

No. 304574

**COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON**

**FILED**

**MAY 18 2012**

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DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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LANZCE G. DOUGLASS INVESTMENTS, LLC,  
and DOUGLASS PARCEL 6B, LLC,  
Appellant,

v.

SECURE SELF STORAGE, LLC,  
Respondent.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

This case involves a limited liability company formed by two brothers, Harley Douglass and Lanzce Douglass. The LLC is a holding company for real property. The LLC owns a parcel of land that the brothers agreed would be held and developed into lots. (Lanzce Douglass spends an enormous amount of effort in his Opening Brief arguing that the LLC is something other than a holding company, which is a distinction without a difference. The sole purpose of the LLC is to hold real property and develop it – the LLC does not sell lots or anything else. It merely holds and develops the property for the benefit of the members.) Harley Douglass was tasked with handling the development. When Lanzce Douglass decided he did not like the direction development was taking, he told his brother he did not want to be partners with him any longer and did not want to proceed with him on development work or planning for the property.

Initially, Lanzce Douglass proposed selling the real property and adoption of a “Russian Roulette” process, where either member could make an offer to purchase the other member’s interest. The other member could either accept the offer or convert it to his own offer, which the member initiating the process would have to accept. This proposed

buyout process was completely different than the buyout provision in the LLC's Operating Agreement, however. Since it was obvious Lanzce Douglass merely wanted a better deal than what he had previously agreed to, Harley Douglass did not accept Lanzce's proposal.

Lanzce Douglass then proceeded to file the instant action, requesting a judicial dissolution of the LLC. He attempted to get an early resolution of his request by filing a motion to dissolve the LLC. The trial court denied the motion on the basis that Lanzce had not shown dissolution was necessary, either under the provisions of the Limited Liability Act or of the LLC's Operating Agreement. Harley Douglass then filed a Motion for Summary Judgment seeking dismissal of the Complaint. Once again, the trial court found that Lanzce Douglass had not shown dissolution was appropriate, as a matter of law, and dismissed his Complaint.

The trial court's determination was correct. Lanzce Douglass did not and could not establish that dissolution of the LLC was the appropriate remedy, either under Washington's Limited Liability Company Act or the terms of the Operating Agreement. The trial court's decision should be affirmed.

## II. DEFENDANT'S STATEMENT OF THE CASE

### A. Identification Of The Parties.

Secure Self Storage, LLC, the Defendant in the case below, is a Washington limited liability company owned by Harley Douglass. Secure Self Storage is an equal member and owner of Douglass Parcel 6B, LLC ("Douglass Parcel 6B"), a Plaintiff in the case below. The other Plaintiff and owner of Douglass Parcel 6B is Lanzce G. Douglass Investments, LLC, which is owned by Harley Douglass's brother, Lanzce G. Douglass. *CP 28-45, ¶¶ 1-2; CP 11, ¶¶ 2-3.* For ease of identification, Secure Self Storage, LLC will be referred to herein as Harley Douglass and Lanzce G. Douglass Investments, LLC will be referred to as Lanzce Douglass.

### B. The Parties Entered Into An LLC Operating Agreement That Provides For Their Membership Rights And Obligations.

Harley Douglass and Lanzce Douglass entered into an Operating Agreement for Douglass Parcel 6B on December 18, 2003. The term of the Operating Agreement was to continue until December 31, 2034, thirty-one years from the adoption date of the Operating Agreement. *CP 33, ¶ 1.04.*

The Operating Agreement contained provisions addressing the resignation or withdrawal of a member (*CP 36, ¶ 2.06*); the management

authority of the members (*CP 36, ¶ 3.02*); compensation of a member who resigns or withdraws (*CP 40-43, Article 6*); and dissolution and termination of the LLC (*CP 43-44, Article 8*).

The Operating Agreement provides that the LLC shall be managed by the members, and that it shall not have managers within the meaning of the Washington Limited Liability Company Act. *CP 36, ¶ 3.01*. Both members have authority to exercise all powers of the LLC and perform any act or function deemed necessary or appropriate in the ordinary course of the Company business, except for four limited instances. *CP 36, ¶ 3.02*.

The right of a member who resigns or withdraws from the LLC to compensation for the member's ownership interest in the company is governed by Article 6 of the Operating Agreement. Paragraph 6.01 of Article 6 states: "**Disassociation of a Member.** The death, *withdrawal, resignation*, retirement, bankruptcy or insolvency of a Member, shall terminate the Membership of the Member in the Company. Such a Member shall constitute a 'disassociated Member.'" *CP 40* (Emphasis added). Pursuant to paragraph 6.02 of Article 6:

(1) Upon the dissolution/termination of an LLC Member, *withdrawal, resignation*, retirement, bankruptcy or insolvency of a Member; the unaffected Members shall have the right, but not the obligation, to buy out the interest

of the affected Member as provided herein. The unaffected Members shall also have the right but not the obligation to elect to sell the LLC and/or all its assets. In such event the parties agree to cooperate in order to obtain the highest possible price and the best possible terms for a sale of the LLC and/or all its assets . . . in the event the unaffected Members elect neither of the foregoing options, the affected Member shall be free to sell its interest to a third party.

*CP 28-45* (Emphasis added). Article 6 of the Operating Agreement goes on to provide that, in the event the unaffected Members elect to purchase the interest of the affected Member upon the occurrence of a triggering event, “[t]he fair market value of the Member’s interest shall be determined by agreement of the parties or by appraisal as provided herein.” *CP 40, ¶ 6.02(2)*. In the event the parties cannot agree upon the fair market value, “the parties shall attempt to agree upon a single neutral appraiser to determine the fair market value of the affected Member’s interest in the LLC.” *CP 40, ¶ 6.02(3)*. If the parties cannot agree on a single neutral appraiser, then the affected member and the unaffected member are to each select a single neutral appraiser, and those two appraisers shall select a third neutral appraiser.” *CP 40-41, ¶ 6.02(3)*.

Article 8 of the Operating Agreement addresses dissolution and termination of Douglass Parcel 6B. In particular, the Agreement discusses the events that will trigger dissolution. Among those events are the death, retirement, *resignation*, *withdrawal*, bankruptcy or dissolution of a

Member, “unless there is at least one remaining Member and said remaining Member consents to continue the Company and its business within 180 days after the occurrence of the event causing the dissolution.” *CP 43, ¶ 8.01(3)* (Emphasis added).

**C. The Parties Had Differences Of Opinion Concerning Development Of Real Estate Owned By The LLC.**

Douglass Parcel 6B acquired undeveloped real estate in Spokane County. It continues to own the real property debt free. The real property is the only asset of Douglass Parcel 6B. *CP 29-30, ¶ 4*. The purpose of Douglass Parcel 6B was to hold the property and develop it into lots. *CP 29-30, ¶ 4; CP 90, ¶ 2*. The developed lots would then be transferred out to the individual members of the LLC for sale. *CP 91, ¶ 5*. In other words, the LLC did no business of its own – it was never intended that the LLC would sell the developed lots to third parties.

Per the agreement between Harley Douglass and Lanzce Douglass, Harley was to be primarily responsible for the development of the project. *CP 91, ¶ 6*. Harley Douglass proceeded to obtain preliminary plat approval for a residential development on the property. *CP 91, ¶ 7*.

In April of 2007, Lanzce Douglass told Harley that he wanted to have a commercial architect draw up a site plan for the frontage along the

highway and then fit houses to it. *CP 95*. Harley agreed with that proposal at that time, but since the engineering was nearly complete he wanted to finish that and then move forward from there. Lanzce agreed that the engineering should be finished, as long as “we don’t spend much more money.” *CP 96*.

