No. 102324-3
Court of Appeals No. 83701-0-I

SUPREME COURT
OF THE STATE OF WASHINGTON

CALLUM HERDSON, an individual,

Respondent/Appellee,

v.

RICHARD FORTIN, ROBERT ENSLEN, XCAR INC., FTW SERVICES, INC., XCAR REMARKETING INC., CROSS BORDER VEHICLE SERVICES, INC. , and CROSSBORDER VEHICLE SALES, LTD.,

Petitioner/Appellants.

RESPONDENT'S RESPONSE TO APPELLANTS' PETITION FOR DISCRETIONARY REVIEW

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I. IDENTITY OF ANSWERING PARTY

Respondent/Appellee Callum Herdson ("Herdson") is a one-third minority shareholder in XCar, who prevailed before the Superior Court in his minority shareholder oppression claim, against Petitioners/Appellants (collectively "Fortin"), with liability affirmed by the Court of Appeals.

II. RESTATEMENT OF THE ISSUES

(1) Should this Court review the well-established elements of statutory minority shareholder oppression under the novel argument that it is nothing more than a common-law tort—a position that relies upon an unpublished decision interpreting Nevada law and never adopted by any court interpreting Washington law?

(2) Should this Court render an advisory opinion concerning the propriety of appointing a special fiscal agent when the Court of Appeals reversed and remanded the appointment for further consideration in light of the current record, which is not now before this Court?

(3) Should this Court review the Superior Court's discretion in managing the trial when both sides were informed and given equal time to present evidence, Petitioners provided no applicable legal framework for review, and Petitioners failed to demonstrate prejudice from the trial proceedings?

III. STATEMENT OF RELEVANT FACTS

A. The Egregious Conduct at Issue

Herdson is a one-third minority shareholder in XCar and entitled to one-third of XCar's after-tax, net profits. Findings of Fact and Conclusions of Law (hereinafter "Findings") ¶ 16 (CP 1729). Fortin oppressed Herdson's minority shareholder rights, deprived Herdson of his share of profits, and used XCar for the controlling shareholders' exclusive benefit. The Superior Court found, and the Court of Appeals affirmed without exception,[1]

[1] Division One published opinion *Herdson v. Fortin*, No. 83701-0-I, 26 Wn. App. 2d 628, 530 P.3d 220 (2023), (hereinafter "COA Op.") at Slip Op. 5-8.

Fortin's lengthy and deep course of oppression, fraud, and illegality.

At every turn, Fortin took steps to "obscure[] XCar's true profitability … devalu[ing] Herdson's interest in XCar and depriv[ing] Herdson of his rightful share of 1/3 of XCar's profits." Findings ¶ 47 (CP 1739). A theme running throughout Fortin's misconduct was its use of "transactions [to] deprive XCar of revenue and enrich[] the [controlling shareholders' through their exclusively owned] Crossborder-owned companies." Findings ¶ 41 (CP 1739).

Fortin "would constantly change how fees and costs were charged between XCar and" Fortin's other companies, "direct[ing] their CFO to retroactively change XCar's accounting by altering and reallocating XCar's costs, expenses, and fees." Findings ¶ 37 (CP 1735). "In deciding those fees, Fortin and Enslen, and XCar's senior management, failed to ensure XCar received fees commensurate with market rates for arms-length transactions." Findings ¶ 38 (CP 1736).

"In one instance in 2019, Fortin, Enslen, and Nicholson [Defendants' CFO] retroactively modified XCar's accounting to assess a $1000 per vehicle fee for each transaction with Crossborder Sales. This change resulted in a significant increase in XCar's expenses and decrease to XCar's net profits. This change also resulted in a parallel increase in Cross Border Sales' revenue." Findings ¶ 40 (CP 1736-37).

