

FILED

MAY 03 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

No. 291502

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

Plaintiffs/Appellants,

v.

PARMINDER SINGH GILLON and BHUPINDER GILLON, as individu-
als, together with the marital community composed thereof,

Defendant/Respondents.

RESPONDENTS' BRIEF

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I. INTRODUCTION¹

The trial court's judgment should be affirmed because (1) no assignment of error or argument is made that the findings of fact are not supported by the evidence; therefore, the findings are verities on appeal; (2) no assignment of error or argument is made that the trial court's conclusions of law are not supported by the findings; (3) the Sainis waived their bias objection, and they have not met their burden of showing bias; (4) the Sainis failed to designate critical matters considered by the trial court in dismissing their individual claims on summary judgment, thus precluding review by this Court; (5) assuming arguendo the trial court erred in dismissing the Sainis' claims, the error was harmless, because each issue and claim was raised and adjudicated in favor of the Gillons at trial (which the Sainis concede); and (6) the Sainis' claims fail as a matter of law.

On August 12, 2008, the Sainis and Gillons entered into a dispute resolution procedure, as reflected in the parties' Memorandum of Agreement ("MOA") executed that date. See Ex 10. Under the MOA, Neena Saini assumed sole ownership and control of PNS. In exchange, the Sainis agreed to purchase the Gillons' interest in the company, by paying to them all of the

1. Appellants' brief is mostly directed to reversing the trial court's dismissal of the Sainis' individual claims; therefore, Appellants Sainis and PNS will collectively be referred to as the Sainis.

funds they had contributed to PNS, minus any funds determined by the court to be owed by the Gillons arising from the allegations contained in the complaint. CP 444; Ex 10 at ¶¶1, 4, 6. The trial court awarded the Gillons the sum of \$344,824.92 as the MOA purchase price; and because no damages arising from allegations against Mr. Gillon were established, there was no reduction from this amount. CP 465. The Sainis, however, want to keep the business without paying anything to the Gillons. Simply put, the Sainis want something for nothing; that is what this case is really about. As Mr. Gillon testified, the Sainis, who are related to the Gillons by marriage, brought this lawsuit as part of an underlying family dispute. RP 56, 62-63 (3/17/10); see also Ex 272. Mr. Gillon's testimony was not disputed, and the trial court gave it weight. CP 443 at n. 1.

II. RESTATEMENT OF THE CASE

A. Relevant Procedural Background.

On August 13, 2007, the Sainis filed their original complaint as a shareholders' derivative action, naming PNS as a defendant in the second cause of action. CP 1, 7. On January 16, 2009, the Gillons filed a motion for summary judgment dismissal of the Sainis' entire original complaint (CP 49) which was never granted. Although the Sainis have failed to designate the trial court's order or decision on the motion, the fact that it was not granted

can be established by comparing the original complaint (CP 1-16) with the second amended complaint (CP 103-121). The Sainis' first, third, fourth, fifth and seventh causes of action of the original complaint are restated in the second amended complaint, along with the corresponding factual allegations.

The second amended complaint was filed on March 20, 2009, after the Sainis took control of PNS pursuant to the MOA. CP 103; Ex 10. In the second amended complaint, both the Sainis and PNS brought concurrent claims against the Gillons. CP 103-121. On March 23, 2009, the Gillons filed their motion for summary judgment dismissal of the Sainis' individual claims. CP 122-147. On April 24, 2009, the trial court entered its summary judgment order dismissing the Sainis' first through fifth causes of action from the second amended complaint. CP 189-191.² On May 12, 2009, pursuant to a stipulation by the parties, the trial court entered its order dismissing the Sainis' sixth, and final, cause of action (an alternative claim for breach of partnership fiduciary duty). CP 192-93.

The case thus proceeded to trial on the following claims: PNS's second amended complaint against the Gillons for breach of fiduciary duty and

2. The Sainis' first cause of action was for breach of contract (CP 111-12); their second cause of action was for breach of fiduciary duty between shareholders (CP 112-14); their third cause of action was for breach of director's and officer's duty of good faith and loyalty (CP 114-16); their fourth cause of action was for wrongful diversion of corporate assets (CP 116-17); and their fifth cause of action was for conversion (CP 117-18).

wrongful diversion/conversion of corporate assets; the Gillons' counterclaim against the Sainis for specific performance of contract (the MOA), or, alternatively, for breach of contract; the Gillons' counterclaim to establish a constructive trust against PNS to preserve the funds the Gillons had contributed to PNS, and for injunctive relief. CP 441. The trial took place on August 20, 21 and 25, 2009, and, following a continuance, on March 9, 10, 11, 12, 16 and 17, 2010. CP 440; see also Verbatim Report of Proceedings.

On May 5, 2010, the trial court filed its Letter Decision, stating in part: "After reviewing the entirety of the admitted evidence, the court is entirely convinced that the reasoning set forth by [the Gillons' counsel] in *The Gillons' Post-Trial Memorandum in Lieu of Oral Closing Argument* is both factually and legally accurate." CP 390 (the Gillons' post-trial memorandum is found at CP 339-368). On May 24, 2010, the trial court entered its findings of fact and conclusions of law (CP 439-466) and judgment for the Gillons (CP 467-470). On June 18, 2010, the Sainis appealed the judgment and certain unidentified "Motion Orders and Summary Judgment Orders during the course of this case." CP 471-72.

