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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 291502

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

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Sparks Scott. Sup. Ct. Cause No. 07-2-00469-9

BHISHAM SAINI and NEENA SAINI, husband and wife, and the  
marital community comprised thereof,

Plaintiffs-Appellants.

-and-

PNS PROPERTIES, INC., a Washington corporation,

Third Party Plaintiff,

-against-

PARMINDER SINGH GILLON AND BHUPINDER GILLON, as  
individuals together with the martial community composed thereof,

Defendants-Appellees.

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APPELLANTS' REPLY BRIEF

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BHISHAM SAINI and NEENA SAINI, husband and  
wife, and the marital community comprised thereof,

PNS PROPERTIES, INC., a Washington corporation

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I. REPLY TO RESPONDENT'S RESTATEMENT OF THE CASE

A. **Current Update and Notice to the Court and Correction of Errors in Original Appeal Brief.** The Sainis' had to file a Chapter 11 Bankruptcy on behalf of PNS, Inc and there is a "Stay" in place at this time. The Sainis' are in financial ruin and their wages are being garnished due to this litigation.

**i. Declarations Missing from the Record.** The Appellant's brief did not contain a portion of the record, namely certain declarations. (Respondents' br. 29)

This omission was an innocent oversight by the Saini's counsel. The accusation by Gillon that this was an "inexcusable neglect", (Respondents' br. 30), is an inaccurate. Upon realization of this error, the Saini's attorney supplemented the record.

**ii. Error in Citation in Referral to Original Complaint instead of Second Amended Complaint and Motion for Summary Judgment dated March 23, 2009.** The Original Complaint (CP 1-16) was cited erroneously in the Appellant's appeal brief instead of the Second Amended Complaint. (CP 103-121).<sup>1</sup> The original brief cited the first Motion for Summary Judgment, (CP 59) on this case in error. The appeal

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<sup>1</sup> The Second Amended Complaint should have been cited in Appellant's brief at 16; 17 at n. 5; 20 at n. 6; 22-23; 26; 22; and 35.

brief did cite the proper date of Motion for Summary Judgment, however the citation should have been (CP 122-147). Attorney Busha' apologizes for these errors.

**B. Reply to Respondent.** The trial court's judgment should *not* be affirmed. Gillon argues throughout the reply brief that the Sainis' have filed a frivolous appeal. (Respondents' br. at 39-43.) Gillon further explains that the purpose of the Sainis' filing this appeal is to avoid paying Gillon for the business (gas station and convenience store). He states, "The Sainis', however want to keep the business without paying anything to the Gillons. Simply put, the Sainis want something for nothing."

(Respondents' br. 1)

The Sainis' started this litigation due to the fact that Mr. Gillon was mismanaging the business and would not cooperate or communicate with the Sainis' (August 20, 2009, RP, 54-61) It was later learned that he misused their initial monetary investment and diverted funds from the business incorporated under PNS, Inc., to other unrelated entities i.e. other gas stations Gillon owned which were not PNS, Inc. corporate assets. This in turn harmed PNS, Inc and the Sainis' individually. (March 9, 2010, RP 87) (March 16, 2010, RP 17-57)

As early as October, 2006, Gillon had not paid his share of the promised equity into the business and was diverting funds to his other

companies or related parties. (March 9, 2010, RP 88) Gillon used the PNS, Inc., business bank account as his personal bank account. The Saini's were betrayed by their family member, Mr. Gillon. This case demonstrates the worst kind of greed and violation of familial trust. Even after signing the MOA, (Ex. 10), on August 12, 2008, which turned the business over to the Sainis', Gillon left the Sainis' in severe debt along with a balance to their main fuel supplier which was never disclosed, (August 20, 2009, RP 92-122) (March 16, 2010, RP 32-33) (Ex. 41-I).

