No. 47716-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ALEX SAFRANSKI

Appellant

V.

SULTAN WEATHERSPOON

Respondent.

ON APPEAL FROM CLARK COUNTY SUPERIOR COURT
(Hon. David E. Gregerson)

APPELLANT'S REPLY BRIEF AND CROSS-RESPONDENT'S RESPONSE BRIEF

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I. INTRODUCTION

In his Opening Brief on Appeal, Safranski demonstrated that Weatherspoon had no standing to sue Safranski for fraud because Weatherspoon's only harm was derivative of the harm suffered by Duma Video, Inc. Weatherspoon raises a host of arguments in his response, but they are all based on either a distorted representation of the record below or on a misstatement of the law governing shareholder derivative claims. The fundamental flaw with Weatherspoon's opposition is he repeatedly disregards Duma as a separate entity. Moreover, Weatherspoon forgets that, in order to sue Safranski directly, Safranski must have had some "special duty" to Weatherspoon that was independent of Weatherspoon's status as a shareholder of Duma. But if Weatherspoon were not a shareholder of Duma, it is clear that Safranski would owe him no duties whatsoever in the subject transaction. In sum, because the only damage Weatherspoon suffered was a

diminution of the value of his shares of Duma, he has no standing to sue directly for harm suffered by Duma.

With respect to the issue of remittitur, Safranski's opening brief demonstrated that the maximum harm Weatherspoon could have possibly suffered as a result of Safranski's conduct was $167,212.45, which is his proportionate share of the payment Duma lost as a result of Safranski's alleged fraud. Even though he has had ample opportunity to do so, Weatherspoon has utterly failed to explain how the evidence supports the jury's award, which was more than $100,000 over Weatherspoon's maximum potential damages. Accordingly, if this court does not reverse the judgment, then it should at least remand the case with instructions to issue a remittitur.

Finally, Weatherspoon cross-appeals the award of prejudgment interest to Safranski, but the cross-appeal is based on a misapprehension of Washington law regarding prejudgment interest. Weatherspoon argues that because the

trial court judge did not expressly find that Weatherspoon ***intentionally*** misappropriated certain funds, then he should not be liable for prejudgment interest on those funds. But the award of prejudgment interest does not hinge on the level of culpability of the liable party—it hinges on the objective certainty of the amount of damages once liability has been established. Thus, this court should reject Weatherspoon's cross-appeal in its entirety.

II. REPLY TO WEATHERSPOON'S COUNTERSTATEMENT OF THE CASE

A consistent theme runs throughout Weatherspoon's counterstatement of the case. He repeatedly mischaracterizes the facts to make it seem as though Weatherspoon—rather than Duma—was directly harmed by Safranski's alleged fraud.

For example, in the very first sentence of his brief, Weatherspoon claims the jury found that Safranski "fraudulently induced … Weatherspoon to sell his majority

interest in Duma…, causing him to sustain economic damages." But that is not what the jury found. The jury verdict form merely indicates that the jury found in favor of Weatherspoon on his "counterclaim for fraud."[1]

The falsity of the very first statement of Weatherspoon's brief is shown by Weatherspoon's own pleadings in the trial court. Weatherspoon consistently pleaded that the Asset Purchase Agreement ("APA") at issue in this case was a sale of ***Duma's assets to BMS***, not a sale of shares. As Weatherspoon wrote in his summary judgment motion against Safranski's derivative claims: "On August 17, 2012, Duma Video, Inc. entered into an Asset Purchase Agreement ("APA") with Broadcast Microwave Services, Inc. ("BMS"). Under that APA, ***Duma sold all of its assets to BMS***…."[2] The same allegation is made in Weatherspoon's counterclaims, wherein he alleges: "The Asset Purchase Agreement resulted in the

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[1] CP 385
[2] CP 52-53

payment of $900,000 ***for Duma's assets***."[3] And Weatherspoon pleaded consistently that ***Duma*** was harmed by Safranski's conduct, because it was ***Duma*** that sold its assets; Weatherspoon never sold his "majority interest" in Duma.

In a further effort to distort the record, Weatherspoon complains on page 2 of his brief that Safranski is asking to be "sheltered from any liability because the victim of his fraud lacked standing to sue him." This is incorrect because the only "victim" of Safranski's alleged fraud was Duma, which received less money from BMS than it otherwise would have. Weatherspoon's harm is completely derivative of the shortfall experienced by Duma.