At this point, it is necessary to clarify the confusion created by the Sainis' opening brief. The Sainis argue that the trial court erred in dismissing their first through fifth causes of action. Appellants' br. at 15-38. In doing

so, the Sainis address the wrong complaint and summary judgment motion. The trial court's order dismissed the Sainis' claims *from the second amended complaint*. CP 189-191. In arguing that the trial court erred, however, the Sainis cite to their *original complaint* (CP 1-16) and the Gillons' *first motion* seeking summary judgment dismissal thereof (CP 49-63). See Appellants' br. at 16; 17 at n. 5; 20 at n. 6; 22-23; 26; 33; and 35. The first motion was not granted; and the original complaint was abandoned and superseded upon the filing of the amended complaint, which was complete in itself. Seely v. Gilbert, 16 Wn.2d 611, 616, 134 P.2d 710 (1943).

The Sainis argue that the trial court erred in dismissing their claims, "because Gillon failed to provide any declarations or affidavits in support of his motion." Appellants' br. at 1, 15. This is not true. The order itself states that the trial court considered the following declarations submitted by the Gillons: the declaration of Douglas W. Nicholson; the declaration of Parminder Gillon; and the supplemental declaration of Douglas W. Nicholson. CP 190.³ The Sainis failed to designate these declarations on appeal.

There are also two misstatements of the record contained in the Sainis' statement of the procedural background. The Sainis state, "the judge hearing

3. A copy of the order is attached at Appendix A hereto.

the case disclosed on the record that he had a business relationship with the Gillons' expert witness [Genine Pratt] . . .” Appellants' br. at 5. The trial judge, however, never said this; instead, he simply stated that *another person* at the same accounting firm prepared his tax returns. RP 40 (3/11/10).

Citing CP 148, the Sainis state, “On March 30, 2009, the Trial Court dismissed the claim of Conversion.” Appellants' br. at 5. However, CP 148 shows that the trial court *denied* the Gillons' motion to strike the conversion claim. The Sainis' claim for conversion (CP 117) was dismissed on April 24, 2009, as part of the trial court's summary judgment order. CP 189-191.

B. Relevant Factual Background.⁴

In June of 2006, Neena Saini and Parminder Gillon formed PNS; the initials “PNS” stand for “Parminder and Neena Saini”. CP 441; Ex 19B at p. 2; RP 42-43 (8/20/09); RP 61 (3/17/10). From the date of its incorporation through 5:00 p.m. on August 12, 2008, Mr. Gillon and Ms. Saini were the only directors and officers of PNS (Mr. Gillon was the president, and Ms. Saini, who has a master's degree in economics, was the treasurer). CP 441; Ex 2; RP 21 (8/21/09); RP 4-5 (3/17/10). Mr. Gillon and Ms. Saini were the only investors in, and intended shareholders of, PNS; however, no shares of

4. Although the trial court's unchallenged findings of fact (CP 439-462) are verities, citations to the findings will be supported with corresponding citations to the evidence.

stock were ever issued. CP 441; RP 21-22 (8/21/09).

On October 2, 2006, PNS purchased from the DeVeres certain real property and business assets commonly known as Cle Elum 76, located in Cle Elum, Washington, which consisted of a convenience store, a Union 76 retail gas station, a car wash, a commercial fuel network (“CFN”) operation, a bulk fuel sales operation (for the sale and delivery of diesel and other petroleum products off-site), and a warehouse operation; the purchase also included a leased warehouse, and a CFN and bulk fuel sales operation in Ellensburg, Washington. CP 442; RP 18-22 (8/20/09). The purchase price was \$1.55 million dollars, plus a \$189,000 promissory note to DeVere for the inventory purchase. RP 35, 39 (8/20/09).

With the consent of Ms. Saini, Mr. Gillon managed the day-to-day operations of PNS, from the time it began operations in October of 2006, through August 12, 2008, the date the Sainis took over PNS. CP 442; Ex 10; RP 26 (8/21/09). Before PNS began its business operations, the parties agreed that PNS would pay Mr. Gillon a salary for managing the business; the Sainis’ own expert, Tiffany Couch, conceded that Mr. Gillon’s monthly salary of \$5,000 was reasonable. CP 458; RP 218 (3/9/10); RP 128 (3/17/10).

During his management of PNS, Mr. Gillon kept the Sainis informed of the business operations and its financial condition. CP 442-43, Exs 5A, 8,

41E, 41F, 205, 206, 251, 257; RP 61-62, 74-75 (3/17/10). Under Mr. Gillon's management, PNS generated a profit during 2007. CP 446; Ex 64A (which shows PNS's net income for 2007 to be \$311,680.66); RP 88-89 (3/11/10). Beginning in January of 2007, and continuing through July of that year, Ms. Saini received monthly payments totaling \$35,000 from PNS. CP 443 at n. 1; RP 28 (8/21/09); RP 86 (3/16/10). Claiming that this amount of money was not satisfactory, that the amount of PNS's overall payroll was too high, and that they were not receiving financial information from Mr. Gillon, the Sainis filed suit against the Gillons the following month, on August 13, 2007. CP 1, 442; RP 60 (8/20/09); RP 28, 30 (8/21/09). The lawsuit was filed despite Ms. Sainis' admission that Mr. Gillon had provided her with a balance sheet showing the income and expenses for PNS's first three months of operations, and that she was satisfied with Mr. Gillon's explanation regarding the payroll expenses. RP 28, 30 (8/21/09).