## II. REPLY TO RESPONDENT'S ARGUMENT

A. Respondent claims that the claimant's argument regarding the Assignment of Error to the Trial Court's Findings of Fact; and the Findings are simply "Verities". The evidence and testimony by the witnesses were not accurately reflected in the Findings of Fact and Conclusions of Law. Despite overwhelming evidence and testimony by the Tiffany Couch, forensic accountant for Plaintiffs, as to Gillon's misuse of company funds, the court gave great deference to Genine Pratt, a bookkeeper who admitted to accounting deficiencies. (March 12, 2010, RP 53,55,56,57,62,64,65). The court gave very little weight to Couch, the expert forensic accountant who was also a Certified Public Accountant for 13 years who identified numerous accounting deficiencies. (March

**As to Respondent's argument regarding the Finding of Fact 20 (CP 488),** Gillon misses the point. He claims that that it is not true that "the court believed unconditionally in the testimony of Gillon's bookkeeper/accountant". (Respondent's br. 20) He further explains that the court reduced Ms. Pratt's MOA accounting by \$43,000 based upon evidence. (CP 458) The Sainis' should not have had to pay any money to Gillon. Based on the evidence and testimony by Couch and multiple reports and exhibits it is clearly illustrated the monies were owed by Gillon just a few months into the business. (March 9, 2010 RP 47-50)(Ex. 39) Furthermore, Gillon's personal accounts showed he had ½ million dollars going through the account in 2007, suspect since there was missing cash and the income tax return he showed earnings of \$60,000.00. (March 17, 2010, RP 156-158, Ex. 61) Furthermore, Ms. Saini testified that she was left with a large fuel bill with RE Powell. Gillon had personally guaranteed a credit increase with RE Powell without Ms. Sainis' knowledge or permission. The limit was \$100,000 and was increased to \$250,000. She did not sign the document where Gillon guaranteed payment. (Ex. 46) (March 17, 2010, RP 28-29) This amount was not included in Ms. Pratt's equity accounting.

The Sainis' had to pay this unexpected bill after taking over the station despite the fact that the MOA, paragraph 4 stated that. Mr. Gillon

shall provide to Saini the documentation necessary to confirm said amount... (Ex. 47, 48) (March 17, 2010, RP 30, 31) The Sainis' were left with no money in the bank account and he admitted to moving the bank account without their knowledge. (Ex 51) (March 17, 2010, RP 3637)

Ms. Pratt also did not take into consideration the closure of the CFN gas station due to Mr. Gillon's mismanagement as testified to by Ms. Saini (March 17, 2010, RP 51 and March 16, 2010, RP 19-57) and those losses. Ms. Saini testified that the closure of the CFN portion of the gas station caused considerable harm to PNS, Inc. and herself individually. (March 16, 2010, RP 19-57)

Mr. Gillon also testified that he indeed instructed Dave Owens to deliver 1000 gallons of fuel from PNS to Shell. (March 17, 2010, RP 99) He also testified that all the money he transferred between PNS, Inc and his gas stations, were really a part of him and not separate corporate entities. (March 17, 2010, RP 135) He admitted that he didn't disclose the business bank account at the Bank of America security question to the Saini's (March 17, 2010, RP 137); he also admitted that he did not provide the Saini's with the banking information at Sterling Bank (March 17, 2010, RP 137) Mr. Gillon also testified that he pulled monies out of his wife's IRA and his Grafco gas station to help PNS, however, he offered absolutely no loan documents or any promissory notes in the amount of

\$630,000.00. He only could show a documented \$100,000.00 of which he paid off the Devere Note which released his personal home from lien. (March 17, 2010, RP 141) He later claimed that the money he put into the business went into the lawsuit and again had no documentation. (March 17, 2010, RP 141) Mr. Gillon also admitted to bouncing checks to PNS and also admitted that he wrote himself checks from PNS which went into his own personal bank account at Wells Fargo. (March 17, 2010, RP 145-156) (Exhibits 55-60)

Ms. Couch provided the court her impressive curriculum vitae. (Exhibit 19(a)) When asked about her experience in investigating the gas station and convenience store, Ms. Couch testified that she did not believe that doing the forensic accounting for the convenience store was a stretch. (March 9, 2011, RP 51)

Mr. Gillon is correct that under *State v Cantu*, 156 Wn.2d 819, 831, 132 P.3d 725 (2006), that the Trier of fact's credibility determinations will not be second guessed on appeal. However, the issue has been oversimplified by Mr. Gillon. The Sainis' are not arguing that the trial court judge gave more credibility to Ms. Pratt than Ms. Couch. The Sainis' are arguing that based on the evidence and testimony of the witnesses, as it relates to the Findings of Fact and Conclusions of Law, this evidence does not support the Findings.

