

66303-8

66303-8

COURT OF APPEALS
DIVISION I
CLERK OF COURT
H

No. 66303-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JASON (GABRIEL) FELIX, Petitioner,

v.

PICO COMPUTING, INC. and
ROBERT TROUT, Respondents

OPENING BRIEF OF APPELLANT

Scott McKay, WSBA No. 12746
Attorney for Petitioner

Scott J. McKay, WSBA No. 12746
6523 California Ave SW
Seattle, WA, 98136
(206) 992-5466

Table of Contents

INTRODUCTION 5

ASSIGNMENTS OF ERROR 9

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 9

STATEMENT OF THE CASE 10

STANDARD OF REVIEW 26

ARGUMENT 28

A. The Trial Court Erred By Failing To Grant Summary Judgment 28

B. Appellant Properly Sought Relief Under RCW 7.24 28

C. The Remedies Sought by Appellant Were Authorized by RCW 7.24 30

D. Specific Performance Was Required By Contract 31

E. The Trial Court Erred In Granting Summary Judgment For Respondent 32

F. Attorney Fees And Costs Of Suit 39

CONCLUSION AND SUMMARY 40

APPENDIX A 41

APPENDIX B .. . 43

Table of Cases

<i>Black Mountain Ranch v. Dev. Co.</i>	38
29 Wn App. 212 (1981)	
<i>Chavlier v. Booth Creek</i>	35
109 Wn. App. 33 (2001)	
<i>Guile v. Ballard Cmty. Hosp.</i>	27
70 Wn. App. 18 (1993).	
<i>Hisle v. Todd Pac. Shipyards Corp.</i>	27
151 Wn.2d 853 (2004)	
<i>Methodist Church v. Hearing Examiner</i>	29, 30
129 Wn.2d 238 (1996)	
<i>Mutual of Enumclaw v. Cox</i>	37
110 Wn.2d 643 (1988)	
<i>Naches School Dist. Cruzen</i>	35
54 Wn. App. 388 (1989).	
<i>Nationwide Mutual v. Watson</i>	38
120 Wn.2d 178 (1992)	
<i>Oregon Mutual Insurance Co. v. Barton</i>	36
109 Wn. App. 405 (2001)	
<i>Reeder v. King County</i>	29
57 Wn.2d 563 (1961)	
<i>Ronken v. County Commissioners</i>	31
89 Wn.2d 304 (1977)	
<i>Seiber v. Poulsbo Marine Ctr. Inc.</i>	28
136 Wn. App. 731 (2007).	
<i>Tenant's Association v. Little Mt. Estates</i>	35
146 Wn. App 546 (2008)	

<i>Uznay v. Bevi</i>	36
139 Wn. App. 359 (2007)	
<i>Weitzman v. Bergstrom</i>	37
75 Wn.2d 693(1969)	
<i>Young v. Key Pharmaceuticals, Inc.</i>	27
112 Wn.2d 216 (1989)	

Table of Statutes

RCW 7.24.020	29, 31
RCW 7.24.080	30, 31

Table of Court Rules

RAP 18.1	40
----------------	----

I

INTRODUCTION

This is an action for declaratory relief and specific performance under the Uniform Declaratory Judgments Act, RCW 7.24.

The purpose of this action is to remedy confirmed appraisal fraud with regard to nearly \$200,000 worth of stock. None of the facts of this case are in dispute.

In November, 2004, Appellant Gabriel Felix, a young and talented hardware engineer, began working on a full time basis for Respondent Pico Computing. During the course of his employment, Appellant purchased nearly \$200,000 worth of stock in the company. The stock was purchased at the price of \$118 per share.

In December, 2007, Appellant terminated his employment. Pursuant to the company's written Shareholder Agreement, Appellant became contractually obligated to "sell back" his stock to the company, at whatever value was established by an "independent appraisal."

In August, 2008, the President and founder of Pico Computing, Dr. Robert Trout, told Appellant that an independent appraisal had been completed by a highly qualified professional appraiser, William Hanlin, CPA.

According to Dr. Trout, Mr. Hanlin had determined that the company's stock was worthless and had a value of "\$0.00 per share."

Based upon this representation, Dr. Trout refused to provide Appellant with any compensation for his stock.

To support his representations, Dr. Trout produced a highly suspicious two-page document which he claimed was Mr. Hanlin's "independent appraisal."

For the Court's convenience, a copy of this document is attached hereto as **Appendix A**.¹ As will be noted, the document is highly suspicious on its face. Among other things:

- The author of the document is not identified;
- The document is not dated or signed;
- The document is not written on any letterhead or stationary;
- Whereas business appraisals are typically several hundred pages in length, the document consists of only two short pages;
- The document does not even remotely meet the minimum professional standards that any competent appraiser would require.

Due to the highly suspicious nature of the document, Appellant's attorney, Scott McKay, repeatedly demanded that Respondent comply

¹The document appears at CP 490-491.

with the “proof of appraisal” provisions of the Shareholder Agreement by providing a signed copy of the ostensible appraisal.

These requests were ignored.

Since these requests were ignored, Mr. McKay attempted to directly contact the appraiser so that he could inquire as to whether the document was intended to serve as a valid independent appraisal.

In response, Dr. Trout’s Seattle attorney, Mathew King, immediately blocked this effort by threatening to move for sanctions. According to Mr. King, the appraiser was an “expert witness” with whom Appellant’s attorney could not have unauthorized ex parte contacts.

In a final attempt to avoid litigation, Mr. McKay drafted a letter to the appraiser which he then sent to Mr. King, along with an accompanying request that the letter be forwarded for a response. The letter specifically asked for verification as to whether or not the document was intended as a valid independent appraisal.

This request was also ignored.

Since it had become clear that Respondent would never voluntarily comply with the Shareholder Agreement, Appellant had no choice but to file suit. The suit was brought under the Uniform Declaratory Judgment Act, RCW 7.24, and sought two primary forms of alternate relief:

1. An order of specific performance which compelled Respondent to comply with the “proof of appraisal” provisions of the Shareholder Agreement; **OR**
2. If no appraisal had been conducted, then an order declaring that the “\$0.00” sales price was null and void.

