

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

2009 NOV -5 2 14 31

No. 81923-8

BY RONALD R. CARPENTER

CLERK

---

**SUPREME COURT  
OF THE STATE OF WASHINGTON**

---

**AFSHIN PISHEYAR,**

**Petitioner**

**v.**

**RICHARD M. SNYDER, et ux., and DAVID HANNAH, et ux., et al.,**

**Respondents**

---

**RESPONDENTS' SUPPLEMENTAL BRIEF**

---

Ronald L. Berenstein, WSBA No. 7573  
RBerenstain@perkinscoie.com  
William C. Rava, WSBA No. 29948  
WRava@perkinscoie.com  
PERKINS COIE LLP  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
Telephone: 206.359.8000  
Facsimile: 206.359.9000

Attorneys for Respondents  
Richard M. Snyder, et ux., and David  
Hannah, et ux., et al.

## TABLE OF CONTENTS

	Page
I. INTRODUCTION .....	1
II. ISSUES PRESENTED FOR REVIEW .....	3
III. STATEMENT OF THE CASE.....	3
A. The Parties and Their Relationship.....	3
B. The Trial Court Examines the Allegations Prior to the Reverse Stock Splits.....	4
IV. ARGUMENT .....	8
A. Standard of Review .....	8
B. The Appraisal Proceeding – Which Addresses All Issues of Fair Value – Is the Exclusive Forum for Litigating Pisheyar's Claims .....	9
1. The Exclusive Nature of the Appraisal Remedy Is Plain on the Face of the Statute .....	10
2. The Appraisal Proceeding Will Fairly and Adequately Address Pisheyar's Claims.....	16
C. Because Pisheyar Is No Longer a Shareholder He Cannot Pursue Claims that Belong to the Corporation .....	18
V. CONCLUSION.....	21

**TABLE OF AUTHORITIES**

	<b>Page</b>
<b>Cases</b>	
<u>Austell v. Smith</u> , 634 F. Supp. 326 (W.D.N.C. 1986).....	16
<u>Borghetti v. System &amp; Computer Tech, Inc.</u> , 199 P.3d 907 (Utah 2008).....	15, 16
<u>Cerrillo v. Esparza</u> , 158 Wn.2d 194, 142 P.3d 155 (2006).....	10
<u>Dep't of Ecology v. Campbell &amp; Gwinn L.L.C.</u> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	8, 9
<u>Exch. Nat'l Bank of Spokane v. United States</u> , 147 Wash. 176, 265 P. 722 (1928) , <u>aff'd</u> , 279 U.S. 80 (1929).....	16
<u>Finley v. Curley</u> , 54 Wn. App. 548, 774 P.2d 542 (1989).....	19
<u>Friends of Snoqualmie Valley v. King County Boundary Review Bd.</u> , 118 Wn.2d 488, 825 P.2d 300 (1992).....	12
<u>Grosset v. Wenaas</u> , 42 Cal. 4th 1100, 175 P.3d 1184, 72 Cal. Rptr. 3d 129 (2008).....	19
<u>Haberman v. Wash. Pub. Power Supply Sys.</u> , 109 Wn.2d 107, 744 P.2d 1032, 750 P.2d 254 (1987).....	18
<u>In re Affymetrix Derivative Litig.</u> , No. C 06-05353 JW, 2008 WL 5050147 (N.D. Cal. Mar. 31, 2008).....	19
<u>In re Countrywide Fin. Corp. Derivative Litig.</u> , 581 F. Supp. 2d 650 (D. Del. 2008).....	20
<u>In re Nw. Greyhound Lines, Inc.</u> , 41 Wn.2d 672, 251 P.2d 607 (1952).....	9
<u>IRA for Benefit of Oppenheimer v. Brenner Cos.</u> , 107 N.C. App. 16, 419 S.E.2d 354 (1992).....	16

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<u>Kilian v. Atkinson</u> , 147 Wn.2d 16, 50 P.3d 638 (2002).....	10
<u>Kona Enter., Inc. v. Estate of Bishop</u> , 179 F.3d 767 (9th Cir. 1999).....	20
<u>Korslund v. DynCorp Tri-Cities Servs., Inc.</u> , 121 Wn. App. 295, 88 P.3d 966 (2004), <u>aff'd</u> , 156 Wn.2d 168, 125 P.3d 119 (2005).....	18
<u>Lewis v. Anderson</u> , 477 A.2d 1040 (Del. 1984).....	20
<u>Lewis v. Chiles</u> , 719 F.2d 1044 (9th Cir. 1983) .....	19
<u>Matteson v. Ziebarth</u> , 40 Wn.2d 286, 242 P.2d 1025 (1952).....	11, 12, 13, 18
<u>Matthew G. Norton Co. v. Smyth</u> , 112 Wn. App. 865, 51 P.3d 159 (2002).....	9
<u>Matthews v. Wenatchee Heights Water Co.</u> , 92 Wn. App. 541, 963 P.2d 958 (1998).....	12, 13, 18
<u>McMinn v. MBF Operating Acquisition Corp.</u> , 142 N.M. 160, 164 P.3d 41 (2007).....	14
<u>Noakes v. Schoenborn</u> , 116 Or. App. 464, 841 P.2d 682 (1992).....	20, 21
<u>Quinn v. Anvil Corp.</u> , No. C08-0182RSL, 2008 WL 4810084 (W.D. Wash. Oct. 31, 2008) .....	19
<u>Romero v. US Unwired, Inc.</u> , Civil Action Nos. 04- 2312, 04-2436, 2006 WL 2366342 (E.D. La. Aug. 11, 2006) .....	20
<u>Saldin Sec., Inc. v. Snohomish County</u> , 134 Wn.2d 288, 949 P.2d 370 (1998).....	3
<u>Sifferle v. Micom Corp.</u> , 384 N.W.2d 503 (Minn. App. 1986) .....	13
<u>Sound Infiniti v. Pisheyar</u> , No. 06-2-19673-2 SEA (Downing, J.) .....	6