There were times, however, when Fortin needed to "increase[] XCar's on-paper profitability in the financial statements [to be] presented to NextGear," XCar's largest lender. Findings ¶¶ 43 (CP 1738). Fortin, however, soon took those temporarily assigned paper-profits back by "again chang[ing] XCar's financial statements when they prepared XCar's corporate tax return for the period that overlapped with the financial statements presented to NextGear. This time, [Fortin] reduced the fees earned by XCar in transactions with Crossborder-owned companies from $650 per car to $400 per car. By doing so, [Fortin] reduced XCar's profits and increased

profits earned by Fortin and Enslen's Crossborder-owned companies." Findings ¶ 44 (CP 1738). The back-and-forth charges were made "in order to increase profits into the Crossborder-owned companies and suppress XCar's income for tax purposes … benefitting Fortin and Enslen." Findings ¶ 42 (CP 1737); *see also* Findings ¶¶ 37-47 (CP 1735-39). "The changes to XCar's financial statements [involving tax statements and profits] were made knowingly and not by inadvertence or mistake." Findings ¶ 65 (CP 1743).

"The court [found] that [Fortin's] financial manipulations of XCar's accounting records, constantly changing fees and expenses for transactions between XCar and the Crossborder-owned companies, and the active and purposeful concealment of XCar's true profits ha[d] occurred …." Findings ¶ 114 (CP 1753-54).

Fortin also improperly funneled money directly to the controlling shareholders, bypassing the need to wash the amounts through their wholly owned Crossborder companies.

"Fortin and Enslen's self-payment of management fees amounted to taking constructive dividends for their benefit." Findings ¶ 52 (CP 1740). Fortin and Enslen executed XCar corporate resolutions directing to themselves amounts earned through CNA's warranty profit-sharing program based on XCar's sales of automobile warranties "for their personal benefit and deprived Herdson of his share of profits from XCar's participation in this program." Findings ¶¶ 53-58 (CP 1740-42).

While Fortin manipulated XCar's profits to the controlling shareholders' benefit, it also "distort[ed] XCar's value depending on the circumstances and for their own gain." Findings ¶ 33 (CP 1734). This behavior was unquestionably deliberate and calculated. Fortin admitted in emails, which anticipated Herdson's lawsuit, that Fortin would have difficulty trying to explain why "XCar has value for one purpose, but no value in court." Findings ¶ 31 (CP 1734).

The Superior Court concluded that "Fortin and Enslen's oppressive, fraudulent, and possibly illegal conduct as set forth

in RCW 23B.14.300(2)(b) has been a continuing course ….” Findings ¶ 95 (CP 1749).

Fortin had every opportunity to defend its actions at trial, but the Superior Court found on numerous occasions that Fortin’s testimony was not credible. *See, e.g.*, Findings ¶¶ 34, 39, 45, 62 (CP 1734, 1736, 1738, 1742-43).

B. Equal Time at Trial

The Superior Court conducted a bench trial and heard testimony over the course of six trial days, with closing arguments on a seventh day. Trial Tran. 1323:20-24. On the second day of trial, when the Superior Court provided its final time allocations of 12.5 hours per side, Fortin’s counsel proceeded without objection. *Id.* at 401:10-402:9. At another juncture, when the Superior Court admonished the parties to streamline to stay within their allotted time, Fortin’s counsel stated, “I think we’ll be able to do that.” *Id.* 1090:22-1092:14. It was not until the end of the fifth (next to last) day of testimony, perhaps when Fortin realized the evidence was weighing heavily

in Herdson's favor, that Fortin more formally argued the matter. *Id.* at 1306:22-1308:16.

Even then, Fortin failed to offer proof of what it intended to show with any additional—and unequal—trial presentation. Fortin asked for "one extra day of trial" to "put on a witness or two," without offering any specifics about what evidence they wanted to present. *Id.* at 1307:22-:24.

Fortin and Mr. Herdson used precisely the same amount of time at trial examining witnesses. Fortin substantively examined most of its own witnesses when called during Herdson's case-in-chief. The Court of Appeals noted that Fortin was able to present contrary testimony, but "[t]he court found Fortin had not 'exercised good faith,' 'proper care, skill, or diligence in the management or operation of XCar.' These findings were largely rooted in the court's determinations that Fortin, Enslen, and Nicholson were not credible in their testimony." COA Op. at 18.