Although PNS generated a profit during 2007 (RP 446; Ex 64A), things went downhill in 2008, for reasons beyond Mr. Gillon's control, including: (1) the harsh winter of 2007-08, during which time Snoqualmie Pass was closed for extended periods, and which also caused a partial closure of PNS's car wash operation; (2) the dramatic spike in the cost of fuel, which peaked during the summer of 2008, at which time PNS was paying as high as \$4.83

per gallon; (3) the competition from fuel sales at Safeway and a new Chevron station located in Cle Elum, which were able to sell fuel at prices below what PNS could charge; (4) PNS's primary fuel supplier, R.E. Powell, lowered PNS's credit line from \$250,000 to \$100,000; (5) PNS's customer base from Suncadia decreased, due to the slow-down of construction at the Suncadia development; and (6) the high cost of the monthly Citybank mortgage obligation (over \$13,000 per month), which, combined with the reduced credit limit and increased cost of fuel, resulted in PNS not having enough operating capital to keep current on all of its financial obligations. CP 446-47; RP 23, 191-93, (3/10/10); RP 22-24, 94 (3/11/10); RP 45-47 (3/12/10); RP 87-93 (3/17/10); see also Exs 230, 231, 241, 19B at p. 3, n. 4.⁵

PNS's Cle Elum 76 business was not the only convenience store/fuel station that experienced significant financial problems in 2008. At least seven other convenience stores/fuel stations in Kittitas County experienced similar difficulties. CP 447; RP 56-59 (3/11/10).

To keep the doors open in 2008, Mr. Gillon continued to pump his own money into the business, whereas Ms. Saini refused to contribute any additional funds. CP 447; Exs 8, 41F, 234 (tab 11), 244, 251; RP 138-39

5. When PNS began business operations in October of 2006, it was paying as little as \$1.80 per gallon for fuel. Thereafter, fuel prices progressively increased and, by the spring of 2008, they exceeded \$4.00 per gallon for the first time. CP 447; Ex 231.

(8/20/09); RP 69 (RP 3/11/10). To help the business, Mr. Gillon also withheld cashing several of his payroll checks in 2008. CP 458; RP 65-66 (3/9/10). He also renegotiated the terms of the Citybank note, which ultimately reduced the monthly payments from \$13,919.82 to \$13,291.40. CP 447; Exs 206, 248, 255; RP 4 (3/17/10). Because PNS did not have sufficient funds to operate both the Cle Elum and Ellensburg operations, Mr. Gillon had no choice but to close down the Ellensburg operation, which was made known to Ms. Saini at the time. CP 447; Ex 251. Without Mr. Gillon's contributions, PNS could not have remained in business. CP 449; Ex 8.

Mr. Gillon managed PNS to the best of his ability; he documented each transaction regarding his funds going in and out of the business, and PNS was not harmed by these transactions. CP 448-49; RP 48-50, 76 (3/12/10); RP 110-111 (3/17/10). PNS's former accountant, Genine Pratt, found no evidence of wrongdoing by Mr. Gillon, and the Sainis' expert, Tiffany Couch, did not reach a contrary conclusion. CP 449; RP 29-30 (3/9/10); RP 6-7, 32-33 (3/10/10); RP 104 (3/11/10); RP 48, 76 (3/12/10). Despite having initiated the litigation against the Gillons in August of 2007 (CP 1), the Sainis insisted that Mr. Gillon continue to manage PNS (RP 117 (3/17/10)).

With full knowledge of PNS's financial condition, Ms. Saini decided to assume sole control and ownership of the business, which she did on August

12, 2008, pursuant to the parties' MOA. CP 444, 456-57; Ex 8 (4/25/08 letters from PNS's former attorney, Jim Denison, explaining PNS's financial trouble and the need for additional funds to keep the business open); see also Exs 41E, 41F, 205, 251, 257; RP 67, 89, 137-39 (8/20/09); RP 25 (3/16/10). Although PNS was experiencing financial difficulties when Ms. Saini took over the business, the inventory and accounts receivable exceeded the amount of the outstanding accounts payable at that time. CP 452; Ex 234 (tab 17); RP 42 (3/10/10); RP 100-101 (3/11/10); RP 95-96 (3/12/10).

The terms and conditions of the MOA were negotiated by the parties, through their respective attorneys, who were all present during the negotiations at PNS on August 12, 2008. CP 456-57; Ex 10; RP 90-91, 146-48, 150-52 (8/20/09); RP 111-12, 114-15 (3/17/10). The typewritten MOA draft was prepared by counsel for the Gillons, and the interlineations and handwritten changes were all done by counsel for the Sainis, based upon changes requested by them during the negotiations. CP 456-57; Ex 10; RP 91 (8/20/09); RP 111-12 (3/17/10).⁶

As part of the MOA negotiations, Mr. Gillon offered to give the Sainis an additional week, until 5:00 p.m. on August 19, 2008, to take over man-

6. A copy of the MOA is attached at Appendix B hereto.

agement and control of PNS, and to further investigate the business before deciding whether to buy out his interest or sell the business; however, the Sainis refused this offer. Ex 10 at ¶¶1, 3; RP 112 (3/17/10). Mr. Gillon had, on several prior occasions, including before the Sainis filed suit in August of 2007, offered to resolve the parties' dispute by (1) buying out the Sainis' interest in PNS, (2) having the Sainis buy out his interest in PNS, or (3) turning over management and control of PNS to the Sainis; yet the Sainis refused each offer. CP 443, 460; Ex 251; RP 35 (8/21/09); RP 61-62 (3/16/10); RP 76-77 (3/17/10).