Similarly, on page 5, Weatherspoon repeats this misstatement of the record: "Weatherspoon executed an agreement ***to sell his majority interest in Duma*** to BMS." As shown directly above, this is patently false. Weatherspoon did

[3] CP 67 (Para. 77) and CP 139 (Para. 48)

not sell his shares in Duma to BMS; Duma sold its assets to BMS.

In this same vein, Weatherspoon writes on page 6: "Had Safranski disclosed the truth to Weatherspoon, Weatherspoon would not have ***sold his interest*** under the APA." Again, Weatherspoon is attempting to distort the record to make it seem as though he sold his shares in Duma to BMS, rather than Duma selling its assets to BMS.

Weatherspoon also tries to make it seem as thought he—and not Duma—was supposed to receive the $350,000 "earnout" payment for delivering the decoder software to BMS. As Weatherspoon states on page 6: "If BMS could get an H.264 decoder for $160,000 through Safranski, why would BMS pay $350,000 for the same decoder ***from Weatherspoon***?" Again, it was Duma—not Weatherspoon—that was to receive the $350,000 for delivering the decoder software. This fact comes directly from Weatherspoon's own counterclaim, in which he alleged: "BMS agreed to pay

$900,000 up front, and an additional $350,000 if and when ***Duma delivered*** an i-7 H.264 decoder."[4]

Finally, Weatherspoon argues in his answering brief, on page 22, that Safranski "diluted the interest of the majority shareholder" and that "Weatherspoon lost control of Duma owing to Safranski's fraud." This is also incorrect. Because the APA was an asset sale, Weatherspoon's ownership of Duma's shares was not diluted—he was the controlling shareholder of Duma before the APA, and he remained the controlling shareholder of Duma after the APA.

In sum, it was Duma—not Weatherspoon—that was harmed when BMS did not make the $350,000 payment to Duma. And it was Duma—not Weatherspoon—who settled this claim with BMS. As Weatherspoon admitted below, "BMS agreed to enter [into] a settlement agreement and ***pay Duma*** $139,000."[5] Thus, Duma's net harm was $211,000 in lost

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[4] CP 65 (Para. 65) and CP 137 (Para. 36)
[5] CP 101, lines 25-26

payments from BMS. Weatherspoon's harm is his proportionate share of that loss, which equals $167,212.45.

Weatherspoon should not be allowed to enjoy the benefits of Duma's separate existence but then disregard that separate existence when it suits his purpose. This is especially true because Weatherspoon relied on Duma's separate existence when he moved, successfully, for summary judgment against Safranski's derivative claims.[6] As Weatherspoon wrote in his summary judgment motion: "[T]he cause of action accrues to the corporation itself and the stockholders' rights therein are merely of a derivative character and therefore can be enforced or asserted only through the corporation."[7] Weatherspoon relied on Duma's separate existence to his advantage in this litigation; he should not be allowed now to deny Duma's separate existence to his advantage.

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[6] CP 52

[7] CP 54-55 (quoting *Goodwin v. Castleton*, 19 Wn.2d 748, 144 P.2d 725 (1944))

III. REPLY TO WEATHERSPOON'S ARGUMENTS RE STANDING

Weatherspoon raises numerous legal arguments for rejecting Safranski's appeal. But none of Weatherspoon's arguments withstands scrutiny.

A. The Record on Appeal is Sufficient

Based on the record that has been submitted to this court, it is clear that Weatherspoon has no standing to sue for harms suffered directly by Duma. This conclusion is based on the facts alleged by Weatherspoon in his own pleadings. Because these facts come directly from Weatherspoon's pleadings, they are judicial admissions, and Weatherspoon should not be allowed to ignore them on this appeal.

Moreover, the pertinent facts regarding the standing issue are not in dispute. According to Weatherspoon's own pleadings, we know that: (1) Weatherspoon is the majority shareholder in Duma, and Safranski was a minority shareholder; (2) Duma entered into the APA to sell essentially

all of its assets to BMS; (3) BMS made an upfront payment of $900,000, with another $350,000 to be paid upon delivery by Duma of certain decoder software; (4) BMS did not make the full payment; and (5) Weatherspoon blames Safranski's alleged fraud for Duma not receiving the full $350,000.