Ms. Couch was tendered as an expert during trial without objection by Mr. Gillon. Ms. Couch testified that she had been a Certified Public Accountant since 1999 and went through her impressive credentials for the court in detail. (March 9, 2010, RP 19-23) Ms. Couch further testified that she did in fact have convenience store experience and testified in the United States Federal Court. (March 9, 2010, RP 25-26)

At no time during the testimony did Ms. Couch claim that she was incompetent. Mr. Gillon attempts to discredit Ms. Couch's reputation in his reply brief and credibility by providing only excerpts of her testimony based on cross examination which is diluted and incomplete only to meet his self serving interests. (Respondents br. 22-28) Ms. Couch testified in great detail as to her analysis based on the information she had at the time and her reasons for her conclusions at several points in her testimony.

**As to Findings of Fact 29, 30, 31, 37, and 45 (CP 451, 453, 454),** Mr. Gillon states that Couch "admitted her lack of competence at trial" (Respondent's br. 23) based on the following excerpts of testimony: "She (Couch) had no prior experience with convenience store/fuel station; she had never done a car wash, bulk fuel or CFN fuel analysis, and she had no prior experience with lottery sales;" (Respondent's br. 23) however, previously, Ms. Couch was tendered an expert in this case with absolutely no objection by Mr. Gillon. (March 9, 2010, RP 25-26)

At the time of the engagement with PNS, Inc., Ms. Couch had not worked on a case involving a gas station. However, upon taking the case she called upon a contact, Mr. Sam Nigrow, a colleague, who does a lot of work for convenience stores. (March 9, 2010, RP 27) She received an explanation from him on accounting for a gas station and how the system generally works. She explained that the only nuance she saw was the use of the credit card systems. Otherwise, it was a cash basis accounting. (March 9, 2010, RP 27)

As to Mr. Gillons other claims, “that she did not visit PNS to investigate its business operations or determine what records might exist on-site.” “She did not know that there was a warehouse on-site”. (Respondent’s br. 23) Ms. Couch was initially retained for the limited purpose of reviewing some litigation documents. She had been provided with a tax return which had been filed as of September 30, 2007. (March 9, 2010, RP 32) It is not clear why it matters if Ms. Couch visited the store to see if there were records on-site? Ms. Couch was not retained to physically hunt down documents in a warehouse.

The question really should be, why weren’t these documents provided in the first place during discovery by Mr. Gillon? In terms of case preparation, she did not interview people at the beginning of the case, however, after she was asked to do a full forensic accounting she did

interview several people. She interviewed Dave Owens, Fuel Delivery Manager, the Sainis' and RE Powell, the fuel distributor.

As to Mr. Gillons further allegations against Ms. Couch, she did explain that when she was first engaged by the Sainis, she had a tax return only and a financial statement printed off of the Quick Books for the same period October '06 to October '07 and some general ledgers. (March 9, 2010, RP 35) (Exhibit 21) At the time, she had been provided with bank statements which showed withdrawals going to Mr. Gillon. ((March 9, 2010, RP 35) (Exhibit 21)

At that time, she did not have all the information and only provided "initial findings". (March 9, 2010, RP 36) (Ex 21) Ms. Couch testified that there were withdrawals showing a WD general account and they occurred every couple of weeks. In her world "WD" stands for withdrawal and it seemed questionable. She identified these withdrawals in her report, but this was not intended to be a final report. (March 9, 2010, RP 37) (Exhibit 22 page 10 of 12) Ms. Couch testified that the purpose of her engagement was to try and come up with the equity of each person/shareholder. (March 9, 2010, RP 40) She further testified that she received more documents to review but still not a full accounting with the bank statements. (March 9, 2010, RP 38-39) She had still not received the QuickBooks. (March 9, 2010, RP 42-43) She further testified that after

learning this information she amended her equity analysis (Exhibit 19-I page 8 appendix a) (March 9, 2010, RP 43)

