

FILED
Court of Appeals
Division II
State of Washington
6/8/2020 1:14 PM
No. 53991-8-II

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

REAL CARRIAGE DOOR COMPANY, INC., ex rel. SCOTT T. REES,
MARDIE A. R. BRODERICK and JEREMY E. BRODERICK,
Shareholders Thereof; and SCOTT T. REES, MARDIE A.R.
BRODERICK and JEREMY E. BRODERICK, Individually,

Appellants/Plaintiffs,

v.

DON T. REES,
Respondent/Defendant.

REPLY BRIEF OF APPELLANTS

VANDEBERG JOHNSON &
GANDARA, LLP

Daniel C. Montopoli, WSBA #26217
James A. Krueger, WSBA #3408
Lucy R. Clifthorne, WSBA #27287
Attorneys for Appellants

1201 Pacific Avenue, Suite 1900
P. O. Box 1315
Tacoma, WA 98401-1315
Telephone: (253) 383-3791

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ARGUMENT IN REPLY	4
A.	Breach of Fiduciary Duty of Good Faith and Loyalty to the Company and its Shareholders	4
B.	Minority Shareholder Oppression.....	5
C.	Summary of the Rules Governing S Corporations	6
1.	Dividends disguised as excessive salaries violate the regulations governing S corporations.	7
2.	Dividends disguised as loans violate the regulations governing S corporations.	7
D.	The Many Improper Actions of the Defendant.....	8
E.	Respondent’s Brief Demonstrates Why the Defendant’s Actions Breached his Fiduciary Duties and Oppressed the Minority Shareholders.	11
1.	Respondent’s brief essentially acknowledges that Don Rees’s post-2015 salary included disguised dividends.....	11
2.	Respondent’s brief reinforces the contention that the Company’s “loan” was an improperly disguised dividend to Don Rees....	13
3.	Respondent’s brief underscores the breaches of fiduciary duty and minority shareholder oppression by Don Rees.	15
F.	The Fraudulent Conduct of the Respondent	17
G.	Business Judgment Rule Does Not Apply	18
III.	CONCLUSION.....	19

TABLE OF AUTHORITIES

CASES

<i>Alterman Foods, Inc. v. United States</i> , 505 F.2d 873 (5th Cir. 1974).....	7, 8, 14
<i>Bramlette Bldg. Corp. v. Commissioner</i> , 424 F.2d 751 (5th Cir. 1970).....	7
<i>Haber v. Commissioner</i> , 52 T.C. 255 (1969), <i>aff'd per curiam</i> , 422 F.2d 198 (5th Cir. 1970).....	8, 14
<i>Hay v. Big Bend Land Co.</i> , 32 Wn.2d 887, 204 P.2d 488 (1949).....	5
<i>Hayes Oyster Co. v. Keypoint Oyster Co.</i> , 64 Wn.2d 375, 391 P.2d 979 (1964)	5
<i>In re Marriage of Sievers</i> , 78 Wn. App. 287, 897 P.2d 388 (1995).....	6
<i>In re: Spokane Concrete Products, Inc.</i> , 126 Wn.2d 269, 892 P.2d 98 (1995)	18
<i>Interlake Porsche & Audi, Inc. v. Bucholz</i> , 45 Wn. App. 502, 728 P.2d 597 (1986)	4
<i>Nursing Home Bldg. Corp. v. DeHart</i> , 13 Wn. App. 489, 535 P.2d 137 (1975).....	18
<i>Scott v. Trans-System, Inc.</i> , 148 Wn.2d 701, 64 P.3d 1 (2003).....	16, 17
<i>Shermer v. Baker</i> , 2 Wn. App. 845, 472 P.2d 589 (1970).....	5
<i>Wool Growers Service Corp. v. Ragan</i> , 18 Wn.2d 655, 140 P.2d 512 (1943)	5