The MOA was not a fully integrated document; rather, the agreement involved both the written and verbal understandings reached by the parties. CP 457. In addition to purchasing the Gillons' interest in PNS, the Sainis were to secure the release of Mr. Gillon's personal guarantees of PNS's obligations, including the Citybank and R.E. Powell personal guarantees. CP 457; Exs 259, 266-268; RP 50, 65, 115 (3/17/10).

The parties never agreed that the MOA purchase price would be reduced by PNS's accounts payable, or by its operating losses, unless these were the result of some proven wrongful conduct by Mr. Gillon, which they were not; nor were PNS's interest expense, asset amortization, or any other aspect of its business operations to be taken into account in determining the MOA pur-

chase price. CP 457; RP 158-60 (8/20/09); RP 113-14 (3/17/10).

Mr. Gillon would not have entered into the MOA if the Sainis were not obligated to remove his personal guarantees, or if the purchase price were to be offset by PNS's accounts payable and operating losses; instead, he would have tried to force a sale of the business to the third-party buyer, who had offered to pay \$1.57 million for the business, plus inventory, on August 19, 2008. CP 457-58; Ex 252; RP 38-40 (8/21/09); RP 112-14, 116 (3/17/10). The Sainis, who now controlled PNS, rejected the offer, which Mr. Gillon wanted to accept. CP 444; Ex 252; RP 70-72 (3/17/10).

After Ms. Saini took control of PNS, its fuel costs dropped significantly, and the business has been able to make money. Ex 231; RP 1 (8/21/09); RP 49-50 (3/17/10). As a result, Ms. Saini wants to keep the business. RP 49 (3/17/10). She also wants to live up to the terms of the MOA, and receive the benefits of owning PNS; however, the Sainis have yet to pay the MOA purchase price to acquire the Gillons' interest in PNS. CP 457-58; RP 11-12, 24 (8/21/09).

Once Ms. Saini took control of PNS, she hired her daughter and son-in-law to run the convenience store. RP 34 (8/21/09). She also terminated the services of both Ms. Pratt and Mr. Denison. RP 58 (8/21/09). Ms. Saini then hired Hardeep Rekhi as PNS's attorney, in part so that PNS could sue Mr.

Gillon. CP 444-45; RP 58-59 (8/21/09). Since taking control of PNS, the Sainis have engaged in the very conduct they alleged against Mr. Gillon when they commenced this litigation. CP 1-16, 445-46; RP 52-56, 65, 67 (8/21/09); RP 196-97 (3/9/10); RP 174-75 (3/10/10); RP 74-76 (3/16/10); RP 106-07 (3/17/10).

III. ARGUMENT

A. Appellants Have Not Assigned Error to the Trial Court's Findings of Fact; Therefore, the Findings are Verities and the Trial Court's Judgment Should be Affirmed.

“[U]nchallenged findings of fact are verities on appeal.” Estate of Watlack, 88 Wn. App. 603, 609, 945 P.2d 1154 (1997). “The appellant must present argument to the court why specific findings of fact are not supported by the evidence and must cite to the record to support that argument.” Inland Foundry v. Labor & Indus., 106 Wn. App. 333, 340, 24 P.3d 424 (2001) (citing In re Estate of Lint, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (citing RAP 10.3)). “Strict adherence to the aforementioned rule is not merely a technical nicety.” In re Estate of Lint, 135 Wn.2d at 532. “If we were to ignore the rule . . . we would be assuming an obligation to comb the record with a view toward constructing arguments for counsel as to what findings are to be assailed and why the evidence does not support these findings. This we will not and should not do.” Id.

The Sainis fail to assign error to any of the trial court's findings of fact; they also fail to present argument, or citations to the record, to establish that the findings are not supported by the evidence. The Sainis also fail to challenge any of the trial court's conclusions of law, or argue that they are not supported by the findings of fact. The Gillons, by contrast, have provided ample citations to the evidence to support the findings necessary to sustain the judgment. A comparison of the conclusions of law (CP 462-66) with the findings of fact (CP 441-62) establishes that the findings support the conclusions. The trial court's judgment should thus be affirmed.

The Sainis argue that several of the trial judge's findings of fact show that he was biased, because he found Ms. Pratt's testimony more credible than the testimony of Ms. Couch. See Appellants' br. at 42-44, 47-48. However, the Sainis fail to properly argue that these findings are not supported by the evidence. This failure means that "the findings will be treated as verities." Inland Foundry, 106 Wn. App. at 340. Moreover, the trier of fact's credibility determinations will not be second-guessed on appeal. State v. Cantu, 156 Wn.2d 819, 831, 132 P.3d 725 (2006).

The Sainis also assert: "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)." Appel-

lants' br. at 48-49. Again, the Sainis fail to argue that these findings are not supported by the evidence; therefore, the findings are verities. Id.

