

No. 67823-0-I

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

JOHN L. DONLIN,

Appellant,

v.

JERRY MURPHY, in his individual capacity and in his capacity as
director and office of Greenshields Industrial Supply, Inc., a Washington
Corporation, and CONTRACTOR SUPPLY CORPORATION, a
Washington Corporation,

Respondent.

APPELLANT’S REPLY BRIEF

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 COURT OF APPEALS
 STATE OF WASHINGTON

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I. INTRODUCTION

The Appellant, John L. Donlin (“Donlin”), seeks this Court’s determination of whether a corporation’s administrative dissolution, under RCW 23B.14 *et seq.*, deprives a shareholder, who is a plaintiff in a derivative action, of his or her derivative standing. The Respondents, Jerry Murphy *et al.* (“Murphy”), maintain that a derivative plaintiff automatically loses standing to maintain such a lawsuit because the corporation’s dissolution deprives the derivative plaintiff of the only thing needed to maintain standing in a corporate derivative lawsuit—the status of shareholder in an active corporation. Murphy reasons that a shareholder plaintiff in a corporate derivative action loses standing when the corporation dissolves administratively because the plaintiff loses his or her status as a shareholder in an active corporation. To Murphy the loss of derivative standing follows an administrative dissolution in the same manner as the night follows the day.

Murphy’s singular reasoning, however, fails to address a number of significant issues that run contrary to his reasoning and urged outcome. First, Murphy fails to account for why Washington’s legislature failed to exclude derivative claims from the mandate of RCW 23B.14.340 that the administrative dissolution of a corporation shall not take away or impair any remedy available against such a corporation, its directors, officers, or

shareholders for any right, claim existing, or liability incurred prior to the dissolution.

Second, Murphy failed to explain precisely how Donlin lost his ability to represent all similarly situated shareholders when the corporation's administrative dissolution simultaneously transmuted all shareholders from the status of shareholders of an active corporation to the status of shareholders of an administratively dissolved corporation. In essence, Donlin and the other shareholders maintained the same relationship with each other and with the corporation throughout the entire relevant time period. The fact that the corporation went through an administrative dissolution enabled the shareholders to maintain a unity of interests, which is after all the necessary ingredient for derivative standing under CR 23.1.

Last, Murphy fails to account for the fact Judge Farris expressly declined to adopt the Receiver's report and findings in her December 14, 2009 Order, and expressly ruled in her June 7, 2010 Order that the "sale of the business was court authorized on the condition the Plaintiff's and shareholders claims in [the] lawsuit would remain for trial and survive the sale" of the business. These two Orders would seem to diminish the importance of the Receiver and the sale of the business with respect to the

analysis of whether Donlin lost his derivative standing when his corporation was administratively dissolved.

To Donlin, he maintained his derivative standing after Greenshields Industrial Supply's (GIS) administrative dissolution because of the compatibility between the legislature's statutory framework for administrative dissolutions and the Superior Court's Civil Rule regarding existence and maintenance of derivative standing. Under Washington's statutory scheme, a corporation continues to exist, in fact, after it's administratively dissolved with the caveat that its prospective existence and operations are limited to winding up its business affairs. RCW 23B.14.210 (3). This necessarily means that shareholders of an administratively dissolved corporation remain shareholders after the date of administrative dissolution; albeit a corporation with diminished authority to act.

This fact of continued shareholder status after a corporate dissolution dovetails into the analysis underlying the Superior Court Civil Rule governing derivative standing when considering whether a shareholder of an administratively dissolved corporation has sufficient standing to maintain a derivative lawsuit as the plaintiff. CR 23.1 states, in relevant part:

The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association

Donlin reads this rule to maintain his derivative standing if he fairly and adequately represents the interests of the other shareholders similarly situated in enforcing the right of the corporation. Donlin met this requirement after GIS' administrative dissolution because he, like all other GIS shareholders, was now a shareholder of an administratively dissolved corporation that was in the business of winding up its business affairs. Donlin concluded that pursuing and resolving GIS' last legal claim constituted the activity of winding up GIS' business affairs.