STATUTES

I.R.C. § 1361(b)(1)(D).....	6
I.R.C. § 1363(a)	6
RCW 23B.08.300(1).....	5, 18

OTHER AUTHORITIES

Treas. Reg. § 1.1361-1.....	6, 7
-----------------------------	------

Treas. Reg. § 1.162-7.....7

TREATISES

2 F. H. O'Neal and Robert B. Thompson, *O'Neal's
Oppression of Minority Shareholders and LLC
Members* (2006).....5

J.P. Rose, Tax Advisors Planning System, 4: S
Corporations at 4:10.02(C) (Thomson Reuters
2020) (“Rose”).....7

R.J. McGaughey, *Washington Corporate Law Handbook*
(2000).....6

I. INTRODUCTION

As discussed in the Appellants' opening brief, the Defendant Don Rees breached his fiduciary duties to the Company and its minority shareholders by taking excessive salaries that were disguised dividends, by taking \$3.1 million from the Company that he later tried to classify as a loan when it was actually another disguised dividend, and by failing to pay the minority shareholders their rightful share of the Company's dividends. Furthermore, Mr. Rees breached his duty of good faith and loyalty to the Company by engaging in self-dealing for his own personal profit and advantage at the expense of the Company.

Mr. Rees's actions also constituted minority shareholder oppression because his actions were intended to punish the minority shareholders, who are also his adult children who sided with their mother in their parents' divorce. After the Defendant's divorce became final and he had control of the Company, Mr. Rees, as the corporation's 88 percent majority shareholder, director and president, ordered the Company to cease paying dividends to the shareholders. Instead, he directed the Company to pay him the same amount of money he would have received if the Company paid dividends by way of an excessive salary, increasing his annual salary from \$120,000 the year before the divorce to \$1,216,367 the year after the divorce. The Defendant took these steps to punish the Plaintiffs for siding

with their mother in the divorce proceedings and, as the Company's former bookkeeper testified, to force the Plaintiffs into selling their shares in the Company to him at below-market rates.

In addition to paying himself an excessive salary, Mr. Rees also directed the Company to give him the approximately \$3.1 million payment he needed to buy his ex-wife's shares in the Company as part of his divorce settlement with her. Over a year later, once he learned that under the applicable IRS Regulations the Company was required to make proportionate distributions of that amount to the minority shareholders, he tried to re-classify this \$3.1 million payment as a loan.

Because the Defendant's excessive salary and \$3.1 million "loan" were actually disguised dividends paid to himself—without pro rata distributions to the other shareholders as required by the IRS—Mr. Rees has, in effect, created two classes of stock. By creating two classes, he has endangered the Company's status as an S corporation. For these reasons, Don Rees has violated his fiduciary duties to the Company and the other shareholders. In addition, his actions constitute the oppression of minority shareholders in violation of Washington law.

In his response brief, Mr. Rees essentially acknowledges that his post-divorce salary is a disguised dividend by brazenly admitting that his inflated salary was intended to replace the dividends he received before the

divorce. By inflating his salary to include disguised dividends, Don Rees has improperly deprived the Plaintiffs of their rightful, pro-rata share of dividend income. In so doing, he has engaged in a text-book example of a breach of his fiduciary duties and the oppression of minority shareholders.

In addition, the response brief fails to address the overwhelming evidence at trial that, in increasing his salary to include disguised dividends while simultaneously ordering the Company to cease making dividend distributions to the other shareholders, he intended to punish the other shareholders for siding with their mother and to force them to sell their shares at below-market rates.

Remarkably, the Respondent's brief ignores the law governing the improper disguising of dividends as loans. In discussing this issue, the Respondent's brief does not cite to any cases and it fails to address the standards used by courts to ascertain when a loan is actually a disguised dividend. Instead, Respondent simply argues that the \$3.1 million distribution was proper because it was re-classified by the Company as a loan more than a year after the Defendant received the distribution. As discussed in the Appellant's opening brief, and as ignored by the Respondent, the case law rejects such a facile attempt to disguise a dividend as a loan. By improperly disguising a dividend as a loan, and as a result depriving the Plaintiffs of their pro-rata share of dividend income, the

Defendant's actions breached his fiduciary duties and oppressed the minority shareholders.

For these reasons, and for the reasons expressed in the Appellants' opening brief, the superior court erred in denying the Plaintiffs' claims. Thus, the Appellants request that this Court reverse the superior court's rulings.