These are all the facts the Court of Appeals needs in order to rule on the standing issue. Weatherspoon argues that Safranski needed to include in the record all of the testimony and other evidence introduced at trial. But when the basis for reversal appears on the face of the respondent's own pleadings, it does not matter what evidence was presented at trial. Under Civil Rule 50, the trial "court may grant a motion for judgment as a matter of law against the party on any claim, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained…" Here, under the controlling law, Weatherspoon cannot maintain his counterclaim for fraud against Safranski, because it resulted in harm only to the corporation.

The trial court denied Safranski's CR 50 motion. But in doing so, the trail court noted: "It does seem to be a pure legal issue…."[8] Because the trial court erred in its ruling on this purely legal issue, the judgment in favor of Weatherspoon can be reversed without reviewing all of the testimony and other evidence introduced at trial.

B. Requiring The Plaintiff to Have Standing Does Not Confer Immunity on the Defendant

Based on the undisputed facts listed above, Weatherspoon lacks standing to bring his fraud claim against Safranski. Weatherspoon devotes a substantial portion of his answering brief to arguing that denying him standing is tantamount to conferring immunity on Safranski. But this argument misses the mark.

[8] Supplemental RT, 3/30/2015, p. 60.

"Standing is a 'party's right to make a legal claim or seek judicial enforcement of a duty or right.'"[9] The doctrine of standing prohibits a litigant from raising another's legal right.[10] It does not confer immunity on the alleged wrongdoer; it simply ensures that only the party with the legally protected right can sue the wrongdoer.

Safranski is not arguing—contrary to Weatherspoon's claim—that this court should find that Safranski is ***immune*** from any claims for alleged fraud. All Safranski is arguing is that—under well-established law—Weatherspoon does not have ***standing*** to sue Safranski for harm caused to the corporation, Duma. Thus, all of Weatherspoon's complaints about immunity are beside the point. Whenever a plaintiff is dismissed for a lack of standing, it results in the defendant effectively being immune from claims ***by that plaintiff.*** But the

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[9] *State v. Link,* 136 Wn. App. 685, 150 P.3d 610, 615 (2007) (quoting Black's Law Dictionary)

[10] *Grant County Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 802, 83 P.3d 419 (2004)

doctrine of standing must be enforced, even if it means that a wrongdoer may never be held liable.

Moreover, it is Weatherspoon's fault if Duma could no longer sue for Safranski's alleged fraud, for two reasons. First, Weatherspoon raised the standing doctrine to defeat Safranski's derivative claims against Weatherspoon.[11]

Second, for the same reason that Safranski could not bring a derivative action, Weatherspoon could not either—because Duma had sold any such claim to BMS under the APA.[12] And Weatherspoon, as the controlling shareholder, is the one responsible for the terms of the APA. In sum, if Safranski is going to escape liability for his alleged fraud, Weatherspoon has no one to blame but himself.

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[11] CP 54, lines 8-10

[12] This fact is based on Weatherspoon's own pleadings. In his answer to Safranski's derivative claims, Weatherspoon pleaded as an affirmative defense: "Pursuant to the Section 2.0l(g) of the APA, Duma transferred ownership of the three [derivative] claims for relief to BMS." (CP 61, para. 42) As Weatherspoon further pleaded, therefore, "Safranski has no standing to pursue the derivative claims on behalf of Duma." (CP 61, para. 43)

C. Weatherspoon Misstates the Law of Shareholder Derivative Suits

The general rule, as explained by Fletcher, is that "[a] shareholder has no separate or individual right of action against third persons for wrongs committed against or damaging to the corporation...."[13] Under this general rule, it is clear that Weatherspoon lacks standing to sue for Safranski's alleged wrongs committed against and damaging to the corporation, Duma. In an effort to avoid this clear result, Weatherspoon attempts to "muddy the waters" in this fairly straightforward area of law. But none of Weatherspoon's arguments has merit.