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<u>Sound Infiniti, Inc. v. Snyder</u> , 145 Wn. App. 333, 186 P.3d 1107 (2008).....	9, 17, 21
<u>State v. Thomas</u> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	3
<u>Stepak v. Schey</u> , 51 Ohio St. 3d 8, 553 N.E.2d 1072 (1990).....	16
<u>Travis v. Mittelstaedt</u> , No. CV 06-2341 LEW GGH, 2008 WL 755842 (E.D. Cal. Mar. 19, 2008).....	19
<u>Van Buren v. Highway Ranch</u> , 46 Wn.2d 582, 283 P.2d 132 (1955).....	12
<u>Williams v. Stanford</u> , 977 So.2d 722 (Fla. App. 1 Dist. 2008) .....	16
<u>Wolf v. Scott Wetzel Servs., Inc.</u> , 113 Wn.2d 665, 782 P.2d 203 (1989).....	18
<u>Woods v. Kittitas County</u> , 162 Wn.2d 597, 174 P.3d 25 (2007).....	16
<b>Statutes</b>	
Chapter 23B.13 RCW .....	10
Del. Gen. Corp. Law § 262 .....	15
RCW 23B.10.020 (4) .....	18
RCW 23B.10.020(4)(b) .....	2
RCW 23B.13.020.....	12, 14
RCW 23B.13.020(1) .....	10
RCW 23B.13.020(2) .....	10
RCW 23B.13.230.....	10
RCW 23B.13.300(1) .....	10
RCW 23B.13.300(2) .....	6
Rem. Supp. 1949 § 3803-41 .....	11
UT ST § 16-10a-1322 .....	16

**TABLE OF AUTHORITIES**  
(continued)

	<b>Page</b>
<b>Regulations and Rules</b>	
RAP 10.3(a)(5).....	3
<b>Other Authorities</b>	
1 S.J. 379-380, 51st Leg. (Wash. 1989).....	10
2 S.J. 2983, 51st Leg. (Wash. 1989).....	10
2 S.J. 3087-88, 51st Leg. (Wash. 1989).....	9
ALI, <u>Principles of Corporate Governance</u> (1994).....	20
Laws of 1933, ch. 185, § 41 .....	10
Webster's Third New International Dictionary (1976).....	11

## I. INTRODUCTION

Petitioner Afshin Pisheyar ("Pisheyar" or "Petitioner") seeks to overturn the unanimous decision of the Court of Appeals upholding the trial court's summary judgment determination that Pisheyar's sole remedy as a dissenter to a procedurally proper reverse stock split transaction is a statutory appraisal proceeding. Pisheyar's assertion that this Court should allow him to simultaneously seek additional damages in a separate proceeding while also pursuing fair value for his shares in the appraisal proceeding is contrary to the unambiguous text of the Washington Business Corporation Act, RCW 23B ("WBCA"), its legislative history and controlling case law, and such a result would threaten the vitality of the corporate structure in this state.

Pisheyar contends that the Court of Appeals' decision opens the floodgates to malfeasance by majority shareholders of Washington corporations. To the contrary, our Legislature carefully crafted a balanced statute which assures that a dissenting shareholder has a proper remedy enforced by a court with special jurisdiction while at the same time guarding the ability of a corporation to continue to function even when all its shareholders fail to agree.

This is not a case about whether a Washington corporation may, if it follows statutory rules, implement a reverse stock split which can result in the elimination of shareholders who hold fractional shares. Nor is it a case about whether a shareholder who objects has a right to remain a

shareholder. Reverse stock splits are statutorily permitted,<sup>1</sup> and no shareholder has a right to be a shareholder forever. Here the only issue is whether the trial court and the Court of Appeals properly concluded that in the event of a reverse stock split the sole remedy for an unhappy shareholder is his special statutory right for an appraisal to assure that he receives "fair value," as defined by the statute, for his shares. Importantly, as the Court of Appeals explained, the appraisal remedy is broad enough to assure that all matters weighing on fair value may be considered. For example, to the extent a dissenting shareholder can properly present evidence that some misconduct, self-dealing, or breach of duty occurred prior to the transaction from which the appraisal right arises and such matters impact the value of the shares being appraised, these are appropriate subjects of the appraisal proceeding. The appraisal remedy protects the rights of the dissenting shareholder to obtain full, fair value for his shares, but the dissenting shareholder is limited to one proceeding in one court and may not pursue additional relief in any other court. To allow any other litigation to proceed would be to deprive the appraisal court of its exclusive jurisdiction.

In addition to properly limiting Pisheyar to his appraisal proceeding, the Court of Appeals correctly applied the civil rules and settled case law to uphold the dismissal of his derivative claims for lack of standing once Pisheyar was no longer a shareholder of the Corporations.

This Court should affirm the Court of Appeals on both issues.

---

<sup>1</sup> See RCW 23B.10.020(4)(b).