II. ARGUMENT IN REPLY

To understand why the actions of Don Rees constituted a breach of his fiduciary duties and minority shareholder oppression requires a brief discussion of these claims as well as a summary of the law governing S corporations.

A. **Breach of Fiduciary Duty of Good Faith and Loyalty to the Company and its Shareholders**

As discussed in the Appellants' opening brief, corporate officers and directors owe a fiduciary duty of good faith and loyalty to the corporation they serve and its shareholders. App. Br. at 19-23; *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 509, 728 P.2d 597 (1986) (directors and officers are fiduciaries of the corporations they serve and are not permitted to retain any personal profit or advantage). Majority shareholders and directors act in bad faith when their actions benefit them, rather than the corporations they serve and the remaining shareholders. *Interlake Porsche & Audi, Inc.*, 45 Wn. App. at 509; *Hayes Oyster Co. v. Keypoint Oyster Co.*, 64 Wn.2d 375,

381, 391 P.2d 979 (1964) (noting fiduciary duty violated when officers or directors “directly or indirectly acquire a profit for themselves or acquire any other personal advantage”). The Washington Business Corporation Act also states that directors are required to discharge their duties in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner the director reasonably believes to be in the best interests of the corporation. RCW 23B.08.300(1). These fiduciary duties of majority shareholders are enhanced in closely held corporations with few shareholders. 2 F.H. O’Neal and R.B. Thompson, *O’Neal’s Oppression of Minority Shareholders and LLC Members* §§ 7:04, 7:05 (2006); *Shermer v. Baker*, 2 Wn. App. 845, 472 P.2d 589 (1970) (majority shareholders stand in a fiduciary relation to corporation and its shareholders and owe a duty to minority not to profit at their expense).

B. Minority Shareholder Oppression

Similarly, Washington law recognizes that majority shareholders owe a fiduciary duty to minority shareholders. *Wool Growers Service Corp. v. Ragan*, 18 Wn.2d 655, 691, 140 P.2d 512 (1943) (“majority stockholders occupy a fiduciary relation toward the minority stockholders.”) This fiduciary duty incorporates a duty of good faith and fair dealing towards minority shareholders. *See Hay v. Big Bend Land Co.*, 32 Wn.2d 887, 897, 204 P.2d 488 (1949) (“The principle that a majority of the stockholders

must, at all times, exercise good faith toward the minority stockholders is well recognized.”); R.J. McGaughey, *Washington Corporate Law Handbook* § 7.10 (2000).

C. Summary of the Rules Governing S Corporations

As discussed in the opening brief, an S corporation does not pay income tax. App. Br. at 25; I.R.C. § 1363(a)). Instead, each shareholder must pay tax on his or her pro rata share of the corporate profits, regardless of whether any of the profits are actually distributed to the shareholders. *In re Marriage of Sievers*, 78 Wn. App. 287, 295 n.2, 897 P.2d 388 (1995) (“Subchapter S corporation and partnership business income flows through to the business owner's individual income tax return.”); Verbatim Report of Proceedings (VRP) 6/17/19 at 114:24-115:115:5.

Federal law requires that an S corporation have only one class of stock. I.R.C. § 1361(b)(1)(D). A corporation has only one class of stock if all outstanding shares of stock of the corporation have identical rights to distribution and liquidation proceeds. Treas. Reg. § 1.1361-1(l)(2)(i). Any distributions that differ in timing or amount are not considered to be identical. *Id.* Thus, if one shareholder routinely receives a distribution, while the other shareholders do not receive their pro-rata share, the S corporation risks creating two classes of stock. *See* Treas. Reg. § 1-1361-1(l)(2)(vi), Example (3).