By June of 2007, Lanzce Douglass was telling Harley that he did not want to spend any more money on the project if it was going toward the approved preliminary [residential] plat. *CP 98*. He again urged Harley to try to get a portion of the property zoned as commercial. *CP 98*. Harley responded that changing the plat to commercial would be a difficult process, that the County was not accepting comprehensive plan changes, and that final approval on the preliminary [residential] plat was imminent. *CP 100-01*. Lanzce, however, continued to assert that they should obtain a site plan for commercial development and request a comprehensive plan change. *CP 102*.

In August 2007, Harley advised Lanzce that the only thing left to be done on the current plan was lighting along the highway. He also told Lanzce he had learned that only one comprehensive plan change had been approved by Spokane County in the prior two years. *CP 103*. Again, however, Lanzce insisted that they should at least obtain a site plan and

then “get in line” for a comprehensive plan change. *CP 104*. Lanzce wrote to Harley again in September of 2007, asking whether Harley wanted to try to get commercial zoning on the front of the property or put houses on the whole thing. *CP 105*.

**D. Lanzce Douglass Expressed His Intent To No Longer Be Involved In Development Of The Douglass Parcel 6B Property.**

It is not clear from the record what transpired over the ensuing months. However, in February of 2008 Lanzce sent Harley a fax in which he stated, “I would also like to make you aware [at] this time that due to your lack of oversight and negligence on the Hunters Point project<sup>1</sup>, I do not feel comfortable with you as a partner and as such do not want to proceed with you on any development work or planning for development on the 6BLLC (sic) property.” *CP 106*. Contrary to what is asserted in the Appellant’s Opening Brief, only then did the communications between the brothers degenerate into what amounted to a *mutual* exchange of unpleasant remarks about old grievances and family discord. *CP 107-111*.

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<sup>1</sup> Spokane County initially denied final approval of the Hunter’s Pointe plat. Since the date of the referenced fax, however, the denial was appealed by Harley Douglass to Spokane County’s Department of Building and Planning. On appeal, the Hearing Examiner determined that Harley Douglass had timely submitted the final plan consistent with RCW 58.17.140 and that the County had erred in denying final approval. The County’s denial of the plat was reversed.

**E. Lanzce Douglass Proposed A Buyout Process That Did Not Follow The Buyout Provision Of The Operating Agreement.**

Lanzce Douglass suggested to Harley that the real property should be sold by an independent broker. He proposed they adopt a “Russian Roulette” process whereby either member could make an offer to purchase the other member’s interest. The other member could either accept or convert that offer to his own offer, which the member initiating the process would be required to accept. *CP 12, ¶ 10*. This proposal differed significantly from the buyout provision in Article 6 of the Operating Agreement. Since it appeared Lanzce just wanted a better bargain than the one he had agreed to in the Operating Agreement, Harley declined to agree to Lanzce’s proposal. *CP 30, ¶ 6*.

**F. Plaintiffs’ Motion For Dissolution Sought Liquidation Of The Real Property And Distribution Of Cash To The Members.**

In March of 2011, Lanzce Douglass filed the instant action in Spokane County Superior Court. *CP 1-5*. On June 10, 2011, Lanzce Douglass filed a Motion For Dissolution And Appointment Of Lanzce G. Douglass To Wind Up Affairs Of Company (“Motion For Dissolution”). *CP 114*. In conjunction with his Motion For Dissolution, Lanzce Douglass also filed a Declaration, in which he reiterated his proposal to sell the property, and the “Russian Roulette” process for buyout. He also

stated his position that the real property “should be converted to cash which would then be distributed to the members according to their respective membership interests.” *CP 12, ¶¶ 10, 12.*

Harley Douglass responded by Declaration filed on June 17, 2011, in which he stated that he did not agree it would be financially prudent to try to sell the real property owned by Douglass Parcel 6B, LLC in the current real estate market. *CP 29-30, ¶6.* Harley Douglass stated his belief that the LLC could not obtain an adequate price for the undeveloped property and that the likelihood of obtaining a buyer in the current market was very low. *CP 30 ¶ 8.* He also pointed out that he did not agree with Lanzce Douglass’ proposal for buyout, because it did not comply with the provisions of Article 6 of the Operating Agreement. *CP 30, ¶ 6.* Harley further stated he was willing to continue to operate the LLC for the purpose of holding the real estate. *CP 30, ¶ 8.*

**G. The Court Denied Plaintiffs’ Motion For Dissolution.**

A hearing was held on Lanzce Douglass’ Motion For Dissolution on June 24, 2011. At the conclusion of argument on the Motion, the trial court stated:

. . . the parties, I think, must have anticipated that the possibility that the company wouldn’t be able to market these properties quickly certainly is always a realistic

danger when you are dealing with real estate development. I think, in my mind, that explains the reasons why the enterprise was stated to have at least a thirty-year duration.

I certainly appreciate that Mr. Lanzce Douglass, at least at this point, feels that he wants out of this situation. But I think that, under this particular set of circumstances, we are bound by the terms of the contractual relationship which was created at the beginning.

I think at this point that, really, the event that would trigger a dissolution, while it is kind of a close question in my mind, I think is premature at this point. I think that it was anticipated that this company would go on for some considerable period of time, probably to allow for the maximization of the conditions which would allow maximum profit on the development at such time as the real estate market would improve. The fact that things are kind of in the doldrums at this point I think is not enough to trigger a dissolution at this point. So I am going to deny the motion to dissolve at this point.

*CP 70-71.*

**H. In Response To The Motion For Summary Judgment, Lanzce Douglass Substantially Changed His Position.**

On July 29, 2011, Harley Douglass, on behalf of Secure Self Storage, LLC, filed a Motion For Summary Judgment. *CP 74-75.* In support of his Motion, Harley relied, in part, upon his Declaration filed in response to the Motion For Dissolution (*CP 29-45*), and the Declaration Of Lanze Douglass filed in support of the Motion For Dissolution. *CP 11-13.*

In response to the Motion For Summary Judgment, Lanzce Douglass filed a new Declaration, dated September 6, 2011. *CP 90-111*. In that Declaration, Lanzce Douglass takes the position that, rather than selling the property and distributing the cash to the owners, development of the property should be completed. He makes the unsupported assertion that “[t]here is a market for new homes in the Spokane area” and “the cost of developing the infrastructure is at a recent historic low.” *CP 93*, ¶¶ 14-15. In one portion of the Declaration he talks about the need to get the current [residential] plat approval extended. *CP 93*, ¶ 16. However, in another (and in the attachments to the Declaration) he is focused on commercial development of the plat, which would have required submission of a comprehensive plan change. *CP 91-111*.

**I. The Trial Court Granted Summary Judgment Dismissing The Complaint For Dissolution Of Douglass Parcel 6B, LLC.**

The trial court heard oral arguments on the Motion For Summary Judgment on September 30, 2011. At the conclusion of the hearing, the court made its oral ruling and stated:

I think that the statute gives the Court a lot of flexibility in how to approach this kind of situation. I think that, obviously, if you are dealing with an ongoing concern, like some sort of a store or business establishment, or something like that, the Court might take one approach, whereas [a different approach might be taken if] you are dealing with a land development situation . . . which, on a

day-to-day basis, probably is a rather passive process, given the nature of things.