## II. ISSUES PRESENTED FOR REVIEW

1. Should the Court affirm the Court of Appeals' unanimous holding that the unambiguous WBCA, supported by well-settled case law, provides an exclusive remedy for Pisheyar, a shareholder dissenting from a procedurally proper reverse stock split transaction?

2. Should the Court affirm the unanimous Court of Appeals' holding that as a result of the lawful reverse stock split, Pisheyar is no longer a shareholder of the Corporations and therefore lost his standing to pursue his derivative claims on behalf of and for the benefit of the Corporations?<sup>2</sup>

## III. STATEMENT OF THE CASE

### A. The Parties and Their Relationship

In 1997, Snyder, Hannah and Pisheyar formed Sound Infiniti, a car dealership. CP 17; 256 ¶ 19. When Pisheyar initiated this action, Hannah owned 51%, Snyder 30% and Pisheyar 19% of Sound Infiniti. CP 256 ¶ 20. In 2003, Snyder, Hannah, Pisheyar and Robert Curtis formed another corporation, Infiniti of Tacoma. When Pisheyar initiated this

---

<sup>2</sup> Pisheyar's Petition for Review ("Petition") identified four issues putatively presented for review; however he offered no argument regarding the fourth issue raised in his Petition, Pet. at 2, relating to his corporate perquisite claims which were dismissed on Appeal. Without any argument, this issue is not properly presented for review. See, e.g., Saldin Sec., Inc. v. Snohomish County, 134 Wn.2d 288, 297 n.4, 949 P.2d 370 (1998) ("brief must include argument in support of issues presented for review as well as citation to authority" (citing RAP 10.3(a)(5))); State v. Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004) ("this court will not review issues for which inadequate argument has been briefed or only passing treatment has been made"). If this Court considers the issue, it should follow the holding of the Court of Appeals which found that the perquisite claims were just like Pisheyar's other purported damages and may relate to the value of his lost shares. Therefore, the proper forum for addressing them is Pisheyar's Appraisal Proceeding. To the extent Pisheyar is raising an issue about his termination, these claims were dismissed and not subject to consideration by the Court of Appeals.

Pisheyar also appears to argue that a reverse stock split can constitute minority oppression in Washington. Pet. at 15-16. This issue is outside the scope of review. The trial court never certified the issue for discretionary review; Commissioner Craighead specifically considered and rejected it, and the Court of Appeals did not address it.

action, Snyder owned 51%, Hannah 25%, Pisheyar 19% and Curtis 5% of Infiniti of Tacoma. CP 257 ¶ 24. The shareholders of the Corporations agreed that Pisheyar would have no role in the management of either dealership. CP 257 ¶ 26; 478 § 2. Hannah and Snyder manage the dealerships, both of which have been successful and profitable. CP 257-58 ¶¶ 27-32; 259 ¶ 40; 951; 2455-57.

By February 2005, Snyder and Hannah had concluded that irreconcilable differences with Pisheyar threatened the continued vitality and success of the Corporations. In early 2005, before Pisheyar initiated this action,<sup>3</sup> Snyder and Hannah began exploring options for purchasing Pisheyar's shares in the Corporations. E.g., CP 259 ¶ 35-38; 948; 952.

In March 2005, Pisheyar filed his original Complaint in this action. CP 1-11; 253 ¶ 1. Pisheyar alleged that the actions of Snyder and Hannah as officers of the Corporations damaged him in his individual capacity and in his capacity as a shareholder, entitling him to recover both personally and derivatively for the Corporations. CP 1-11; 315-26.

**B. The Trial Court Examines the Allegations Prior to the Reverse Stock Splits**

In July 2005, the Corporations informed their respective shareholders of proposals to implement reverse stock splits, which would result in Pisheyar and shareholder Curtis owning fractional shares that the Corporations would be entitled to purchase. CP 33-36; 48-90. Pisheyar moved to enjoin the Corporations from proceeding with the transaction.

---

<sup>3</sup> Thus, Pisheyar is wrong when he claims that the reverse stock splits were a retaliatory response to initiation of his litigation. Pet. at 4-6.

He did not then nor has he ever claimed any procedural irregularity or fraud in connection with the transaction. CP 253 ¶ 4. The trial court temporarily enjoined the Corporations from implementing the reverse stock splits (the "August 31 TRO"), until an evidentiary hearing (the "Injunction Hearing") to determine whether a preliminary injunction should issue. CP 997-99; 252; 253 ¶ 6; 253-54 ¶¶ 4-7; 1000-07.

The trial court held a two-day, full evidentiary Injunction Hearing. CP 252; 1008-2068; RP (11/17/05); RP (12/08/05). The central question was whether, by permitting the Corporations to effect statutorily-permitted reverse stock splits, the Corporations would possibly be damaged because no one with standing would remain to pursue remedies on behalf of the Corporations. CP 254-55 ¶¶ 7-14; RP (11/17/05) 53:15-54:14.

On December 20, 2005, the trial court dissolved the August 31 TRO on grounds that there was no risk that possible damage to the Corporations would go unredressed because there was no evidence of any damage to the Corporations. CP 251-70, 261 ¶ 54; 262 ¶ 61.<sup>4</sup>

Pisheyar filed a motion for discretionary review seeking reversal of the denial of the injunction (Ct. App. # 57803-1), which was denied. The Court of Appeals also denied his Motion to Modify.

