

FILED

APR 05 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 291502

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

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.

APPELLANTS' BRIEF

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

PNS PROPERTIES, INC., a Washington
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A. INTRODUCTION

Appellants, Bhisham and Neena Saini (hereinafter “Saini”) and PNS Properties, Inc. (hereinafter “PNS”) respectfully request this court review and reverse the ruling of the Kittitas County Superior Court set forth below as assignments of error.

B. ASSIGNMENTS OF ERROR

No. 1 The Trial Court erred in dismissing Saini’s individual claims on Gillon’s Motion for Summary Judgment because Gillon failed to provide and declarations or affidavits in support of his motion.

No. 2 The Trial Court Erred in dismissing Saini’s Individual Claim #1, **Breach of Contract**, in the Second Amended Complaint because there were genuine issues of material fact regarding the parties’ divergent understanding of the agreements made prior to the formation of PNS and execution of the Memorandum of Understanding such that Defendant was not entitled to judgment as a matter of law.¹) Even if there were no genuine issues of material fact, the Trial Court erred in dismissing Claim # 1 of the Saini’s Second Amended Complaint because the contract at issue was solely between Saini and Gillon.

No. 3 The Trial Court Erred in Dismissing Saini’s Individual Claim #2, **Breach of Fiduciary Duty Between Shareholders**, in the Second Amended Complaint, because there were genuine issues of material fact pertaining to Gillon’s wrongful taking of corporate assets without authorization or permission such that Defendant was not entitled to judgment as a matter of law.

No. 4 The Trial Court erred in dismissing Saini’s Individual Claim #3 **Breach of Director’s and Officer’s Duty of Good Faith and Loyalty**, in the Second Amended Complaint, because there were genuine issues of material fact in that Saini disputed including: (1) Gillon had authorization or permission to pay himself a salary; (2) Gillon had authorization to transfer corporate assets to himself and third parties; and (3) Gillon failed to share corporate records with Saini such that Defendant was not entitled to judgment as a matter of law.

No. 5 The Trial Court erred in dismissing Saini's Individual Claim #4, **Wrongful Diversion of Corporate Assets**, in the Second Amended Complaint, because there were genuine issues of material fact in that the parties dispute that shareholder approval was required before Gillon transferred corporate assets to himself involving substantial sums of money and fuel such that Defendant was not entitled to judgment as a matter of law.

No. 6 The Trial Court erred in dismissing Saini's Individual Claim #5 **Conversion**, in the Second Amended Complaint because there were genuine issues of material fact in that the parties dispute that Gillon wrongfully took control of Saini's investment money and converted corporate assets in violation of the parties' agreement by taking more than 25% of the monthly net profits of the business such that Defendant was not entitled to judgment as a matter of law.

No. 7 The Trial Court Judge erred by not disclosing to the parties over the course of two years of pending litigation, that he used the Defendant's accounting firm for his own personal accounting and no inquiry was made of counsel as to whether this would create a conflict or as to whether the judge should be recused based on the Appearance of Fairness doctrine under the Code of Judicial Conduct (CJC) Canon 3(D)(1).

No. 8 The Trial Judge erred by making Findings of Fact which were improper due to the fact that Saini's individual claims had previously been dismissed on Summary Judgment yet findings were made adverse to the Sainis' individually.

C. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

No. 1 Did the Trial Court err in dismissing Saini's individual claims on Gillon's Motion for Summary Judgment because Gillon failed to provide and declarations or affidavits in support of his motion?

No. 2 Did the Trial Court Err in dismissing Saini's Individual Claim #1, **Breach of Contract**, in the Second Amended Complaint, because there were genuine issues of material fact regarding the parties' divergent understanding of the agreements made prior to the formation of

PNS and execution of the Memorandum of Understanding such that Defendant was not entitled to judgment as a matter of law?

- 1) Did the Trial Court err in dismissing Claim # 1 of Saini's Second Amended Complaint because the contract at issue was solely between the Saini's and Gillons where PNS was not a party?

No. 3 Did the Trial Court Err in Dismissing Saini's Individual Claim #2, **Breach of Fiduciary Duty Between Shareholders**, in the Second Amended Complaint, because there were genuine issues of material fact pertaining to Gillon's wrongful taking of corporate assets without authorization or permission such that Defendant was not entitled to judgment as a matter of law?

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No. 7 Did the Trial Court Judge err by not disclosing to the parties over the course of two years of pending litigation, that he used the Defendant's accounting firm for his own personal accounting and no inquiry was made of counsel as to whether this would create a conflict or as to whether the judge should be recused based on the Appearance of Fairness doctrine under the Code of Judicial Conduct (CJC) Canon 3(D)(1)?

No. 8 Did the Trial Judge erred by making Findings of Fact which were improper due to the fact that Saini's individual claims had previously been dismissed on Summary Judgment yet findings were made adverse to the Sainis individually?

D. STATEMENT OF THE CASE

1. Procedural Background

This matter involves a complex and lengthy litigation¹ between Saini and PNS as Plaintiffs and Defendants, Parminder Gillon and Bhupinder Gillon (hereinafter "Gillon"). (CP 1) (CP 82) (CP 103)

On January 16, 2009, Gillon filed a Motion for Summary Judgment asking for dismissal of all causes of action brought by Saini of the original verified complaint. (CP 49) On March 23, 2009, Gillon filed

¹ The original verified Complaint was filed on August 13, 2007, (CP 1). The First Amended Complaint, (CP 82) had a few changes, such as adding facts which occurred on or after August 12, 2008, adding PNS Properties, Inc. as a plaintiff and creating an 8th Alternative Cause of Action for Breach of the Partnership Fiduciary Duty. (CP 82) On February 17, 2009, the Court granted PNS Properties, Inc.'s Motion to Amend the Complaint, which permitted PNS to join in the litigation as a Plaintiff and creating an 8th Cause of Action for Breach of Fiduciary Duty and by agreement of the parties, (CP 101), a Second Amended Complaint, (CP 103) was filed on the same day, March 20, 2009, in order to change the claim of "Fraud in the Inducement" to "Constructive Fraud" as part of the breach of fiduciary duty claims, and claim 2 from the original verified Complaint, (CP 1) was dropped by Saini.

another Motion for Summary Judgment asking for dismissal of all claims on the Second Amended Complaint. (CP 103). On March 30, 2009, the Trial Court dismissed the claim of Conversion. (CP 148) On April 24, 2009, the Trial Court granted Gillon's motion and dismissed counts 1 through 5 brought by Saini. (CP 189-191) On May 12, 2009, the parties agreed to dismiss claim, Breach of Partnership Fiduciary Duty (CP 192).

Beginning on August 20, 2009, the Trial Court held a nine day bench trial; however, the trial was broken into two "sections" because of some discovery issues that are not relevant to this appeal. The first "section" of the trial ran from August 20, 2009, through August 25, 2009. The second "section" of the trial ran from March 10, 2010, through March 17, 2010, seven months after the trial had begun. Toward the end of the second "section" of the trial, the judge hearing the case disclosed on the record that he had a business relationship with Gillon's expert witness and her employer, Bivens and Wilson, P.S. accounting firm. The judge disclosed that this firm handled his personal accounting work. No inquiry was made of counsel as to whether this would create a conflict and no inquiry was made as to whether the judge should be recused. (RP, 40) After the trial, the court found in favor of Gillon. In the court's Findings of Fact and Conclusions of Law, it was clear that the court found Gillon's expert, the employee from Bivens and Wilson, much more

credible and reliable than the PNS expert. (CP 478) This appeal followed.

2. Factual Background

In 2006, Saini and Gillon negotiated an agreement whereby they would begin a business relationship through which the parties would jointly own and operate a business (later incorporated as PNS). PNS was to purchase real property and an on-going business, a 76 gas station and convenience store in Cle Elum, Washington as well as real property and a CFN fuel distribution center in Ellensburg, Washington. The parties purchased the property from Jim Devere, (hereinafter collectively the “Devere Property”) (CP 2), (CP 832, lines 3-12).