It wasn't until Ms. Couch filed a report on December 8, 2008, (Exhibit 19-C) after still not having been provided with the QuickBooks from Mr. Gillon that she received more information as to the accounting of PNS, Inc and Mr. Gillons dealings. It wasn't until the report was filed did a response correcting the questionable Wondrak accounting become clarified by Mr. Gillon. Ms. Couch goes on to explain her equity analysis of the business in extensive detail. (March 9, 2010, RP 45 – 56) Couch further identified very clearly the difference in equity positions between her analysis and Ms. Pratt's. (Ex 19-O and 19-K -19-N), it gives an idea of the monies coming in and the money leaving PNS, Inc. as they relate to related companies. (March 9, 2010, RP 56) Ms. Couch further explains that the related companies meant, Mr. Gillon's other businesses including the Shell station, Chevron and Subway. (March 9, 2010, RP 56 and 57)

Ms. Couch goes onto explain to the court that she valued the equity of both parties by taking into account the fact that Mr. Gillon going through in great detail Mr. Gillon's "ins and outs" of the numerous cash transactions involving the PNS bank account along with outside transactions where he refinanced his personal property and sent the previous owner of the business money. She also deducted personal

expenses which were going through the business which benefited Mr. Gillon. She considered these personal draws which reduced his equity. This was outlined in 19-I appendix a. (March 9, 2010, RP 60)

Ms. Couch identified in exhibits 19-s and 19-T the questionable expenses of Mr. Gillon as well. These included personal travel by Mr. Gillon, cash withdrawals, a cashier's check which went to Self Serve Petroleum, which is a California gas station or fuel distributor, a \$20,000 check which didn't have anything to do with PNS, a \$4,500 withdrawal, 11,000 withdrawal unknown payee, \$500 bank check withdrawal. It was not until October that Couch finally received the Quick Books, 13 months into the case. (March 9, 2010, RP 63)

To say that Ms. Couch did not use proper source documents; she instead "used whatever document worked to her advantage" and failed to do basic double entry accounting is a mischaracterization of her testimony and a downright lie. (Respondents' br. 26)

Mr. Gillon caused this problem by not being forthright with the proper documents and discovery. Couch did not receive access to the Quick Books until February 2009. (March 9, 2010, RP 63) To say that Ms. Couch's profit analysis was over simplified and did not take into account the actual business operations is not accurate. She testified that it was Ms. Pratt who failed to analyze the profit and loss of the business (March 9,

2010, RP 65) Mr. Gillon accused her of not doing basic double entry accounting. (Respondent's br. 27) Yet, it was Ms. Couch who testified as to the accounting mistakes made by Ms. Pratt. The deposits were recorded as journal entries. The sales were being recorded as accounts receivables. This made no sense for a gas station/convenience store. (March 9, 2010, RP 72) Furthermore, Ms. Pratt was using an accrual basis not a cash basis. The deposits in the journal entries did not match the bank statements. (March 9, 2010, RP 72-73) Ms. Couch was not doing basic accounting incorrectly, she was trying to deal with the improper bookkeeping by PNS, Inc. she further describes seeing single journal entries for all sales of one million dollars or \$600,000 or one transaction for the entire month for the business. (March 9, 2010, RP 73) Ms. Pratt, the bookkeeper for PNS, Inc., didn't agree with the method, *it was not wrong*. (emphasis added) She admitted to continuing this method of accounting. "All fuel was just recorded. All the fuel expenses were recorded together. And so because it didn't matter to us it did not matter we wanted to record sales. We wanted to record expenses and we wanted to show were you or were you not making money." (March 11, 2011, RP 60)

Ms. Pratt also testified that Gillon was owed \$387,000 in equity. (March 11, 2011, RP 69) Yet, it is not clear how Ms. Pratt ascertained this information given the sloppy bookkeeping and failure to track the bounced

checks when figuring out Mr. Gillon's equity share of the business.

(March 11, 2011, RP 92) Based on Ms. Pratt's testimony, it was clear that Gillon used the business as his personal bank account. These transfers included monies to unrelated third parties. (March 11, 2011, RP 89-90)