When I dealt with this a few weeks ago on the initial motion [for dissolution, *CP 14-18*], I made some comments which I think are still expressive of the Court's belief at this point. The dissolution process is not one which, essentially, should be used when, for lack of a better term, one side has some buyer's remorse about a situation that they have entered into.

\* \* \* \*

My view is that, pretty much as I said at the time we dealt with this back in June, the basic purpose of the enterprise here is still a viable one. I think that notwithstanding the fact that the plaintiff has some dissatisfaction with the direction of the enterprise, that is not, in and of itself, sufficient grounds to grant a dissolution at this point. As I said before, this was something which was not going to, by its contemplation, occur in a very near-term timeframe.

I think that defendants' position is correct here in seeking summary judgment. I am inclined, then, to grant the summary judgment in favor of the defendants as requested here.

### **III. SUMMARY OF THE ARGUMENT**

Under the material facts present in this case, the trial court properly entered summary judgment in favor of Harley Douglass. The Plaintiffs could not establish that dissolution was appropriate, under either the provisions of Washington's Limited Liability Act or the LLC's Operating Agreement. The basic business purpose of Douglass Parcel 6B has not been frustrated, because the anticipated duration of the LLC contemplates

a lengthy period of time within which its stated purpose (to hold and develop real property) may be accomplished. Moreover, an exit mechanism/buyout provision in the Operating Agreement would allow Lanzce Douglass to liquidate his interest in the LLC in the event he is dissatisfied with the status quo, and still allow the LLC to continue to operate.

While Plaintiffs argue in their Opening Brief that there were genuine issues of material fact precluding summary judgment, many of the “facts” cited as relevant by the Plaintiffs were unsupported by sufficient evidence. Further, there were significant inconsistencies in Plaintiffs’ own evidence, which the trial court could properly consider when determining whether the Plaintiffs had met their burden of producing sufficient evidence to create a genuine issue of material fact. Finally, even where there were disagreements in the evidence presented, the disputed facts were not material to the issue of whether the business purpose of Douglass Parcel 6B was frustrated. Therefore, even when viewed in a light most favorable to the Plaintiffs, there was no genuine issue as to whether Plaintiffs could establish the remedy of dissolution of Douglass Parcel 6B was appropriate. The trial court correctly ordered dismissal of Plaintiffs’ Complaint For Dissolution, Winding Up and Distribution.

#### IV. ARGUMENT

A. **The Trial Court Properly Granted Summary Judgment In This Matter Because, Under The Undisputed Facts Of This Case, Judicial Dissolution Is Not Appropriate.**

RCW 25.15.275 states, in language virtually identical to the Delaware statute cited in Appellants' Opening Brief<sup>2</sup>, as follows:

On application by or for a member or manager the superior courts *may* decree dissolution of a limited liability company whenever: (1) It is not reasonably practicable to carry on the business in conformity with a limited liability company agreement; or (2) other circumstances render dissolution equitable.

(Emphasis added.) The operative language in RCW 25.15.275 (the statute applicable in this case) is the word “may.” In other words, the court’s authority to order dissolution remains discretionary and may be influenced by the particular circumstances of the case. *See, e.g., Haley v. Talcott*, 864 A.2d 86, 96 (2004). In fact, even where a court finds there are no facts under which an LLC could carry on business in conformity with its LLC agreement, the remedy of dissolution remains discretionary. *Id.*, at 93.

Washington’s Limited Liability Act, Chapter 25.15 RCW, is modeled substantially on the Uniform Limited Liability Act (ULLA),

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<sup>2</sup> 6 Del. C. § 18-802

which was, in turn, modeled on the Uniform Partnership Act and the Revised Uniform Partnership Act. Washington courts may look to these uniform acts, and cases interpreting these acts, for guidance in interpreting the Washington statutes. *Dragt v. Dragt/DeTray, LLC*, 139 Wn. App. 560, 575, 161 P.3d 473 (2007); *Koh v. Inno-Pacific Holdings, Ltd.*, 114 Wn. App. 268, 271-72, 54 P.3d 1270 (2002).

Courts in other jurisdictions have held that it is not enough that an LLC has not experienced a “smooth glide to profitability” or that events have not transpired exactly as the members originally envisioned. *In the Matter of 1545 Ocean Avenue, LLC*, 72 A.D.3d 121, 893 N.Y.S.2d 590 (2010). Instead, dissolution is a drastic remedy reserved for situations in which the LLC’s management has become so dysfunctional or its business purpose so thwarted that it is no longer practicable to operate the business. *Id.* at 130 (holding that where an LLC’s operating agreement empowers each manager to act autonomously and to unilaterally bind the entity in furtherance of the business entity, and the business purpose of the LLC is being met despite the disagreements between the members, dissolution is not appropriate).

Judicial dissolution *may* be appropriate where disagreement between the partners is so severe that “all confidence and cooperation

between the parties has been destroyed” or where the behavior of a partner “materially hinders a proper conduct of the partnership business.” *Tiger, Inc. v. Fisher Agro, Inc.*, 301 S.C. 229, 238, 391 S.E.2d 538 (1989), citing *Owen v. Cohen*, 19 Cal.2d 147, 119 P.2d 713, 715 (1941).

[The] general rule is that gross misconduct, want of good faith, willful neglect of partnership obligations, and such other causes as are productive of serious and permanent injury to the partnership or which render it impracticable to carry on the partnership business, are proper grounds for the dissolution of a partnership by a court of equity at the instance of the innocent party, nevertheless a court of equity will not dissolve an existing partnership for trifling causes or temporary grievances involving no permanent mischief.

*Logan v. Logan*, 36 Wn.App. 411, 417, 675 P.2d 1242 (1984), citing *Fuller v. Brough*, 149 Colo. 147, 153, 411 P.2d 18 (1966). The conduct complained of “must be legally substantial and evidence either gross misconduct or want of good faith, or cause serious and permanent injury to the partnership.” *Wood v. Holiday Mobile Home Resorts, Inc.*, 128 Ariz. 274, 280, 625 P.2d 337 (1980). “If there is no evidence of substantial misconduct, a partner should not be allowed to defeat the rights of other parties by the ‘simple expedient of bringing suit.’” *Tiger, Inc.*, 301 S.C. at 239, 391 S.E.2d at 544, citing *Master Garage, Inc. v. Bugdanowitz*, 690 P.2d 879, 881 (Colo.App. 1984) (holding that

dissolution of joint venture was not warranted on basis of discord or economic nonviability).

A court of equity will not decree dissolution of a partnership because of temporary or trifling disputes among the partners, or for animosity between partners which does not injuriously affect the partnership business, or because of technical opposition of a partner to the spirit of the articles of copartnership, where nothing dishonest or extravagant is shown and the conduct of the business is profitable.

*Roberts v. Mariner*, 195 Ore. 311, 319-20, 245 P.2d 927 (1952).

The standards of dissolution are stringent, and a review of the law in this area indicates that judicial dissolution of a venture is appropriate only in serious situations. See, e.g., *Wood v. Holiday Mobile Home Resorts, Inc.*, 128 Ariz. 274, 625 P.2d 337 (1980) (dissolution appropriate where partner placed mortgage on partnership property in amount greatly exceeding value received and at excessive interest rate, and failed to provide partners with accounting or allow access to books for over ten years); *Lau v. Wong*, 1 Haw.App. 217, 616 P.2d 1031 (1980) (partner withheld information about the business, failed to call meetings, and the business had begun to exist only for his benefit); *Steckroth v. Ferguson*, 281 Mich. 279, 274 N.W. 792 (1937) (defendant attempted to dominate business, countermanding plaintiff-partner's directions to employees, resulting in chaos); *Cadwalader, Wickersham & Taft vs. Beasley*, 728

So.2d 253 (Fla.App. 4 Dist. 1998) (partner wrongfully excluded co-partner from participation in the conduct of the business).