Pursuant to these negotiations and agreements, Saini agreed to invest an initial sum of \$270,000.00 and later invested/loaned an additional \$50,000.00 for a total sum of \$320,000.00. (CP 811, lines 13-28)(CP 812, lines 1-6)(CP 834, lines 19-21) This money was invested with Gillon who in turn was to give Saini an equity interest and shareholder status in the newly formed PNS. (CP 3, lines 2-6) Saini did in fact invest this sum with Gillon, and in return, Gillon agreed to invest a sum of money approximately equal to the funds invested by Saini (approximately \$300,000.00). (CP 812 lines 6-14) (CP 832, lines 15-19). Saini was promised an equal ownership interest in PNS, including equal

ownership in the Cle Elum 76 gas station (and the real property to which it is attached) and the Ellensburg property. (CP 4, lines 4-7 and CP 832, lines 13-23)(CP 812, lines 1-7)

On June 26, 2006, PNS was incorporated and registered in the state of Washington. PNS also does business as "Gillon Oil". (CP 4, lines 11-12).

On or about October 2, 2006, Saini and Gillon executed a Promissory Note as part of the joint purchase of the Devere Property in the amount of One Million Seven Hundred Thirty-Nine Thousand Two-Hundred Five Dollars and Seventy-Two Cents (\$1,739,205.72). (CP 3, line 7-13) A Statutory Warranty Deed was signed by both parties and filed with the Kittitas County Auditor as part of the purchase agreement for the Devere Property. PNS is listed as the owner of the real estate.

Additionally, Saini and Gillon, on their personal behalf and on behalf of PNS, signed an agreement in which they agreed to assume a Motor Fuel Supply Contract from Charlotte and James Devere. (CP 4, lines 17-20) (EX 4).

They executed a corporate resolution and Promissory Note with City Bank (located in Lynnwood, Washington) authorizing PNS to borrow \$1,266,350.99 for purposes of completing the purchase of the Devere Property. (CP 4 line 21)(CP 5 lines 1-2) (EX 255). Both Saini and Gillon

entered in personal Commercial Guaranties in which they each individually guaranteed payment of the loan from City Bank. (CP 5, lines 2-5) (EX 271).

The parties agreed that Gillon would manage the operations of the business under certain terms which was orally agreed to prior to the incorporation of PNS. (CP 832, lines 14-16) During the course of Gillon's management of the Cle Elum property and business, Saini deferred to his expertise and knowledge in running the gas station. (CP 834, lines 1-6). He owned two gas stations, Grafco, in California and two others in Cle Elum, Washington, Shell and Chevron both competing gas stations of the 76 gas station (the Sainis" were not investors of either Shell or Chevron).(CP 835, lines 26-28) (CP 835, lines 7-10) Gillon was at all times from PNS's inception until August 12, 2008, the controlling shareholder of PNS, acting as Director and President of the Company, in charge of all of the day to day operations of the business, controlling access to accounts, hiring accountants and lawyers, managing the financial affairs, and deciding when the business needed additional operating funds. (CP 284) (CP 808-809) (CP 831-835) This was also because Saini resided in California. (CP 104) Saini had also relied on Gillon to keep them

apprised of the financial condition of PNS. (CP 834 lines 1-6) (CP 834, lines 22-25)²

It was after the incorporation of PNS, that the parties disagreed as to the terms of the distribution of the net profits as to the business. (CP 834, lines 22-25) (CP 833, lines 13-22) (CP 834))

On April 25, 2007, Gillon drafted a document, titled “Minutes-Special Meeting if the PNS Properties Inc., Board of Directors and Officers” his rendition of the parties agreement which outlined certain terms including an acknowledgment that he would receive \$5,000.00 per month in salary as a management fee along with other provisions as to the distribution of net profits and interests to Saini. (CP 838) Saini did not sign the document. (CP 833, lines 13-17) (CP 839)

Saini contended that they had an agreement with Gillon as to the distribution of the net profits whereby Gillon would take 25% of the net profits of the business as payment for managing the business (CP 832, lines 19-25) (CP 841) and Saini would share in the profits based on the ratio of each party’s investment instead of Gillon’s proposal that they

² Prior to August 12, 2008 Saini made multiple requests that Gillon provide them with passwords to PNS bank accounts, as well as access to other information that would have allowed her to obtain a realistic view of PNS’s financial condition during the period of Gillon’s management and control, but Gillon regularly refused her requests. (CP 284, lines 25-27)

share the net profits 50/50. (CP 832 lines 19-25) (CP 833 lines 18-23) (CP 841)

After a visit to the business in June 2007, Saini wrote a letter to Gillon which outlined her issues and concerns. Saini was concerned because Gillon refused to provide her with financial documents and banking passwords. (CP 841) She was also concerned that Gillon was permission or agreement. (CP 841). She asked to inspect the financial documents within two weeks. (CP 841)

It was clear that neither party agreed to the terms of the distribution of the net profits or Gillon's monthly salary amount of \$5,000.00 per month that he was paying himself. Both parties had a different understanding as to the financial arrangement. (CP 811, lines 13-28) (CP 812, lines 1-7)

Saini became even more concerned when she did not receive any return on her investment. Instead the investment had cost her thousands of dollars as she had invested over \$320,000.00 into the business and had secured that loan using her personal home as collateral. She was making payments plus interest on that loan from her personal money. (CP 108)

Saini filed a verified Complaint against Gillon on August 13, 2007 for several causes of action. (CP 1) After amending the verified Complaint

(CP 1) to the Second Amended Complaint (CP 103)³ the court considered the claims that Gillon was 1) in Breach of Contract, 2) in Breach of Fiduciary Duty Between Shareholders, 3) in Breach of Director's and Officer's Duty of Good Faith and Loyalty; 4) was guilty of wrongful Diversion of Corporate Assets; and 5) guilty of Conversion. (CP 1 and CP 103) The Sainis filed these claims after learning that Gillon was taking an unauthorized salary along with other unauthorized distributions. (CP 833 lines 11-17)

Saini hired a Forensic Accountant, Tiffany Couch, a certified fraud examiner of the Acuity Group, to investigate the corporate funds and financial assets of PNS. Ms. Couch charged the Sainis \$10,000.00 in fees at the outset of the case for her services. (CP 834, lines 12-18) Through Ms. Couch's investigation, Saini discovered that Gillon was self dealing by transferring money to himself and diverting gasoline to his other gas stations. (CP 834, lines 7-9) (CP 888-918)⁴. The report from Couch concluded that Gillon had diverted corporate assets. (CP 834, line 12-14) (CP 888-918).

³ For ease of reference, when Appellant refers to the "Complaint" reference is being made to the Second Amended Complaint filed on 3-20-2009. (CP 103)

⁴ In the report dated December 8, 2008, Couch confirms several questionable withdrawals including monies being transferred to entities apparently related only to Gillon which included his other gas stations, Grafco, Shell and Chevron.(CP 888-918)

Based on the report, Gillon had diverted funds from the corporate account without director or shareholder permission or disclosure, and he was transferring funds to himself or to third parties he controlled. (CP 834, lines 10-14). After several months of litigation, Saini took over operations of the business on August 12, 2008, (CP 49) as a result of negotiations between the attorneys for Saini and Gillon. The parties signed a Memorandum of Understanding, (hereinafter referred to as the "MOA").(CP 49) The parties agreed to a change in control of the gas station and a profit and loss statement for PNS (EX 69) was provided by Gillon in May, 2008. The Sainis relied on the financial information given to them by Gillon showing the financial condition of the business. This included a 2006 tax return he had filed on behalf of PNS and profit and loss statements. (CP 847 - 856) This information drove the terms of the MOA. (CP 594-595) However, they did not know the extent of the debt owed to RE Powell, other unpaid debts, taxes and licenses or the fuel assets available until the actually took over the business. (CP 834, lines 22-25)

After taking over the business on August 12, 2008, Saini discovered that Gillon had been untruthful with them when he represented the financial condition of PNS and the extent of monies he had taken from the business. (CP 834, lines 25-28). PNS was severely in debt.