In January 2006, a majority of the shareholders of the Corporations voted to implement the reverse stock splits, leaving Pisheyar and Curtis

---

<sup>4</sup> The trial court also sanctioned Pisheyar under Rule 11 for baseless claims made in the litigation and awarded the Corporations more than \$150,000 in attorneys' fees for the wrongfully issued TRO. See Supp. Counter-Designation of Clerk's Papers, Findings of Fact Re: Costs and Findings of Fact Re: Sanctions (both filed 8/22/06).

with fractional shares. CP 173 ¶¶ 2, 3; 175-227; 232. Pisheyar dissented, and, as provided by the statute, he disputed the Corporations' determination of fair value. Pisheyar made a demand for payment based on his determination of fair value, and tendered his shares. CP 273 ¶ 8. Unable to reach an agreement on fair value, Sound Infiniti, in accordance with RCW 23B.13.300(2), commenced a lawsuit in King County Superior Court (the Appraisal Proceeding) in which the King County Superior Court will determine the fair value—as that term is defined in the WSBA—of Pisheyar's former interest in Sound Infiniti.<sup>5</sup>

After the implementation of the reverse stock splits, Snyder and Hannah moved to dismiss Pisheyar's derivative claims as he was no longer a shareholder. CP 2069-90. The trial court granted the motion, CP 309-11, but nonetheless permitted Pisheyar to continue litigating his so-called personal claims, including his perquisite claims. CP 2124-36; 2269; 2287.

Between approximately August 2005 and October 2006, Snyder and Hannah conducted discovery regarding Pisheyar's alleged damages. CP 2158-74, particularly 2170-71. Ultimately, Pisheyar admitted that his purported damages constituted 19% (his former ownership share of the Corporation) of whatever damages the Corporations supposedly suffered arising from Snyder's and Hannah's alleged wrongdoing. *E.g.*, CP 2213-21; 2817. He failed to identify, let alone offer any support for any

---

<sup>5</sup> That action, *Sound Infiniti v. Pisheyar*, No. 06-2-19673-2 SEA (Downing, J.), (the "Appraisal Proceeding") is ongoing but stayed pending this appeal. The Appraisal Proceeding relates only to Pisheyar's shares in Sound Infiniti. Pisheyar has not challenged that he received "fair value" for his shares in Infiniti of Tacoma.

damages that were not a supposed diminution in value of his interest in the Corporation. CP 2281; 2297.

Snyder and Hannah moved for partial summary judgment on his so-called personal damage claims. CP 2266-2301; 2281; 2297; RP (11/3/06) 27:3-31:22. The trial court granted summary judgment in favor of Snyder and Hannah, holding that Pisheyar's "claims for damages . . . resulting in reduced corporate profits, or increased corporate expenses, and therefore in reduced dividend distributions" are "derivative in nature, and [Pisheyar] lacks standing to assert them." CP 528.

The trial court also dismissed Pisheyar's separate claims for damages arising from implementation of the reverse stock split on grounds that the Appraisal Remedy was exclusive because "there is no evidence before the court that the transaction either failed to comply with procedural requirements, or was fraudulent." CP 528.

The Court of Appeals accepted interlocutory review of three limited issues, and found in favor of Snyder and Hannah on all three, holding that (1) the Appraisal Proceeding is exclusive regarding Pisheyar's claims related to the reverse stock splits; (2) Pisheyar's derivative claims were properly dismissed; and (3) Pisheyar's corporate perquisite claims should also have been dismissed because they were either subject to the Appraisal Proceeding or derivative. Pisheyar petitioned this Court for review, apparently seeking reversal of the Court of Appeals' three rulings, though entirely failing to brief or argue the final issue regarding the

corporate perquisite claims.<sup>6</sup>

#### IV. ARGUMENT

##### A. Standard of Review

This appeal is about the interpretation of a Washington statute. The Court of Appeals properly recognized that the fundamental objective of an appellate court interpreting a statute "is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). Where there is no ambiguity, there is no need to consult secondary sources such as the legislative history or decisions from other jurisdictions. See Campbell, 146 Wn.2d at 12. Here the statutory provision is plain, and this Court should adhere to its guardian principle of giving effect to the Legislature's clear and unequivocal intent.

##### B. The Appraisal Proceeding – Which Addresses All Issues of Fair Value – Is the Exclusive Forum for Litigating Pisheyar's Claims

Despite his assertions, Pisheyar's circumstances are not unique nor is this a case of first impression. Relying on the "unambiguous text of the [WSBA], its legislative history, and controlling case law," the Court of Appeals correctly held that "appraisal is the exclusive remedy for dissenting shareholders in [Pisheyar's] circumstance." Sound Infiniti, Inc. v. Snyder, 145 Wn. App. 333, 343, 186 P.3d 1107 (2008). But in

---

<sup>6</sup> See supra note 3, at 3.

doing so, the Court of Appeals made clear that an appraisal proceeding under the WBCA can address issues of alleged majority misconduct,<sup>7</sup> breach of duty and other wrongdoing which preceded the transaction at issue if the evidence of such wrongdoing goes to the value of shares being appraised. Sound Infiniti, 145 Wn. App. at 349. Because Pisheyar's only identified damages are related to supposed diminution in the value of his former interest in the Corporation, the exclusive venue for addressing his claims is the Appraisal Proceeding which he is pursuing.

**1. The Exclusive Nature of the Appraisal Remedy Is Plain on the Face of the Statute**

If the language of a statute is clear on its face, Washington courts must give effect to its plain meaning without resort to extrinsic "evidence" of that meaning. Cerrillo v. Esparza, 158 Wn.2d 194, 201, 142 P.3d 155 (2006); Kilian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2002).

"Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute." Kilian, 147 Wn.2d at 21.

There is no legitimate way to read the WBCA to find any ambiguity regarding the exclusivity of the appraisal remedy for dissenting

---

<sup>7</sup> Pisheyar attempts to convince this Court that affirmance of the Court of Appeals will "encourage[] misconduct and retaliation by majority shareholders" against a complaining minority. Pet. at 16. Pisheyar has repeatedly and mistakenly cast the dissenter's rights statute as one solely affording protection to shareholders and that it is inadequate as applied here. But providing dissenters' rights for reverse stock splits has the dual purpose of affording protection to shareholders who dissent and "enhancing the majority's freedom to make such changes." 2 S.J. 3087-88, 51st Leg. (Wash. 1989). This Court has consistently recognized the statutory purpose of promoting efficient corporate functioning. See Respondent's Court of Appeals Brief at 25 (citing In re Nw. Greyhound Lines, Inc., 41 Wn.2d 672, 677, 251 P.2d 607 (1952); accord Matthew G. Norton Co. v. Smyth, 112 Wn. App. 865, 873, 51 P.3d 159 (2002)).

shareholders absent procedural flaws or fraud:<sup>8</sup>

a shareholder entitled to dissent . . . may not challenge the corporate action . . . unless the action fails to comply with the procedural requirements imposed by this title . . . , the articles of incorporation, or the bylaws, or is fraudulent with respect to the shareholder or the corporation.

RCW 23B.13.020(2). Pisheyar has never alleged any procedural irregularity nor fraud with regard to the reverse stock split transactions.

On appeal, for the first time and with no support, he argues that "fraudulent" means something less than "actual fraud," thus entitling him to continue to pursue some of his claims of wrongdoing in this case while still pursuing fair value in the Appraisal Proceeding. Pet. at 11-15. But there can be no legitimate question that "fraudulent" encompasses only acts of fraud. See, e.g., Webster's Third New International Dictionary 904 (1976) (defining fraudulent as "belonging to or characterized by fraud,<sup>9</sup> founded on fraud, . . . obtained or performed by fraud").

Indeed, this Court, interpreting the predecessor dissenters rights statute, Rem. Supp. 1949 § 3803-41, defined fraudulent in the context of a corporate act to mean "actual fraud." Matteson v. Ziebarth, 40 Wn.2d

---

<sup>8</sup> The right of appraisal for dissenting shareholders has been part of Washington's legal landscape since 1933. See Laws of 1933, ch. 185, § 41. The current Act is codified at Chapter 23B.13 RCW and enacts Washington's version of the Revised Model Business Corporation Act, REV. MODEL. BUS. CORP. ACT § 13.02(b) (1984) ("MBCA"). 1 S.J. 379-380, 51st Leg. (Wash. 1989); 2 S.J. 2983, 51st Leg. (Wash. 1989). The Act entitles shareholders who dissent from certain corporate actions, such as reverse stock splits, to obtain payment for the fair value of their shares. RCW 23B.13.020(1). A dissenting shareholder must demand payment for his shares and deposit his certificates in accordance with the corporations' notice to the shareholder. RCW 23B.13.230. If a shareholder and the corporation cannot agree on the fair value of the shares, the Act requires the corporation to petition the superior court to determine the fair value. RCW 23B.13.300(1).

<sup>9</sup> In turn, fraud is defined as "an instance or an act of trickery or deceit especially when involving misrepresentation, an act of deluding." Id.

286, 297, 242 P.2d 1025 (1952).<sup>10</sup> This Court held that "under our own act, the statutory remedy is likewise exclusive as to unfairness or breach of fiduciary duty short of actual fraud." 40 Wn.2d at 297. The issue before the Matteson Court was the scope of remedies for a shareholder removed from a corporation as a result of a merger. The statute did not at that time include the corporate action of a reverse stock split, but the statute did include dissenters rights for any corporate act that "changes the rights of the holders of any outstanding shares." There is nothing to suggest the Court's holding regarding the exclusivity of the appraisal remedy absent actual fraud was limited to the type of merger at issue in that case. Indeed, Washington courts citing Matteson have applied its holding to the dissenter's rights statute as a whole. See Matthews v. Wenatchee Heights Water Co.:

The remedy provided under the dissenter's right statute to a minority shareholder that opposes *any corporate decision or action* is "exclusive as to unfairness or breach of fiduciary duty *short of actual fraud.*" Matteson v. Ziebarth, 40 Wn.2d 286, 297, 242 P.2d 1025 (1952) (emphasis added). Here, Mr. Matthews has not alleged the District acted fraudulently. He therefore was limited to relief provided by RCW 23B.13.020.

92 Wn. App. 541, 555, 963 P.2d 958 (1998) (first emphasis added) (dismissing plaintiff's challenge to corporate act dissolving corporation based on exclusivity of dissenter's rights act).<sup>11</sup>

---

<sup>10</sup> See Court of Appeals Respondent's Brief at 34 for a discussion of the facts of Matteson.

<sup>11</sup> See also Van Buren v. Highway Ranch, 46 Wn.2d 582, 586, 283 P.2d 132 (1955) ("In Matteson, it was held that, where the statutory remedy was available, if properly invoked, a minority stockholder could not obtain relief in equity on a claim based upon unfairness rather than fraud.").