In 2010, Appellant finally obtained “**smoking gun**” evidence of fraud.

As the appraiser unequivocally testified during his deposition, while the document in question had been authored by him, it was **NEVER** intended by him to be used as an appraisal, nor was it ever intended by him to be relied upon by the parties or courts for that purpose. Simply put, the appraiser confirmed that **no appraisal had ever been conducted**.

Based upon the appraiser’s testimony, Appellant moved for an order of summary judgment which requested two forms of relief:

1. For an order declaring that since no appraisal had ever occurred, the sales price of “\$0.00” was null and void; **and**
2. For an order of specific performance which compelled a new appraisal, as mandated by the Shareholder Agreement.

In a stunning decision that defies logical understanding, the trial court judge not only denied Appellant’s motion, but also granted Respondent’s counter-motion for summary judgment.

As shown herein, clear error was committed. The case must therefore be reversed and remanded to the trial court, with instructions to grant the relief requested by Appellant.

In addition, Appellant must be declared to be the “prevailing party” within the meaning of the attorney fee provisions of the Shareholder Agreement. Appellant is therefore entitled to recover reasonable attorney fees and costs for both this appeal and the trial court litigation.

II.

ASSIGNMENTS OF ERROR

1. The Court erred in refusing to grant summary judgment for Appellant;
2. The Court erred in granting summary judgment for Respondent.

III.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Are there any material issues of fact that are in dispute?
2. Has this case been properly brought under the Uniform Declaratory Judgments Act, RCW 7.24?
3. Do the undisputed facts entitle Appellant to judgment as a matter of law?
4. Is Appellant entitled to recover reasonable attorney fees and costs for both this appeal and the trial court litigation?

IV.

STATEMENT OF THE CASE

None of the facts of this case are in dispute.

Pico Computing, Inc.

Pico Computing Inc. is a “for profit” corporation that was formed in Washington in November, 2004.² As listed by the Washington Secretary of State’s Office, the company’s “governing person” is Dr. Robert Trout, the founder and President of the company.³

The business of Pico Computing has always been to design and manufacture computer hardware and software.⁴

Although the company was small when it was founded in 2004, by 2008 the company had grown to 10 full time employees.⁵

As shown by an article that appeared in Forbes magazine last year, the company is flourishing and has been operating at a profit since at least 2008.⁶

² Cons. Stmt. Facts at CP 435, lines 5-6; Cert. Stmt. Gabriel Felix, at CP 506-507

³ Id at lines 6-7.

⁴ Id at lines 9-10.

⁵ Id a lines 10-12.

⁶ The Forbes article appears at CP 450-454. For authentication, see CP 435, lines 14-15; Cert Stmt. Gabriel Felix, CP 506-507.

Hiring of Appellant

Gabriel Felix is an intellectually gifted young man who has always been a computer and electrical engineering hobbyist.⁷

Appellant attended high school in San Diego, and first met Dr. Trout through his high school recruiting office.⁸ Thereafter, Appellant began working on a part-time basis for a local software company that Dr. Trout partially owned, Ansus Inc.⁹

After graduating from high school, Appellant attended Seattle Pacific University, where he earned a degree in electrical engineering.¹⁰

In October, 2004, Appellant was contacted by Dr. Trout and offered a position with Pico Computing.¹¹ Dr. Trout explained that Appellant would be paid a salary of \$90,000 per year, but that Appellant would be given the option to receive his salary in the form of cash wages, stock in the company, or any combination thereof.¹²

⁷ CP 436, lines 5-6; CP 506-507.

⁸ CP 436, lines 5-9; CP 506-507.

⁹ Id at lines 10-11; CP 507, lines 15-16.

¹⁰ CP 436, lines 14-18; CP 507, lines 15-16.

¹¹ Id.

¹² CP 436, lines 19-32; CP 507, lines 15-16.

Because Appellant had enjoyed a good working relationship with Dr. Trout in the past, he readily accepted the offer.¹³ He began working for the company on a full-time basis in November, 2004.¹⁴

Written Shareholder Agreement

Approximately one year after he started working for Pico Computing, Appellant and other employees were required to sign a written Shareholder Agreement.¹⁵ The agreement contained various provisions that are directly relevant to this litigation:

1. Right to Elect Form of Compensation

Section 2 of the contract allowed employees to choose whether to receive their salaries in the form of cash wages, stock in the company, or any combination thereof:

2.1.1. Option of an Employee to Purchase Shares. Any employee of the Corporation with at least one year of service or whose first day of employment was before Nov. 5th, 2005, shall be eligible to purchase shares of the Corporation . . .

2.1.2 An employee may choose to defer all or part of his salary in expectation of purchasing stock in the Corporation.

CP 461; CP 507, lines 20-21.

¹³ CP 436, lines 17-18; CP 508, lines 19-20.

¹⁴ Id at line 25.

¹⁵ CP 437, lines 1-3; CP 506-507.

2. Mandatory “Sell Back” Requirement Upon Termination of Employment

Section 4 of the contract provided that upon the termination of employment, employees were required to “sell back” any stock they had acquired in the company:

4.1 Obligation to Purchase Shares (“Purchase Event”). Upon the occurrence of any of the events listed below, the Corporation shall have the obligation to purchase all the Shares owned by the Selling Shareholder and the Selling Shareholder shall be obligated to sell such Shares to the Corporation. The events triggering a mandatory purchase of Shares are:

4.1.1 The death or Total Disability of a Shareholder; or

4.1.2 The termination of a Shareholder’s employment with the Corporation for any reason.

CP 465; CP 507, lines 20-21.