B. Appellants' Argument that the Trial Court Judge Was Biased is Without Merit.

1. Appellants Waived Their "Bias" Objection by Failing to Raise it Prior to Entry of Judgment.

The Sainis argue that the trial court judge violated the judicial canons of ethics, because he was allegedly biased and failed to recuse himself. Appellants' br. at 38-48. Shortly after PNS's former accountant, Genine Pratt, was called to testify, the trial court judge disclosed, on the record, that another accountant at the same accounting firm prepared his tax returns. RP 40 (3/11/10). The Sainis concede that they raised no objection following this disclosure, and that they did not ask the judge to recuse himself. Appellants' br. at 39. The Sainis have, therefore, waived their bias argument.

"Under RAP 2.5(a), an appellate court may refuse to review any claim of error that was not raised in the trial court.' Washington courts have applied the doctrine of waiver to bias and appearance of fairness claims." Marriage of Wallace, 111 Wn. App. 697, 705, 45 P.3d 1131 (2002), review denied, 148 Wn.2d 1011 (2003) (citing inter alia In re Carpenter, 21 Wn. App. 814, 820, 587 P.2d 588 (1978) ("a litigant who proceeds to trial knowing of potential bias by the trial court waives his objection and cannot challenge the

court's qualifications on appeal"); Brauhn v. Brauhn, 10 Wn. App. 592, 597, 518 P.2d 1089 (1974) (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).

2. Appellants Have Not Established Bias.

“A trial court is presumed to perform its functions regularly and properly without bias or prejudice.” Bus. Servs. of Am. v. Wafertech, 159 Wn. App. 591, 600, 245 P.3d 257 (2011). The “party challenging impartiality bears the burden of presenting evidence of actual or potential bias.” Pers. Restraint of Wiatt, 151 Wn. App. 22, 53, 211 P.3d 1030 (2009).

“Decisions on recusal are reviewed for an abuse of discretion.” State v. Leon, 133 Wn. App. 810, 812, 138 P.3d 159 (2006), review denied, 159 Wn.2d 1022 (2007). “An abuse of discretion exists only if no reasonable person would have taken the view adopted by the trial court.” Holaday v. Merceri, 49 Wn. App. 321, 324, 742 P.2d 127 (1987). A respondent in a bench trial is entitled to the benefit of all evidence and reasonable inferences therefrom in support of the trial court's findings of fact. Keever v. Randall, 129 Wn. App. 733, 737, 119 P.3d 926 (2005). Thus, even where an appellate court disagrees with a trial court, it may not substitute its judgment for that of the trial court if the evidence supports the finding. Thorndike v. Hesperian

Orchards, 54 Wn.2d 570, 575, 343 P.2d 183 (1959).

The Sainis present no evidence of the trial judge's actual or potential bias. The mere fact that another member in the same accounting firm prepared the judge's tax returns is not sufficient to establish the claim. In State v. Dominguez, 81 Wn. App. 325, 914 P.2d 141 (1996), a criminal matter in which the issues of bias and recusal should arguably be considered more seriously than in a civil case, this Court refused to find bias where the trial judge earlier acted once for the defendant and once against him in his professional capacity as an attorney. Id. at 329 ("unless there is a specific showing of bias, a judge is not disqualified merely because he or she worked as a lawyer for or against a party in a previous, unrelated case").

The Sainis' claim of bias falls far short of the bias claim in Dominguez. There is no evidence that the trial judge ever had a personal or professional relationship with Ms. Pratt. See RP 40 (3/11/10). 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 Sainis argue that findings of fact 20-22, 29, 30-31, 37-38, 41, 45, 56, and 57 establish bias, because the trial judge found Ms. Pratt's testimony more credible than Ms. Couch's. Appellants' br. at 41-44, 47-48. This is a

credibility argument, which is not proper for appellate review. Cantu, 156 Wn.2d at 831 (“credibility determinations are for the trier of fact and are not subject to review”).

The Sainis’ credibility-based bias argument presents a self-serving recitation of their version of the facts; it ignores the substantial evidence supporting the trial court’s findings. “[A]n appellant’s brief is insufficient if it merely contains a recitation of the facts in the light most favorable to the appellant even if it contains a sprinkling of citations to the record throughout the factual recitation.” In re Estate of Lint, 135 Wn.2d at 531-32.

The Sainis argue that Ms. Pratt only recently received her CPA license; therefore, Ms. Couch was more qualified than Ms. Pratt to opine on PNS’s business operations and finances. Appellants’ br. at 41-42. The argument is without merit. Ms. Pratt passed the CPA exam in November of 1989. RP 38 (3/11/10). Although her license lapsed because she did not fulfill the continuing education requirements, Ms. Pratt took 120 hours of continuing education, and her CPA license was active when she testified; she was also an accountant during the whole time her license was inactive. RP 38-39 (3/11/10). More importantly, Ms. Pratt, who had been PNS’s accountant, had personal knowledge of every aspect of its business operations. RP 44, 50-52 (3/11/10); RP 12-13, 25-27, 37-40, 45-47, 66-74, 151-56 (3/12/10). She also

had knowledge of several other fuel stations/convenience stores in Kittitas County which were similar to PNS's operations. RP 41-42, 55-57, 58-59 (3/11/10); RP 37-41 (3/12/10). Ms. Couch, by contrast, had no such experience or knowledge. Before her involvement in this litigation, she had never done any accounting work for a fuel station/convenience store. RP 138-39 (3/9/10).