Fortin had equal time, entered no evidence of prejudice, and presents no, presumably (although not defined) constitutional, argument worthy of this Court's review.[2]

C. Superior Court's Appointment of a Special Fiscal Agent Reversed and Remanded

Fortin filed a notice of appeal after the Superior Court issued its Findings of Fact and Conclusions of Law, which indicated the appointment of a receiver over XCar, but before the Superior Court ultimately issued its order appointing a special fiscal agent instead of a receiver. Given the pending appeal, the Court of Appeals held that pursuant to RAP 7.2, the Superior Court lacked authority to appoint the special fiscal agent. The Court of Appeals stated:

> [W]e do not reach the propriety of the choice to appoint special fiscal agents and a financial auditor over a receiver, but rather conclude that the order before us is void based on the failure to comply with RAP 7.2.

[2] Appellants did not seek a new trial under CR 59.

> Because the court lacked authority to enter the February 25 order, we reverse on this issue. We further note that our authority in this case terminates upon issuance of the mandate. At that point, the trial court has the authority to order a remedy it deems equitable based on the record before it.

COA Op. at 23-24. Accordingly, the Superior Court's appointment of a special fiscal agent is voided. Neither party seeks to overturn the Court of Appeals' reversal of the special fiscal agent's appointment.

IV. ARGUMENT

During trial, Herdson presented overwhelming evidence supporting his claim of minority shareholder oppression—oppression that was deliberate and severe. The Superior Court made lengthy, detailed findings concerning Fortin's conduct and its liability for minority shareholder oppression. Fortin cannot sustain any attack on those factual findings, which the Court of Appeals made clear in a lengthy, reasoned opinion.

To gain this Court's attention, Fortin attempts to: manufacture a split in Washington authority over the elements of

minority shareholder oppression, where there is none; obtain an advisory opinion on a hypothetical remedy; raise for the first time the criminal-law doctrine of structural error; and repeat empty complaints about trial proceedings.

None of these present (1) a conflict between or among decisions of this Court and the state's courts of appeals, or (2) a significant constitutional question, which would warrant review by this Court.[3] *See* RAP 13.4(b).

A. Washington Cases Consistently Follow *Scott*'s Interpretation of Washington's Minority Shareholder Oppression Statute

Fortin ignores the statutory and equitable nature of minority shareholder oppression in Washington. *Scott v. Trans-Sys., Inc.*, 148 Wn.2d 701, 716, 64 P.3d 1 (2003) ("Dissolution suits under Washington's dissolution statute are

[3] Fortin introduces a number of tangential, disputable facts and legal assertions that are not central to any of the primary claims for review. Herdson does not acquiesce, but at this stage of consideration, does not believe these matters should require this Court to review yet more briefing.

fundamentally equitable in nature."). Instead, Fortin suggests that Washington's statute is nothing more than a common-law tort—perhaps a corollary to a breach of fiduciary duty. Fortin has no support for this novel and wrong assertion.

Fortin relies exclusively on one Washington decision, *Roil Energy, LLC v. Edington*, 195 Wn. App. 1030, 2016 WL 4132471 (Aug. 2, 2016) (unpublished). As the Court of Appeals noted in its opinion, *Roil Energy* is an unpublished decision that interprets Nevada law. COA Op. at 10 n.6.

Fortin continues to argue that *Roil Energy* applied Washington, not Nevada, law. No fair reading of *Roil Energy* could conclude that. When discussing the elements of fraud in the paragraph immediately preceding the discussion of minority shareholder oppression, *Roil Energy* cites nothing but Washington cases. *See* 2016 WL 4132471, at *17. But when discussing minority shareholder oppression, *Roil Energy* cites four cases—not one of them from Washington—and omits Washington's leading minority shareholder oppression case,

Scott v. Trans-System, Inc.. *See Roil Energy*, 2016 WL 4132471, at *17. *Roil Energy* expressly notes that one of its cited minority shareholder oppression cases applies Nevada law. *See id. Roil Energy* concludes: "A cause of action for oppression could be considered a species of breach of fiduciary duty. [Counterparty] cites no Nevada law to the contrary." *Id.*

The likely reason for *Roil Energy*'s alternate analysis and incorporation of common-law fiduciary duty was explained in an opinion from the U.S. Fifth Circuit Court of Appeals: Nevada "does not list oppression among its bases for statutory dissolution," but that "does not preclude the existence of a fiduciary duty." *Hollis v. Hill*, 232 F.3d 460, 468 (5th Cir. 2000). Washington's statute and accompanying interpretations are different from Nevada's. Fortin does not offer even one case interpreting Washington law that supports Fortin's incorrect position.