3. “Fair Market Value” Standard for Establishing Sales Price

Section 5 of the contract provided that the “sales” price for any stock would be based upon the company’s “fair market value.” As explained in Paragraph 5.1.1:

5.1.1 The purchase price for the Selling Shareholder’s Shares under Section 4 shall be determined by dividing the fair market value of the Corporation, as determined under Section 5.1.3, by the total number of shares outstanding as of the date of the Purchase Event and multiplying such per share price by the number of shares owned by the Selling Shareholder.

CP 467; CP 507, lines 20-21.

4. Mandatory Requirement for “Independent Appraisal”

Section 5 of the Shareholder Agreement established various protocols for establishing the company’s “fair market value.”

Under these protocols, the parties were first required to try and reach an agreement as to the “fair market value” of the corporation.

However, in the event an agreement could not be reached, then it became **mandatory** for the “fair market value” of the company to be established by an “independent appraisal.” In obtaining an independent appraisal, the parties were required to adhere to the following protocols:

5.1.3 Appraisal. In the event that the fair market value of the Corporation cannot be determined [by agreement between the parties], the fair market value of the Corporation shall be determined by an appraisal in accordance with the following provisions:

5.1.3.1 . . . the fair market value of the Corporation shall be determined by an appraiser who shall be selected by the mutual agreement of the Corporation and the Selling Shareholder

5.1.3.2 [If the] Selling Shareholder and the Corporation are unable to agree on the selection of an appraiser within thirty (30) days after [termination of employment], each shall select an independent appraiser . . . The two appraisers so selected shall each independently determine the fair market value of the Corporation . . . the fair market value of the Corporation shall be conclusively deemed to equal the average of the two appraisals.

5.1.3.3 If the Selling Shareholder fails to select an independent appraiser within the time required by this paragraph, the fair market value of the Corporation shall be

conclusively deemed to equal the appraisal of the independent appraiser timely selected by the Corporation. Likewise if the Corporation fails to select an independent appraiser within the time required by this paragraph, the fair market value of the Corporation shall be conclusively deemed to equal the appraisal of the independent appraiser timely selected by the Selling Shareholder.

CP 467-468; CP 507, lines 20-21.

5. “Proof of Appraisal” and Signature Requirements

Section 5 of the Shareholder Agreement contained a “proof of appraisal” provision.

Under this provision, any independent appraiser appointed under the agreement was required to "deliver" a "signed copy" of the completed appraisal to each party, together with a statement of the "opinions and considerations" upon which the appraisal was based. As stated in

Paragraph 5.1.3.5:

5.1.3.5 . . . In determining the fair market value of the Corporation, the appraisers appointed under this Agreement shall consider all opinions and relevant evidence submitted to them by the parties, or otherwise obtained by them, and shall set forth their determination in writing together with their opinions and the considerations on which the opinions are based, with a signed copy of the appraisal delivered to each party.

CP 468; CP 507, lines 20-21.

6. Contractual Obligation to Use Remedy of Specific Performance

Paragraph 7.7 specifically provided that upon breach of any provision of the agreement, the parties were **required** to use the remedy of specific performance:

Right to Specific Performance. The parties hereto covenant and enter into this Agreement with the knowledge that . . . the parties will be irreparably damaged in the event that this Agreement is not specifically enforced. Accordingly, in the event of any controversy concerning the right or obligation to purchase or sell any of the stock of this Corporation or to perform any other act pursuant to this Agreement, ***such right or obligation shall be enforceable in a court of equity by a decree of specific performance.*** Such remedy shall be cumulative and non-exclusive, being in addition to any and all other remedies which the parties may have . . .

(Italics, bolding and underlines added). CP 470; CP 507, lines 20-21.

7. Attorney Fees and Costs

Paragraph 7.8 of the contract provided that in the event a lawsuit was brought to enforce any provision of the agreement, the prevailing party was entitled to collect reasonable attorney fees and costs of suit:

Attorneys' Fees. In the event any party hereto shall bring any action or proceeding to enforce any provision of this Agreement against any other party (or any transferee of rights pursuant hereto) the prevailing party, whether at trial or on appeal, shall be entitled to recover reasonable attorneys' fees, costs and necessary disbursements in addition to any other relief to which such party is entitled.

CP 470; CP 507, lines 20-21.

Purchase of Stock by Appellant (\$195,189.24)

When he first started working for Pico Computing, Appellant decided to take all of his salary in the form of stock payments.¹⁶

In 2006, Appellant decided to modify his compensation and thereafter chose to accept approximately 50% of his salary in stock, and 50% in cash.¹⁷

In addition to trading his salary for stock, Appellant's faith in Dr. Trout and the company was so great that he also invested **\$40,000** of his own personal cash savings into buying additional stock.¹⁸

Regardless of whether the stock was purchased via salary payments or cash, all stock was purchased at the agreed rate of approximately \$118 per share.¹⁹

During the three years that Appellant was employed by Pico Computing, his stock purchases totaled \$195,189.24.²⁰

¹⁶ CP 440, lines 4-5; CP 507, lines 23-25.

¹⁷ CP 440, lines 8-9; CP 507, lines 23-25.

¹⁸ CP 442, lines 22-24; CP 507, lines 28-30.

¹⁹ CP 443, lines 1-4; CP 507, lines 28-30.

²⁰ CP 443, lines 1-4; CP 507, lines 28-29.

Dr. Trout's Appointment of Appraiser

Appellant terminated his employment with Pico Computing in December 15, 2007.²¹ As previously shown, this triggered the mandatory “sell back” provisions of the Shareholder Agreement.

Since the parties were unable to reach agreement as to the “fair market value” of the company, Dr. Trout notified Appellant that he had nominated William Hanlin, CPA, to conduct an independent appraisal.²²

Since the Shareholder Agreement gave Appellant the right (but not the obligation) to hire a second independent appraiser at his own expense,²³ Appellant contacted several appraisers for this purpose.²⁴ Unfortunately, he learned that the costs could be as high as \$30,000.²⁵ Because Appellant could not afford such an expense, he decided that he had no choice but to accept the appraiser appointed by Dr. Trout, William Hanlin.²⁶

²¹ CP 441, line 11; CP 507, lines 23-25.