“A trial court’s findings will not be disturbed if there is substantial evidence to support them.” Peterson v. Big Bend Ins. Agency, 150 Wn. App. 504, 514, 202 P.3d 372 (2009). “Substantial evidence’ is evidence sufficient to persuade a fair-minded and rational person of the truth of the declared premise.” Id. “The deference accorded under the substantial evidence standard recognizes that the trier of fact is in a better position than the reviewing court to evaluate the credibility and demeanor of the witnesses.” Id. Each finding the Sainis contend shows bias is supported by substantial evidence.⁷

Finding of Fact 20 (CP 488). The Sainis argue that “the court believed unconditionally in the testimony of the Gillon’s bookkeeper/accountant”. Appellants’ br. at 43. This is not true. The trial court reduced Ms. Pratt’s MOA accounting by \$43,000 based upon the evidence. CP 458. The Sainis

7. Even if the findings purporting to show bias were eliminated, the remaining related findings, which are also unchallenged verities, would support the judgment. See findings of fact 15-18, 23-28, 32-36, 39-40, 43-44, 47-48, 55, 58-61, 63, 65, and 67.

also contend the trial court disregarded Ms. Couch's testimony that "there was substantial monetary harm to PNS and Saini". *Id.* (citing RP 127-28 (3/9/10)). The Sainis' citation to the record, however, does not support their argument. And the Sainis fail to cite to the evidence refuting it. RP 104-105 (3/11/10); RP 48-50, 76 (RP 3/12/10).

The Sainis also contend that the court believed Ms. Pratt in finding that, "at all times after October 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." Appellants' br. at 43. These findings, however, are likewise supported by the evidence. Exs 234 (tab 11), 244; RP 48-50 (3/12/10).

Finding of Fact 21 (CP 449). The Sainis argue that the trial judge was biased, because he found there was no wrongful conversion or diversion of PNS's assets, or harm to PNS, despite Ms. Pratt's admission that she did not account for several bounced checks that were not deducted from Mr. Gillon's equity share. Appellants' br. at 43-44. The judge did, however, take these checks into consideration in determining the MOA purchase price. CP 458. And the finding that there was no wrongful conversion or diversion of PNS's

assets, or harm to PNS, is supported by the evidence. RP 104-105 (3/11/10); RP 48-50, 76 (3/12/10).

Finding of Fact 22 (CP 449). The Sainis continue their bias argument by representing that the trial court disregarded Ms. Couch's testimony that "there was over \$2.3 million missing as a result of Mr. Gillon's conduct." Appellants' br. at 44 (citing RP 95-98 (3/9/10)). The Sainis' citation again fails to support their representation. Ms. Couch never said "there was over \$2.3 million missing as a result of Mr. Gillon's conduct." And the evidence supports the trial judge's finding regarding Mr. Gillon's contributions to PNS, without which PNS could not have remained in business. Exs 8, 234 (tab 11), 244; RP 42, 45-50, 76 (3/12/10).

Findings of Fact 29, 30, 31, 37 and 45 (CP 451, 453, 454). The Sainis argue that the findings challenging Ms. Couch's competency, analyses, and conclusions further demonstrate bias. Appellants' br. at 44-48. The Sainis claim that Ms. Couch "testified she investigated the inner workings of the gas station." *Id.* at 44 (citing RP 138-140 (3/9/10)). The citation again fails to support the proposition for which it is cited; it establishes only that Ms. Couch spoke with a gentleman who neither owned nor operated a fuel station, and who could not tell Ms. Couch anything specific regarding PNS. RP 140 (3/9/10).

Ms. Couch admitted her lack of competence at trial. She had no prior experience doing any accounting for a convenience store/fuel station (RP 138-39 (3/9/10)); she had never done a car wash, bulk fuel or CFN fuel analysis, and she had no prior experience with lottery sales (RP 147-48 (3/9/10)); she did not visit PNS to investigate its business operations or to determine what records might exist on-site (RP 150-51 (3/9/10)) (Dave Owens, PNS's bulk plant manager (RP 73-74 (3/10/10)) testified that all of PNS's historical records were available if anyone had asked for them (RP 7-9 (3/11/10)); she did not know that there was a warehouse on-site (RP 152 (3/9/10)); she never spoke with PNS's attorneys or accountants to learn about the business, and instead relied upon the Sainis' former litigation counsel, Noah Davis, to provide the information she relied on (RP 76, 155-56 (3/9/10)); she first learned of PNS's bulk fuel sales receipts during the trial in August of 2009 (RP 157-58 (3/9/10)); despite first being engaged in this matter in January of 2008 (RP 31 (3/9/10)), she was still trying to figure out what the different fuel accounts were for PNS in mid-November of 2008; she never contacted PNS's store manager to inquire what the different accounts were, and she did not know that Ms. Saini had taken over the business in August of 2008 (RP 160-162 (3/9/10)); she did not learn that "WD Wondrack" was not a private account of Mr. Gillon's, but instead the account of an outside fuel distributor, until De-