Washington's statute, RCW 23B.14.300(2)(b), provides that a superior court is authorized to dissolve a corporation if

"[t]he directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, oppressive, or fraudulent." RCW 23B.14.300(2)(b). Because the statute does not define oppressive conduct, this Court adopted two primary tests for oppressive conduct:

> The first, called the "reasonable expectations" test, defines oppression as a violation by the majority of the reasonable expectations of the minority. Reasonable expectations are those spoken and unspoken understandings on which the founders of a venture rely when commencing the venture. Application of the reasonable expectations test is most appropriate in situations where the complaining shareholder was one of the original participants in the venture—one who would have committed capital and resources.
>
> The second test describes oppression as:
>
> burdensome, harsh and wrongful conduct; a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members; or a visible departure from the standards of fair dealing, and a violation of fair play on which every shareholder who entrusts his money to a company is entitled to rely.

Scott, 148 Wn.2d at 711 (cleaned up) (citing *Gimpel v. Bolstein,* 125 Misc. 2d 45, 477 N.Y.S.2d 1014 (N.Y. Sup. Ct.

1984)).[4] These tests are not mutually exclusive, and both may be used in the same case, depending on the facts. *Id.* at 711.

Nowhere to be found in the text of the statute or in this Court's controlling interpretation is a requirement that a quantum of damage be distilled because, at base, the statutory triggers are equitable, focusing strictly on the conduct of those who control the corporation.

In *Scott*, this Court emphasized the wide range of equitable remedies available once oppressive conduct is shown including: appointing a receiver to operate the corporation to curb "'oppressive' conduct"; appointing a special fiscal agent under the jurisdiction of the court to protect minority shareholders; an award of damages; and the ordering of an accounting, among others. *Id.* at 717–18. *Scott* leaves no doubt that oppressive

[4] Although oppressive "*conduct*" against a minority shareholder may be similar to the conduct constituting a breach of fiduciary duty, minority shareholder oppression is of course distinct including in the equitable remedial alternatives available after oppression is demonstrated. *Scott*, 148 Wn.2d at 711 (emphasis added); COA Op. 19-20.

conduct triggering relief under the minority shareholder oppression statute does not merely mimic common law torts, but is far broader in concept and, thereby, its contemplated remedies.

Put simply, "[t]o prevail on [a] minority shareholder oppression claim, [plaintiffs are] required to prove the [sic] (1) [majority shareholder] engaged in oppressive conduct, and (2) there was no legitimate business justification for the conduct." *Real Carriage Door Co., Inc. ex. rel. Rees v. Rees*, 17 Wn. App. 2d 449, 460, 486 P.3d 955, *review denied sub nom. Real Carriage Door Co. Inc. v. Rees*, 198 Wn.2d 1025, 497 P.3d 394 (2021) (interpreting *Scott*, 148 Wn.2d 701). Washington's courts understand well the contours of minority shareholder oppression.

As the uncontroverted facts recited above demonstrate, Fortin engaged in severe and injurious minority shareholder oppression against Herdson. The Superior Court saw through Fortin's attempts to explain away its indefensible conduct—deeming Fortin's testimony not to be credible—and thus

defeating Fortin's business judgment rule defense. COA Op. at 18.

There is no split of authority or confusion among the courts about the elements of Washington's minority shareholder oppression statute and no need for this Court to address it.

B. Fortin Seeks an Advisory Opinion Concerning a Reversed Remedy

Fortin asked the Court of Appeals to reverse the appointment of the special fiscal agent. The Court of Appeals did reverse and remand the Superior Court's appointment as procedural error under RAP 7.2. COA Op. at 23. The Court of Appeals further directed that the Superior Court, on remand, reconsider an equitable remedy based on "the record before it." COA Op. at 23-24.

Having received what it wanted, Fortin could not, and does not, ask this Court to reverse the Court of Appeals' holding regarding the special fiscal agent. There is no relief for this Court to grant concerning the special fiscal agent. Fortin instead wants this Court to opine upon the substantive propriety of the Superior

Court potentially re-appointing a special fiscal agent based on a record that was neither before the Court of Appeals nor now before this Court.