²² CP 443, lines 11-12; CP 507, lines 28-30.

²³ See Shareholder Agreement, Paragraph 5.1.3.2 (CP 467).

²⁴ CP 327, lines 15-19; Second Cert. Stmt. Gabriel Felix, CP 4-11-412.

²⁵ Id.

²⁶ Id; CP 311, lines 18-19.

No Delivery of Appraisal by Hanlin

After Mr. Hanlin was appointed to serve as the independent appraiser, Appellant contacted him multiple times to inquire about the status of the appraisal.²⁷

At no time did Mr. Hanlin ever contact Appellant to advise him that an “appraisal” had been completed, or what the results were.²⁸

Surprise Presentation of “Appraisal” by Dr. Trout

In August, 2008, Appellant was surprised to learn from Dr. Trout that Mr. Hanlin had completed his “appraisal.”²⁹ This was a surprise to Appellant because, as previously shown, Mr. Hanlin had never contacted him, nor had Mr. Hanlin ever delivered a copy of the completed appraisal report to Appellant, as required by the Shareholder Agreement.³⁰

Dr. Trout’s Representation of “\$0.00” Appraisal

Dr. Trout specifically represented to Appellant that Mr. Hanlin had appraised the company’s stock as being worthless, with a value of “\$0.00 per share.”³¹

²⁷ CP 443, lines 15-23; CP 507, lines 28-30.

²⁸ Id.

²⁹ CP 443, lines 25-26; CP 507, lines 28-30.

³⁰ CP 443, line 25 to CP 444, lines 1-2; CP 507, lines 28-30; CP 468.

³¹ CP 444, lines 10-13; CP 507, lines 28-3-; CP 487.

To support these claims, Dr. Trout provided Appellant with an unsigned two-page document which he claimed was Mr. Hanlin's "appraisal."³² A copy of this document is attached hereto as **Appendix A.**³³

Based upon the "results" of the ostensible "appraisal," Dr. Trout refused to provide Appellant with any compensation for his stock.³⁴

Appellant's Initial Belief That "Appraisal" Was Genuine

Although Appellant was talented in the area electrical engineering, he was naïve and gullible about business matters. Accordingly, he initially believed that Dr. Trout's representations were true, and that the document was a valid "appraisal" of his stock.³⁵

For this reason, Appellant promptly emailed Dr. Trout a brief "thank you" note which expressed gratitude for following the terms of the Shareholder Agreement, and which also promised to surrender the stock certificates.³⁶ For the Court's convenience, a copy of this "thank you" note is attached hereto as **Appendix B**. It provided as follows:

³² CP 444, lines 3-8; CP 507, lines 28-30.

³³ CP 490-491; For authentication, see CP 507, lines 28-30.

³⁴ CP 444, lines 10-13; CP 507, lines 28-30.

³⁵ CP 328, lines 5-15 CP 411, lines 20-30; CP 411-412.

³⁶ Id.

Dear Dr. Trout,

Thank you for fulfilling the terms of the shareholders agreement. I will do my part and return the certificate to you shortly.

Best Regards, Gabriel Felix.

CP 412, line 18; CP 424; CP 214.

Subsequent Doubts and Decision to Hire Attorney

In the days following his initial receipt of the “appraisal,” Appellant began to have serious doubts as to whether it was legitimate.³⁷

Due to these doubts, Appellant consulted various attorneys and ultimately hired his present attorney, Scott McKay, to determine what rights, if any, he had concerning the appraisal.³⁸

Investigation and Actions by McKay

Upon reviewing the ostensible “appraisal,” Mr. McKay formed the opinion that it likely was invalid, if not downright fraudulent.³⁹

This opinion was based upon various glaring deficiencies that appeared on the face of the document, including:

- The document was not signed or dated;
- The document was not written on any letterhead or stationary;

³⁷ CP 328, lines 19-22; CP 411-412.

³⁸ CP 444, lines 15-16; Cert. Stmt. Scott McKay at CP 432-433.

³⁹ CP 444, lines 19-22; CP 432, lines 26-30.

- The document did not purport to establish a "fair market value" for the corporation, which was the purpose of the appraisal;
- The document did not appear to even remotely meet the minimum professional standards for appraisals, nor did it even remotely meet the standards of the professional organization to which Mr. Hanlin belonged, NACVA.

CP 444, line 23 to CP 445, line 5; CP 432, lines 26-30.

Due his grave doubts about the authenticity of the document, Mr. McKay contacted Respondent's attorneys and demanded that they produce a signed copy of the "appraisal," as required by the "proof of appraisal" provisions of the Shareholder Agreement (Paragraph 5.1.3.5).⁴⁰

These demands were ignored.⁴¹

Since these demands were ignored, Mr. McKay advised Respondent's attorneys that he had no choice but to directly contact the appraiser himself, so that he could verify whether or not the document was authentic.⁴²

Respondent's Seattle attorney, Mathew King, immediately blocked this effort by threatening sanctions.⁴³ According to Mr. King, the appraiser was an "expert witness" with whom Mr. McKay could not have

⁴⁰ CP 445, lines 9-14; CP 432, lines 28-30. The "proof of appraisal" provision appears at CP 468, paragraph 5.1.3.5.

⁴¹ CP 445, lines 9-14; CP 432, lines 28-30.

⁴² CP 445, lines 16-23; CP 432, lines 28-30.

⁴³ Id.

unauthorized ex parte contacts.⁴⁴ Mr. King specifically threatened in writing that "*any future contact with Mr. Hanlin, without my prior written permission, will be met with a motion for sanctions.*"⁴⁵

In a final attempt to avoid litigation, Mr. McKay drafted a letter to Mr. Hanlin and sent it to Mr. King with an accompanying request that it be forwarded for a response.⁴⁶

The letter specifically asked Mr. Hanlin to verify whether or not the document in question was authentic.⁴⁷ The letter also outlined various reasons why fraud was suspected, and requested Mr. Hanlin's comments.⁴⁸

Once again, no response was ever received.⁴⁹

Appellant Forced to File Suit

Since it had become clear that neither Respondent nor its attorneys would cooperate, Appellant had no choice but to file suit under the Uniform Declaratory Judgments Act, RCW 7.24.⁵⁰

⁴⁴ Id.