For example, Weatherspoon boldly proclaims that "[a]n individual cause of action can be asserted when the wrong is both to the shareholder and to the corporation." If this statement were taken at face value, it would be contrary to everything else Fletcher had written on this topic, and more importantly, it would be contrary to Washington's adoption of Fletcher's approach in *Sabey*. In that case, the court noted:

[13] Fletcher, Cyclopedia of Corporations, § 36 (2015)

"Ordinarily, a shareholder cannot sue for wrongs done to a corporation," even if the shareholder also suffered damage.[14] There is simply no way to reconcile Weatherspoon's broad proclamation with the teachings of Fletcher or the holding in *Sabey* in this regard.

The only way to explain this seeming contradiction is to realize that Weatherspoon has quoted a snippet of Fletcher's writings out of context. Weatherspoon cites to "Fletcher, Cyclopedia of the Law of Corporations, § 5908" to support his broad proclamation, but he does not indicate which edition he is citing to. Nevertheless, here is what else Fletcher had to say in the same section of his work: "Where the basis of the action is a wrong to the corporation, redress ***must be sought in a derivative action***."[15]

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[14] *Sabey v. Howard Johnson Co.*, 101 Wn.App. 575, 5 P.3d 730, 735 (2000) (citing *Gustafson v. Gustafson*, 47 Wn. App. 272, 734 P.2d 949, 952 (1987) and Fletcher, Cyclopedia of Corporations, § 5910 (perm. ed. rev.vol.1993))

[15] Fletcher, Cyclopedia of Corporations, § 5908 (2000) (emphasis added)

The second source of authority cited by Weatherspoon to support his position is an opinion from the Ninth Circuit Court of Appeals.[16] But Weatherspoon's reliance on that case is misplaced. In *Far West*, the plaintiffs were not only shareholders, they were also explicitly named as third-party beneficiaries under a contract. As a result, the court held as follows:

> Because the circumstances of the transaction indicate that the Investors were intended beneficiaries of the Conversion Agreement and because FHLBB's breach of its promise injured the Investors personally, as well as injuring Far West, we hold that the Investors have standing to sue for rescission of the agreement and restitution of their investment.[17]

This same factual distinction was addressed by the District Court for the Western District of Washington in the *Aventa Learning* case.[18] Like Weatherspoon, the shareholders in *Aventa* alleged they had standing to bring a direct action for

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[16] *Far West Federal Bank v. Office of Thrift Supervision Director,* 119 F.3d 1358 (9th Cir. 1997)
[17] *Far West Federal Bank, supra*, 119 F.3d at 1364
[18] *Aventa Learning, Inc. v. K12, Inc.*, 830 F.Supp. 2d 1083 (W.D. Wash., 2011)

harm they suffered when the corporation's assets were sold to a third party. And like Weatherspoon, the *Aventa* plaintiffs cited to the *Far West* case. The District Court disposed of *Far West* with ease:

> On summary judgment, it is apparent that the factual circumstances here are not in accord with *Far West*. In *Far West*, the written agreement at issue explicitly identified the individual investors as intended beneficiaries.... Here, the individual plaintiffs are not express beneficiaries under the APA, nor have plaintiffs provided evidence of individualized injury - separate from their status as Aventa's shareholders.[19]

The same is true here. Weatherspoon was not an express third-party beneficiary of the APA and he has suffered no individualized injury separate from his status as one of Duma's shareholders. Thus, neither *Far West* nor the snippet quoted from Fletcher provides Weatherspoon any support on his standing argument.

The law in Washington is clear: if Weatherspoon's only injury was the diminution of value of his shares in Duma, then

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[19] *Aventa Learning, Inc., supra*, 830 F.Supp. at 1103, nt. 13

he does not have standing to sue in his individual capacity. One reason for this rule is that if all shareholders could sue for diminution in value, then there could be as many lawsuits as there are shareholders. Weatherspoon attempts to sidestep this problem by arguing that he is the only shareholder who was harmed, but there are several problems with this argument.

First, based on Weatherspoon's own pleadings, there were two other shareholders of Duma—besides Weatherspoon and Safranski. When he filed his counterclaim in February 2013, Weatherspoon alleged: "Defendant Weatherspoon owned 70% of the Duma stock, ***and 10% of the Duma stock was owned by Andrea McAdam and Ralph Gillespie***, who were not employed or otherwise involved in the operations of Duma."[20]

Second, not only is Weatherspoon's argument contrary to the facts, it is contrary to the law. Even if Weatherspoon were the sole shareholder of Duma, he would not have standing to bring claims against Safranski for harm to Duma. As the court

[20] CP 19, para. 27 (emphasis added)

noted in *Sabey*: "Even a shareholder who owns all or most of the stock, but who suffers damages only indirectly as a shareholder, cannot sue as an individual."[21]

In sum, under Washington's general rules governing shareholder derivative suits, Weatherspoon does not have standing to bring a claim against Safranski for harm he allegedly caused to Duma.