Saini discovered that the parties had not initially invested equal amounts into PNS. This caused PNS to be under-funded from the very beginning. After the forensic accounting review by Couch was completed, Saini learned that Gillon had invested approximately \$100,100.00 while the Saini's invested \$270,000.00 into PNS. As a result, and due to Gillon's bad conduct as to operation of the business from October 2006 through August 12, 2008, a variety of claims had arisen between the parties. (CP 1 and CP 103). After several motions were heard by the trial court on Summary Judgment, the Saini's lost the opportunity to pursue their individual claims against Gillon after the trial court dismissed them. (CP 189-191)

In addition, the Sainis were not afforded an opportunity to object to the judge who presided over the trial. In addition, the judge failed to disclose his close relationship with the employer of Gillon's expert witness. The trial took nine days. After two years of litigation and into the third day of the "second" part of trial, the trial court judge divulged that he used the same accounting firm, Biven's and Wilson, as Defendant, Gillon. (March 11, 2010, RP 41). Finally, the court entered improper Findings and Conclusions (CP 478) which dismissed the Saini's individual claims.

E. STANDARD OF REVIEW

Summary Judgment Review Is De Novo. "On appeal of summary judgment, the standard of review is de novo, and the appellate court performs the same inquiry as the trial court." *Lybbert v. Grant County, State of Washington*, 141 Wn.2d 29, 1 P.3d 1124 (2000) (citing *Nivens v. 7-11 Hoagy's Corner*, 133 Wn.2d 192, 197-98, 943 P.2d 286 (1997)). "When ruling on a summary judgment motion, the court is to review all facts and reasonable inferences therefrom most favorably toward the nonmoving party." *Id.* (citing *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994)) (emphasis added). "A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* (citing *RujJv. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995); see also, CR 56(c)).

Mere surmise that a responding party may not prevail at trial is not a sufficient basis to grant a moving party's motion for summary judgment. *Meadows v Grant's Auto Brokers, Inc.*, 71 Wn. 2d 874, 881 431 P.2d 216 (1967).

Furthermore, the court must deny the motion for summary judgment if the record shows any reasonable hypothesis that entitles the

nonmoving party to the relief sought, i.e. denial of summary judgment.

Mostrom v Pettibon, 25 Wn. App. 158, 607 P.2d 864 (1980).

F. ARGUMENT

The trial court's rulings are contradictory to established legal authority, including a very strained interpretation of the applicable civil rules. Because the trial court's rulings are without legal and factual basis, such rulings should be reversed on appeal.

No. 1 The Trial Court erred in dismissing Saini's individual claims on Gillon's Motion for Summary Judgment because Gillon failed to provide any declarations or affidavits in support of his motion.

The trial judge relied on unsupported conclusory statements in a brief, filed by Gillon and should not have been considered by the court on a motion for summary judgment. *Kirk v Moe*, 114 Wn.2d 550, 557, 789, P.2d 84 (1990) "A defendant cannot push a plaintiff out of court by swearing that the plaintiff has no case." *Klossner v. San Juan County*, 21 Wn. App. 689, 696, 586 P.2d 899 (1978), aff'd 93 Wn.2d 42 (1980). As a result, the Defendant Gillon has failed to meet his initial burden of proof.

No. 2 The Trial Court Erred in dismissing Saini's Individual Claim #1, Breach of Contract, in the Second Amended Complaint because there were genuine issues of material fact regarding the parties' divergent understanding of the agreements made prior to the formation of PNS and execution of the Memorandum of Understanding such that Defendant was not entitled to judgment as a matter of law.

Even if there were no genuine issues of material fact, the Trial Court erred in dismissing Claim # 1 of the Saini's Second Amended Complaint because the contract at issue was solely between the Saini's and Gillon. Saini had standing as shareholders of PNS to file the Breach of Contract claim.

Gillon argued that the Saini's did not have standing to file suit due to the fact that they did not have shareholder status. (CP 49) To the extent that Defendant alleged that any of the facts in the Complaint were untrue, then those facts are in dispute. In the verified Complaint, the Saini's asserted that they were shareholders. (CP 1, 3.11, 6.2 and 6.3) In the Motion for Summary Judgment, (CP 49), Gillon asserted that Saini were not shareholders. The evidence which supported Saini's claim was Gillon's own deposition whereby Gillon admitted that it was his intent to make Neena Saini a shareholder and it was his belief that this was the case. (CP 875, lines 18-20)

Q: Great. Thank you. Do you believe that Neena Saini is a current shareholder of PNS?

A: I do.

In addition, and as set forth in the verified Complaint, (CP 1) concomitant with the promissory note, the Gillon drafted (or caused to be drafted) a document entitled "Consent to Purchase in Lieu of Special

Meeting of Shareholders and Directors of PNS Properties, Inc.” (“Consent”) and presented the same to Saini for signature. (CP 838-839)

Gillon’s stance changed from his testimony during the deposition and the evidence presented in the Complaint for purposes of the Motion for Summary Judgment. As a result, there were facts in dispute requiring a factual determination by the Trial Judge. This fact was crucial to Saini’s claims in terms of their shareholder status and standing. Moreover, Gillon provided no written agreements or declarations in support of his assertions as to the lack of shareholder status or standing of Saini . As to the facts in the complaint, since Gillon did not refute any of the factual contentions, they should be considered true⁵ when the Court considers Gillon’s motion for summary judgment - Saini invested \$320,000.00 into the business and Saini was promised an ownership interest in the business and of the Union 76 station, as well as a share of the revenues. (CP 96, lines 13-17)

Gillon further argued that summary judgment is appropriate where, “[a] moving defendant may meet [the initial burden of establishing the absence of material fact] by showing that there is an absence of evidence to support the non-moving party’s case.” *Howell v Blookbank*, 117 Wn2d 619, 624, 818 P.2d 1056 (1991). This was not the situation in this case.

⁵ Allegations contained in the verified complaint are to be treated as true. *Parker v Taylor*, 136 Wash. App. 524, 150 P.3d 127 Wash.App. Div. 3 (Jan. 2007)

Gillon asserted that Saini was not a shareholder of PNS and therefore did not have standing. However, this was a factual issue at the time it was presented to the court on Gillon's motion for summary judgment.

Even if the Court were to decide the disputed fact as to the shareholder status of Saini, it would be PNS that had the right to assert such a position, not Gillon, since it is PNS that has been replaced as the party in interest for failing to enforce the breach of fiduciary duty that it is owed. Standing to challenge the failure to comply with the procedural requirements of a derivative suit lies with the entity the stockholder seeks to represent. *Haberman v Washington Public Power Supply System*, 109 Wn.2d 107, 148, 744 P.2d 1032 (1987). Therefore, Gillon's assertion that Saini lacked standing was improperly raised.

Additionally, if Saini were not a shareholder, for reasons set forth by Gillon, then neither is Gillon. Thus, Gillon would be precluded from objecting to shareholder status as it is not his objection to make. PNS is the interested party in whether or not either or both Parties are shareholders.

Based on Gillon's misrepresentations and fraud, the Court, after determining the issue of shareholder status would most certainly apply a standard of constructive shareholder status (due to Gillon's conduct) to

the Saini's for purposes of carrying out their causes of action or alternatively finding that Saini and Gillon were partners in the venture. Gillon now has benefitted from his failure of to create a shareholder relationship between him and the Saini and PNS.