⁴⁵ Id.

⁴⁶ CP 445, lines 25-28; CP 432-433.

⁴⁷ CP 445, line 28 to CP 446, line 3; The letter appears at CP 491-497. For authentication, see CP 432-433.

⁴⁸ Id.

⁴⁹ CP 446, line 5; CP 432-433. As was later learned during the deposition of Mr. Hanlin, Mr. King ignored the request and never forwarded the letter to Mr. Hanlin. See Statement of Facts, *infra*, pp. 25-26.

⁵⁰ CP 446, lines 7-19; CP 432-433.

The suit had only one purpose: to enforce Appellant's right under the Shareholder Agreement to receive a valid and signed appraisal.⁵¹ To this end, the First Amended Complaint asked for a combination of both declaratory relief and specific performance. The Prayer for Relief requested:

1. An order declaring that the "proof of appraisal" provisions of the Shareholder Agreement had been materially breached;
2. An order requiring specific performance of such provisions;
3. An order declaring that if a valid signed valid appraisal was not produced, then an order declaring that the alleged "\$0.00" sales price for the stock was null and void;
4. For all such relief as was available at law or equity.

CP 188-189.

"Smoking Gun" Evidence of Appraisal Fraud

After suit was filed, Appellant finally obtained confirmation that as had been suspected, fraud had been committed.

This "smoking gun" evidence was obtained during the deposition of the ostensible "appraiser," William Hanlin. See CP 498-505.

Mr. Hanlin testified in stark and unmistakable terms that while the two page document was authored by him, it was **NEVER** intended by him

⁵¹ Third Cert. Stmt. Gabriel Felix, CP 427, lines 20-22.

to serve as an independent appraisal, and was **NEVER** intended to be relied upon by the parties or courts to value Appellant's stock:

Q. [By Mr. McKay]. Sir, let me ask you this. Was that two-page document, was that intended by you to be a valid, independent appraisal as to the value of Pico Computing for the purposes of evaluating the value of my client's stock?

A. It was not.

Q. It would be your position then, sir, that the parties should not rely upon that document for purposes of evaluating my client's -- value of his stock then, correct?

A. That is correct.

Q. And it would be your position that the Superior Court should not rely on this document for establishing the value of my client's stock?

MR. KING: I'm going to object. It calls for a legal conclusion. You mislead the evidence and also directly ask the witness to put his role as judicial officer and not as independent appraiser or expert.

Q. (BY MR. McKay). Go ahead and answer the question, sir.

A. I don't know what a judge would do, but if I were the judge, I don't see this as a complete report.

CP 501, line 12 to CP 504, line 10.

Mr. Hanlin was also asked if he had ever received the letter that Mr. McKay had forwarded to him via Mr. King. Mr. Hanlin testified that he had never seen the letter, and had no awareness of it until shortly before his deposition, when it was emailed to him by Mr. McKay:

Q. (BY MR. McKay). [W]e are going to refer to finally Exhibit Number J, which is a letter . . . I sent to [Mr.King] and asked him to forward to you. Did he forward it to you?

A. No, he did not.

Q. When is the first time you saw that letter?

A. When I got your email last week.

CP 500, lines 12-24.

Corroborating Testimony by Appellant's Expert

In support of his motion for summary judgment, Appellant presented the affidavit of another appraiser, Mark Kucik, CPA.⁵²

For various reasons that are extensively described in his affidavit, Mr. Kucik confirmed that the document does not even remotely qualify as an "appraisal."⁵³

V.

STANDARD OF REVIEW

The rules pertaining to summary judgments motions are well known to this Court and therefore will not be extensively discussed.

Appellant relies upon the following rules:

⁵² Mr. Kucik's affidavit appears at CP 352-394.

⁵³ CP 353, line 22 to CP 354, line 6.

1. Appellate Review is De Novo

Summary judgment decisions are reviewed on a de novo basis. As the Washington Supreme Court has stated:

This court reviews summary judgment orders de novo, performing the same inquiry as the trial court. *Kruse v. Hemp*, 121 Wn.2d 722, 853 P.2d 1373 (1993). In conducting this inquiry, this court must view all facts and reasonable inferences in the light most favorable to the nonmoving party. *City of Lakewood v. Pierce County*, 144 Wn.2d 118, 125, 30 P.3d 446 (2001). Summary judgment is proper where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860-861, 93 P.3d 108 (2004).

2. The Moving Party Can Meet its Initial Burden of Proof by Showing the Other Side Lacks Proof

A moving party may meet its initial burden of proof by showing that the opposing party has no evidence to support its case. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225 at footnote 1, 770 P.2d 182 (1989); *Guile v. Ballard Cmty. Hosp.*, 70 Wn. App. 18, 21, 851 P.2d 689 (1993).

3. The Opposing Party Must Produce ACTUAL Facts, Not Unsupported Conclusory Arguments

The party opposing summary judgment must produce competent affidavits which contain actual, discrete facts. A party may not rely upon

unsupported conclusory allegations or arguments. *Seiber v. Poulsbo Marine Ctr., Inc.* 136 Wn. App. 731, 736, 150 P.3d 633 (2007).

VI.

ARGUMENT

A. THE TRIAL COURT ERRED BY FAILING TO GRANT SUMMARY JUDGMENT FOR BREACH OF CONTRACT

The undisputed facts demonstrate that breach of contract occurred as a matter of law. This conclusion is so obvious as to not require argument. Instead, Appellant only needs to recite three facts, none of which are in dispute:

1. The parties were contractually bound to follow the terms of the written Shareholder Agreement;
2. The Shareholder Agreement provided that the “sales price” for Appellant’s stock would be whatever value was established by an appraisal;
3. No appraisal ever occurred.