D. Weatherspoon's Claim Does not Fit Within any Exception to the Shareholder Derivative Rules

As the above discussion demonstrates, Weatherspoon is prohibited by the general rule regarding derivative claims from bringing a direct action against Safranski for alleged harm to the corporation. In his Answering Brief, Weatherspoon argues that he fits within multiple exceptions to the general rule. But Weatherspoon does not fit into any of these exceptions for one simple reason: Weatherspoon suffered no injury apart from his ***status as a shareholder of Duma***.

[21] *Sabey*, *supra*, 5 P.3d at 735.

The first exception Weatherspoon invokes is for "fraud in inducing a subsequent sale of stock."[22] As noted above, however, Weatherspoon did not sell any stock: Duma sold its assets to BMS.

The second exception Weatherspoon invokes is when a shareholder is deprived "of the advantage of majority control."[23] But Safranski did not deprive Weatherspoon of his majority control: Weatherspoon had majority control of Duma before and after the asset sale to BMS.

Along these same lines, Weatherspoon cites Am.Jur.2d of Corporations for the proposition that a shareholder can sue as an individual for a "direct fraud" on the shareholder.[24] But here, the alleged fraud was committed directly on Duma, not Weatherspoon, by persuading Duma to sell its assets to BMS under the APA.

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[22] Response Brief, p. 13.
[23] *Ibid.*
[24] *Ibid.*

Finally, Weatherspoon cites the same text to argue he can sue directly because "full relief to the stockholder cannot be had through a recovery by the corporation."[25] But here, Weatherspoon could recover full relief through recovery by the corporation: if the corporation had sued and received the remainder of the payment shortfall, Weatherspoon would have been made whole.

Weatherspoon also argues that he has standing because the trial court instructed the jury that Safranski had a duty to disclose to Weatherspoon. But Weatherspoon cannot "bootstrap" himself to have standing by virtue of jury instructions; if Weatherspoon lacked standing, the trial court could not confer it upon him in a jury instruction.

Ultimately, Weatherspoon turns to the two exceptions to the general rule that are set forth in the *Sabey* decision. First, Weatherspoon argues that he fits within the "special duty" exception, which allows a stockholder to maintain a direct

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[25] Response Brief, p. 14.

action against a third party when the stockholder's injury resulted from violation of some special duty owed to the stockholder. But there is one very important caveat to this exception—the "special duty" owed to the stockholder must have "its origin in circumstances independent of the stockholder's status as a stockholder."[26]

The fundamental issue is whether Safranski owed Weatherspoon any duty, independent of Weatherspoon's status as a shareholder of Duma. In other words, if we assumed that Weatherspoon were not a shareholder of Duma, would Safranski owe him any duties in connection with Duma's sale of its assets to BMS. The answer is clearly, no.

In an effort to resurrect this argument, Weatherspoon then argues that the caveat to this exception applies only when the third party is not also a shareholder of the corporation. But Weatherspoon can cite no Washington case in which a majority stockholder had standing to sue a minority stockholder directly

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[26] *Sabey*, *supra*, 101 Wn. App. at 585

for harm the minority stockholder allegedly caused to the corporation.

Moreover, Weatherspoon argues that "Safranski cites to zero cases in which a shareholder's direct claim against another shareholder was disqualified because the duty arose out of the defendant shareholder's status as a shareholder." First, this challenge reveals a fundamental misunderstanding by Weatherspoon regarding the caveat to the "special duty" exception in Sabey. When the court refers to the "stockholder's status as a stockholder," the court is referring to the ***plaintiff***, not the ***defendant***. *Sabey*'s recitation of this caveat is quoted from the opinion in *Hunter v. Knight, Vale & Gregory*.[27] In Hunter, the principal shareholder of a corporation sued an accounting firm for malpractice and breach of fiduciary duty. The issue was whether a three-year statute of limitations barred the shareholder's claims. The plaintiff all but conceded the statute of limitations had run for any such claim brought by the