The fact that Saini did not have stock certificates does not preclude them from having standing as a shareholder. *Bolt v. Hurn*, 40 Wash.App. 54, 696 P.2d 1261 (Wash.App. Div. 3 1985) In *Bolt*, Mr. Bolt had given no consideration for any stock and his only contribution to the corporation was the use of his D-8 tractor to build a logging road. The *Bolt* court stated, " that if Mr. Bolt had given consideration for any stock, even if the stock had not been issued, his claim as an equitable owner of unissued stock might have had merit." *Bolt v. Hurn*, 40 Wash.App. 54, 696 P.2d 1261 (Wash.App. Div. 3 1985). Thus, the *Bolt* case stands in favor of a finding that the Sainis were shareholders.

This court should also note that Gillon concealed numerous wrongful acts and as such, an exception to the derivative action statute applies to the case where wrongful acts were effectually concealed. *Davis v Harrison*, 25 Wn.2d 1, 11 167 P2d 1015, 1019 (1946). In this case, Gillon concealed wrongful acts-namely, that Saini was not legally a shareholder (if such a determination had been made by the trial court) when in fact Gillon continually represented that they were (to both third

parties and to Saini)⁶ and where Gillon also concealed his self dealing and self payments. (CP 834, lines 15-25)

In light of the information presented to the court during Summary Judgment, the court should have denied Gillon's Motion for Summary Judgment. There were clear facts in dispute as to whether or not the Sainis were shareholders and had standing to bring the claims as shareholders in their own right and derivatively on behalf of PNS, and as such the court should have taken the facts in the light most favorable to Saini. The factual dispute could have led the Trial Court, after hearing the evidence and testimony of the parties, to the conclusion that the Sainis' were constructive shareholders (due to Gillon's conduct).

Finally, even if the court found that Saini did not have standing as shareholders to file this lawsuit, then neither was Gillon which would have precluded him from asserting whether or not a person or party is a shareholder, and the Court would have treated this case as one in partnership law with the same breach of fiduciary claims as set forth in the Complaint (but at an even higher standard)⁷. Saini had no chance to

⁶ See Shareholder Consent to Purchase (CP 1).

⁷ In Gillon's Motion for Summary Judgment, he attempted to assert that one of the alternative causes of action in the Complaint supported their "no shareholders" theory, and that because Saini's only loaned money to PNS they were not shareholders. However, the provision Gillon cites is only an "alternative basis" for relief. (CP 122) That is, if Saini were not shareholders in the Corporation, they were fraudulently induced to invest in the Corporation without receiving a property equity interests as shareholders and therefore induced to invest in the Corporation without receiving a property equity

present her evidence to the trial court and Gillon did not offer one affidavit or declaration in support of his Motion for Summary judgment.

No. 3 The Trial Court Erred in Dismissing Saini's Individual Claim #2, Breach of Fiduciary Duty Between Shareholders, in the Second Amended Complaint, because there were genuine issues of material fact pertaining to Gillon's wrongful taking of corporate assets without authorization or permission such that Defendant was not entitled to judgment as a matter of law.

Another disputed fact was whether or not Gillon had authority or permission to pay himself a salary of \$5,000.00 per month through PNS and his taking of corporate funds for himself and his other businesses. (CP 103) This material fact was highly disputed. (CP 834, lines 13-15)

Again, Gillon failed to provide a declaration in opposition to this fact, nor did he provide any legal argument as to why he took the salary, even during the times when the business was clearly insolvent. (CP 834, lines 10-14) Saini contended that Gillon set his own salary and lacked authority as a Director to set his own level of compensation. This conduct amounted to a self-dealing proposition. "Directors and other officers of a private corporation cannot directly or indirectly acquire a profit for themselves or acquire any other personal advantage in dealing with others on behalf of a corporation." *State ex rel. Hayes Oyster Co. v Keypoint, Oyster Co.*, 64 Wn.2d 375, 382 P.2d 979 (1964).

interest as shareholders and therefore were inducted to "loan" Gillon \$320,000.00 that was paid to Gillon. However, it is clear that the undisputed fact is that the Saini's invested \$320,000.00 with Gillon. (CP 96, lines 13-17)

Saini argued that Gillon lacked the authority to draw a salary - a salary he fixed without consent from the other directors (Neena Saini). Saini's position was that Gillon's conduct amounted to self-dealing and breached the terms of the Parties' contract and agreement. "Where a transaction involving self-dealing or evidence of personal benefit is shown, then the burden shifts to the fiduciary to show good faith." *Bellis v Thal*, 373 F. Supp. 120, 123-124 (E.D.Pa. 1974), *aff'd*, 510 f.2d 969 (3rd Circuit. 1975); *Wolf v Fried*, 473 Pa. 26, 373 A.2d 734, 736 n. 8 (1977)

Saini's verified Complaint sets forth a completely different understanding (in terms of compensation). That agreement was that Gillon would receive 25% of the profits for managing the business (as this would ensure that Gillon had a direct stake in fulfilling his promise that the business was profitable, and ensuring that it stayed that way). (CP 1) (CP 833, lines 18-22). Gillon, at his deposition, testified that he was to take a salary plus 25% of the profits. (CP, 868, lines 10-25) (CP 869) Thus, a material dispute exists over what had been agreed to by the parties. Gillon provided no factual evidence to rebut claims by the Sainis as to the exact conditions set forth in terms of payment to Gillon in the form of a salary and share of profits. Therefore, the court should have used Saini's allegations as the true allegations. The court did not do so.

As to the analysis involving the idea of whether or not PNS actually had shareholders⁸, if the Trial Court had an opportunity to hear arguments as to the contrary agreement, the court may have found that a corporation did not exist because no shares were issued, and Gillon would then not be a director of the corporation and as a result lacked authority to pay himself an unauthorized salary, regardless of what he believed it to be in terms of a reasonable salary.

Alternatively, if the Trial Court were to find that this was really a partnership, as Gillon infers, then Gillon would not lawfully be entitled to a reasonable salary as a substitute to draw from profits. Gillon would have had to obtain permission from the partners to take a draw. The characterization of the business relationship was in dispute, and absent the corporation, a partnership would exist. *Paulson v McMillian*, 8 Wn.2d 295, 298, 111 P.2d 983 (1941). The characterization of the business relationship between Gillon and Saini was in dispute. Again, Gillon provided no factual evidence to rebut the claims asserted by Saini (as contained in their verified Complaint, (CP 1) and set forth in Neena Saini's declaration. (CP 834, lines 1-6) (CP 834, lines 14-18).

⁸ Gillon previously argued that Sainis did not have standing due to the fact they were not shareholders because they did not have shares of stock distributed to them via a certificate. If the court gave credibility to Gillon's argument then Gillon himself, who did not have shares of stock would also not be a shareholder. (CP 56) (CP 59) (CP 63) (CP 800)

Clearly, there was a dispute as to what the Saini's and Gillon agreed to and in that instance, after hearing testimony, the Trial Court could have found that there was a contrary agreement and that Gillon was indeed self-dealing and that the funds he acquired for his personal benefit. In that instance, Saini would be entitled to damages. *Bellis v Thal*, 373 F. Supp. 120, 123-124 (E.D.Pa. 1974), aff'd, 510 f.2d 969 (3rd Circuit. 1975)

Another genuine issue of material fact is Saini's investment of over \$320,000.00 into PNS and Gillon's lack of investment to match those funds. (CP 832, lines 14-17). Gillon did not pay \$300,000.00 into the business and instead alleges that somehow the promissory note that he and Saini signed as individuals was a credit to his account for \$189,000.00 which Saini claims was untrue. (CP 865, lines 15-25) (CP 866, lines 15-21) (CP 878, lines 5-17)⁹. Thus, it is clear that there is a dispute as to the amount of funds each party invested and agreement as to the amount each was to invest. Prior to taking over PNS, Gillon provided Saini with a profit and loss statement for PNS. (EX 69) This was given in May 2008. Prior to taking over PNS, Gillon provided Saini with a profit and loss statement for PNS. (EX 69) This was provided in May, 2008. After taking over on August 12, 2008, Saini discovered that Gillon had been untruthful when