Given these facts, no conclusion is possible other than a breach of contract occurred. The trial court clearly erred in failing to grant summary judgment on behalf of Appellant.

B. APPELLANT PROPERLY BROUGHT SUIT UNDER THE UNIFORM DECLARATORY JUDGMENT ACT, RCW 7.24

This is a classic example of the type of case that is contemplated by the Uniform Declaratory Judgments Act, RCW 7.24.

Where a party has sustained injury that cannot be remedied by an action at law, he/she may seek relief under the Uniform Declaratory Judgments Act. *Reeder v. King County*, 57 Wn.2d 563, 564, 358 P.2s 810 (1961). Such relief is specifically authorized by RCW 7.24.020, which provides:

A person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder.

In order to obtain relief under the Act, there must be a “justiciable controversy.” A justiciable controversy is:

(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.

Methodist Church v. Hearing Examiner, 129 Wn.2d 238, 245, 916 P.2d 374 (1996).

Here, Appellant was clearly an “interested” party, within the meaning of RCW 7.24.020. He paid nearly \$200,000 for his stock, and therefore clearly had a vested interest in ensuring that the appraisal

provisions of the Shareholder Agreement were properly applied and complied with.

Likewise, there can be no dispute that this case presented a “justiciable controversy.” Specifically: (1) there was an “*actual dispute*,” (2) the parties had “*genuine and opposing interests*,” (3) the interests at stake were “*direct and substantial*” and (4) judicial rulings would be “*final and conclusive*” as to the issues presented by the case. See: *Methodist Church v. Hearing Examiner*, supra, 129 Wn.2d at 245.

Finally, the only remedies which could adequately address the injuries sustained by Appellant were the remedies of declaratory judgment and specific performance, both of which were authorized by the Uniform Declaratory Judgments Act. (See discussion, immediately below). Since Appellant could not obtain such remedies via an action at law, his only option was to obtain such relief under the Uniform Declaratory Judgments Act.

C. PLAINTIFF WAS ENTITLED TO THE REMEDIES OF DECLARATORY RELIEF AND SPECIFIC PERFORMANCE

The Uniform Declaratory Judgments Act bestows broad powers upon courts to fashion any remedy that is deemed to be “necessary and proper.” RCW 7.24.080.

Consistent with this broad grant of authority, courts may grant relief in the form of a judicial declaration of “rights, status or other legal relations.” RCW 7.24.020. Courts are also authorized to grant the remedy of specific performance. *Ronken v. County Commissioners*, 89 Wn.2d 304, 311-312, 572 P.2d 1 (1977) (confirming that courts have authority to order specific performance and "coercive" relief under the Act).

Since no appraisal was ever conducted, Appellant was entitled to an order of declaratory relief which stated that the alleged sales price of “\$0.00” was null and void. RCW 7.24.020.

For the same reason, he was also entitled to a decree of specific performance which required the parties to obtain a new appraisal. RCW 7.24.080.

Since these remedies were fully authorized by the Uniform Declaratory Judgments Act, the trial court erred by not granting the relief that had been requested.

**D. THE REMEDY OF SPECIFIC PERFORMANCE WAS ALSO
REQUIRED BY CONTRACT**

Not only was the remedy of specific performance required under the Uniform Declaratory Judgments Act, it was also required as a matter of contractual obligation.

This is made clear by Paragraph 7.7 of the Shareholder Agreement.

As explicitly stated therein, in the event of any breach of contract, the parties are **contractually required** to remedy such breach via an action for specific performance:

Right to Specific Performance. The parties hereto covenant . . . that . . . ***the parties will be irreparably damaged in the event that this Agreement is not specifically enforced.*** Accordingly, *in the event of any controversy concerning the right or obligation to purchase or sell any of the stock of this Corporation* or to perform any other act pursuant to this Agreement, such right or obligation ***shall be enforceable in a court of equity by a decree of specific performance.*** Such remedy shall be cumulative and non-exclusive, being in addition to any and all other remedies which the parties may have . . .

(Italics, bolding and underlines added), CP 470; CP 507, lines 20-21.

Since there can be no question that the appraisal provisions of the Shareholder Agreement were materially breached, the parties were contractually required to remedy the breach via the remedy of specific performance. This provides another reason why the trial court erred in failing to grant Appellant's request for an order of specific performance.

E. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR RESPONDENT

Respondent's counter-motion for summary judgment was based upon three separate arguments:

1. “Breach of contract” did not occur because the suspect document had been “signed” and “authenticated” as an “appraisal”;
2. The “thank you” note that Appellant sent “constituted a “waiver” of his right to have a valid appraisal;
3. Since Appellant did not allege economic damages, he had no right of action.

As the following discussion shows, none of these arguments had any merit whatsoever.

1. The Suspect Document WAS NOT an “Appraisal”

Respondent’s first argument was that breach of contract **did not** occur because the appraiser “intended” to “sign” and “authenticate” the document as an “appraisal.”⁵⁴

According to Respondent’s attorney, the fact that Mr. Hanlin never physically signed the document was “immaterial” because Mr. Hanlin “emailed” the document to Dr. Trout. With logic that is hard to fathom, Respondent’s attorney somehow reasoned that this “proved” that Mr. Hanlin had “intended” to “sign” and “authenticate” the document as an “appraisal.”⁵⁵

This argument was preposterous and should have resulted in sanctions under CR 11.

⁵⁴ CP 205, lines 3-11; CP 281, lines 11-13.

⁵⁵Id.

Respondent's attorney was fully aware that his factual assertions were directly and explicitly contradicted by Mr. Hanlin, who unequivocally testified that the document was NEVER intended to be signed, used or authenticated as an appraisal.

Notwithstanding such knowledge, Respondent's attorney took the exact opposite position, and argued that Mr. Hanlin intended to sign and authenticate the document as an appraisal.⁵⁶ Not only was this argument squarely contradicted by the evidence, it was made without a shred of factual support.⁵⁷

If Respondent's attorney repeats this same argument on appeal, significant sanctions should be imposed.