In other words, Fortin asks this Court to give advice to the Superior Court—or render an advisory opinion concerning a future, hypothetical decision without a full record before it. As the Court knows well, advisory opinions are highly disfavored. *See State v. Norby*, 122 Wn.2d 258, 269, 858 P.2d 210 (1993) ("Advisory opinions are disfavored by courts."); *Dickens v. All. Analytical Labs., LLC*, 127 Wn. App. 433, 437, 111 P.3d 889 (2005) ("We decline to give advisory opinions. Thus, our analysis is confined to responding to the limited grant of discretionary review….").

If the Superior Court appoints a special fiscal agent on remand, *based upon a different record*, Fortin *may* have grounds to appeal. For now, the issues are not ripe, and there is nothing for this Court to decide. *Cf. King Cnty. v. King Cnty. Water Districts Nos. 20, 45, 49, 90, 111, 119, 125*, 194 Wn.2d 830, 844,

453 P.3d 681 (2019) ("Such a hypothetical as-applied challenge, however, is both unripe and beyond the scope of the issue before us."). There is no constitutional question or split in authority to address. There is not a basis for this Court's review.

C. Fortin Made No Showing of Unfairness in the Trial Proceedings

As shown above, both parties had the same amount of time to present evidence at trial. The Court of Appeals found that Fortin offered no legal standard or showing of prejudice that would justify disturbing the Superior Court's significant discretion in managing the trial proceedings. COA Op. at 24; *In re Marriage of Zigler*, 154 Wn. App. 803, 815, 226 P.3d 202 (2010). Nothing about the trial proceedings warrants this Court's attention.

D. The Doctrine of Structural Error Does Not Apply and Was Never Raised Below

For the first time in its petition to this Court, Fortin argues that the now-reversed appointment of a special fiscal agent also constitutes "structural error." In addition to this issue being

unripe and any determination advisory, it is also waived because it was not raised prior. *Clark Cnty. v. W. Wash. Growth Mgmt. Hearings Rev. Bd.*, 177 Wn.2d 136, 144, 298 P.3d 704 (2013) ("The scope of a given appeal is determined by the notice of appeal, the assignments of error, and the substantive argumentation of the parties."); *Joe Chung v. Louie Fong Co.*, 130 Wash. 154, 163, 226 P. 726 (1924) ("The question … was not raised in the court below, and the objection is considered waived, and cannot be urged on appeal.").

The doctrine of structural error is also substantively misplaced here. "[F]ive justices of this court explicitly rejected the proposition that the concept of 'structural error' had a place outside of criminal law." *Saleemi v. Doctor's Assocs., Inc.*, 176 Wn.2d 368, 385-86, 292 P.3d 108 (2013) (citing *In re Det. of D.F.F.*, 172 Wn.2d 37, 48, 256 P.3d 357 (2011) (J.M. Johnson, J., concurring, joined by Chambers, J.), (Madsen, C.J., dissenting, joined by C. Johnson and Fairhurst, JJ.)); *In re*

Detention of Reyes, 184 Wn.2d 340, 348, 358 P.3d 394 (2015) ("the concept of structural error does not apply to civil cases").

Fortin faces no fundamental unfairness from a now-reversed remedy. It is hypothetical and unripe. It is waived because it was not raised until now. Finally, as a doctrine reserved for criminal cases, structural error gives no path to relief here.

V. CONCLUSION

Herdson respectfully requests this Court deny Fortin's petition for review.

* * *

RAP 18.17(b) Certificate of Compliance with Word Limitations: The undersigned attorneys certify that this answer contains 3,279 words, in compliance with RAP 18.17(c)(10).

Respectfully submitted this 6th day of October, 2023.

Respectfully submitted,

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DECLARATION OF SERVICE

I am over the age of eighteen years, not a party to this action, and competent to be a witness herein. On October 6, 2023, I caused the foregoing document to be served as follows:

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

DATED this 6th day of October, 2023, at Bremerton, Washington.

/s/ Sandra D. Lonon
Sandra D. Lonon, Legal Practice Assistant

FOSTER GARVEY PC

October 06, 2023 - 3:00 PM

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