Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor Cnty.*, 164 Wn. App. 641, 655–56, 266 P.3d 229 (2011). Here, what is relevant is the intent of the RSC founders—not the intent of the Plaintiffs. What Plaintiffs did or did not do years after the Articles were drafted is irrelevant. Moreover, the fact that Adam and David did not make certain changes to meeting minutes from 2013 is not an admission about the shareholder voting regime. Viewing that as an admission would require an inference in Defendants’ favor, when on summary judgment all inferences must be drawn in favor of the Plaintiffs as non-movants.

Finally, Defendants misrepresent the deposition testimony Plaintiffs cited from Harvey and Dianne’s depositions. It is relevant that Harvey testified that “it’s pretty hard to live under an agreement that was done 40 years ago” (CP 120) because it sheds light on the basis for Harvey and Dianne’s actions leading to this litigation. For the same reason it is relevant that Dianne testified that she and Harvey can sell because they “have to take advantage of the market . . .” CP 59.

**4. Defendants ignore the argument that the trial court could not have ruled in their favor without improperly drawing inferences and resolving factual issues.**

Defendants do not deny that the trial court must have improperly drawn inferences against Plaintiffs and resolved factual issues in Defendants’ favor. App. Op. Br. at 41–42. The language in the Articles

discussing voting by “stockholder” precludes summary judgment in Defendants’ favor. *Kelley v. Tonda*, 198 Wn. App. 303, 311, 393 P.3d 824 (2017) (where facts are subject to more than one reasonable inference, summary judgment is not proper). Likewise, even if the Articles were ambiguous, viewing extrinsic evidence in Plaintiffs’ favor precludes summary judgment for Defendants. *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 711–12, 334 P.3d 116 (2014).

**B. The Trial Court Erred by Awarding Mandatory Indemnification**

Defendants are not entitled to be indemnified for costs incurred in connection with their own improper self-dealing. Under RCW 23B.08.520, directors are only entitled to indemnification when they are sued “because of being a director.” Here, Harvey and Dianne were sued, in part, because in their role as *shareholders*, they were violating the Articles and 1989 SPA. Defendants characterize Plaintiffs’ “goal” in this litigation as trying to “gain negative control over the business to prevent their aunt and uncle from carrying out corporate acts that could lead to the sale of Rosen Supply’s assets.” Resp. Br. at 1–2. Under Washington law, however, selling a company’s assets is an act taken by shareholders. RCW 23B.12.020(1) (asset sale “requires approval of the corporation’s shareholders”). Thus even Defendants recognize that Plaintiffs sued them

primarily in their capacity as shareholders. Defendants' reliance on cases allowing indemnification for directors is therefore misplaced. *See, e.g., Weisbart v. Agri Tech, Inc.*, 22 P.3d 954, 957–58 (2001) (indemnification proper where a defendant directors “defends against claims . . . that *arise from or have a nexus to his corporate position*”); *Heffernan v. Pac. Dunlop GNB Corp.*, 965 F.2d 369 (7th Cir. 1992) (indemnification only encompasses suits against a director or officer).

The cases Defendants cite as support for a broad interpretation of the indemnification statute are distinguishable. *See Damerow Ford Co. v. Bradshaw*, 876 P.2d 788 (Or. Ct. App. 1994) and *Sabre Farms, Inc. v. Jordan*, 717 P.2d 156, 157–58 (Or. Ct. App. 1986). Plaintiffs brought three identifiable claims against Defendants in their capacity as shareholders, and only one in their capacity as directors (breach of fiduciary duty). Thus the claims fundamentally arose from Defendants' actions and omissions as shareholders, not directors.

Nor would Delaware law entitle Defendants to mandatory indemnification. *See, e.g., Hyatt v. Al Jazeera Am. Holdings II, LLC*, CV 11465-VCG, 2016 WL 1301743, at \*8 (Del. Ch. Mar. 31, 2016) (nexus or causal connection justifying mandatory indemnification exists “if corporate powers were used or necessary for the commission of the alleged misconduct”). Here, Defendants' alleged misconduct—as they

acknowledge—is trying to sell RSC’s assets without due authority. Resp. Br. at 1–2. That is fundamentally shareholder action.

Defendants’ other arguments are similarly deficient. While they argue that Plaintiffs are judicially estopped from arguing against indemnification, Defendants fail to explain how the facts here support the application of judicial estoppel, which is difficult to establish and rarely applied. *Taylor v. Bell*, 185 Wn. App. 270, 282, 340 P.3d 951 (2014). Regardless, Plaintiffs’ acknowledgment that RSC would be bound by the trial court’s rulings on the merits of the shareholder voting dispute is not a concession that RSC should pay hundreds of thousands of dollars in excessive attorneys’ fees incurred by Harvey and Dianne.

This Court should reverse the trial court’s order requiring RSC to indemnify Harvey and Dianne for the expenses they incurred defending their wrongful actions as shareholders.

**C. The Trial Court Abused Its Discretion in Awarding Defendants Fees**

The trial court abused its discretion in awarding approximately \$500,000 in fees by merely relying on the billing records of the Defendants’ attorneys without actually deciding what amount represented a reasonable amount of fees. *Mayer v. City of Seattle*, 102 Wn. App. 66, 78–79, 10 P.3d 408 (2000) (holding court abused its discretion in

awarding fees). The trial court acknowledged that the overall fee request was “excessive,” CP 1233, yet it made only a modest reduction to the award. Defendants have never reasonably explained how they spent over \$600,000 on a case that never made it past summary judgment. While they assail Plaintiff’s fees of \$200,000 as unsupported by so much as “a shred of evidence,” Resp. Br. at 66, Defendants have no basis to attack this figure other than unfounded speculation that Plaintiffs misrepresented their fees.

### **III. REQUEST FOR FEES AND COSTS PURSUANT TO RAP 18.1**

Because this Court should reverse the trial court’s grant of summary judgment and remand for entry in favor of Plaintiffs, Plaintiffs respectfully request that the Court deny Defendants’ request for fees and costs on appeal and instead award Plaintiffs their reasonable attorneys’ fees, costs, and expenses incurred on appeal. RCW 7.24.100.

### **IV. CONCLUSION**

For the reasons set forth above and in the initial brief on appeal, the Court should reverse the trial court’s grant of summary judgment in favor of Defendants and remand for entry of judgment in favor of Plaintiffs.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of August, 2019.

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## DECLARATION OF SERVICE

On August 21, 2019, I caused to be served a true and correct copy of the foregoing **APPELLANTS' REPLY BRIEF** to be served on counsel of record stated below, via the Washington Courts E-Portal:

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

DATED this 21<sup>st</sup> day of August, 2019, at Seattle, Washington.

s/Thao Do  
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**MCNAUL EBEL NAWROT AND HELGREN PLLC**

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