⁹ On February 4, 2009, Parminder Gillon's deposition was taken and copy of the transcript was delivered as an E-transcript and is verified and certified as a true and correct copy by self-authentication affidavit of Phyllis Craver Lykken, RPR. (CP 887)

he represented the financial condition of PNS. (CP 834, lines 22-25). Saini discovered that the parties had not initially invested equal amounts into PNS and this caused PNS to be under-funded from the very beginning. Gillon had invested approximately \$100,100.00 while Saini invested \$270,000.00.¹⁰

Finally, the oral contract to purchase the 76 Gas Station and to share in the equity investment in return for both parties investing the same amount of money was done pre-formation of the corporation, and was between the Gillon and Saini personally. PNS was not a party to the contract. Saini claimed that Gillon was personally liable to them because of the misrepresentations made. The court dismissed this claim thus precluding Saini from coming before the Trial Court with an individual claim. This was clear error.

The characterization of the business relationship involved numerous factual issues concerning the respective duties of the parties, the conditions of the business relationship and payments therefore making summary judgment improper under the circumstances. Gillon provided no

¹⁰ Prior to August 12, 2008, both the Sainis and PNS had both made claims based on events concerning PNS's formation and operation prior to August 12, 2008, but the Court later decided that only PNS would be permitted to pursue those claims. Saini still has defenses (and are asserting their claims through PNS) while Gillon's claims were solely against the Sainis based upon events surrounding the signing and carrying out of the Memorandum of Agreement. (CP 799-835)

declaration and did not rebut any issues as set forth in the verified Complaint. (CP 1)

The claim brought by Saini pertaining to Gillon's wrongful taking of corporate assets was premised on the duty shareholders in a closely held corporation have to one another. In Washington closely held corporations, a shareholder owes a fiduciary duty to other shareholders (particularly the controlling shareholders to the non-controlling ones). *Saviano v Westport Amusements Inc.*, 144 Wash. App. 72, 80 180 P.3d 874 (Div. 2 2008).

It is a breach of fiduciary duty for a shareholder to retain personal profits owing to a corporation. *McCormick v. Dunn & Blac, P.S.*, 140 Wn. App.873, 894, 167 P.3d 610 (2007);¹¹ See also *Scott v Trans-System*, 148 Wn.2d 701, 64 P.3d 1 (2003). In this case, Gillon paid himself from the earnings of PNS without permission of the Board or other shareholders. (CP 833, lines 13-18). Gillon deemed those payments "loan repayments." (CP 881, lines 4-25) (CP 882). However, such a self-serving classification does not take away from the fact that neither the Board of Directors nor the shareholders authorized 1) a loan from Gillon to PNS, or 2) any repayment by PNS to Gillon. In addition, Gillon paid himself from the earnings of PNS (regardless of what he saw fit to call those payouts - yet another issue in dispute), and Gillon failed to inform Saini about the

¹¹ McCormick also noted the prohibition against the exact type of bad conduct Gillon had engaged – retaining personal profit.

transfers to and from PNS - between the business account and his own accounts.

Under Washington law, particularly *Saviano v Westport Amusements Inc.* 144 Wash. App. 72, 180 P.3d 874 (Div. 2 2008), unauthorized and unapproved loans equate to self-dealing and may be a breach of fiduciary duty to the company particularly where other non-controlling shareholders suffer a detriment by repayment of the loans. Contrary to Gillon's assertions that he is immune from liability by the business judgment rule, such immunization does not apply where a corporate director or officer is shown to have acted in bad faith or with corrupt motive. *Interlake Porsche & Audi, Inc. v. Bucholz*, 728 P.2d 597, 45 Wn. App. 502 , (1986).

A number of other state courts have also recognized that shareholders in closely held corporations owe one another a fiduciary duty. "In the case of a closely held corporation, which resembles a partnership, duties of loyalty extend to shareholders, who owe one another substantially the same duty of utmost good faith and loyalty in the operation of the enterprise that partners owe one another, a duty that is even stricter than that required of directors and shareholders in corporations generally." *Demoulas v Demoulas Super markets, Inc.*, 424 Mass 501, 677 NE2d 159, 179 (1997); *Johnson v Gilbert*, 127 Ariz. 410,

621 P.2d 916, 918 (Ariz. Ct. App. 1980), and *Crosby v Beam*, 47 Ohio St.3d 105, 548 N.E.2d 217 (1989).

In *Orsi v Sunshine Art Studios, Inc.*, 874 F. Supp 471 (D. Mass 1995) the defendants moved for Summary Judgment on plaintiff's claims made against them as individuals for breach of fiduciary duty owed to her as a shareholder in a close corporation. *Id.* at 474. Some of the allegations made by plaintiff under this claim included defendant's alleged diversion of corporate assets to their own benefit and excessive compensation paid to themselves amount others. *Id.* The defendants argued that the claims asserted by plaintiff were merely claims made on behalf of the corporation; therefore, direct relief, in the form of monetary award to plaintiff was not available. *Id.* 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 state: "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 two individual defendants, because any recovery in a derivative suit would return the funds to the control of defendant brothers, rather than to the injured party." *Id.* The *Orsi* court then ruled that "after a trial of the 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.

The same reasoning applied by the *Orsi* court should be applied to the facts of this case. Gillon breached his fiduciary duty to Saini as shareholders of PNS when he committed acts similar to those committed by the defendants in *Orsi*, including the taking of excessive compensation, and wrongfully diverting and converting corporate assets to his own benefit and the benefit of third parties, as well as wrongfully converting Saini’s dividend/profit payments to his own personal benefit. The court should have allowed this claim because the breach of fiduciary duty between shareholders to stand so as to give the injured party, Saini, the opportunity to recover directly for the harms suffered as the only other shareholder of the close corporation, PNS.

In *Johnson v Gilbert*, 127 Ariz. 410, 621 P.2d 916 (Ariz. Ct. App. 1980), the court noted that the action was brought individually by the plaintiffs, a married couple who were 50% shareholders in the closely held corporation, rather than derivatively on behalf of the corporation and went on to state that “[b]ecause the corporation was closely held by only the plaintiffs and defendants, they operated more as partners than in strict compliance with the corporate form. In such circumstances the plaintiffs

had standing, both derivatively and directly to sue on the alleged contract and for an accounting.

Similarly in this case, the corporation, PNS, was closely held by only Saini and Gillon who operated more as partners than in strict compliance with the corporate form. As such, like *Johnson*, it should be held that Saini has standing to sue Gillon directly.

In *Crosby v Beam*, 47 Ohio St.3d 105, 548 N.E.2d 217 (1989) the court held that, “claims of breach of fiduciary duty alleged by minority shareholders against shareholders who control a majority of shares in a close corporation, and use their control to deprive minority shareholders of the benefit of their investments, may be brought as individuals or direct actions and are not the subject to the provisions of Civ. R. 23.1.” *Id.* at 109 & 110. The *Crosby* court reasoned that “if we require a minority shareholder in a close corporation, who alleges that the majority shareholder breached their fiduciary duty to him, to institute an action pursuant to Civ. R. 23.1, then any recovery would accrue to the corporation and remain under the control of the very parties who are defendants in the litigation. Thus a derivative remedy is not an effective remedy because the wrongdoers would be the principal beneficiaries of the recovery. *Id.* 109.

In this case, the trial court as a matter of law should have allowed Saini their individual actions for breach of fiduciary duty of as shareholders. Saini was a non-controlling, minority shareholder, who suffered a direct loss in terms of equity in the corporation, the value of their investment, as well as the loss on their promised return.