In this case, there is no evidence of gross misconduct, want of good faith, willful neglect of partnership obligations, or any other causes that have produced serious and permanent injury to the LLC or which render it impracticable to carry on the LLC's business. Instead, there is merely a disagreement about the direction development of the LLC's real property should take. While there may be a degree of animosity between the members, the terms of the Operating Agreement do not require that they conduct the business by majority vote, nor does this animosity render the business unable to operate.

Moreover, other undisputed facts militate against dissolution of the LLC. These include a term of existence of as much as thirty-one years, and an exit mechanism/buyout provision for a member who is dissatisfied with the status quo to resign or withdraw and obtain the cash value of his interest in the LLC. Under these circumstances, and given the fact that the trial court would *always* have discretion to deny the remedy of dissolution even under the best possible case for it, the trial court was correct in determining that the Plaintiffs could not establish dissolution was the appropriate remedy.

1. *The trial court properly relied upon the parties' recognition in the Operating Agreement of a potentially lengthy time-frame to accomplish its stated purpose.*

The Operating Agreement entered into between the parties on December 18, 2003 had a stated term of more than thirty-one years. *CP*

33. The trial court noted and specifically commented on this fact, stating:

My view is that, pretty much as I said at the time we dealt with this back in June, the basic purpose of the enterprise here is still a viable one. I think that notwithstanding the fact that the plaintiff has some dissatisfaction with the direction of the enterprise, that is not, in and of itself, sufficient grounds to grant a dissolution at this point. As I said before, this was something which was not going to, by its contemplation, occur in a very near-term timeframe.

*CP 129.*

This is not a situation where a business was engaged in frequent, ongoing operations, such as buying and selling products on a daily basis. Instead, it was contemplated by the parties that a large parcel of property would be acquired, developed into lots (whether residential or commercial), and those lots would then be transferred to the members. This is not a process that can normally be completed in the short-term, as evidenced by the specific provision in the Operating Agreement for continuation of the existence of Douglass Parcel 6B for as long as thirty-one years, providing substantial opportunity for the LLC to realize a return

on its investment. It is clear from the comments of the trial court that it believed the business purpose of Douglass Parcel 6B was *not* frustrated, even where there were some obvious disagreements between the parties, because of the very nature of real estate development and the lengthy term of existence of the LLC as set forth in the Operating Agreement. Based on those circumstances, the trial court properly granted summary judgment in favor of Harley Douglass.

**2. *The Operating Agreement also provides a mechanism for a member to resign or withdraw from the LLC – another circumstance rendering dissolution unnecessary.***

The Plaintiffs have claimed that Harley Douglass argued at summary judgment that the parties were contractually precluded from seeking a judicial dissolution of Douglass Parcel 6B. Their claim is completely incorrect. Harley Douglass has always argued that Lanzce Douglass could not establish dissolution of the LLC was appropriate, under either Washington's Limited Liability Act or the Operating Agreement. Moreover, Harley Douglass stressed the existence of an exit mechanism/buyout provision in the Operating Agreement that would address Lanzce Douglass's expressed desire to "[not] proceed with [Harley Douglass] on any development work or planning for development on the 6BLLC property"(CP 106), and thereby avoid dissolution of the

LLC. Although the trial court did not specifically cite to this contractual mechanism in making its ruling, the provision does establish another basis for the granting of summary judgment.

The intent of Washington's Limited Liability Act, RCW 25.15.050 through 25.15.901, is to provide maximum flexibility in managing and operating a limited liability company. "It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements." RCW 25.15.080 (2); *see also* RCW 25.15.050.

A principle attraction of the LLC form of entity is the statutory freedom granted to members to shape, by contract, their own approach to common business "relationship" problems. If an equitable alternative to continued deadlock has been specified in the LLC Agreement, arguably judicial dissolution . . . might not be warranted.

*Haley v. Talcott*, 864 A.2d 86, 87 (2004). If a limited liability agreement itself provides a fair opportunity for a dissenting member who disfavors the inertial status quo to exit and receive the fair market value of his interest in the company, it is at least arguable that the limited liability company may still proceed to operate practicably under its agreement because the agreement itself provides an equitable way to break the impasse. *Haley v. Talcott*, 864 A.2d 86, 96 (2004).

The *Haley* case involved a dispute between parties to an LLC agreement that included an exit mechanism. This exit mechanism provided a dissenting member the right to leave the LLC and receive his fair share of its market value. The terms of the exit mechanism were virtually identical to that provided in Article 6 of the Operating Agreement for Douglass Parcel 6B. Although under the particular facts of the *Haley* case the court ultimately concluded that dissolution was appropriate<sup>3</sup>, it also made several observations that are instructive in this matter. For example, the *Haley* court recognized that the LLC agreement itself provided a fair opportunity for the dissenting member who was not happy with the status quo to exit and receive the fair market value of his interest. 864 A.2d at 96. It noted that, under the principles of freedom of contract, there was a good argument the limited liability company could still operate. The court also noted that the dissenting member had already voted to sell the LLC's only asset, a parcel of real property and, given that reality, it made sense for the court to stay its hand and allow the contract itself to solve the problem. *Id.*

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<sup>3</sup> In the *Haley* case, the court observed that the exit mechanism in the LLC agreement could not afford the dissenting member a satisfactory resolution, because he could not be released from liability under a personal guaranty given to secure a mortgage. Based on that complicating fact, the *Haley* court concluded that dissolution was the only viable resolution of the parties' disagreement. 860 A.2d at 96-98. Such a complicating factor is not present here.

Like the LLC agreement at issue in *Haley*, the Operating Agreement at issue here contains an exit mechanism. *CP 36, 40-43*. Also, the dissenting member, Lanzce Douglass, has already indicated a desire to no longer be involved in Douglass Parcel 6B – in other words, his withdrawal or resignation from the LLC – which should have triggered the provisions of Article 6 of the Operating Agreement. Indeed, in his June 10, 2011 Declaration in support of the Motion For Dissolution Lanzce Douglass stated his desire to liquidate the property to cash and distribute the proceeds to the members (*CP 12*). He clearly wanted to receive the monetary value of his interest in the LLC.

The real issue for Lanzce Douglass, however, is the *manner* in which he wants the value of his interest to be determined. Instead of following the procedure described in Article 6 of the Operating Agreement – a procedure to which he agreed in December 2003 – Lanzce Douglass wants to use a “Russian-Roulette” type of agreement. *CP 12, ¶10*. He wants the benefit of a better deal than the one he agreed to in the Operating Agreement.

Contrary to what the Plaintiffs have argued, neither Washington’s Limited Liability Company Act nor Article 8 of Douglas Parcel 6B’s Operating Agreement (*CP 43*) make judicial dissolution the *only* available

remedy. Given Lanzce Douglass's expressed intent to withdraw or resign from Douglass Parcel 6B, it would be appropriate to allow the exit mechanism within the LLC's Operating Agreement to work. Harley Douglass could simply buy out Lanzce Douglass's interest, according to the provisions of Article 6 of the Operating Agreement, giving Lanzce Douglass an adequate remedy for his current grievances. There is no need to dissolve the LLC. The parties "have at their disposal a far less drastic means to resolve their personal disagreement." *Haley*, 864 A.2d 86, citing *In re Delaware Surgical Services*, C.A. No. 2121-S, at 5 (Del.Ch. Jan. 28, 2002).<sup>4</sup> The principle of freedom of contract, as recognized by RCW 25.15.080 (2) and the *Haley* court is, therefore, an additional basis supporting the trial court's decision that the Plaintiffs could not establish dissolution of Douglass Parcel 6B was appropriate, and its entry of summary judgment in favor of Harley Douglass.