ember of 2008 (RP 162-63 (3/9/10)); she did not know that R.E. Powell was the retail fuel supplier until after April 15, 2009 (RP 162-63 (3/9/10)); in April of 2009, she erroneously determined that there were 345,000 gallons of fuel that appeared to be missing, worth \$933,000, but a month later completely rescinded this finding after receiving, through Gillons' counsel, the transaction history report from R.E. Powell (Exs 19X, 19HH; RP 174-179)); she acknowledged that the best source of the fuel transactions would have been R.E. Powell, the distributor for the retail fuel sales, and Wondrack, the distributor for the bulk fuel sales, but she never contacted either entity to obtain the necessary information (RP 178-180 (3/9/10)); she was not aware of the MOA (Ex 10) until May 28, 2009, and was not asked to do an accounting based upon the MOA (RP 180-82 (3/9/10)); she admitted that her "potential missing car wash revenue" did not take into account the costs associated with operating the car wash, because she claimed that the car wash "does not have costs" (RP 200 (3/9/10)) (Mr. Owens testified that the car wash does have operating costs (RP 80 (3/10/10)); she thought that the car wash bill changer was a source of revenue, that you put money back into the bill changer to turn on the car wash (RP 80-82 (3/9/10)), and that the bill changer also issued tokens for car washes (RP 117 (3/9/10), RP 44 (3/10/11)); however, the bill changer simply exchanges dollars for quarters (it is not a source of revenue);

the machine that turns on the car wash is located in the car wash bay; and the bill changer does not issue tokens, which come from the warehouse (Owens' testimony at RP 92, 182-83 (3/10/10); Pratt testimony at RP 103-105 (3/11/10)); she admitted that her accounting relied on the Quickbooks information, which she conceded is not a reliable source of information (RP 110-111 (3/9/10)); she was not aware that PNS was sued as a defendant in the original complaint, and thus disallowed payment of its attorney fees, without investigating whether the fees were incurred on behalf of PNS as opposed to Mr. Gillon (RP 205-211 (3/9/10)); she did not know that every retail fuel sale is recorded electronically through the cash register (RP 60-61 (3/10/10)); she then later conceded that they were and that the cash register tapes, not Mr. Owens' handwritten fuel journals, are the best source documents for determining retail fuel sales (RP 105-107 (3/12/10)); nonetheless, she did her fuel sales analysis based upon Mr. Owens' handwritten fuel journals, which are not tied to the cash register tapes and do not take into account expenses for credit card charges (CP 107-108 (3/12/10) (Mr. Owens himself testified that the cash register tapes would show exactly how many gallons of retail fuel were sold and at what price (RP 178-79 (3/10/10)); she conceded that the CFN transactions are electronically recorded through the CFN cardlock system, that all CFN transactions for fuel sales were accounted for, and she

could not answer why the convenience store fuel sales electronic records do not match Mr. Owens' handwritten fuel ledgers (RP 108-109 (3/12/10)); she also admitted she used data from the general ledger in doing her fuel sales analysis, but conceded that the general ledger is not a proper source document for the convenience store fuel sales (the convenience store register tapes are, which she did not use in doing her analysis) (RP 125-27 (3/12/10)).

Ms. Pratt also provided extensive testimony regarding Ms. Couch's lack of competency and understanding regarding her accounting analysis for PNS. RP 32 (3/12/10) (the convenience store and CFN fuel sales are all electronically recorded and cannot be tampered with, and the electronic records are the best source documents for determining actual fuel sales); RP 102-103 (3/11/10) (Dave Owens' handwritten car wash journals are not a reliable source document for car wash sales); RP 11-14 (3/12/10) (Ms. Couch's analysis of the lottery sales did not correctly reflect how the lottery system actually works and her numbers are overstated); RP 16 (3/12/10) (Ms. Couch listed ATM fees and interest earned as expenses; however, they are actually income to PNS, so Ms. Couch has made a double accounting error); RP 23-25 (3/12/10) (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); RP 25-27 (3/12/10) (Ms. Couch's profit analysis was over-

simplified and did not take into account the actual business operations); RP 28-30 (3/12/10) (Ms. Couch's MTD report analysis did not use proper source documents; Ms. Couch again did not do basic double entry accounting); RP 28-32 (3/12/10) (Ms. Couch's findings are incomplete and inaccurate, she was not consistent from one report to the next, and her numbers kept changing, depending upon which source document she used in her analysis); RP 149-152 (3/12/10) (Ms. Pratt explained the fuel sales and refuted Ms. Couch's conclusion that there was a negative amount in fuel sales) (Mr. Owens also testified that fuel was never sold at a loss (RP 139 (3/10/10))).

Finding of Fact 38 (CP 453). The Sainis represent that, "Ms. Couch testified that there was over \$2 million dollars missing due to Gillon's monetary transactions." Appellants' br. at 46 (citing RP 37 (3/10/10)). The citation again fails to support the representation; it simply shows Ms. Couch testified that the slight discrepancy regarding the bulk fuel sales was "not an issue in her accounting analysis". RP 37-38 (3/10/10).

Finding of Fact 41 (CP 454). The Sainis argue that the trial judge was biased because he found Dave Owens' handwritten fuel log journal, upon which Ms. Couch relied in her fuel analysis, as being suspect. Appellants' br. at 47. This finding is supported by comparing Mr. Owens' handwritten fuel log journal (Ex 30) with his handwritten inventory journal of 8/11/08 (Ex 32).

The fuel log journal contains entries covering an approximate three year period. Mr. Owens testified that he would make his journal entries, which were mostly done in pencil, after removing the change from the car wash vending machines, or after making bulk fuel sales deliveries, and that he would eat food or drink beverages while making the entries. (RP 9-10 (3/11/10). The entries themselves, however, are virtually pristine; there are no smudge marks and the handwriting looks identical, as though the entries were all done at the same time. Despite the fact that this litigation had been pending since August of 2007, Mr. Owen's fuel log journal (Ex 30) did not surface until three weeks before trial resumed on March 9, 2010. RP 129-130 (3/10/10).