As to the allegation that Ms. Couch did not use the register tapes, she testified that she had been asking for register receipts because it was a convenience store. (March 9, 2010, RP 74) She had relied on the Quick Books which recorded sales and receipts improperly. She did not receive register receipts until May 2009. (March 9, 2010, RP 74) She was provided with a summary of the register tapes. She also told the court that she attempted to go through these documents painstakingly line by line. (March 9, 2010, RP 77-78) For the bulk fuel she recreated a bulk fuel income from the source documents of the bulk fuel sales of which she was able to verify through meticulous records received from the bulk fuel sales and recorded in the bank. (March 9, 2010, RP 79) She used the MTV report as it reflected the RE Powell balances and testified that she was able to reconcile the incomes from the bulk fuel sales and the convenience store. (March 9, 2010, RP 79) She found that the fuel sales per the general ledger was \$3,450,000.00 and Mr. Owens records showed sales at \$3,450,000.00 a difference of \$383,000.00 (March 12, 2010, RP 98)(Ex. 19-CC and 37)

It is interesting that Mr. Gillon complains that Ms. Couch indeed did not have any experience in dealing with car washes, however, upon direct examination by Mr. Gillon's attorney, she claimed that she never even received any car wash records. Ms. Pratt testified that she had no idea why it would be important to separate all those sales..." (Ex. 19-I)(March 11, 2011, RP 51)

The fact is that Mr. Dave Owens kept meticulous records of bulk fuel and the loads coming in and he indicated to Ms. Couch that he took meticulous records of the bill changer and the car wash. Mr. Owens told Ms. Couch that the car was netting about \$6,000 per month. She estimated that there were untraceable monies in the amount of \$96,500.00. (March 9, 2011, RP 83-84)

Ms. Couch clearly testified her understanding of the car wash and the lottery sales. She did her own investigation into the lottery sales and the process by calling the Washington State Lottery Commission. (March 9, 2011, RP 84-85) She did so because they were no source documents for the lottery and they had – were recording half a million dollars in sales on the summary sheets provided to her in place of register receipts. (March 9, 2011, RP 84) She testified that she used the report from the Lottery Commission. Again, there was a shortfall. (March 9, 2011, RP 85) Alternatively, the Quick Books only showed \$17,700. The difference

being \$14,600.

Ms. Couch identified that the Saini's total claim should be worth \$2,184,000.00 and some change. (March 10, 2010, RP 104) (Ex 39) These numbers were ignored by the court, despite the detailed summary and testimony. This does not include the monies Gillon deposited into his personal bank accounts over 22 months that he was controlling PNS.

**B. The Saini's position that the Trial Judge was Bias has a great deal of merit. Respondent's assertion that the Saini's have not established bias of the trial court judge is inaccurate.**

The main focus of this case was the financial accounting and Mr. Gillon's mismanagement of the business and self dealing. (1) The court had visibility to the fact that Ms. Pratt, of Biven's and Wilson was the accountant in the case. At no time did the trial judge during these proceedings disclose to the parties that he used this same accounting firm for his personal taxes. The Sainis' argue that the judge had a duty to disclose this information since it could cause a potential conflict of interest. The Saini's never had a chance to object. Canon 3(D)(1) of the Code of Judicial Conduct (2002) requires that a judge disqualify him or herself from hearing a case if that judge is biased against a party or if his or her impartiality may be reasonably questioned. Canon 3(D)(1).

There is no dispute that the trial court Judge disclosed late into trial<sup>2</sup>, that he used the same accounting firm as Gillon. The fact that this case largely hinged on the accuracy, interpretation and validity of the accounting by both parties is important. The Saini's also rely on the "Appearance of Fairness" doctrine. State v. Dominguez, 914 P.2d 141, If the court views this case in its totality, the Findings of Fact do not track based on the testimony where Ms. Pratt admitted to the accounting and recording problems, and the lack of concise record keeping versus the testimony of Ms. Couch, who did a two year investigation. Mr. Gillon admitted to taking money for third party entities, and there is no dispute that he continued to take money from the company including a salary which was not agreed upon even though the company was in trouble. (August 20, 2009, RP 48)(March 17, 2010, RP 122)

Given the fact that the Judge had to make a decision between the credibility of two accountants, one a stranger and one he had used for