**B. Entry Of Summary Judgment In Favor Of Secure Self Storage Was Appropriate Because Plaintiff Failed To Create A Genuine Issue Of Material Fact.**

In a motion for summary judgment, the moving party bears the initial burden of showing the absence of an issue of fact. *Young v. Key*

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<sup>4</sup> Pursuant to GR 14.1(b), a copy of the *Delaware Surgical Services* case is attached as Ex. A and served and filed with this brief. Unpublished opinions are precedent in Delaware and may be cited in briefs filed in that State. *Del. Sup. Ct. Rule 14(b)(vi)B(2)*, attached as Ex. B.

*Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). If this showing is made, the burden shifts to the party with the burden of proof at trial to establish the existence of each essential element of its case. *Id.* Once a party moving for summary judgment makes an initial showing that there is no genuine issue of material fact, the nonmoving party must demonstrate the existence of such an issue by setting forth specific facts that go beyond mere unsupported allegations. *Brame v. St. Regis Paper Co.*, 97 Wn.2d 748, 752, 640 P.2d 836 (1982); CR 56 (e). A bare allegation of fact by affidavit without any showing of evidence is insufficient to raise a genuine issue of fact for purposes of a motion for summary judgment. The affidavit must furnish the factual evidence upon which it relies. *Dwinnel's Central Neon v. Cosmopolitan Chinook Hotel*, 21 Wn. App. 929, 933, 587 P.2d 191 (1978), citing *Lundgren v. Kieran*, 64 Wn.2d 672, 677, 393 P.2d 625 (1964).

A non-moving party attempting to preclude summary judgment may not rely on argumentative assertions or on having its affidavits considered at face value, but must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue of material fact exists. *Twelker v. Shannon & Wilson, Inc.*, 88 Wn.2d 473, 479, 564 P.2d 1131 (1977). A "material" fact is one upon which the outcome of litigation depends in whole or in part. *Morris v. McNicol*, 83

Wn.2d 491, 494, 519 P.2d 7 (1974). To avoid a summary judgment, a disputed fact must be material to issues dispositive of the particular relief sought by the parties. CR 56.

The Plaintiff has argued extensively in its Opening Brief that the trial court failed to properly consider the “facts” proffered by Lanzce Douglass, failed to view those facts in a light most favorable to Lanzce Douglass, and weighed the competing evidence in reaching its decision. However, a review of the facts cited by Plaintiffs reveals that, even though they arguably show some disagreements between the parties, they are not properly supported by evidence nor are they material to the question of whether the business purposes of the LLC has been frustrated. The Plaintiffs’ own evidence, moreover, is in conflict on several points. There is nothing in the trial court’s ruling to suggest that it accepted one party’s version of the facts over the other’s or that it improperly weighed the evidence in reaching its decision. To the contrary, the trial court’s ruling clearly sets forth the facts upon which it based its ruling, and those facts were uncontested. The Plaintiffs merely failed to provide sufficient evidence to create a genuine issue of material fact.

**1. *The facts cited by the Plaintiffs were not properly supported with evidence.***

In their Opening Brief, the Plaintiffs have set forth various facts which, they claim, created genuine issues of fact that should have precluded summary judgment. For example, Lance Douglass testified about the amount of money that has been spent and will need to be spent to complete the development, the supposed marketability of the property, and the anticipated costs of construction. *Appellants' Opening Brief*, pp. 19-22; *CP 91-93*. These "facts," however lack sufficient foundation. Lance Douglass never cited to any financial records, reports or publications that may have provided him with market statistics, nor even testified to how or why those facts may have been within his particular knowledge. Therefore, the trial court was *not* required to accept them as true, and they were insufficient to create genuine issues of material fact. *See e.g., Dwinell's Central Neon*, 29 Wn. App. at 933-34.

**2. *The Plaintiffs' own evidence, even when considered in a light most favorable to them, conflicted and failed to create genuine issues of material fact.***

Plaintiffs argue that the trial court must have accepted one parties' version of the facts over the other's, weighed competing inferences, and failed to view the Plaintiffs' evidence in a light most favorable to them. A review of the Plaintiffs' evidence, however, shows that it was in conflict

on several issues. For example, Lanzce Douglass asserted in his September 6, 2011 Declaration (*CP 90-111*) that development of the property should go ahead before the preliminary plat expired, because there was a market for new homes and because the LLC would lose a significant amount of money if the preliminary plat was allowed to expire. *CP 93*. However, the same Declaration contained multiple exhibits in the form of faxes in which Lanzce Douglass repeatedly told Harley Douglass “I do not want to spend any more money on this project if it is going toward the approved pre-liminary plat,” which was zoned solely for residential property. *CP 98*. Instead, he wanted to get at least a portion of the property zoned as commercial, which would have required a comprehensive plan change. *CP 91, 92, 95, 98, 102, 104, 106*.

Also, in his June 10, 2011 Declaration submitted in support of the Motion For Dissolution (*CP 14-18*), Lanzce Douglass stated that the real property should be converted to cash, which would then be distributed to the members according to their respective membership interests. *CP 12, ¶12*. Of course, he wanted to use a different procedure for a buyout than the one he had agreed to in the Operating Agreement. *CP 12, ¶ 10*. Later, in his September 6, 2011 Declaration in Opposition to the Motion For Summary Judgment, he stated he wanted to move forward on the development of the project. *CP 93*.

No explanation was given for these inconsistencies in Lanzce Douglass' testimony. Apparently Lanzce Douglass will change his testimony as he sees fit in an effort to accomplish his purpose at any given time. It was appropriate for the trial court to consider these inconsistencies in determining whether, overall, the Plaintiffs had brought forth sufficient evidence to create genuine issues of fact. *See, e.g., Marshall v. A. C. & S, Inc.*, 56 Wn. App. 181, 183, 782 P.2d 1107 (1989).

The trial court, however, gave no indication in its oral ruling that it was discounting Lanzce Douglass' testimony in any manner. Instead, it clearly stated that notwithstanding the disagreements between the parties, the business purpose of the LLC had not been frustrated, especially in light of the fact that the parties had contemplated the term of the LLC would continue for as long as 31 years. The Plaintiffs simply failed to produce sufficient evidence to create a genuine issue of material fact as to whether dissolution was the appropriate remedy in this case.

3. ***Even when the evidence submitted by the Plaintiffs is considered in a light most favorable to them, it is not material to the issue of whether the business purpose of the LLC has been frustrated.***

The Plaintiffs rely upon the alleged statistics cited by Lanzce Douglass, his testimony about disagreements with his brother, and suggestions that Harley Douglass's action or inaction was a result of old

grudges and personal animosity, and argue that the trial court failed to consider these facts in a light most favorable to the Plaintiffs. In an attempt to bolster the argument for a better deal than that provided in the Operating Agreement, Lanzce Douglass marches out a parade of horrors concerning his communications and disagreements with his brother, Harley Douglass. This is nothing more than hyperbole. It exaggerates the negative communications between the members and, more significantly, is simply not relevant. These alleged facts were not material to the trial court's determination of whether the business purpose of the LLC had been frustrated. Instead, the trial court relied upon the business purpose of Douglass Parcel 6B and the anticipated 31-year term of its existence. Given the character of real estate development itself, the trial court concluded there was no need to dissolve the LLC, notwithstanding the disagreements of the parties as to the direction the development should take, because it was an endeavor that was never contemplated to be completed within the near-term. The trial court's conclusion was correct, under the circumstances present in this matter.