1. Dividends disguised as excessive salaries violate the regulations governing S corporations.

If the compensation received by an employee-shareholder of an S corporation is “unreasonably high in relation to the services rendered to the corporation, the IRS may recharacterize a portion of the payments as distributions pursuant to its general authority under Code Section 162.” J.P. Rose, *Tax Advisors Planning System*, 4: S Corporations at 4:10.02(C) (Thomson Reuters 2020). In that scenario, the IRS may conclude that the excessive payment is actually a “distribution of earnings upon the stock.” *Treas. Reg. § 1.162-7; Bramlette Bldg. Corp. v. Commissioner*, 424 F.2d 751, 752-54 (5th Cir. 1970) (excessive payments to the president of an S corporation constitute a dividend and not salary).

If the excessive salary paid to a shareholder constitutes a scheme to avoid pro-rata distributions to the other shareholders, the IRS may determine that there are two classes of stock, a condition that is incompatible with a S corporation. *See* *Treas. Reg. § 1-1361-1(l)(2)(vi)*, Example (3); IRS P.L.R. No. 201236003.

2. Dividends disguised as loans violate the regulations governing S corporations.

As with an excessive salary, a loan to shareholder may constitute a disguised dividend. *Alterman Foods, Inc. v. United States*, 505 F.2d 873 (5th Cir. 1974); Bittker at § 8.05[6] (“If corporate funds are loaned to a

shareholder but the parties do not intend to create a bona fide creditor-debtor relationship, the withdrawals may be treated as constructive or disguised distributions; . . .”) In deciding whether the funds were a loan or a dividend, the *Alterman Foods* court did not rely on how the taxpayer classified the transaction, but instead examined the facts surrounding the cash advance. *Id.* at 877. These factors include whether there was any indication that the sums advanced would be repaid, whether there was an absolute duty to repay, and whether the shareholder had made any effort to repay the advances. *Id.* at 878-79. Furthermore, whether a transaction is a bona fide loan is assessed at the time of the transaction and takes into consideration the relationship between the shareholder and the corporation. *Haber v. Commissioner*, 52 T.C. 255, 266 (1969), *aff’d per curiam*, 422 F2d 198 (5th Cir. 1970) (emphasis added).

D. The Many Improper Actions of the Defendant

After the divorce became final in April 2015 and after acquiring his ex-wife’s shares in the divorce settlement, Don Rees owned 88 percent of the Company’s shares, while he also served as President and Chief Executive Officer of the Company. VRP 6/18/19 at 36:25-37:6; 126:23-25. Thus, Mr. Rees had complete control of the Company.

In that role, the opening brief of the Appellants detailed the numerous improper acts of Don Rees:

- 1) He paid himself a salary of \$1,216,367 in 2015, an increase of 913% from his \$120,000 salary in 2014.
- 2) In the four years after the divorce, Mr. Rees paid himself an average annual salary of \$994,838, compared to an average annual salary of \$101,145 in the four years before the divorce.
- 3) He ordered the Company to stop paying dividends to the minority shareholders.
- 4) As a result, the minority shareholders were forced to pay their share of the company's taxes using their own funds;
- 5) Mr. Rees admitted to the Company's bookkeeper that he ordered the Company to stop paying dividends to the shareholders, knowing that the minority shareholders would still have to pay taxes on their share of the Company's net income, to force them to sell their shares of stock to him at below market rates. VRP 6/17/19 at 73:1-74:5.
- 6) When asked at trial if he had made this statement to the Company's bookkeeper, Mr. Rees stated that he did not recall making it but stated if he did "it would certainly be within the realm." VRP 06/18/19 at 32:25-33:2
- 7) Mr. Rees admitted at trial that he arrived at his salary of \$1,216,367 in 2015 by shifting his prior dividend income over

to his salary (“I shifted my total compensation which, prior, had included salary and dividends. I shifted the dividend amount basically over to the salary column.” VRP 6/19/19 at 52:19-24.