The Legislature is presumed to have been aware of this Court's judicial interpretation in Matteson when it enacted RCW 23B.13.020, see Friends of Snoqualmie Valley v. King County Boundary Review Bd., 118 Wn.2d 488, 496, 825 P.2d 300, 305 (1992), and, in the absence of express contrary intent, to have intended the current appraisal statute to be interpreted consistent with it. Id. This Court's decision in Matteson, and followed in Matthews, establishes that the fraud exception to the exclusive remedy of an appraisal proceeding requires actual fraud in connection with the implementation of the corporate transaction at issue, and nothing less. Matteson, 40 Wn.2d at 297; Matthews, 92 Wn. App. at 555. Here, Pisheyar concedes that he has not alleged that the reverse stock split transactions were implemented by fraudulent means.

Ignoring directly applicable Washington precedent, Pisheyar argues that the Court should instead rely on the Minnesota Court of Appeals ruling in Sifferle v. Micom Corp., 384 N.W.2d 503 (Minn. App. 1986), to support the conflated argument that the exclusion of the term "unlawful", which is contained in the Model Act (on which the Washington and Minnesota statutes are based) but not in the Washington statute and the use of the term "fraudulent" rather than "fraud" mean that our Legislature intended "fraudulent" to be something broader than actual fraud. Pet. at 11-12. The Court of Appeals rejected this backwards argument and so too should this Court. The Court of Appeals noted that the Legislature's deletion of the Model Act's "unlawful" indicates the contrary intent—that our Legislature wanted exceptions to appraisal to be

very narrow, and it enacted such exceptions to include only procedural irregularity or actual fraud.

Moreover, the Minnesota and Washington legislatures took different approaches in fashioning their own respective versions of the Model Act, which makes any comparison dubious. Although, like Washington, the Minnesota legislature deleted the term "unlawful" when it adopted its act, it failed to provide any exclusivity exception for procedural violations in connection with the implementation of the transaction at issue except the "fraudulent" exception. Sifferle, 384 N.W.2d at 507. Accordingly, the Minnesota court interpreted its fraudulent exception to include procedural irregularities. Id. at 507 & n.2 ("We think that . . . the Minnesota legislature intended the term 'fraudulent' . . . to be construed more broadly than strict common-law fraud . . . . For example, the legislature certainly did not intend that because the term 'unlawful' was not included in § 302A.471, subd. 4, a dissenting shareholder could not seek to set aside a merger which did not comply with the statutory procedure governing mergers."). In Washington, however, the Legislature specifically included an exception for procedural violations. See RCW 23B.13.020 (making it clear that the fraud exception was meant to deal with the rare circumstance where the vote concerning the transaction giving rise to dissenter's rights was fatally flawed).

Pisheyar also relies on a New Mexico case, McMinn v. MBF Operating Acquisition Corp., 142 N.M. 160, 164 P.3d 41 (2007). But

McMinn is distinguishable on multiple levels. See Court of Appeals Brief of Respondent at 34-36. For example, New Mexico's rules of statutory construction differ markedly from Washington's. The McMinn court determined that the statutory appraisal language was unambiguous but nonetheless searched the legislative "history and background" for any "lurking" provisions giving rise to "genuine uncertainty." 164 P.3d at 47 (internal quotation and citation omitted). Where statutory language is unambiguous, Washington courts do not search for what might be lurking. The Court of Appeals found McMinn of no value here, and neither should this Court.

Even though Pisheyar fails to identify any ambiguity in the appraisal statute, nonetheless, he urges the Court to consider the statute's legislative history in disregard of Washington's principles of statutory interpretation. Although unnecessary here, a review of that history reinforces the conclusion that the appraisal remedy is both plenary and exclusive where, as here, there are no allegations of procedural irregularity or actual fraud. See Court of Appeals Brief of Respondent at 33-37.

Pisheyar also argues that the Washington statute – even though not ambiguous – should be interpreted based on Delaware jurisprudence. But as the Court of Appeals noted, the Delaware cases were decided after the Model Act was drafted and after Washington adopted its version of the Model Act. Further, the Delaware dissenters rights statute is not based on the Model Act, differs markedly from Washington's statute<sup>12</sup> and has no

---

<sup>12</sup> See Del. Gen. Corp. Law § 262(b).

exclusivity provision. Del. Gen. Corp. Law § 262.

Pisheyar's reliance on cases from other jurisdictions does not provide any support for the assertion that the appraisal proceeding is not exclusive in Washington because the statutes in these states differ markedly from ours. For example, in Borghetti v. System & Computer Tech, Inc., 199 P.3d 907, 916 (Utah 2008), the Utah statute permitting exceptions to exclusivity includes the term "unlawful," a term expressly rejected by the Legislature in Washington. UT ST § 16-10a-1322. Moreover, the Borghetti court's approach accrues no benefit to Pisheyar — the court was addressing the total cancellation of a shareholder's shares as the result of a merger at a price amounting to less than the preferred shareholders' liquidation price. The court concluded that appropriate damages were "the value of the plaintiff's shares had the company not merged" and nothing more. The Appraisal Proceeding affords Pisheyar the value of his shares.<sup>13</sup>

This Court is bound to interpret the statute as it is written, not as Pisheyar desires it to be read based on non-binding case law from a different jurisdiction interpreting a markedly different statute. "This court's role is to interpret the statute as enacted by the Legislature . . . we will not rewrite [it]." Woods v. Kittitas County, 162 Wn.2d 597, 614, 174

---

<sup>13</sup> Pisheyar's reliance on Williams v. Stanford, 977 So.2d 722, 727 (Fla. App. 1 Dist. 2008) is equally misplaced, where the Florida statute is broader than that in Washington and the court relies exclusively on Delaware law. See also Pet. at 17 IRA for Benefit of Oppenheimer v. Brenner Cos., 107 N.C. App. 16, 419 S.E.2d 354 (1992), (a shareholder's appraisal remedy is "[i]n addition to any other right he may have in law or equity." N.C. Gen. Stat. § 54-166(a)); Austell v. Smith, 634 F. Supp. 326, 330 (W.D.N.C. 1986) Similarly, in Stepak v. Schey, the Ohio appraisal statute contains no exclusivity provision at all. 51 Ohio St. 3d 8, 553 N.E.2d 1072 (1990) (interpreting R.C. § 1701.85).