[27] 18 Wash. App. 640, 646, 571 P.2d 212 (1977)

corporation, but they claimed that it had not run for the stockholder's individual claims against the accounting firm. The Court of Appeals restated the "special duty" exception to the general rule governing shareholder derivative actions:

> As an exception to the general rule, a stockholder may maintain an action in his own right against a third party (although the corporation may likewise have a cause of action for the same wrong) when the injury to the individual resulted from the violation of some special duty owed to the stockholder ***but only when that special duty had its origin in circumstances independent of the stockholder's status as a stockholder***.[28]

The court concluded that the plaintiff did not fit within this exception because, but for the plaintiff's status as a shareholder, the accounting firm owed him no duty. "That independent origin is nonexistent in the case at bench."[29] Thus, to determine whether the "special duty" exception applies, the courts look to the status of the ***plaintiff*** as a stockholder, not the status of the ***defendant***. Moreover, like the plaintiff in *Hunter*,

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[28] *Id.* at 646 (emphasis added)
[29] *Ibid.*

Safranski owed Weatherspoon no duties independent of Weatherspoon's status as a stockholder of Duma.

In his Response Brief, Weatherspoon challenges Safranski to cite to a single case "in which a shareholder's direct claim against another shareholder was disqualified" because of the limitation on the "special duty" exception noted in *Sabey* and *Hunter*. Well, here is such a case. In *Sound Infiniti, Inc. v. Snyder*, the minority shareholder (Pisheyar) sued two majority shareholders (Snyder and Hannah) of two closely held corporations. One of the minority shareholder's claims was that the majority shareholders had deprived the minority shareholder of certain corporate perquisites. The Court of Appeals ruled that Pisheyar could not bring these claims directly because they were premised on his status as a shareholder. After quoting the limitation set forth in Hunter, the court rejected the individual claim of the minority shareholder against the majority shareholders because they owed him no duties, independent of his status as a shareholder:

> Pisheyar may only maintain personal damage claims against third parties — such as Snyder and Hannah in their individual capacities — for the deprivation of perquisites if his alleged entitlement to them arises from something other than his shareholder status….[30]

These authorities make clear that Weatherspoon does not fit within the "special duty" exception under *Sabey*. Nor does Weatherspoon fit within the other *Sabey* exception—when the shareholder suffers damages that are distinct from damages suffered by other shareholders.

Weatherspoon argues he suffered a distinct injury because Safranski's actions "diluted the interest of the majority shareholder."[31] But that is not true—Weatherspoon owned the same percentage of shares of Duma before and after the sale of its assets to BMS.

Similarly, Weatherspoon also argues he suffered a unique injury because he "lost control of Duma owing to Safranski's

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[30] *Sound Infiniti, Inc. v. Snyder*, 145 Wn. App. 333, 186 P.3d 1107 (2008)
[31] Response Brief, p. 22.

fraud."[32] But this is also incorrect—Weatherspoon still controlled Duma after the asset sale to BMS. Thus, Weatherspoon did not suffer any harm that was "separate and distinct from that suffered by other shareholders,"[33] and he does not fit within this exception either.

In sum, try as he might, Weatherspoon cannot escape the fact that any harm he suffered was derivative of the harm suffered by the corporation, Duma. Even though Weatherspoon was the majority shareholder of Duma, Weatherspoon had no standing to sue Safranski for harm suffered directly by the corporation. Only Duma could bring that claim and, by virtue of Weatherspoon's own actions and pleadings below, Duma no longer owned that claim.

IV. REPLY TO RESPONDENT'S ARGUMENTS REGARDING THE REMITTITUR

If this court agrees that Weatherspoon lacked standing to bring the fraud claim against Safranski, then the issue of the

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[32] *Ibid.*
[33] *Sabey*, *supra*, 101 Wn.App. at 584

remittitur is moot. If this court does not agree, then it should remand the case to the trial court with instructions to issue a remittitur.