Accordingly, Donlin requests this Court to remand the matter to the trial court for trial so that Donlin can finally begin the resolution of GIS' last matter of business.

II. ARGUMENT

A. *De Novo* Standard of Review

This Court reviews *de novo* a trial court's ruling on a motion to dismiss for failure to state a claim. A decision to dismiss granted under CR 12(b)(6) is a question of law and is reviewed *de novo* by an appellate court. Cutler v. Phillips Petroleum Co., 124 Wn.2d 749, 755, 881 P.2d 216 (1994). Whether a trial court's interpretation of the Washington Business Corporation Act, Title 23B RCW, is correct is a question of statutory

construction and so is reviewed *de novo* on appeal. Ballard Square Condo. Owners Ass'n v. Dynasty Constr., 158 Wn.2d 603, 612, 146 P.3d.914 (2006). “The court’s fundamental objective is to ascertain and carry out the Legislature’s intent, and if the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” Dep’t of Ecology v. Campbell &Gwinn, L.L.C., 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

B. Washington’s Legislature Declined to Exempt Derivative Claims from the Operation of RCW 23B.14.340.

Murphy addressed RCW 23B.14.340 in the Respondent’s brief, but he only addressed that aspect of the statute that allows an administratively dissolved company to pursue its claims and remedies if such activity is commenced within three years. Respondents Brief at Pp. 20, 21. Murphy failed to explain why the statute’s mandate that the dissolution of a corporation “*shall not* take away or impair *any remedy available against* such a corporation, *its directors, officers, or shareholders, for any right or claim existing,* or any liability incurred, prior to such dissolution . . .”(Emphasis added). See RCW 23B.14.340.

A derivative claim is a claim generally brought against a corporation’s directors, officers, and shareholders by shareholders on behalf of their aggrieved or injured corporations. Washington’s legislature is presumed to know about derivative claims when it drafted RCW

23B.14.340. See e.g., In Re Marriage of Gimlett, 95 Wn.2d 699, 629 P.2d 450 (1981). Donlin simply asks this Court to give legal effect to the fact that the legislature did not exempt derivative claims from the operation of RCW 23B.14.340. Donlin asks this Court to hold that RCW 23B.14.340 prevented GIS' dissolution from taking away the derivative claims against GIS' officers, directors, and shareholders.

C. Civil Rule 23.1 Prohibits Derivative Actions when it Appears that Plaintiff does not Fairly and Adequately Represent the Interests of the Other Shareholders

At the trial Court level, CR 23.1 operated as the proverbial “Y” in the analytical road between Donlin and Murphy. Murphy relied on the discussion and reasoning of the Supreme Court in Sound Infiniti, Inc. v. Snyder, 169 Wash.2d 199, 212-213, 186 P.3d 1107 (2010), to focus on Donlin's status as a former GIS shareholder as justification to conclude that Donlin lost his derivative standing under CR 23.1 when GIS dissolved. Respondent's Brief at Pp. 17-21. As discussed previously by the parties, the plaintiff in Sound Infiniti lost his shareholder status in the ongoing active corporation when the Sound Infiniti forcibly purchased his shares as part of a reverse stock split. Id. This purchase stripped the plaintiff of any ownership interest in the company and rendered his interests distinct from the interests of those who remained shareholders in the active corporation. Id. The Court in Sound Infiniti correctly focused

on this obvious difference between the plaintiff and the remaining shareholders and between the plaintiff and Sound Infiniti to conclude that the plaintiff could no longer maintain its derivative standing under CR 23.1 because a non-shareholder could not adequately represent the interests of either an active corporation or of shareholders of the active corporation. Id.