- 8) In 2014 & 2015, Mr. Rees caused the Company to make two distributions to him totaling \$3,189,582, which he used to purchase his wife share’s in the Company as part of the divorce settlement.
- 9) In 2016, he directed the Company to reclassify these distributions to him as personal loans instead, ostensibly to prevent the Company from having to make pro-rata distributions to the minority shareholders.
- 10) Approximately 1.5 years after receiving the \$3,189,582 distributions, Mr. Rees belatedly signed a promissory note for the money in October 2016, backdating the note to December 31, 2015 to make it appear as if the \$3,189,582 was a loan to him.
- 11) When asked why it took him 1.5 years to sign the promissory note, Mr. Rees testified that he was too busy to sign the note. VRP 6/19/19 at 42:4 (“I was incredibly occupied.”)
- 12) When asked why he never made a payment in 2016 on the \$3.1 million promissory note, Mr. Rees testified that he was “busy,”

that it was an “oversight,” and he blamed his accountant for failing to remind him to make a payment on the note. VRP 6/19/19 at 43:19-44:4.

As this evidence demonstrates, the superior court’s conclusions of law that Don Rees did not breach his fiduciary duty or oppress the minority shareholders are not supported by substantial evidence in the record. Because these conclusions are not supported by substantial evidence, they should be reversed.

E. Respondent’s Brief Demonstrates Why the Defendant’s Actions Breached his Fiduciary Duties and Oppressed the Minority Shareholders.

1. Respondent’s brief essentially acknowledges that Don Rees’s post-2015 salary included disguised dividends.

In several places, the Respondent’s brief essentially acknowledges that his post-divorce salary was inflated to include what had previously been distributed as dividends. First, the brief defines “total compensation” to include salary *and* dividends. Resp. Br. at 15. Then, the brief admits that the Company “ceased distributing stock dividends in 2015 and increased Don’s salary so that his total compensation would remain the same.” *Id.* The brief adds that “there was no material net change in total shareholder-employee compensation from 2014 to 2015.” Resp. Br. at 16.

In other words, the brief acknowledges that the Company stopped paying dividends to the minority shareholders, while simultaneously

increasing Don Rees's salary to include dividend income. Indeed, the brief reinforces Don Rees's testimony at trial that after the divorce he "shifted the dividend amount basically over to the salary column." VRP 6/19/19 at 52:19-24. Thus, the Respondent admits that his post-divorce salary included funds that are really dividend distributions, distributions that violated the regulations governing S corporations because the Company failed to make pro-rata distributions to the minority shareholders.

Curiously, the response brief argues that the Appellants had no objection to the "total compensation" paid by the Company to Don Rees prior to 2015. Resp. Br. at 16, 30. The Appellants did not object because before 2015 the Company was properly making pro-rata distributions to all shareholders, as the law requires. Before 2015, the Company was not disguising its improper dividend distribution to only one shareholder through the inflated salary paid to Mr. Rees.

For the Defendant's post-divorce salary to not violate these regulations, requires Mr. Rees to show that the near ten-fold increase in his salary was reasonable. The response brief attempts to justify the post-divorce salary by arguing that: "Since 2015, Don has had to perform his job and all that entails, and also the jobs previously performed by Beth and Appellants" before they left the Company. Resp. Br. at 17.

The response brief, however, fails to point out that after Mrs. Rees and the Plaintiffs stopped working for the Company, the \$1.2 million salary of Don Rees in the year after the divorce is still more than 3.5 to 4 times the combined salaries of Don Rees, Beth Rees and the Plaintiffs in the year before the divorce. VRP 6/19/19 at 76:8-79:11. Thus, even by the Respondent's standard, the post-divorce salary of Mr. Rees is excessive. Scott Rees also testified that he trained his replacement prior to leaving the Company. VRP 6/17/19 at 35:15-37:14.

Moreover, the response brief does not dispute that the only expert testimony in the record of a what a reasonable salary for an executive like Mr. Rees should be is the testimony of the Plaintiffs' expert, Shelly Drury. Ms. Drury testified that a reasonable salary for Mr. Rees would be \$200,000, deriving that figure from her research, experience, a review of industry performance statistics, and the fact that Don Rees would be performing some of the duties previously performed by Beth Rees and others. VRP 6/17/19 at 112:16-113:11, Ex. 14 at pp. 2-4.

2. Respondent's brief reinforces the contention that the Company's "loan" was an improperly disguised dividend to Don Rees.

In its discussion of the alleged loan, the brief of the Respondent is notable for what it ignores and glosses over. Resp. Br. at 31-33.