## **V. CONCLUSION**

The circumstances in this case fall far short of the stringent standards warranting judicial dissolution of an LLC. The trial court relied

upon the stated purpose and the stated term of Douglass Parcel 6B, LLC to find that, under the circumstances, dissolution was not an appropriate remedy as a matter of law. This finding was correct, because the Plaintiffs failed to submit sufficient evidence to create a genuine issue of material fact. Defendant, therefore, requests that this Court affirm the decision of the trial court dismissing the Plaintiffs' Complaint.

RESPECTFULLY SUBMITTED this 18<sup>th</sup> day of May, 2012.

STAMPER RUBENS, P.S.

By: 

MICHAEL H. CHURCH

WSBA # 24957

MELODY D. FARANCE

WSBA # 34044

Attorneys for Defendant/

Appellant Secure Self Storage,

LLC

**CERTIFICATE OF SERVICE**

I hereby certify that on the 18<sup>th</sup> day of May, 2012 I caused to be served the within and foregoing **BRIEF OF RESPONDENT** on the following party at the following addresses:

Gregory S. McElroy  
McElroy Law Firm, PLLC  
1808 North 42<sup>nd</sup> Street  
Seattle, WA 98103

by delivering to said party a true and correct copy of the same, certified by me as such, by way of Overnight Delivery, postage prepaid.

  
\_\_\_\_\_  
MELODY D. FARANCE

# **Exhibit A**

2002 Del. Ch. LEXIS 158,\*

In re Delaware Bay Surgical Services

Civil Action No. 2121-S

COURT OF CHANCERY OF DELAWARE, SUSSEX

2002 Del. Ch. LEXIS 158

January 14, 2002, Submitted

January 28, 2002, Decided

**NOTICE:**

[\*1] THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL.

**SUBSEQUENT HISTORY:** Reargument denied by **In re Del. Bay Surgical Servs., 2002 Del. Ch. LEXIS 157 (Del. Ch., Feb. 26, 2002)**  
Related proceeding at **Spellman v. Katz, 2009 Del. Ch. LEXIS 18 (Del. Ch., Feb. 6, 2009)**

**DISPOSITION:**

Summary judgment entered in favor of Respondent and against Petitioner and Petition for Dissolution DISMISSED.

**COUNSEL:** David R. Hackett, Griffin & Hackett, P.A., Georgetown, DE.

Grover C. Brown, Gordon, Fournaris & Mammarella, Wilmington, DE.

Victor F. Battaglia, Sr., Philip B. Bartoshesky, Biggs and Battaglia, Wilmington, DE.

**JUDGES:** William B. Chandler III, CHANCELLOR.

**OPINION BY:** William B. Chandler III

**OPINION**

Pending before the Court are cross-motions for summary judgment in this action for dissolution, under **8 Del. C. § 273**, of a Delaware corporation. The motions have been fully briefed. As petitioner's counsel requested the Court, in a January 14, 2002 letter, to address the motions "at its earliest convenience" and made no mention of oral argument, the Court immediately took the matter under advisement. For the reasons set forth in more detail later, I grant respondent's motion for summary judgment and deny petitioner's motion. Accordingly, the petition for dissolution will be dismissed.

The pertinent facts are as follows. Mayer Katz, the respondent in this proceeding, is a general and vascular surgeon. Katz incorporated his practice, as Mayer Katz, M. [\*2] D., P.A., which did business as "Delaware Bay Surgical Services." In 1996, Katz hired James Spellman, the petitioner, as a surgeon employee in Katz's firm. Spellman practices surgical oncology. In 1997, Katz made an offer to Spellman, which he accepted, to become an equal 50% stockholder of the corporation. Spellman agreed to buy-in 50% of Katz's stock for \$ 200,000, with interest at 8.5%, payable over five years and ending on December 31, 2002. They also agreed to change the corporation's name from Mayer Katz, M.D., P.A. to Delaware Bay Surgical Services Inc. ("DBSS").

The new relationship between Katz and Spellman was broadly outlined in a December 16, 1997 Letter of Intent. That document contemplated, among other things, the execution of formal written agreements to carry out the Letter of Intent. In fact, a Shareholders' Agreement and an Employment Agreement were drafted and executed on January 1, 1998. The Shareholders' Agreement and the Employment Agreement carried forward many of the provisions found in the Letter of Intent.

Katz and Spellman agreed, in the Shareholders' Agreement/Employment Agreement, that in the event that either of them should decide not to practice medicine [\*3] with the other at any point in the future, Katz would have the option to retain the corporation (DBSS) he founded, its business location and telephone number. Also, as set forth in the Letter of Intent between them, both Katz and Spellman were to be involved in the corporation's management of the medical practice, but in the event they could not reach agreement on a particular issue, it was specifically agreed that "Dr. Katz will have the final decision until Dr. Spellman has completed his five-year buy-in." n1 This clear understanding of the parties, as expressed in the Letter of Intent, was carried forward in the Shareholders' Agreement between Katz and Spellman. Paragraph 9(a) of the Shareholders' Agreement reads as follows:

(a) In the event that Katz and Spellman have reached a deadlock and are unable to agree on any major decision or issue pertaining to the operation and/or management of the Corporation, Katz shall, for the term commencing January 1, 1998, through December 31, 2002, be the sole and final arbiter on such matters. n2

----- Footnotes -----

1. See Katz Answering Br., Ex. A at p. 7. [\*4]
2. Katz Answering Br., Ex. B, Shareholders' Agreement at p. 5.

----- End Footnotes-----

The Shareholders' Agreement also included, at paragraph 10, a "founder's provision" granting Katz a contractual right to continue to operate the corporation as a corporate entity in the event Spellman ever elected to voluntarily withdraw from the corporation. The founder's provision went on to specify that Spellman would be deemed to have withdrawn voluntarily in the event of a disagreement between the two 50% stockholders which renders the corporation unable to act.

The foregoing background is reasonably straightforward, but there is a great deal of disagreement between Katz and Spellman over how and why the relationship between them got to where it is now. It is enough for present purposes, however, to note that the relationship between the two doctors has deteriorated since 1998 when it began. What is relevant for this proceeding is that around August 2001 Spellman filed his petition to dissolve DBSS, together with a plan of dissolution that purports to apportion, equally between the two doctors, the assets and liabilities of [\*5] the business. DBSS appears to operate successfully, albeit with two stockholders who no longer wish to be in business together. DBSS continues to arrange for the delivery of medical services to Katz's and Spellman's respective patients. Katz and Spellman continue to be compensated by DBSS for the medical services they deliver. Nevertheless, Spellman insists that he has a right, under 8 Del. C. § 273, to compel the dissolution of DBSS and to have a receiver appointed to wind up its affairs. Not surprisingly, Katz opposes the petition, as does DBSS, which is separately represented by its own counsel. Based on the undisputed facts, I conclude that this is not a case where dissolution is appropriate.