Murphy's analysis of the Sound Infiniti Decision focused on the Court's use of the phrase "lost his status as a shareholder" in the reasoning used by the Court to justify its conclusion that the plaintiff in Sound Infiniti lost his standing to maintain a derivative action. **Respondents Brief** at P. 17. However, Murphy's analysis failed to ask why the language "lost shareholder status" failed to appear in CR 23.1's operative language. To Murphy, the analytic path behind this question remained the proverbial road not taken. And, from Donlin's perspective taking this path of analysis makes all the difference.

Donlin sees the Sound Infiniti Decision as instructive but not controlling. To Donlin, the Sound Infiniti Decision affirms the idea that a plaintiff loses its derivative standing when it no longer fairly and adequately represents the interests of the shareholders. The Sound Infiniti Decision, however, fails to address the situation that occurs during an administrative dissolution where the corporation continues its existence,

but only for the limited purpose of winding up its affairs. RCW 23B.14.210 (3). The Sound Infiniti Decision simply does not apply to the facts of this case.

Here, Donlin maintained the same relationship he had with the other GIS shareholders after GIS' administrative dissolution that he had with them prior to the dissolution. More importantly, Donlin and the other GIS shareholders maintained the same relationship between them and GIS both before and after dissolution. Put simply, under RCW 23B.14.210 (3), GIS' dissolution failed to alter the relationships between the shareholders and GIS and between the each of the individual GIS shareholders and each other. For this reason, if Donlin properly had derivative standing prior to GIS' dissolution—which is uncontested—then GIS' dissolution did nothing to change that uncontested conclusion.

D. Judge Farris' Orders Supersede the Receiver's Findings and Report.

Murphy goes to some effort to suggest that all claims resided within the Receiver's authority and the Receiver's decision not to pursue such claim effectively resolved the claims in the Defendants/Respondents' favor. Respondents' Brief at Pp. 22-24.

The flaw with such reasoning is that it ignores the effect of Judge Farris' two Orders that came after the Receiver's work in this matter and

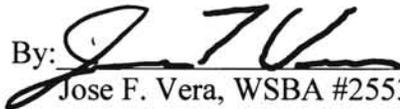
that considered and rejected the Receiver's Report and Findings in making the two Orders. CP 210-213, 243-244. In fact, in her December 14, 2009 Order, Judge Farris wrote, "[s]pecifically, the Court does not "adopt" the report and findings of the receiver as the Court's findings." CP 244. Judge Farris clarified the Court's position in its June 7, 2010 Order when it hand-wrote the following on its Order Denying Murphy's Motion for Summary Judgment, "[t]he sale of the business was Court authorized on the condition the Plaintiff's and shareholders' claims in this lawsuit could remain for trial and survive the sale. . ." CP 212. This quoted language from Judge Farris' June 7, 2010 Order expressly states that the Court conditioned the approval of GIS's sale on the survival of the shareholder derivative claims for trial. Hence, to Donlin the Receiver's opinions, plans, report, and findings go the way of the best laid plans of mice and men.

III. CONCLUSION

Based on the foregoing and on Donlin's opening Brief, Donlin respectfully requests that this Court remand the matter for trial so that Donlin may commence the resolution of GIS' last asset—the derivative claim against the Respondents.

RESPECTFULLY SUBMITTED this 2nd day of August, 2012.

VERA & ASSOCIATES PLLC

By: 
Jose F. Vera, WSBA #25534

DECLARATION/CERTIFICATE OF SERVICE

I, Michelle Vance, declare and say as follows:

1. I am a citizen of the United States and resident of the state of Washington, over the age of 18 years, not a party to the above-entitled action, and am competent to be a witness herein. My business address is 2110 N. Pacific St., Suite 100, Seattle, WA 98103, (206) 217-9300.

2. On August 2, 2012, I caused to be served the following documents(s) on the individuals named below in the specific manner indicated.

- 1. Appellant’s Reply Brief; and
- 2. [This] Declaration of Service

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

EXECUTED this 2nd day of August, 2012.

Michelle Vance
Michelle Vance

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