First, the brief ignores the law governing when a loan is an improperly disguised dividend. Second, the brief does not acknowledge the steps the Company and Don Rees took to disguise the distribution as a loan occurred more than a year and half after the transaction.

As discussed in Section II.C.2 above and in Appellants' brief, whether a loan is a disguised dividend include analysis of such factors as whether there was any indication that the sums advanced would be repaid, whether there was absolute duty to repay, and whether the shareholder had made any effort to repay the advances. *Alterman Foods* at 878-79. Furthermore, whether a transaction is a bona fide loan is assessed at the time of the transaction and takes into consideration the relationship between the shareholder and the corporation. *Haber* at 266.

Not only is there no discussion of these factors or the timing of the transaction, the Respondent's brief fails to even cite the *Alterman Foods* or *Haber* cases. The Respondent may ignore these cases, but this Court should not.

Indeed, the *Alterman Foods* and *Haber* factors when applied to this case establish that the "loan" in 2015 was actually a disguised dividend improperly made to only one shareholder, Don Rees. Here, at the time of the transaction, there was no indication that the sums advanced would be repaid, there was no absolute duty to repay, and shareholder made no effort

to repay the advances. It was not until October 14, 2016—a year and half after Don Rees received the funds—when Don Rees and the Company executed a promissory note. VRP 6/18/19 at 16:8-23; Ex. 112, Ex. 113. During that intervening period, no interest was paid and Don Rees made no attempt to repay any portion of the so-called loan. In fact, the first payment by Don Rees actually occurred in 2017, almost two years after he received the funds. VRP 6/18/19 at 43:21-44:6.

Because the \$3.1 million payment to Don Rees was a dividend, the superior court's conclusion that the Company and Mr. Rees entered into a loan in 2015 is not supported by substantial evidence or the law governing dividends improperly disguised as loans. CP at 265 (Conclusion of Law No. 10).

3. Respondent's brief underscores the breaches of fiduciary duty and minority shareholder oppression by Don Rees.

The Respondent's brief attempts to minimize the Respondent's violations of the laws governing S corporations by claiming that these violations are merely hypothetical and speculative because the IRS has not launched an investigation into the Company's actions. Resp. Br. at 21-23. The Respondent argues that because the IRS has not investigated the Company for failing to comply with the laws governing S corporations,

there has been no breach of fiduciary duty or minority shareholder oppression. Resp. Br. at 21.

The standards governing the breach of fiduciary duty and minority shareholder oppression, however, do not require a prosecution or formal investigation. Rather, breach of fiduciary duty and minority shareholder oppression require “burdensome, harsh and wrongful conduct; a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members; or a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely.” *Scott v. Trans-System, Inc.*, 148 Wn.2d 701, 711, 64 P.3d 1 (2003) (noting that minority oppression and breach of fiduciary duty are “closely related.”)

Respondent’s brief also fails to address the overwhelming evidence in the record that the actions of Don Rees were intended to force the Plaintiffs to sell their shares to him at below market rates. Indeed, there is no mention in the response brief of the uncontroverted testimony of Jennifer Pomeroy, the Company’s former bookkeeper, that Don Rees told her he ordered the Company to stop paying dividends to the minority shareholders, knowing that they would still have to pay taxes on their share of the Company’s net income, to force them to sell their shares of stock to him at below market rates. VRP 6/17/19 at 73:1-74:5. If these actions do not

constitute a breach of fiduciary duty or the oppression of minority shareholders, then what does?

Because there is overwhelming evidence in the record that the conduct of Don Rees constitutes “burdensome, harsh and wrongful conduct” and a lack of fair dealing, the superior court erred in concluding that the Respondent did not breach his fiduciary duties or oppress the minority shareholders. *See Scott*, 148 Wn.2d at 711.

F. The Fraudulent Conduct of the Respondent

The response brief does not dispute that the superior court applied the elements of common law fraud to the Plaintiff’s claim in Conclusion of Law No. 9. Nor does the brief deny that the superior court failed to apply the standard for fraudulent conduct found in the Washington Business Corporation Act.