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<sup>2</sup> The court indicated the following on March 11, 2011 prior the testimony of Ms. Pratt: "I need to disclose to everybody Bill Wilson is my accountant in that firm so everybody I think I don't know if that's – inaudible – how many choices do you have in Ellensburg, right? So he has been my accountant for a long time. We don't talk about anything except my taxes. He doesn't have time to talk to me. So I don't know anything about this case. He never mentioned – it's not come up." Mr. Nicholson then questioned Ms. Pratt, "I want to clarify you don't know – personally you have no personal association or social relationship of any kind with Your Honor Judge Sparks?" "No" The Court further said, "I would second that. I know where she lives because she lives on the same road as I do but everybody knows where I live." Mr. Nicholson said, "I live kind of close to you also." The court, "Yeah, small town stuff." Mr. Nicholson, "Small town." (March 11, 2010, RP 40)

years on his own personal taxes, there is no question that this doctrine applies as to whether reasonably prudent and disinterested observer would conclude defendant obtained fair, impartial, and neutral trial. The Sainis' argue that this doctrine applies and they did not receive a fair trial. This case should be distinguished from *Brauhn v. Brauhn*, due to the fact that the judge knew that the accounting firm being used by Respondent's was Bivens and Wilson early on in the case. The Sainis' did not have an opportunity to object. Then at the end of the trial, the judge disclosed this information. It is not reasonable to apply *Brauhn v Brauhn*, 10 Wn. App. 592, 597, 518,P2d 1089 (1974) in this case, where the court ruled that one who claims a judge is biased waives his right to complain by not timely raising the objection and continuing with a pending trial as if the judge were not disqualified. (Respondents' br. 17)

No person will use an accounting firm that they do not trust. The idea of using the services of an incompetent accountant for business or personal tax services is absurd. It is not relevant that the trial judge did not know Ms. Pratt personally or that he discussed this case with his accountant at the firm as he indicated when he disclosed this fact during trial.

The fact that Ms. Pratt did not track the accounting properly and really had no idea as to what the sale breakdown was in terms of the Quick

Books and all monies were just lumped together, it is incredible that the trial court judge found in favor of Gillon at all. The Judicial Canon CJC 3(D)(1) clearly states that the test is whether a reasonably prudent and disinterested observer would conclude defendant obtained a fair, impartial and neutral trial. The court record shows numerous examples of Pratt's inconsistency and confusion regarding the accounting.

Mr. Gillon makes the argument that, "To find bias under the facts presented here would make it virtually impossible for a trial court judge, in a small, rural community like Ellensburg, to ever hear a case if an accountant from a local accounting firm is called to testify. The argument is absurd. Pratt was a bookkeeper not a licensed accountant during her tenure with PNS. It should be shocking to the court that even in Mr. Gillon's brief, he states that Ms. Pratt, allowed her license to lapse and "was an accountant during the whole time her license was inactive." (Respondent's br. 19)

Ms. Pratt testified that she did not have an active CPA license for 13 years. In addition, she had no training during those 13 years. She did admit to doing CPA work for Bivens and Wilson even though she was not licensed. (March 12, 2011, RP 51) Ms. Pratt testified that even though she did not believe the bookkeeping numbers could not be relied upon, she prepared a tax return anyway using the unreliable numbers. (March 11,

2011, RP 51)(Exhibit 33 and 34) Ms. Couch testified that the 2006 tax return was filed incorrectly. (March 12, 2011, RP 86) Even Ms. Pratt admitted that the tax return should be amended, however, since Bivens and Wilson were no longer retained she would not be doing it. (March 12, 2011, RP 65-66)When asked about the risk to the company on using the general ledger entries she said it is not a problem in preparing tax returns or compilation but it is in a doing an audit or tracing transactions.(March 12, 2011, RP 56)

Pratt testified that she never computed the profit/loss for the C-Store fuel sales. She indicated she had the CFN fuel sales only. (March 12, 2011, RP68)

When asked if she had figured out the equity share between the parties she indicated that she had not. She also admitted that Mr. Gillon was commingling funds between PNS, Inc. and his other gas stations, but didn't advise it. (March 12, 2011, RP 68) Yet, this sloppy bookkeeping went on for the duration of the case and was completely ignored by the court.

The court gave wide deference to Pratt and her testimony as it relates to the Findings of Fact. This rises to the level of bias because at some point, the judge must make a decision on a case which relies greatly on the testimony of two witnesses which interpret the actuality of the financials

differently. It is inconceivable that anyone who used an accounting firm and trusted that firm with their financial and legal livelihood would find any troublesome activity associated with that firm in this case an accounting firm. It is also troublesome that the judge did not disclose this at the beginning of the case. The case continued over three years. At no time, despite the disclosures based on the numerous motions filed by both parties, did the judge disclose the fact that he used the same accounting firm. At a minimum, this gives the perception of bias in a case which so greatly hinges on the accounting component of the case.