In this case, Gillon diverted corporate assets, including money and fuel, to himself and his other entities without shareholder approval. (CP 834, lines 14-18) (CP 834, lines 26-28) (CP 834, lines 19-20). Such actions were undertaken for Gillon's personal benefit and amounts to bad faith and a corrupt motive.¹² The business judgment rule also does not apply if Gillon was not a director (which he was not if there were no shareholders in the corporation as Gillon argues in this Motion). But even if Gillon is a director, the business judgment rule does not apply to a closely held corporation. Gillon also argued that the Cause of Action failed because exact damages could not be established. (CP 49) However, once a breach of fiduciary duty has been established, while the plaintiff must prove the damages resulting from the breach, if damages cannot be

¹² The fiduciary has the burden to show good faith for any transactions involving self-dealing or evidence of personal benefit. *Bucholz*, 45 Wn. App. at 512. The transactions involving Gillon's self-dealing for personal benefit include payments Gillon directed from PNS to himself, Graeco Station, Chevron and Shell (all of which are related to Gillon). This self dealing includes transferring gas to other stations without payment (CP 834, lines 25-28)

ascertained with precision, the trial court will exercise its sound discretion in fixing those damages.¹³

In fact, Saini set forth that damages exist, in the value of money they continue to have invested in PNS (\$285,000.00), plus the cost of the fuel that Gillon ran up with RE Powell without obtaining payment and without informing Saini. Saini was liable on these amounts and on that account. In addition, Saini was damaged in an amount equal to the cost of monies withdrawn from PNS properties by Gillon that should have been retained by the company (according to the equity report of Couch, this was at least \$367,659.00) (CP 834, lines 14-18). In addition, Saini alleged Gillon was liable for the value of the gas transferred to Gillon's other gas stations without payment. (CP 834, lines 14-18)

Gillon had the burden to show good faith for any transactions involving self-dealing or transactions evidencing personal benefit including, at the very least payments Gillon directed from PNS to himself, Grafco Station, Chevron and Shell (all of which are related to Gillon). The self dealing included transferring gas to other stations without payment (CP 834, lines 14-18) (CP 884, lines 7-23). Thus the burden shifted to Gillon to show good faith for these transactions, which he failed to provide, as Gillon did not provide any proof in his Motion.

¹³ *Interlake*, 45 Wn. App at 510

No. 4 The Trial Court erred in dismissing Saini's Individual Claim #3, Breach of Director's and Officer's Duty of Good Faith and Loyalty, in the Second Amended Complaint, because there were genuine issues of material fact in that the Sainis disputed that (1) Gillon had authorization or permission to pay himself a salary; (2) Gillon had authorization to transfer corporate assets to himself and third parties; and (3) Gillon failed to share corporate records with Saini such that Defendant was not entitled to judgment as a matter of law.

In this case, PNS, a closely held corporation, should be the subject of close scrutiny by the court. "Directors, officers and shareholders in a closely-held corporation have a fiduciary relationship that imposes the highest standard of integrity and good faith." *Saviano v Westport Amusements Inc.*, 144 Wash. App. 72, 80 180 P.3d 874 (2008)

Gillon, was in absolute control of the business which resulted in him retaining personal profits from PNS in direct violation of his duty of good faith and loyalty by 1) paying himself and his related parties without informing the shareholders or other directors of the company and 2) by taking gasoline owned by and paid for by PNS (which was secured personally by Saini) to third parties namely his other gas stations without payment to PNS and 3) transferring corporate monies to his personal bank account and that of third parties. (CP 1) (CP 103) (CP 834 - 835)

In this case, it was disputed that Gillon retained personal profits from PNS in direct violation of his fiduciary duties by paying himself and his related parties without informing the shareholders or other directors of the

company and by taking gasoline owned by and paid for by PNS and secured by Saini to other gas stations without payment back to PNS

“Directors and officers stand in fiduciary relation to the corporation they serve and are not permitted to retain any personal profit or advantage gleaned “on the side.” *Interlake Porsche & Audi, Inc. v. Bucholz*, 728 P.2d 597, 45 Wn. App. 502 , (1986).

The *Saviano* court stated that the burden of proving good faith is on the officer or director because of his fiduciary capacity: As a fiduciary, the officer or director has a strong influence on how the corporation conducts its affairs, and a correspondingly strong duty not to conduct those affairs to the unfair detriment of others, such as minority shareholders or creditors, who also have legitimate interests in the corporation but lack the power of the fiduciary. *Saviano v Westport Amusements Inc.*, 144 Wash. App. 72, 80 180 P.3d 874 (2008)

In addition, Gillon incurred a significant debt with RE Powell and at the time of his deposition, he did not even know the amount owed to RE Powell (an amount that he not only bound PNS to, but also Saini). (CP 863, lines 9-2) See attachment Fuel Supply contract (CP 843).

There was also evidence of gross mismanagement which also was a breach of the fiduciary duty owed by the Director to the corporation and to the shareholders. In addition to bouncing checks and incurring check fees,

Gillon also created a situation where the fuel supplier refused to deliver fuel due to approximately \$240,000 then being owed to the supplier. (CP 864, lines 1-25)

No. 5 The Trial Court erred in dismissing Saini's Individual Claim #4, Wrongful Diversion of Corporate Assets, in the Second Amended Complaint, because there were genuine issues of material fact in that the parties dispute that shareholder approval was required before Gillon transferred corporate assets to himself involving substantial sums of money and fuel such that Defendant was not entitled to judgment as a matter of law.

Gillon failed to address or support his contentions against the claim of Wrongful Diversion of Corporate Assets and filed no declarations or affidavits in opposition to it. In fact, the evidence that has already been produced provided clear evidence that Gillon diverted corporate assets without shareholder approval. (CP 834) See report of Tiffany Couch (CP 889-914). Gillon cited the business rule as a defense to his actions; however, this rule does not apply where a shareholder, as a director or officer, has expended corporate funds or assets for personal use without the approval or ratification of other shareholders. This would constitute a breach of fiduciary duty to the corporation. *Interlake Porsche & Audi, Inc. v. Bucholz*, 728 P.2d 597, 45 Wn. App. 502, (1986).

Gillon's Motion For Summary Judgment on this issue (CP 49) is unintelligible and otherwise without basis as Saini maintained the derivative action as a shareholder, not as an officer. Additionally, PNS

moved the Court to amend the Complaint so that it was dismissed as a Defendant and added as a Plaintiff in its own right. (CP 834). In addition, PNS was only ever a nominal Defendant in the action.

Although Gillon's Motion for Summary Judgment alleged that Saini failed to support the claims contained in the verified Complaint by failing to provide evidence, in actuality, the contrary is true. In addition to the un-refuted, verified complaint, all three reports provided by the Forensic Auditor showed that Gillon transferred funds from the company to himself and third parties without notice, disclosure or agreement from Saini (as directors or shareholders). (CP 889-914)

The fact that the Court dismissed these claims despite the fact that there were numerous issues of material fact and despite the fact that Gillon provided no affidavits or in any way countered the factual allegations and claims made, this case should have fallen under CR 56(f): "should it appear from that a party opposing the motion cannot present by affidavits facts essential to justify opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such an order as is just." The court at the very least should have continued the Motion for Summary Judgment in order to wait for the accounting by Forensic Accountant T Couch to be completed. (CP 834)

Furthermore, as a matter of law, Saini had an individual and direct claim against Gillon for Wrongful Diversion of Corporate Assets. If the Company were determined to have been profitable at any stage, Saini would have a direct claim against Gillon for failure to pay dividends or failure to pay all shareholders dividends equally. *Walters v Center Electric, inc.* 8 Wash.App. 322, 506 P.2d 883 (1973). In *Walters*, the court found that the company itself was innocent in paying a dividend when ordered by a director who was also controlling shareholder and who had authorized the company to pay only the controlling shareholder was required to reimburse the non-controlling shareholder.