Instead, the Respondent argues that: (1) the broader standard for fraudulent conduct Washington Business Corporation Act only applies in narrow circumstances and (2) even if the broader standard applied, the Respondent’s actions were not fraudulent because they were made in good faith. Resp. Br. at 34-36.

This argument fails, however, because the standard for fraud found in the corporation act does and should apply to the breach of fiduciary duty and the oppression of minority shareholders by a majority shareholder,

director and corporate officer, and because the conduct of Respondent was in bad faith.

G. Business Judgment Rule Does Not Apply

Under RCW 23B.08.300(1) and the business judgment rule, courts will not substitute their judgment for that of a director unless the director acted with bad faith, fraud, dishonesty or incompetence. *In re: Spokane Concrete Products, Inc.*, 126 Wn.2d 269, 279, 892 P.2d 98 (1995), *Nursing Home Bldg. Corp. v. DeHart*, 13 Wn. App. 489, 498, 535 P.2d 137 (1975) (directors may take risks in the interest of their corporation so long as they comply with RCW 23B.08.300(1), which requires them to act in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner they reasonably believe to be in the best interests of the corporation).

Here, the many bad acts of Don Rees are summarized in Section II.D above. These acts establish that the superior court's conclusion that the Defendant acted in good faith is not supported by substantial evidence. Because Mr. Rees acted in bad faith and not in the best interests of the Company, the business judgment rule does not apply and the superior court committed reversible error in holding that the business judgment rule protected his conduct. CP at 264-65 (Conclusions of Law Nos. 3, 6, 7, 8).

III. CONCLUSION

For the above reasons and for the reasons stated in their opening brief, the Appellants request that this Court reverse the judgment of the superior court and hold that the Appellants established their claims for breach of fiduciary duty, minority shareholder oppression, and fraud by Don Rees. As a result, this matter should be remanded to the superior court for a determination of damages and entry of judgment in favor of the Plaintiffs.

RESPECTFULLY SUBMITTED this 8th day of June, 2020.

VANDEBERG JOHNSON &
GANDARA, LLP

By 
Daniel C. Montopoli, WSBA #26217
James A. Krueger, WSBA #3408
Lucy R. Clifthorne, WSBA #27287
Attorneys for Appellants

CERTIFICATE OF SERVICE

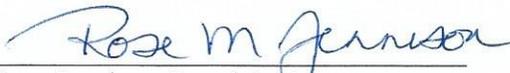
The undersigned makes the following declaration under penalty of perjury as permitted by RCW 9A.72.085.

I am a legal assistant for the firm of Vandenberg Johnson & Gandara. On the 8th day of June, 2020, I caused to be served via email and first class mail a copy of the foregoing document to:

Michael M.K. Hemphill
Roberts Johns Hemphill
7525 Pioneer Way, Suite 202
Gig Harbor, WA 98335
mikeh@rjh-legal.com
kris@rjh-legal.com

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

Dated this 8th day of June, 2020, at Tacoma, Washington.


Rose Jennison, Legal Assistant

VANDEBERG JOHNSON & GANDARA

June 08, 2020 - 1:14 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 53991-8
Appellate Court Case Title: Real Carriage Door Company, Inc., et al., Appellants v. Don T. Rees, Respondent
Superior Court Case Number: 18-2-06404-5

The following documents have been uploaded:

- 539918_Briefs_20200608131241D2899885_8408.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Reply Brief.pdf

A copy of the uploaded files will be sent to:

- jkrueger@vjglaw.com
- kredford@vjglaw.com
- kris@rjh-legal.com
- ksomerville@vjglaw.com
- lclifthorne@vjglaw.com
- mikeh@rjh-legal.com
- rjennison@vjglaw.com

Comments:

Sender Name: Rose Jennison - Email: rjennison@vjglaw.com

Filing on Behalf of: Daniel C Montopoli - Email: dmontopoli@vjglaw.com (Alternate Email:)

Address:
1201 Pacific Avenue, Suite 1900
Tacoma, WA, 98402
Phone: (253) 383-3791

Note: The Filing Id is 20200608131241D2899885