This is not a situation as alleged by Mr. Gillon that, “the Sainis’s credibility-based argument presents a self-serving recitation of their version of the facts;” (Respondent br 19). The judge had to make a determination as to the validity of both sides evidence which included analysis of the financials.

Furthermore, Mr. Gillon quotes an unpublished opinion i.e. *Pers. Restraint of Wiatt*.<sup>3</sup> As to Mr. Gillon’s reference to *Pers. Restraint of Wiatt*, 151 Wn. App. 22, 53, 211 P.3d 1030 (2009), that opinion was withdrawn upon reconsideration, the court decided to withdraw the

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<sup>3</sup> As to Gillon’s reference to *Pers. Restraint of Wiatt*, 151 Wn. App. 22, 53, 211 P.3d 1030 (2009), page 17, that published opinion was withdrawn upon reconsideration, the court decided to withdraw the published opinion filed on June 30, 2009. It was therefore ordered, that the published opinion filed in the case on June 30, 2009 was withdrawn and the court will issue a new opinion.

published opinion filed on June 30, 2009. It was therefore ordered, that the published opinion filed in the case on June 30, 2009 was withdrawn and the court will issue a new opinion.

**C. The Trial Court did err in dismissing the Sainis' Individual Claims during the Summary Judgment Adjudication.** Mr. Gillon argues that, the Sainis' have failed to designate the following matters considered by the trial court in granting summary judgment..." The record has been supplemented and was an honest oversight by the Saini's attorney, Ms. Busha'. A supplement to the record has been entered.

**As to Mr. Gillon's argument that res judicata and collateral estoppels preclude the Sainis' from arguing that their individual claims based on the order for the Summary Judgment,** (Respondents br. 35-37), the Sainis' situation does not meet the factors as set out by the court with respect to these doctrines and they don't apply. The Sainis' individual claims are unique with different interests at stake. The Sainis, as shareholders, have the right to sue in their own name and own accord- this is particularly true with respect to the pre-incorporation contract they had entered with the Gillons, with respect to the duties that the controlling shareholder, Gillon, owed to them as a non-controlling (or minority) shareholders and with respect to the special relationship between the parties, and the particular facts and peculiar injuries of this case. The

distinctions as to the damages and rights between the Saini's and PNS are as follows. It should be noted that Gillon filed a tax return in 2006 which designates himself as the 55% shareholder. (Ex. 242)

**Breach of Contract.** The Sainis and Gillon had an oral agreement prior to the creation of PNS, Inc. PNS, Inc. was not a party to that and had no interest in it. The damages from the breach of contract are suffered by the Sainis' not PNS, Inc. Thus the Sainis' are the only ones who can sue and enforce the contract. The parties disagreed on a number of issues including the amount of investment by each party, the salary Mr. Gillon took, the split of profits all material disputes. (March 16, 2010 RP 19-56) PNS, Inc. has no privities to this contract. Mr. Gillon also took a salary of \$5,000.00 per month which was in dispute. (March 16, 2010 RP 19-20) That money could have been distributed to the Saini's as dividends. PNS was not a party to the contract which created it. Gillon breached the terms of the agreement by drawing an unauthorized salary, by failing to ensure that the Sainis' received their 8% return and dividends. (March 16, 2010, RP 27) Mr. Gillon controlled PNS to the extent that monies were paid out per his wishes and he failed to pay his share of the equity into the business which created insolvency.