No. 6 The Trial Court erred in dismissing Saini's Individual Claim #5 Conversion, in the Second Amended Complaint because there were genuine issues of material fact in that the parties dispute that Gillon wrongfully took control of Saini's investment money and converted corporate assets in violation of the parties' agreement by taking more than 25% of the monthly net profits of the business such that Defendant was not entitled to judgment as a matter of law.

There was also a genuine issue of material fact as to Gillon's use of the corporate assets. (CP 831-835) Again Gillon failed to address or support his contention against this cause of action. Gillon claimed as his defense that he was sheltered from liability using the business judgment rule. (CP 59) However, the business judgment rule did not apply in this situation. The Business Judgment Rule does not apply where a shareholder, as a director or officer, has expended corporate funds or assets for personal use

without the approval or ratification by other shareholders since this constitutes a breach of fiduciary duty to the corporation. *Interlake Porsche & Audi, Inc. v. Bucholz*, 728 P.2d 597, 45 Wn. App. 502 (1986). Saini has continuously maintained the derivative action as a shareholder, and not as an officer.

No. 7 The Trial Court Judge erred by not disclosing to the parties over the course of two years of pending litigation, that he used the Defendant's accounting firm for his own personal accounting and no inquiry was made of counsel as to whether this would create a conflict or as to whether the judge should be recused based on the Appearance of Fairness doctrine under the Code of Judicial Conduct (CJC) Canon 3(D)(1).

The first section of the trial in this matter began on August 20, 2009, and ran through August 25, 2009. The second part of the trial ran from March 11, 2010, until March 17, 2010. The judge reviewed several documents which clearly showed Bivens & Wilson as the accountants for the defendant, Gillon, including:

1. A Letter from Bivens and Wilson dated December 30, 2008 (CP 622)
2. Referencing a Letter from Genine Pratt, employee of Bivens and Wilson, to Parminder Gillon regarding the reconciliation of the Acuity Group's report, December 8, 2008. (CP 623-628)
3. Reference to Genine Pratt, in the Complaint Interpleader dated, December 10, 2008 (CP 44, lines 12-16)

4. An Order on a Motion in Limine regarding the Witness List of Gillon with references to Bivens and Wilson (CP 932) and an Order which referencing Bivens and Wilson as the accountants for Gillon, (CP 588)

Despite these clear indications that the accounting firm of Bivens and Wilson was involved on Gillon's side of the case, it was not until the 2nd day of the "second part" of the trial that the Trial Judge disclosed that he used the same accounting firm personally and that he lived down the street from Genine Pratt, the bookkeeper/accountant employed by Bivens and Wilson and whose testimony formed the primary basis for the court's opinion.

The Trial Court judge said, "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." (March 11, 2010, RP 41)

Saini concedes they did not object during trial to this disclosure by the Trial Judge and did not ask the judge to recuse himself; however, 1) they were not given an opportunity after the judge's disclosure and 2) this

litigation had been underway for over 2 years, and half the trial was already completed. Saini had hired a forensic accountant who had prepared numerous reports¹⁴ and testified in trial for three days¹⁵. However, under the appearance of fairness doctrine under the Code of Judicial Conduct (CJC) Canon 3(D)(1), and under basic due process rights, the court had an obligation to disclose this information months in advance of the trial and once it was discovered recuse himself or ask the parties if there was an objection to him hearing the case. It was not fair to the Saini's for the judge to disclose this critical information on the day before the end of a long litigation and trial.

CJC Canon 3(D)(1) and the appearance of fairness doctrine require a judge to disqualify himself from a proceeding if the judge is biased against a party, or the judge's impartiality may reasonably be questioned. *State v Dominquez*, 81 Wn.App. 325, 328, 914 P.2d 141 (1996) citing in re Murchison, 349 U.S. 133, 136, 75 s.Ct. 623, 625, 99 L.Ed. 942 (1955); *State v. Madry*, 8 Wash.App. 61, 68-70, 504 P.2d 1156 (1972) The appearance of fairness doctrine is "directed at the evil of a biased or potentially interested judge or quasi-judicial decision maker." *State v Post*, 118 Wash.2d 596 at 618-619.

¹⁴ Ms. Couch updated her reports as the evidence came in.

¹⁵ March 9, 10, 12, 2010.

The test for determining whether a judge should be disqualified is an objective one. *State v Leon*, 133 Wn. App. 810, 812, 138 P.3d 159 (2006). A court must determine “whether a reasonably prudent and disinterested observer would conclude [the defendant] obtained a fair, impartial, and neutral [hearing].” *State v Dominquez*, 81 Wn.App. 330, 914 P.2d 141 (1996) The evidence supporting this claim is two-fold. First, the Trial Court judge had notice that the Defendant, Gillon was using the Bivens and Wilson accounting firm since 2008. At no time during this lengthy litigation did the judge disclose that he used this accounting firm. In fact, it was not until the next to last day of trial and on cross examination of Genine Pratt by Saini’s counsel, that the judge disclosed the fact that he used the accounting firm of Bivens and Wilson. Second, this case was primarily an accounting action relying heavily on the testimony of competing experts. (CP 478). Even a cursory review of the Findings of Fact and Conclusions of Law entered by the trial court will show the great weight given to the expert testimony of Ms. Pratt.

Gillon used his bookkeeper/accountant, Genine Pratt, as his expert witness despite the fact that she had only recently received her license as a Certified Public Accountant. On cross-examination, Ms. Pratt admitted that she had just received her C.P.A. license.

Q. How long did you not have a license before you just got your

recent C.P.A license?

A. I always had a license.

Q. You indicated that you had not renewed your license. Was it inactive? A. It was inactive.

Q. So you did not have a license for approximately 13 years?

A. 99' to 2009 (March 12, 2010, RP 50-51)

In stark contrast, Saini used a forensic accountant with 12 years experience as a CPA and who was a certified fraud expert. The forensic accountant, Tiffany Couch, provided six separate reports during her two investigation. Ms. Couch testified for 3 days where she presented numerous exhibits and charts as to the equity positions of both parties along with her analysis of the financial transactions done by Gillon. (March 9, 2010, RP 1-223)

Looking solely at the findings and exhibits it is clear that the court gave more credibility to the Bivens and Wilson accounting firm than the highly trained forensic accountant. Whether it was an unconscious or conscious, it is clear from the findings that the court made it very clear that Ms. Couch was given no credibility despite her licensure as a fraud expert and despite the fact that she was a trained accountant. It is also clear that the court gave great deference to the bookkeeper, Genine Pratt, who admitted several missteps she made when handling the bookkeeping for Gillon. (March 12, 2010, RP 53-56, 64-66, 68, 71-73, 145-148)

The Findings and Conclusions adopted by the court showed the following which create issues as to bias and prejudice of the trial judge:

1. Finding of Fact #20. Ms. Couch testified there was substantial monetary harm to PNS and Saini (March 9, 2010, RP 127-128,). The court found that “even if there were a time in 2007 when the net 18 transfers to and from PNS may have shown a balance in favor of PNS, PNS has not shown that it sustained any resulting damages.” (CP 487)

Furthermore, despite the testimony by the Forensic Accountant that Mr. Gillon did not have a substantial equity share in the business after two years of investigation (March 9, 2010, RP 124-125), the court found that “at all times after October of 2007, the net of these transactions showed an ever-increasing balance in favor of Mr. Gillon - that is, he continued to put far more money into the business than what he withdrew.” As of August 12, 2008, the date on which Ms. Saini assumed sole control of PNS, the net balance in favor of Mr. Gillon (exclusive of his "equity" investment) was over \$90,000. Clearly the court believed unconditionally in the testimony by Gillon’s bookkeeper/accountant.

