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CASE NO. 67979-1-1

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COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

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JOHN MCKAY, A Washington Resident, GEORGE MCKAY, A  
Washington Resident, JOHN MCKAY *ex rel.* SUNSET CARS OF  
RENTON, INC., A Washington Corporation, and GEORGE MCKAY *ex*  
*rel.* SUNSET CARS OF RENTON, INC., A Washington Corporation,

Appellants,

vs.

MORRIS PROSZEK and "JANE DOE" PROSZEK, Husband and Wife  
and the Marital Community Comprised Thereof,

Respondent.

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Appellants' Reply Brief

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## I. ARGUMENT.

### **A. The Trial Court Erred When it Dismissed the Derivative Action Because George McKay was not a Board Member and Appellants Could Establish that a Pre-Litigation Demand Would have been Futile.**

Respondents are incorrect when they assert that George McKay, John McKay, and Morris Proszek were Board Members at the time the suit was filed. (Resp. Br. at 16) In fact, the evidence shows that when George McKay voted to remove Proszek from his position as director, officer, fiduciary, and as a signer from all corporate accounts on May 6, 2011 as shareholders in compliance with RCW § 23B.0.080.<sup>1</sup> (CP 129, 132, 273-4)

Further, the special meeting occurred after Appellants filed their suit. (CP 26) As the time Appellants filed their action futility did exist because John McKay would have had to demand that he and Morris Proszek vote as board members to initiate litigation against Proszek. (CP 123) As Respondents note, with the futility standard courts look

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<sup>1</sup> Appellants incorrectly labeled the action as a special meeting of the board of directors. However, as set forth in RCW § 23B.08.080 the meeting with a special meeting to remove Proszek as a director and clarify his lack of agency authority. The scrivener's error was apparent and, in fact, given the procedural action taken on May 6, 2011, it is apparent that the action was by shareholders and not board members.

filed. Here, Proszek incorrectly asserts that George McKay was a board member and the facts in the record do not support Proszek's contention. Given that Appellants' claims were dismissed with prejudice on a CR 12(b)(6) Motion, the record cannot support the lower court's ruling. Accordingly, the Trial Court erred when it dismissed Appellants' derivative action with prejudice. Instead, case law mandates that the Trial Court should have dismissed the claims without prejudice and afforded Appellants an opportunity to either refile their suit or file an amended complaint.

**B. The Trial Court erred when it Dismissed With Prejudice John McKay's Claim for Implied Indemnification Because he Pled the Necessary Facts that Give Rise to the Cause of Action.**

John McKay is entitled to assert a claim for implied indemnification because of the nature of his relationship with Proszek, Proszek's actions towards Sunset Cars of Renton, and the fact that they both signed numerous personal guaranties on behalf of Sunset Cars of Renton. As Respondent notes, a cause of action for implied indemnification exists when one party incurs liability by

virtue of the parties' relationship. **Fortune View Condominium Association v. Fortune Star Development Co.**, 151 Wn.2d 534, 90 P.3d 1062 (2004) Here, John McKay has pled the facts necessary to support his claims. Further, contrary to Respondent's assertion, McKay's indemnification claims go beyond simply the personal guaranty for the line of credit issued by Fife Commercial but also other guaranties that pose potential liability in the future. (CP 129, ¶ 11) Therefore, even if the issues related to the personal guaranty for the Fife Commercial line of credit have been resolved, this Court should still reverse the lower court's dismissal with prejudice of John McKay's claims as he has standing to present the claims and because he signed additional personal guaranties, future claims may arise. Accordingly, the Trial Court erred when it dismissed John McKay's implied indemnification claim with prejudice.

**C. The Trial Court Abused its Discretion When it Awarded Attorney Fees Because Appellants' Claims were Well-Founded in the Facts of this Case.**

The lower court abused its discretion when it awarded attorney fees to Respondent because Appellants' claims were well-grounded in the facts of this case and were not put forth for frivolous purposes. Importantly, John McKay explicitly stated that when Appellants filed their Complaint, the only two board members were John McKay and Morris Proszek. (CP 274, ¶ 15) Therefore, Respondent's assertion that he was one of three board members is categorically false. Morris Proszek never explicitly stated in a declaration he was one of three board members because it would not have been correct. Rather, his sole argument focused on vague language in the May 6, 2011 minutes of the Special Meeting to assert that John McKay was a board member. This assertion, however, is not supported by the record and is false. Further, the minutes for the February 7, 2011 meeting show that it was a shareholder meeting and John McKay was present as a shareholder. (CP 276-77) Because the sole issue of concern at the trial court level was the adequacy of the pleadings and not the factual merits of the claims, the Trial Court abused its discretion when it awarded attorney fees under CR 11 and RCW § 4.85.185.

## II. CONCLUSION.

The Lower Court erred when it dismissed Appellants' claims with prejudice because Appellants set forth the necessary facts to support their claims. Washington law establishes that the pleading defects in the Complaint, to the extent they were present, do not warrant dismissal with prejudice. Rather, the appropriate action is dismissal without prejudice with leave to amend. Because the Trial Court erred when it dismissed Appellants' claims with prejudice and abused its discretion when it awarded attorney fees and costs, the Court should reverse the Trial Court's orders and remand this matter for further proceedings.

Respectfully submitted this 24<sup>th</sup> day of April 2011.

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**Proof of Service**

I certify that on April 24, 2012 I caused a true and correct copy of the Appellants' Reply Brief to be served on the following in the manner indicated below:

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