**Breach of Fiduciary Duty Between Shareholders.** Gillon caused the Sainis, as individual non-controlling, minority shareholders, a direct loss in terms of their equity in the corporation, the value of their investment, as well as loss on the return (profit/income/dividends) promised. (March 16, 2011, RP 19-20)

**Wrongful Diversion of Corporate Assets and Action for Conversion**

Mr. Gillon diverted corporate assets without shareholder approval. The Saini's personal money was converted to the personal use of Gillon. The Sainis' were never repaid their investment and because Gillon was controlling shareholder he caused the PNS to wrongfully divert money to the Gillon's personal accounts and that of third parties. (March 16, 2011, RP,19-57)

The analysis involving res judicata Res judicata prevents re-litigation of the same claim where a subsequent claim involves the same (1) subject matter, (2) cause of action, (3) persons and parties, and (4) quality of persons for or against the claim made. In re Estate of Black, 153 Wn.2d 152, 170, 102 P.3d 796 (2004). The Sainis argue that under Orsi v Sunshine Art Studios, Inc. 874 F. Supp 471 (D. Mass 1995), where there was an allegation of diversion of corporate assets to the defendants benefit, the defendants argued that the claims asserted by the plaintiff were merely claims made on behalf of the corporation and therefore direct

relief, in the form of a monetary award to plaintiff was not available. “ Id. At 474. The Orsi court was not persuaded by defendant’s arguments and ruled that the court had an obligation to tailor the remedies to the facts of each individual case. Id. At 475. The Orsi court went on to stated, “If unfairness is found, however, it may be futile to require the minority shareholder to sue on behalf of the corporation when the only other shareholders are the two individual defendants, because any recovery in a derivative suit would return the funds to the control of the defendant brothers, rather than to the injured party.” The Orsi court ruled that, “After a trial of contested facts in this case, it may well be within the power of the court to grant direct relief to the plaintiff.” Id. At 475. This same reasoning should be applied here. The Sainis’ should have had the opportunity to recover directly from Gillon the harms they suffered as the only shareholders of the close corporation, PNS.

The analysis involving collateral estoppels applies to the County's argument on collateral estoppels, which may bar litigation of an issue in a subsequent proceeding involving the same parties. Yakima County v. Yakima County Law Enforcement Officers Guild, 157 Wn. App. 304, 331, 237 P.3d 316 (2010). The party seeking to avoid litigation of an issue must show “that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier

proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppels is asserted was a party to, or in privities with a party to, the earlier proceeding; and (4) application of collateral estoppels does not work an injustice on the party against whom it is applied.” Id. at 331-32 (quoting Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 299, 307, 96 P.3d 957 (2004)) For the same reasons stated above, collateral estoppels would work an injustice on the Sainis. Even though the claims were the same, the Sainis’ would not have been the direct beneficiaries of any monetary award. The corporation would have of which Gillon is still involved. Mr. Gillon would essentially also benefit, from a derivative remedy. There is also the fact that the Breach of Contract claim, there was no privities between the Sainis and PNS because PNS had not been formed.

II. **CONCLUSION** This appeal is not frivolous and has merit; what is appalling is the tragic ordeal that the Sainis’ have had to endure at Mr. Gillon’s deceit, fraud and dishonesty while operating PNS Properties, Inc.; Mr. Gillon should have to pay all the Saini’s attorney fees and monies owed to them due to his mismanagement of PNS, Inc. which includes the profit that he didn’t share with the Sainis. The Sainis ask that this court

**not** affirm the trial court decision. The court should not award attorneys fees to Gillon. They ask for reimbursement of their attorneys fees.

Dated this 26<sup>th</sup> Day of May, 2011

Respectfully Submitted,

BUSHA LAW OFFICES

By: \_\_\_\_\_

Cathy Busha', WSBA #36297

Attorney for Appelants

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Dated this 26<sup>th</sup> day of August, 2011

Respectfully Submitted,

BUSHA LAW OFFICES

By: Cathy Busha

Cathy Busha', WSBA #36297

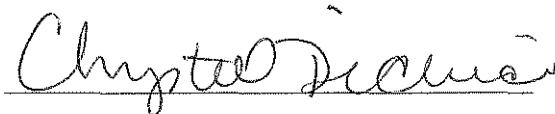
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of September 2011, pursuant to RAP 5.4 (b), I served a true and correct copies of the foregoing document to counsel for the Defendants and to the Court of Appeals as follows:

PARTY/COUNSEL	DELIVERY INSTRUCTIONS
Doug Nicholson 2005 E Third Avenue Ellensburg, WA 98926 Attorney for Defendant	Via Legal Messenger
Court of Appeals, Division III 500 N. Cedar St Spokane, WA 99201	Via U.S. Mail/FAX

Dated this 14<sup>th</sup> day of September, 2011, in Ellensburg, Washington



Chrystal DiChiara  
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