P.3d 25 (2007) (internal quotation marks and citation omitted); Exch. Nat'l Bank of Spokane v. United States, 147 Wash. 176, 186, 265 P. 722 (1928), aff'd, 279 U.S. 80 (1929).

**2. The Appraisal Proceeding Will Fairly and Adequately Address Pisheyar's Claims**

Pisheyar argues—without authority—that the application of the exclusive appraisal remedy is inadequate because he will not be allowed to redress all his claims in the Appraisal Proceeding.<sup>14</sup> Pet. at 17. But, as the Court of Appeals carefully explained, an appraisal proceeding under Washington law may broadly consider breaches of fiduciary duty, misuse of corporate funds, self-dealing and other alleged wrongs preceding the transaction at issue if the evidence presented shows that such conduct impacted the fair value of the shares being appraised. As the Court of Appeals stated: "To be clear: the court is not limited to determining the value of the minority shareholder's interest at the fixed point in time when the appraisal-triggering action occurred, without reference to prior actions by the majority that may have resulted in that value being reduced." 145 Wn. App. at 349.

Thus, contrary to Pisheyar's contention, an appraisal proceeding may address all matters that relate to the alleged diminution in value of shares. See Court of Appeals Brief of Appellant at 20-23, 29 (identifying "the damages he has suffered . . . as decreased shareholder distributions"); see also Pet. at 17(same). Any claims of wrongdoing, whether related to

---

<sup>14</sup> Pisheyar's claims that he has identified damages separate from those that inure to the value of his shares, Pet. at 15, 17, are not supported by the record, as noted by the Court of Appeals. 145 Wn. App. at 352-353; see CP 2213-21; 2817; 2281; 528.

issues of reduced distributions or denied perquisites, can be considered in determining fair value. Regardless of the terms used to describe the alleged wrongful conduct – whether breach of fiduciary duty, misuse of corporate assets or self-dealing—if there is evidence that such conduct impacted fair value, it may be relevant in the Appraisal Proceeding.<sup>15</sup>

Nor does Pisheyar's claim for supposed injunctive relief provide any way around the Appraisal Proceeding being the exclusive place for all issues arising from the transaction. The Washington statute scheme does not allow Pisheyar to collaterally attack the statutorily permitted transaction<sup>16</sup> no matter how he characterizes his harm or describes the relief he seeks. He is entitled solely to the fair value of his shares, and anything bearing on fair value is relevant in the appraisal process.

**C. Because Pisheyar Is No Longer a Shareholder He Cannot Pursue Claims that Belong to the Corporation**

Derivative suits are rare because the Washington Legislature and courts have long recognized the strong presumption in favor of allowing a corporation's board of directors to determine in its business judgment what claims it will pursue on behalf of the corporation. Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 147, 744 P.2d 1032, 750 P.2d 254 (1987).

---

<sup>15</sup> Moreover, Matteson and Matthews demonstrate that Washington courts must look only to the statutory remedy where one is provided, even if adherence to the statute were to completely foreclose a plaintiff's claims for relief (which it does not do here). Matteson, 40 Wn.2d at 297; Matthews, 92 Wn. App. at 555.

These rulings are consistent with the general rule in Washington that a statutory remedy will bar a common law tort claim if the statutory remedy is mandatory and exclusive. See, e.g., Wolf v. Scott Wetzel Servs., Inc., 113 Wn.2d 665, 668, 782 P.2d 203 (1989); Korslund v. DynCorp Tri-Cities Servs., Inc., 121 Wn. App. 295, 321, 88 P.3d 966 (2004), aff'd, 156 Wn.2d 168, 125 P.3d 119 (2005).

<sup>16</sup> RCW 23B.10.020 (4) (permits reverse stock splits).

To commence and maintain a derivative action, a plaintiff must have a proprietary interest, i.e., be a shareholder of the corporation on whose behalf he is acting. 109 Wn.2d at 149; Finley v. Curley, 54 Wn. App. 548, 557, 774 P.2d 542 (1989). Virtually all courts that have addressed this issue, including the Court of Appeals below, have concluded that the stock ownership requirement is continuous from the commencement of the litigation through its conclusion. For example, the Ninth Circuit long has required that to maintain a derivative action, a plaintiff: (1) must be a shareholder at the time of the alleged wrongful acts; and (2) retain ownership of the stock for the duration of the lawsuit. Lewis v. Chiles, 719 F.2d 1044, 1047 (9th Cir. 1983).<sup>17</sup> A plaintiff loses his standing to pursue a derivative claim once he ceases to have an interest in any recovery obtained for the corporation's benefit. Grosset v. Wenaas, 42 Cal. 4th 1100, 175 P.3d 1184, 72 Cal. Rptr. 3d 129, 141-42 (2008) ("[p]laintiffs who lose their shares involuntarily have no greater interest in the continued well-being of a corporation than plaintiffs who willingly sell their shares. Neither class of plaintiff retains a proprietary interest in the corporate enterprise." 72 Cal. Rptr. 3d at 142). Other recent decisions reach the same result. See, e.g., Quinn v. Anvil Corp., No. C08-0182RSL, 2008 WL 4810084, at \*4 (W.D. Wash. Oct. 31, 2008) (relying on "the language of Rule 23.1 and the Ninth Circuit's unqualified enunciation of