2. Appellant Never Waived His Right To Challenge the Appraisal

Respondent also argued that the note that Appellant sent to Dr. Trout after receiving the suspect document constituted a "waiver" of his right to later challenge the document.⁵⁸

There are two reasons why this argument is clearly without merit.

⁵⁶ CP 205, lines 5-7.

⁵⁷ Id.

⁵⁸ CP 206, lines 1-3; CP 281, line 22 to 282, line 22.

a. Written Waiver Did Not Exist As a Matter of Law

“Waiver” will only exist where there is a “voluntary and intentional relinquishment of a known right.” *Naches School Dist. Cruzen*, 54 Wn. App. 388, 396, 775 P.2d 960 (1989).

Consistent with this rule, written waivers must contain clear and unambiguous language which expresses an intent to waive. *Tenant’s Associaiont v. Little Mt. Estates*, 146 Wn. App 546, 560-561, 192 P.2d 378 (2008). If the plain language of a waiver provision fails to clearly state an intent to waive, then waiver cannot exist as a matter of law. *Chavlier v.Booth Creek* , 109 Wn. App. 334, 339-40, 35 P.3d 383 (2001).

As can be readily seen, the language of the note did not purport to waive any rights under the Shareholder Agreement. To the contrary, it did the opposite: it reflected an intent that the terms of the contract should be followed:

Dear Dr. Trout,

Thank you for fulfilling the terms of the shareholders agreement. I will do my part and return the certificate to you shortly.

Best Regards, Gabriel Felix.

CP 424; CP 214; CP 412, line 18. (**Appendix B**).

Clearly, this language does not express an intent to waive any right under the contract, including the right to have a valid appraisal. Written waiver did not occur as a matter of law.

b. There Are No Facts To Support Implied Waiver

Respondent has no facts to support an argument that there was implied waiver.

Implied waiver of contractual rights is not favored. Accordingly, the party claiming waiver has the heavy burden of proof. *Oregon Mutual Insurance Co. v. Barton, 109 Wn. App. 405, 418, 36 P.3d 1065 (2001).*

Implied waiver will only exist where two essential requirements are met: 1) There must be unequivocal acts of conduct which evidences a party's intent to waive **and** 2) The conduct must be inconsistent with any intent other than to waive. As this Court has stated:

For waiver to apply, "it must be shown by unequivocal acts or conduct showing intent to waive, and the conduct must also be inconsistent with any intention other than to waive.

Uznay v. Bevis, 139 Wn. App. 359, 369, 161 P.3d 1040 (2007).

As this Court will readily verify, there is no evidence in the record to support an argument for implied waiver. Indeed, the **ONLY** evidence on this topic was introduced by Appellant. This evidence consisted of two simple facts:

1. When Appellant first received the ostensible “appraisal,” he believed it was valid;
2. Based upon this initial belief, Appellant sent a brief note to Dr. Trout which expressed gratitude for following the terms of the Shareholder Agreement, and which also promised to return the stock certificates.

These bare facts cannot possibly be said to reflect an “unequivocal intent to waive.” Nor can they be said to be “inconsistent with any intention other than to waive.” *Uznay v. Bevis*, supra, 139 Wn. App. at 369.

The bottom line is that there was no facts or evidence to support an argument for implied waiver. Any argument to the contrary must be summarily rejected for lack of evidence.

3. Even if “Waiver” Did Exist, It Was Not Effective Because It Was Induced by Fraud

Even if this Court could somehow conclude that Appellant’s actions in sending the “thank you” note constituted waiver, such waiver would be ineffective and inconsequential because it was induced by fraud or mistake.

It is fundamental that waiver of any contract right **will not** be effective if it has been induced by fraud or mistake. *Nationwide Mutual v. Watson*, 120 Wn.2d 178, 187, 840 P.2d (1992); *Weitzman v. Bergstrom*, 75 Wn.2d 693, 699, 453 P.2d 860 (1969). See Also: *Mutual of Enumclaw*

v. *Cox*, 110 Wn.2d 643, 757 P.2d 499 (holding that the remedy of estoppel is not available to parties who have engaged in misrepresentation, concealment or fraud).

This rule specifically applies to appraisals:

The general rule is that in the absence of mistake, arbitrary or capricious action or fraud, the decision by such an appraiser is conclusive upon the parties. *Hegeberg v. New Eng. Fish Co.*, 7 Wn.2d 509, 526, 110 P.2d 182 (1941); 5 S. Williston, CONTRACTS 802, at 825 (3d ed. 1961). Only where the appraiser has proceeded upon a fundamentally wrong basis may the court ignore the appraiser's findings. *Peterson v. Granger Irrigation Dist.*, *Supra* at 670.

Black Mountain Ranch v. Dev. Co., 29 Wn App. 212, 216, 627 P.2d 1006 (1981).

Here, Appellant sent the “thank you” note based upon his mistaken belief that the suspect document was a valid independent appraisal. Since this mistake was induced by Dr. Trout’s fraudulent misrepresentations, waiver cannot exist as a matter of law. *Nationwide Mutual v. Watson*, *supra*, 120 Wn.2d at 187; *Weitzman v. Bergstrom*, *supra*, 75 Wn.2d at 699.

4. Appellant Was Not Required to Allege Economic Damages

Respondent's final argument was that since Appellant did not allege that he sustained monetary damages, he was not entitled to relief.⁵⁹ This is nonsense.

This lawsuit was not instituted to recover monetary damages. Instead, it was brought to obtain **non-monetary** relief. More specifically, it was brought to obtain declaratory relief and specific performance concerning Appellant's right to have his stock valued by a valid independent appraisal. Since these remedies were fully authorized by the Uniform Declaratory Judgments Act (see Argument, supra, pp. 30-31), Appellant was entitled to obtain the relief he requested.

F. ATTORNEY FEES AND COSTS OF SUIT

Since Appellant must be declared the "prevailing party" to this action, he is entitled to recover reasonable attorney fees and costs of suit, as provided by Paragraph 7.8 of the Shareholder Agreement. See Statement of Facts, supra, p. 16.