In his opening brief, Safranski demonstrated that the maximum damages Weatherspoon could have possibly suffered as a result of the alleged fraud was his proportionate share of the payment shortfall from BMS. In his opposition, Weatherspoon does not disagree with Safranski's calculation of this amount, which is $167,212.45. Instead, Weatherspoon argues that he "offered the jury several alternative ways in which Weatherspoon's damages could be based upon the evidence."[34] Despite having had an ample opportunity to do so, however, Weatherspoon fails to cite this court to a shred of evidence that would support an award in excess of $167,212.45.

Moreover, Weatherspoon does not address head-on the fundamental question—how can Weatherspoon have had $275,637.50 in damages when Duma itself missed out on less

[34] Response Brief, p. 24

than $211,000 as a result of Safranski's alleged fraud? Because Weatherspoon cannot explain this anomalous result, his arguments against the remittitur lack merit.

V. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY AWARDING PREJUDGMENT INTEREST

A. Standard of Review

Safranski agrees with Weatherspoon that the standard of review for an award of prejudgment interest is whether the trial court abused its discretion in making the award. As this court has explained the standard:

> We review a trial court's order on prejudgment interest for an abuse of discretion. A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds or reasons.[35]

Thus, in order to prevail on his cross-appeal, Weatherspoon needed to show that the trial court's decision awarding prejudgment interest was either "manifestly

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[35] *Spradlin Rock Prods., Inc. v. Pub. Util. Dist. No. 1 of Grays Harbor Cnty.*, 164 Wn. App. 641, 266 P.3d 229, 240 (2011) (citations omitted)

unreasonable" or "based on untenable grounds." As shown immediately below, however, Weatherspoon cannot meet this standard.

B. Prejudgment Interest is Proper When—Once Liability has Been Determined—the Damages can be Ascertained Without the Exercise of Discretion

In his brief, Weatherspoon fails to set forth the complete test for awarding prejudgment interest. Weatherspoon only discusses the circumstances in which prejudgment interest is not available; he does not discuss the circumstances in which it is available.

The *Dautel* court recounted the circumstances in which prejudgment interest is available:

> Washington law has historically treated prejudgment interest as a matter of right when a claim is liquidated. A liquidated claim is one where the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion.[36]

[36] *Dautel v. Heritage Home Center, Inc.*, 89 Wn.App. 148, 153, 948 P.2d 397 (1997) (citations and quotation marks omitted)

This test fits the case at bar perfectly. In this case, not only did the evidence furnish data that made it possible to compute the amount of damages with exactness, the parties actually stipulated to the amount of damages when they stipulated to the amount of expenses for which Weatherspoon could provide no business justification. In other words, once the parties stipulated that Weatherspoon could provide no justification for $279,290 of Duma's money that Weatherspoon spent, the amount of Safranski's damages could be ascertained by a simple calculation. Because Safranski owned exactly 20.69% of Duma's shares, he was entitled to 20.69% of the stipulated amount of unjustified expenditures, which equals $57,785.

In other words, once the amount of spending for which Weatherspoon was liable was determined, the calculation of Safranski's resulting damages could be computed "with

exactness, without reliance on opinion or discretion."[37] Weatherspoon's cross-appeal is without merit because he conflates certainty of ***liability*** with certainty of ***calculated damages***. Weatherspoon argues that he could not predict, at the time he made each expenditure, that he would fail in his duty to keep adequate records for each expenditure. As a result, he argues, he should not be liable for prejudgment interest. But this argument fails for two reasons.

First, as the controlling shareholder and President of Duma, Weatherspoon had a duty to keep adequate records of expenditures he made of Duma's funds. Thus, whenever he failed to meet this duty, Weatherspoon was on notice that such an expense could be deemed to be unjustified. Thus, there is nothing inequitable in awarding interest on these amounts.