---

<sup>17</sup> Lewis is the seminal Ninth Circuit ruling and continues to be cited and followed. See, e.g., In re Affymetrix Derivative Litig., No. C 06-05353 JW, 2008 WL 5050147, at \*8 (N.D. Cal. Mar. 31, 2008); Travis v. Mittelstaedt, No. CV 06-2341 LEW GGH, 2008 WL 755842, at \*1 (E.D. Cal. Mar. 19, 2008).

the continuous ownership requirement" to dismiss a shareholder derivative suit for lack of standing after a reverse stock split); In re Countrywide Fin. Corp. Derivative Litig., 581 F. Supp. 2d 650, 653 (D. Del. 2008).<sup>18</sup>

In spite of this well-settled law, Pisheyar urges this Court to follow a minority position espoused in Noakes v. Schoenborn, 116 Or. App. 464, 841 P.2d 682 (1992), which adopted Section 7.2 of the American Law Institute's Principles of Corporate Governance. See ALI, Principles of Corporate Governance § 7.02(a) (1994) (the "ALI Principle"). The Noakes court and the ALI drafters were primarily concerned that, where shareholder status is lost involuntarily, there might be circumstances in which no entity would remain to represent the best interests of the corporation. Noakes, 841 P.2d at 686; ALI Principle § 7.02 cmt. a.<sup>19</sup>

Although Noakes is not the law in Washington, and is contrary to Ninth Circuit case law, its premise is also entirely irrelevant here, because, prior to permitting the reverse stock splits which resulted in the involuntary loss of his shares, the trial court undertook an extensive examination of whether the corporate action might leave damages to these Corporations unredressed. At the conclusion of the Injunction Hearing, the trial court held that there was no risk of allowing damage to the

---

<sup>18</sup> The very limited merger exception to this almost universal rule does not apply here. See, e.g., Kona Enter., Inc. v. Estate of Bishop, 179 F.3d 767, 770 (9th Cir. 1999); Lewis v. Anderson, 477 A.2d 1040, 1046 (Del. 1984).

<sup>19</sup> Even the authors of the ALI Principle acknowledge the minority position. The ALI Principle explicitly states that it departs from the majority approach to the continuous-ownership rule. See ALI Principle § 7.02 cmt. a ("Section 7.02 departs from the majority approach"); see also Romero v. US Unwired, Inc., Civil Action Nos. 04-2312, 04-2436, 2006 WL 2366342, at \*5 (E.D. La. Aug. 11, 2006) (rejecting the ALI Principle in light of prevailing Delaware and federal law).

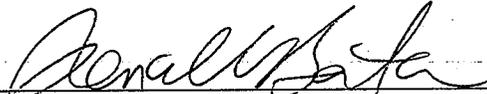
Corporations to go unredressed as there was no evidence of either wrongdoing or damage to the Corporations.<sup>20</sup> Given the elaborate pre-reverse stock hearing Pisheyar received, as the Court of Appeals correctly held, "there is no basis to depart from the well-established rule that a shareholder must remain a shareholder in order to maintain corporate derivative claims." 145 Wn. App. at 351.

#### V. CONCLUSION

For the foregoing reasons, the Court should affirm the Court of Appeals.

DATED: March 5, 2009.

**PERKINS COIE LLP**

By: 

Ronald L. Berenstain, WSBA No. 7573  
William C. Rava, WSBA No. 29948  
1201 Third Avenue, Suite 4800  
Seattle, WA 98101-3099  
Telephone: 206.359.8000  
Facsimile: 206.359.9000

Attorneys for Respondents/Cross-Appellants  
Richard M. Snyder and David Hannah, et al.

---

<sup>20</sup> So the Noakes approach was followed by the trial court in this case even though it is not the law of this state. Thus, Pisheyar would gain nothing if this minority approach was adopted because he already had the proceeding that the Noakes court envisions.

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

**PROOF OF SERVICE**

2009 MAR -5 P 4:44

I, June Starr, an employee with the law firm of Perkins Coie LLP  
hereby certify under penalty of perjury under the laws of the State of  
Washington that on March 5, 2009, I caused to be served upon counsel of  
record at the addresses and in the manner described below, the foregoing  
Respondents' Supplemental Brief.

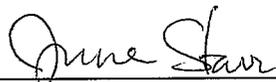
**Service Via Hand Delivery**

James A. Krueger  
Lucy R. Clifthorne  
Daniel C. Montopoli  
VANDEBERG JOHNSON & GANDARA  
1201 Pacific Avenue, Suite 1900  
Tacoma, WA 98401

**Service Via U.S. Mail**

Boyd F. Buckingham  
BOYD F. BUCKINGHAM, INC. P.S.  
321 Burnett Ave. S. Suite 200  
Renton, WA 98057

Signed at Seattle, Washington this 5th day of March, 2009

  
\_\_\_\_\_  
June Starr