Upon remand, the Court should direct the trial court to award reasonable attorney fees and costs which were incurred during the proceedings below.

⁵⁹ CP 206, lines 5-18.

It should also award fees and costs for this appeal, as provided by RAP 18.1.

VII.

CONCLUSION & SUMMARY

The trial court's decision constituted clear error, and must be reversed. Upon remand, the trial court should be directed to enter the following orders:

1. A declaratory judgment which declares that the ostensible "sales price" of "\$0.00" is null and void, and therefore set aside;
2. An order of specific performance which directs the parties to obtain a new appraisal, under the protocols and rules established by **Section 5** of the Shareholder Agreement;
3. An order awarding Appellant reasonable attorney fees and costs.

Pursuant to RAP 18.1, attorney fees and costs for this appeal should also be awarded.

Dated this 3rd Day of May, 2011



Scott McKay, WSBA No. 12746
Attorney for Appellant

APPENDIX A

Pico Computing, Inc.

Value of stock as of December 31, 2007

Valuation requires consideration of the three general approaches to valuation

1. The cost approach
2. The income approach
3. The market approach

The Cost Approach

In the valuation of a business, the cost approach is a value most often described as the value of the assets, net of the liabilities. As of December 31, 2007, the Company has assets and liabilities are as follows:

Assets --	
Cash	18,936
Accounts receivable	140,195
Inventory	154,048
Prepaid expenses	800
Depreciable assets – net of depreciation	59,642
Goodwill – net of amortization	133,483
Licenses	8,000
Security deposits	<u>3,336</u>
	518,443
Liabilities --	
Accounts payable and accrued expenses	36,256
Loans and amounts due to shareholder	<u>628,145</u>
	664,401
Excess of liabilities over assets	(145,958)

The Company, as of December 31, 2007, has no book value. Using the cost approach, the value of the stock is \$0.00.

The Income Approach

In order to use existing models for the income approach, a business must have either a history of historical earnings, or a valid projection of its ability to generate profits into the future. The Company was formed in 2004, and has recorded the following profits or losses as of each December 31

Two months ending December 31, 2004	(6,910)
Twelve months ending December 31, 2005	(400,889)
Twelve months ending December 31, 2006	(30,780)
Twelve months ending December 31, 2007	(<u>512,360</u>)
Net income (loss)	(<u>1,000,939</u>)

The historical earnings of the Company have all been losses, and Management has not produced any meaningful projections that could be used to evaluate future value based upon income.

Therefore, we were unable to apply the income approach to value Pico Computing, Inc. as of December 31, 2007

The Market Approach

The market approach requires that the valuation analysts identify comparable companies, usually publicly traded entities, in order to determine value. In this instance, we could discover no such companies that were similar in assets, revenues, synergies, or structure.

Therefore, we were unable to apply the market approach to value Pico Computing as of December 31, 2007.

Conclusion

In our opinion, the stock of Pico Computing, Inc., as of December 31, 2007, is \$0.00 per share.

APPENDIX B

Re: Stock Appraisal

Subject: Re: Stock Appraisal
From: VashonGabriel <VashonGabriel@gmail.com>
Date: Thu, 07 Aug 2008 08:17:17 -0700
To: Robert Trout <rtrout@picocomputing.com>

Dear Dr. Trout,

Thank you for fulfilling the terms of the shareholders agreement. I will do my part and return the certificate to you shortly.

Best Regards,

Gabriel Felix

Robert Trout wrote:

Jason:

I received this day the appraisal of Pico Computing as of Dec 31st, 2007 from Hanlin Moss.

Hanlin Moss's appraisal is zero. Taking this into consideration the remaining stockholders of the corporation intend to declare a value of \$1+/- per share for 2007. At this valuation your stock would be worth approximately \$2000.

You have recently demanded payment of some debt which you describe as 'back salary', citing some fatuous notions of the Corporation's health. Your presumptions are very wide of the mark. I have already put approximately \$100K into the corporation this year. This is in addition to the \$600K which Pico Computing, Inc owes me from 2007. These and the artificially low salary of the current stockholders will take precedence over any other claims. The \$600K is structured as a 10 year note, which is a fair proxy for how long it will be before the corporation will be in sufficiently good health to meet any claims tagged with the caveat 'when the company can afford it'.

Although the decision to leave the corporation at its nadir was entirely yours, i am mindful of your contributions to Pico Computing over the years and have consistently sought a generous settlement. To that end we are prepared to declare a stock value which would net you \$8000. This would be in settlement of all obligations Pico Computing, Inc & Jason Felix.

Here are your options as i see them:

1. Accept the offer of \$8000 for all obligations, return your stock certificates, sign a release (which we will write). We will send you a check for \$8000.

2. Accept the offer of \$2000 +/- for your stock, return your stock certificates and we will send you a check for \$2000 +/- . Unrelated to this settlement, you should reduce to writing the terms of any remaining obligations so that we may agree upon them.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30

2011 MAY 5 AM 11:50

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

JASON FELIX,

Appellant,

vs.

PICO COMPUTING,

Respondent.

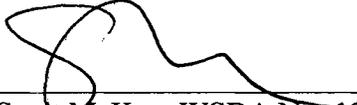
No. 66303-8-I

**PROOF OF SERVICE OF OPENING
BRIEF OF APPELLANT**

COMES NOW THE APPELLANT HEREIN, and advises this Court that the parties hereto have a prior and longstanding stipulation that all pleadings in this case may be served upon either party via email. Pursuant to this stipulation, a copy of Appellant's Opening Brief in his matter has been emailed to Respondent's attorney, Mathew King, at his email addresses, *matthewrkinglaw@hotmail.com* and *matthewrkinglaw@hotmail.com*

I certify under the penalty of perjury under the laws of the State of Washington that the foregoing is known by me to be true and correct.

Dated in Seattle, Washington, this 5h day of May, 2011



Scott McKay, WSBA No. 12746
Attorney for Appellant