Second, simply because Weatherspoon may not have been able to predict that he was going to be held liable for his breach of duty does not mean that no prejudgment interest is

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[37] *Ibid.*

warranted. As the *Dautel* court wrote: "The fact that a dispute exists over all or part of a claim does not make the claim unliquidated."[38]

The facts here are reminiscent of those in the *Spradlin* case, which this court recently decided. In that case, the defendant stipulated during closing argument to owing a certain sum to the plaintiff based on the plaintiff's unpaid invoices. The trial court awarded prejudgment interest on that amount, and the defendant appealed from that award. Like Weatherspoon, the defendant argued that the damages were not liquidated merely because they were in a stipulated amount. This court responded with the following quote from *Dautel*:

> While it is true that "[t]he fact that the parties stipulated to a portion of the amount owing does not by itself render that amount liquidated," if the amount stipulated to is capable of being fixed due to the nature of debt, it is liquidated.[39]

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[38] *Id.* at 154 (citation omitted)
[39] *Spradlin Rock Prods., Inc., supra*, 164 Wn. App. at 666 (citation omitted)

Here, the amount stipulated to is capable of being fixed because it is based on simply adding up all the expenditures for which Weatherspoon stipulated he failed to meet his duty to keep adequate records, and then multiplying that amount by Safranski's share ownership of 20.69 percent.

Thus, the trial court had sufficient data to ascertain damages with exactness, and once liability was determined, the calculation of damages required no resort to opinions or discretion. Nevertheless, Weatherspoon cites to the *Fiorito* case as similar to this case.[40] A careful review of that case, however, reveals that the facts were quite different. In Fiorito, the suit was not between shareholders of the same corporation; instead, it was brought by one joint venturer against another. The claim upon which prejudgment interest does not seem to be based on improper expenditures by the defendant. Instead, the plaintiff's claim sought an "accounting" of profits and "amounts alleged to be due for services rendered and for rental

[40] *Fiorito v. Goerig*, 27 Wn. 2d 615, 179 P.2d 316 (1947)

of machinery."[41] Rather than there being amounts due, the defendants argued, the plaintiff had actually been overpaid. The reason prejudgment interest was denied in that case was because the value of the services rendered and for rental of machinery could not be determined without resort to opinion or discretion. As a result, the *Fiorito* court stated the pertinent rule as follows:

> "Where, however, the demand is for something which requires evidence to establish the quantity or amount of the thing furnished, ***or the value of the services rendered***, interest will not be allowed prior to the judgment."[42]

Thus, *Fiorito* is distinguishable on its facts. This is especially true because the "accounting" portion of the dispute was decided in favor of the defendant. Moreover, a lot of ink has been spilled regarding the propriety of prejudgment interest since the *Fiorito* case was decided, nearly seventy years ago. In fact, *Fiorito* has not been cited in any Washington case on the

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[41] *Ibid.*
[42] *Ibid.* (quoting *Wright v. Tacoma*, 87 Wn. 334, 151 P. 837 (1915)) (emphasis added)

issue of prejudgment interest since 1954, which is more than sixty years ago. And given an "abuse of discretion" standard of review, the trial court's award of prejudgment interest to Safranski cannot be said to be manifestly unreasonable or based on untenable grounds.

Finally, Weatherspoon raises one last argument in his effort to avoid paying prejudgment interest—that no prejudgment interest can be awarded "[a]bsent a finding that Weatherspoon ***intentionally*** took expense reimbursements he knew to be for personal expenses."[43] But this argument fails for two reasons.

First, the court did not award Safranski damages because Weatherspoon intentionally misappropriated these funds—it awarded damages because Weatherspoon "failed in his duty to keep records of those expenses…."

Second, and perhaps more importantly, there is no case in Washington in which the plaintiff had to prove that the acts

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[43] Response Brief, p. 26

creating liability were ***intentional*** in order for prejudgment interest to be awarded. Weatherspoon hopes to raise the bar for Safranski to be awarded prejudgment interest, but this effort is not supported by Washington law.

In sum, Weatherspoon has failed to show that the trial court abused its discretion by awarding prejudgment interest. As there is no argument that the amount of interest was calculated incorrectly, the judgment amount in favor of Safranski should be affirmed.

VI. CONCLUSION

For the forgoing reasons, Safranski respectfully requests that the jury award in favor of Weatherspoon be vacated. In the alternative, Safranski respectfully requests that this Court issue a remittitur to plaintiff in the amount of $167,212.45. Finally,

Safranski requests that the court reject Weatherspoon's appeal regarding the award of prejudgment interest to Safranski.

Dated: April 25, 2016 Respectfully Submitted,

s/ *Steven E. Turner*

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I hereby certify that I served the foregoing **Appellant's Reply Brief and Cross-Respondent's Response** on:

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DATED this 25th day of April, 2016

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April 25, 2016 - 4:31 PM

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