**Section 273 of the Delaware General Corporation Law** provides as follows:

**§ 273. Dissolution of joint venture corporation having 2 stockholders**

(a) If the stockholders of a corporation of this State, having only 2 stockholders each of which own 50% of the stock therein, shall be engaged in the prosecution of a joint venture and if such stockholders shall be unable to agree upon the desirability of discontinuing such joint venture and disposing [\*6] of the assets used in such venture, either stockholder may, unless otherwise provided in the certificate of incorporation of the corporation or in a written agreement between the stockholders, file with the Court of Chancery a petition stating that it desires to discontinue such joint venture and to dispose of the assets used in such venture in accordance with a plan to be agreed upon by both stockholders or that, if no such plan shall be agreed upon by both stockholders, the corporations be dissolved. . . . It is clear from the language of § 273(a) that owning 50% of the stock of a Delaware corporation does not, standing alone, permit a stockholder to bring about a dissolution of the corporation against the wishes of the other 50% stockholder. Rather, § 273(a) requires that the two stockholders must be engaged in "the prosecution of a joint venture" in order to invoke a right to dissolution under § 273. If two 50% stockholders in a joint venture corporation are unable to agree upon the desirability of discontinuing the joint venture and disposing of its assets and if no provision in the charter or a written agreement provides otherwise, then such a stockholder may file [\*7] a petition for dissolution under § 273. That is not necessarily the end of the matter, however, as the statute clearly provides that the Court of Chancery has the discretion to deny an application under § 273. n3

----- Footnotes -----

3. See *In re Arthur Treacher's Fish & Chips, Del. Ch., 386 A.2d 1162 (1978)*.

----- End Footnotes-----

Turning now to the facts of this particular case, the uncontroverted documents before the Court demonstrate that Katz and Spellman are not yet engaged in the prosecution of a joint venture within the meaning of § 273. Under the unambiguous terms of the Shareholders' Agreement (and consistent with the nature of Spellman's buy-in of his 50% interest), Spellman will not become engaged in the prosecution of a joint

venture with Katz until after January 1, 2003, when Spellman has fully paid Katz for the purchase of his 50% stock interest. As of January 1, 2003, Spellman will have a joint proprietary interest in the subject matter of the corporate enterprise. At that time, Spellman also will enjoy joint control, [\*8] or a right of control, with Katz in the joint venture. A joint proprietary interest in the subject matter of a corporate enterprise and joint control or the right of joint control are essential elements of a joint venture. n4 That Spellman does not currently enjoy joint control or a right of joint control with Katz is evident from the provisions of paragraph 9(a) of the Shareholders' Agreement. Indeed, Spellman concedes in his petition, and in his briefs on the pending motions that Katz exercises his prerogative to decide all questions or issues pertaining to the operation and management of the corporation. The Shareholders' Agreement spells out, in the plainest terms possible, that Katz's authority to be the sole and final arbiter on decisions affecting the operation or management of the corporation shall continue until December 31, 2002. The only issues over which Katz does not exercise sole authority are defined, in paragraph 9(b) of the Shareholders' Agreement, to include is certain matters pertaining to compensation for services, bonuses and other terms of employment, all of which are addressed by the written Employment Agreement between the company and Spellman. Because DBSS [\*9] is not yet a true joint venture corporation, Spellman's petition for dissolution pursuant to § 273 must be dismissed.

----- Footnotes -----

4. **Warren v. Goldinger Bros., Inc., Del. Supr., 414 A.2d 507 (1980).**

----- End Footnotes-----

In the alternative, even were the Court to find that DBSS is operating as a joint venture corporation, I think it highly doubtful that this Court would exercise its discretion under § 273 to dissolve DBSS. That is because Katz and Spellman have expressed their clear intent, from the beginning of their relationship, that if Katz and Spellman decide not to practice medicine together, that Katz would have the right to retain the business (DBSS), including its name, location, telephone number, etc. The parties also made it clear that Spellman's interest would be purchased, either by Katz or by DBSS, in accordance with a formula provided in the Shareholders' Agreement. n5

----- Footnotes -----

5. *See* Shareholders' Agreement, P 10 at p. 6.

----- End Footnotes-----

[\*10] From the filing of the petition for dissolution, it seems evident that Spellman no longer wants to practice medicine with Katz through DBSS. Katz's opposition to the dissolution no doubt stems in part from his desire to retain DBSS, which he originally established, as the corporate vehicle for his medical practice. Given that the parties expressly contracted in a fashion that would enable Katz to retain the corporate entity, and provided a mechanism for Spellman's interest to be purchased, I am hard pressed to understand why this Court would exercise its discretion to dissolve an otherwise successful company. The parties have at their disposal far less drastic means to resolve their personal disagreement.

For all of the above reasons, I grant respondent's motion for summary judgment and deny petitioner's motion for summary judgment. An Order has been entered that dismisses the petition for dissolution.

William B. Chandler III

**ORDER**

For the reasons set forth in this Court's letter decision entered in this case on this date, it is

ORDERED that summary judgment is entered in favor of Respondent and against Petitioner and the Petition for Dissolution is DISMISSED.

[\*11] William B. Chandler III

Chancellor

Dated: January 28, 2002

## **Exhibit B**

# **RULES OF THE SUPREME COURT OF THE STATE OF DELAWARE**

## **PART I. THE COURT.**

### **Rule 1. Term of Court.**

There shall be 1 term of the Court which shall coincide with the calendar year. Oral arguments will be scheduled as provided in Rule 16(c) or as otherwise ordered by the Court.

### **Rule 2. Quorum; seniority.**

(a) Quorum. A quorum of the Court en Banc shall be 5 and a quorum of the Court sitting as a panel shall be 3. A former Justice of the Supreme Court or an active constitutional judge may be assigned to complete a quorum as provided in Article IV, § 12 and § 38 of the Constitution.

(b) Seniority. Seniority of active Justices of the Court shall be determined under the provisions of Article IV, § 2 of the Constitution. Active Justices of the Supreme Court shall be senior in rank to an assigned former Justice. Assignment of a former Justice shall be by seniority determined by date of original appointment to the Supreme Court. A constitutional judge to be assigned shall be the most senior in rank available in that court. As to constitutional judges, the term "senior in rank" shall mean the presiding judges of the constitutional courts, as the case may be, or, if such Judge shall be unavailable or disqualified, then the term shall refer to the ranking Judge of such court in terms of judicial service on such court.

### **Rule 3. Powers of individual Justices.**

(a) Decisions or orders of the Court. Except for decisions or orders entered pursuant to paragraph (b) of this Rule, a decision or order of the Court which will determine or terminate the case shall not be made or entered unless concurred in by a majority of the Court.

(b) Decisions or orders of the Court by a single Justice. A decision or order of the Court may be made by 1 Justice when:

(1) The decision or order does not terminate the case; or

(2) All parties consent to the termination of the case. A party is deemed to have consented to the termination of the case when the party fails to respond timely to (a) another party's motion to dismiss, (b) this Court's notice to show cause why the appeal should not be dismissed, or (c) a direction of this Court requiring the party to take action by a fixed date.

(c) Motion Justice. Pursuant to a monthly rotation schedule, a member of the Court shall be designated as the Motion Justice to consider and initially review all motions, interlocutory appeals, certifications of questions of law, certificates of reasonable doubt, original writs, requests for advisory opinions, and appeals from the decisions of the Board on Professional Responsibility, the Board on the Unauthorized Practice of Law, and the Board of Bar Examiners. If the current Motion Justice has entered a disqualification in a case, any motion or other paper filed in said case that requires action by the Motion Justice shall be referred to the next qualified and available Motion Justice in the monthly rotation schedule.