2. 2. Finding of Fact 21. The judge found that there was no wrongful conversion or diversion of PNS’s assets; or that there was any harm to PNS. When figuring out Gillon’s equity share of the business, Ms.

Pratt admitted that she did not account for several bounced checks written by Gillon and had not deducted them from his equity share. (CP 488) (March 17, 2010, RP 144-149)

3. Finding of Fact 22. Ms. Couch testified that Mr. Gillon did not contribute the same amount of capital to the business in terms of equity as Saini. Ms. Couch testified there was over \$2.3 million missing as a result of Mr. Gillon's conduct.(March 9, 2010, RP 95-98). However, the court found that, “[o]n the contrary, the additional funds contributed to PNS by Mr. Gillon, over and above his ‘equity’ contribution, benefited PNS; and without Mr. Gillon's contribution of additional funds in 2008, PNS could not have remained in business. (CP 488) Genine Pratt, who was PNS's accountant between the fall of 2007 and September of 2008, testified that there was no evidence of wrongdoing by Mr. Gillon.”(March 12, 2010, RP 64) Again, the judge gave weight only to Gillon's witness despite overwhelming evidence that Gillon had taken monies from PNS.

4. Finding of Fact 29. Despite the fact that Ms. Couch had 13 years as a certified public accountant and expert training in forensic accounting and despite the fact that she testified she investigated the inner workings of this gas station, (March 9, 2010, RP 138-140) the court found that “Ms. Couch demonstrated a complete lack of knowledge regarding

the very business for which she purported to do a forensic accounting, and the accounting itself was not competently performed.” (CP 490)

5. Finding of Fact 30. This Finding is a complete misrepresentation of Ms. Couch’s testimony during the trial. (CP 490) Ms. Couch did testify that she did not have access to the entire records including the QuickBooks until March of 2009 after the court ordered the discovery turned over to Saini. Ms. Couch also testified that she did not understand the report; however, after her own investigation she did in fact reverse her prior conclusions as to the missing fuel. (March 9, 2010, RP 201)

6. Findings of Fact 31: The testimony of Ms. Couch is misrepresented and in accurate. (CP 490) Ms. Couch provided seven separate reports, analyzed all the bank statements provided as well as cash register receipts, interviewed the Lottery Commission, interviewed RE Powell and analyzed and recreated the QuickBooks numbers provided after several months. (March 9, 2010, RP 33-220 & March 10, 2010, RP 54). Yet, the court found “due to the fact that since Ms. Couch never visited the PNS operations, and due to the fact that she never sought to meet with its management or the business's various suppliers to understand how the operations worked, Ms. Couch never did fully

understand how the lottery sales were computed; nor did she have an understanding of how the car wash operated.”

7. Finding of Facts 37: The court in its findings launched unnecessary personal attacks on Ms. Couch and misrepresented facts as to Ms. Couch’s testimony. The court stated, “Ms. Couch also arbitrarily relied on whatever information suited her purposes.” (CP 492) Ms. Couch testified that she used the best source documents that she had available to her at the different times while writing her reports. (RP 151, 152, 158, 160, 162, 163, 174, 175, 176 3-9-10) Yet, the court found that, “she would use the cash register receipts in some instances and journal entries in others, even though she testified that the best source document was the cash register receipts; she would also use the Quick Book records, if those were to her advantage, even though she testified that the “Quick Book records were generally unreliable.” (March 9, 2010, RP 72-73)

8. Findings of Fact 38: This rendition of Ms. Couch’s testimony is simply not accurate. Ms. Couch testified that there was over \$2 million missing due to Gillon’s monetary transactions. (March 10, 2010, RP 37) She also testified that the De Vere and Son’s tax return only reflected the in store car wash sales and the net amount for the sale of the business, Ms. Couch also did not testify that “net profit of \$93,000 per month, in fuel sales alone when the business as depicted in the F of F. (CP

492)

9. Findings of Fact 41: Despite the fact that Mr. Owen's, the Station Manager, testified that he has kept a handwritten log on the fuel sales for years, which showed the markup price of fuel, (March 11, 2010, RP 12-13) which contradicted Gillon's and Pratt's testimony saying there was no profit for fuel sales, (March 12, 2010, RP 67) the court found, "that Mr. Owens' fuel log journal is itself his highly suspect." (CP 493)

10. Findings of Fact 45: Despite the fact that Ms. Couch testified that she interviewed the Lottery Commission representative and produced documentation of the percentages of the lottery profits to the court (March 9, 2010, RP 85), the court found that "Ms. Couch's opinion regarding the lottery sales is not supported by the evidence." (CP 494)

The court did not give Ms. Couch much credibility however, even after Ms. Pratt admitted her CPA license was not valid for several years and she mainly did bookkeeping services, the court found that , "her testimony establishes that Ms. Pratt, has extensive prior accounting experience with car wash sales, convenience store sales, fuel sales, and lottery sales, explained how these operations worked, and her testimony establishes that Mr. Gillon did not mismanage PNS's business, both generally and in each of these specific areas." (CP 494) The court found this despite the fact that Ms. Pratt admitted she did not account for Mr.

Gillon's bounced checks (RP 162-163 3-12-10) nor were the QuickBooks records completely accurate, even though she also admitted the PNS 2006 tax return was based on the QuickBooks records.(March 12, 2010, RP 61)

11. Findings of Fact 56: Despite the fact that Ms. Couch identified several deficiencies with Ms. Pratt's accounting which included the fact she did not account or deduct for losses to PNS (March 12, 2010, RP 78-83), the court found that in favor of Ms. Pratt's equity accounting. (CP 497)

12. Findings of Fact 57: This is a misrepresentation of Couch's testimony. (CP 497) Ms. Couch testified that it is reasonable to give credit and it was reasonable for an officer to take a salary, however, made no opinion as to the reasonableness of the salary amount itself. Ms. Saini testified that she never agreed with this amount and did not sign the minutes proposed by Ms. Gillon which were offered into evidence by Ms. Saini. (March 16, 2010, RP 18-20)

No. 8 The Trial Judge erred by making Findings of Fact which were improper due to the fact that Saini's individual claims had previously been dismissed on Summary Judgment yet findings were made adverse to the Sainis' individually?

Findings of Fact #7, #8, #9, and #10, (CP 483-484) all dismissed the individual claims of Saini improperly as these claims were dismissed on the order for Summary Judgment (CP 189-191.)

The issue challenges several of the findings and conclusions following the bench trial. The court's review is limited to determining whether substantial evidence supports the findings and, if so, whether they support the trial court's conclusions of law and judgment. *Sunnyside Valley Irrigation Dist. v. Dickie*, 111 Wash.App. 209, 214, 43 P.3d 1277 (2002) aff'd, 149 Wash.2d 873, 73 P.3d 369 (2003) Evidence is substantial if it is sufficient to persuade a fair-minded person that the declared premise is true. *Sunnyside Valley*, 111 Wash.App. at 214, 43 P.3d 1277. Saini has the burden of showing that the record does not support the findings they are challenging. *Sunnyside Valley*, 111 Wash.App. at 214, 43 P.3d 1277

The Findings and Conclusions were improper because the judge had already dismissed these claims in the Order for Summary Judgment. (CP 189-191)

G. CONCLUSION

There were genuine issues of material fact as to the summary judgment. The court improperly dismissed those individual claims in the Findings and Conclusions. There was also a serious conflict of interest as to the failure of the Trial judge to disclose his association with the defendant's, Gillon's accounting firm. The Saini respectfully asks that the court to 1) reverse court's dismissal of summary judgment claims 1-5; and

2) reverse the trial court's judgment. The Sainis ask for attorneys fees pursuant to RAP 18(b).

Dated: April 4, 2011

Presented by:

A handwritten signature in cursive script that reads "Cathy Busha".

CATHY BUSHA

WSBA #36297

Attorney for Appellant