### **Rule 4. Panel assignments and the Court en Banc.**

(a) Composition of Court. The Court en Banc consists of all qualified and available members of the Court. In any case in which the accused shall have been sentenced to death or in any other case where a Rule of this Court provides for a hearing en Banc or a rehearing en Banc under paragraph (d) or (f) hereof, the Court shall sit en Banc. If fewer than all the Justices are qualified and available to constitute a quorum, there shall be an assignment of retired Justices or active constitutional judges, pursuant to Article IV, §§ 12 and 38 of the Constitution and Rule 2, sufficient to constitute a quorum.

(c) Use of both sides and use of recyclable paper. It is permissible for any brief, appendix, motion or other paper to include material printed or typed on 1 side or both sides of the page, provided legibility is maintained, and the Court encourages this practice. The Court encourages the use of recycled paper by all parties filing papers with the Court, and, when used, the use of recycled paper must be indicated on the last page of the paper being filed.

**Rule 14. Briefs and appendices; contents.**

(a) Briefs – Cover. On the front cover of each brief and appendix or supplemental brief and appendix there shall be stated the name of this Court, the caption of the case and its case number, the name of the trial court, the title of the brief or appendix, the name of the party for whom the brief is filed, the name of counsel by whom the brief is filed and the date of filing. Each cover shall be the appropriate color, where applicable.

(i) Title. Each brief and appendix shall be appropriately titled, for example: "Appellant's Opening Brief" or "Appendix to Appellee's Answering Brief." Where a cross-appeal exists, the cross-appellant's brief should be properly labeled as such, i.e., "Appellee's Answering Brief on Appeal and Cross-Appellant's Opening Brief on Cross-Appeal." The cross-appellee's brief should also be properly labeled, i.e., "Appellant's Reply Brief on Appeal and Cross-Appellee's Answering Brief on Cross-Appeal."

(ii) Color. Except where the litigant is in forma pauperis, the cover of the brief of the appellant will be blue; that of the appellee, red; that of an intervenor or amicus curiae, green; that of any reply brief, gray. The cover of the appendix will be white. When a transparent cover is used, the underlying sheet must nevertheless conform to these color requirements.

(b) Opening and answering. The opening brief of appellant and the answering brief of appellee shall contain the following under distinctive titles, commencing on a new page, in the listed order:

(i) Table of contents. The table of contents shall reflect each section required by this rule, including all headings designated in the body of the brief, and shall reflect the page number on which each section or heading begins. The table of contents shall also reflect all attachments or exhibits to the brief.

(ii) Table of citations. A table of citations to cases, statutes, rules, textbooks and other authorities, alphabetically arranged;

(iii) Nature of proceedings. A statement of the nature of the proceeding and the judgment or order sought to be reviewed;

(iv) Summary of argument. A summary of argument, stating in separate numbered paragraphs the legal propositions upon which each side relies. Appellant's statement shall be admitted or denied with specificity in appellee's summary, paragraph by paragraph.

(v) Statement of facts. A concise statement of facts, with supporting references to appendices or record, presenting succinctly the background of the questions involved. The statement shall include a concise statement of all facts which should be known in order to determine the points in controversy and shall describe in particular the judgment or order sought to be reviewed. Each party shall be referred to as "plaintiff", "State", "defendant", as the case may be, or by the party's name or other appropriate designation which makes clear the party's identity. References to the parties as appellant or appellee shall be avoided except where necessary. Appellee's counterstatement of facts need not repeat facts recited by appellant.

(vi) Argument. The argument shall be divided into appropriate headings, and each argument shall commence on a new page. Each argument shall be further subdivided into 3 parts:

A.(1) Questions presented. The first shall state the question or questions presented, with a clear and exact reference to the pages of the appendix where a party preserved each question in the trial court. Where a party did not preserve the question in the trial court, counsel shall state why the interests of justice exception to Rule 8 may be applicable.

(2) Scope of review. The second shall state the standard and scope of review applicable to the issue.

(3) Merits of argument. The third shall state the merits of the argument. The merits of any argument that is not raised in the body of the opening brief shall be deemed waived and will not be considered by the Court on appeal.

B.(1) Citations. The style of citations shall be as provided in paragraph (g) of this rule.

(2) Unreported decisions. If an opinion or order which is unreported or not yet reported is cited, a copy thereof shall be attached to the brief, except that if the number of decisions is too numerous to attach, then the decisions may be bound in a separate compendium.

(vii) Trial court's judgment and rationale. The opening brief of the appellant shall include a copy of the order or orders of judgment being appealed and, if any, the separate written or transcribed rationale of the trial court. These items shall be inserted at the end of the opening brief, and not in the appendix.

(c) Reply briefs.

(i) Contents. Appellant shall not reserve material for reply brief which should have been included in a full and fair opening brief. There shall not be repetition of materials contained in the opening brief. A table of contents and a table of citations, as required by paragraphs (b)(i) and (ii), above, shall be included in the reply brief.

(ii) Cross-appeal. Where there is a cross-appeal, appellee's summary of argument with regard to the cross-appeal shall be admitted or denied with specificity in the reply brief. As appropriate, the reply brief may also contain sections specified under paragraph (b)(iii) and (b)(v) of this rule, with respect to such cross-appeal.

(iii) Headings. To the extent that the reply brief contains any of the items set forth in paragraph (b) of this rule, they shall be set forth under distinctive titles and commence on a new page.

(d) Length of briefs. Without leave of Court, an opening or answering brief shall not exceed a total of 35 pages and a reply brief shall not exceed 20 pages, exclusive of appendix; but where there is a cross-appeal, the answering/opening brief on cross-appeal of appellee shall not exceed 50 pages and the reply brief of appellant shall not exceed 35 pages, exclusive of appendix. In the calculation of pages, the material required by paragraphs (b)(i) and (ii) of this rule is excluded and the material required by paragraphs (b)(iii) through (vi) of this rule is included. Footnotes shall not be used for argument ordinarily included in the body of a brief or for the purpose of avoiding these page limitations. Footnotes shall be single spaced and be of the same type size as the text of the brief. The Court looks with disfavor upon motions to exceed the page limitation, and such motions will be granted only for good cause shown. Any motion filed pursuant to this section must be filed at least five days before the due date for the filing of the brief to which it relates.

(e) Appendices. Appellant's appendix shall contain a paginated table of contents, the complete docket entries in the trial court arranged chronologically in a single column, and relevant portions of the charge. Unless otherwise ordered by the Court, the appellant's appendix shall contain such portions of the trial transcript as are necessary to give this Court a fair and accurate account of the context in which the claim of error occurred and must include a transcript of all evidence relevant to the challenged finding or conclusion. The appendix of either appellant or appellee shall, unless otherwise ordered by the Court, contain such other parts of the record material to the questions presented as each wishes the Justices to read; duplication shall be avoided whenever possible. The portions of the record in the appendix shall be arranged in chronological order following the docket entries. If testimony of witnesses is included, appropriate references to the pages of such testimony in the typewritten transcript shall be made in the table of contents. Asterisks or other appropriate means shall be used to indicate omissions in such testimony. Each appendix shall have a table of contents and be organized so that its contents can be clearly identified and rapid reference thereto can be made. All appendices shall be separately bound. Whenever any document, paper or testimony in a foreign language is included in any appendix or is cited in any brief, an English translation of such document, paper or testimony, made under the authority of the trial court or agreed by the parties to be correct, shall be included in the appendix. The appellant's opening brief is required to be accompanied by an appendix in all cases except, in a Certification of Questions of Law matter filed pursuant to Supreme Court Rule 41.