Finding of Fact 56 (CP 458). The Sainis argue that the trial court favored Ms. Pratt's equity accounting, despite the fact that she did not account or deduct for PNS's business losses, as did Ms. Couch. Appellants' br. at 48. Ms. Pratt's "equity accounting", however, was for purposes of determining the MOA purchase price, which did not include PNS's business losses or debt. CP 457-58; RP 158-60 (8/20/09); RP 113-14 (3/17/10). Ms. Pratt properly did an MOA purchase price accounting. RP 69-71 (3/11/10); RP 21 (3/12/10). Ms. Couch, however, did not. RP 180-82 (3/9/10).

Finding of Fact 57 (CP 458). Without citing to the record, the Sainis assert that Ms. Couch made no opinion as to the reasonableness of Mr. Gil-

lon's \$5,000 per month salary. Appellants' br. at 48. Ms. Couch in fact testified that this was a reasonable salary. RP 218 (3/9/10).

C. Appellants' Argument That the Trial Court Erred in Dismissing The Sainis' Individual Claims by Summary Adjudication is Also Without Merit.

1. The Sainis Failed to Designate Critical Matters Considered by the Trial Court; Therefore, the Court's Order Must be Affirmed.

The Sainis have failed to designate the following matters considered by the trial court in granting summary judgment dismissal of their claims: the declaration of Douglas W. Nicholson in support of the Gillons' motion; the Gillons' reply to the Sainis' opposition; the declaration of Parminder Gillon in support of the Gillons' reply; the supplemental declaration of Douglas W. Nicholson in support of the Gillons' reply; the Gillons' motion to strike the Sainis' declaration and exhibits; the praecipe filed by the Sainis' counsel; the Gillons' motion to strike the Sainis' late-filed exhibits and the declaration of Tiffany Couch; the supplemental declaration of Noah Davis; and the Gillons' motion to strike Mr. Davis' supplemental declaration.

“In an appellate review of a summary judgment of dismissal, the reviewing court must have before it the precise record considered by the trial court.” LeBeuf v. Atkins, 93 Wn.2d 34, 36, 604 P.2d 1287 (1980). Failure to provide the precise record precludes review, and summary judgment must there-

fore be affirmed. Harris v. Kuhn, 80 Wn.2d 630, 632, 497 P.2d 164 (1972); Siegrist v. Simpson Timber Co., 39 Wn. App. 500, 504, 694 P.2d 1110 (1985), review denied, 103 Wn.2d 1037 (1985) (summary judgment must be affirmed where the failure to provide a complete record prevents a reviewing court from determining whether trial court committed error). The Sainis' omission of a substantial portion of the record precludes appellate review in this case; therefore, the summary judgment must be affirmed. Moreover, this omission is inexcusable neglect, since the order itself specifically identifies each item considered by the court. CP 189-191.

Compounding the problem, and further precluding appellate review, is the fact that the Sainis' argument improperly focuses on the allegations of their *original* complaint (CP 1-16), and the Gillons' arguments seeking its dismissal, as raised in their *earlier* motion for summary judgment (CP 489-63), *which was not granted*. As a result, the Sainis' argument fails to address several of the specific arguments raised by the Gillons in seeking summary judgment dismissal of the Sainis' individual claims from the *second amended complaint*. Compare Appellants' br. at 15-38 with the Gillons' relevant summary judgment motion (CP 122-147).

2. The Sainis' Claims Were Adjudicated at Trial.

The Sainis concede that the trial court's unchallenged findings of fact ef-

fectively adjudicated their claims. Appellants' br. at 48. As such, collateral estoppel and res judicata prevent relitigating them.

“Collateral estoppel, or issue preclusion, bars litigation of an issue in a subsequent proceeding involving the same parties.” Yakima County v. Officers Guild, 157 Wn. App. 304, 331, 237 P.3d 316 (2010). The party asserting “collateral estoppel 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 estoppel is asserted is a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel 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)).

“Res judicata, or claim preclusion, bars the relitigation of claims and issues that were litigated, or might have been litigated, in a prior action.” Officers Guild, 157 Wn. App. at 327. “For res judicata to apply, a prior judgment must have the same (1) subject matter, (2) cause of action, (3) persons and parties, and (4) the [same] quality of the persons for or against whom the claim is made (identity of interest).” Id. at 327-28. “Causes of action are identical for res judicata if (1) prosecution of the later action would impair

the rights established in the earlier action, (2) the evidence in both actions is substantially the same, (3) infringement of the same right is alleged in both actions, and (4) the actions arise out of the same nucleus of facts.” Id. at 328.

The distinction between *res judicata* and collateral estoppel is that the former prevents the second assertion of the same claim or cause of action, whereas the latter prevents a second litigation of issues between the parties, even where a different claim or cause of action is asserted. Id. at 331.

The Sainis’ entire brief presents issues and claims that were fully adjudicated at trial. In their statement of purported facts, the Sainis claim that they “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)” (Appellants’ br. at 6); that “PNS was to purchase real property and an on-going business [the DeVere property and the convenience store/fuel station]” (id.); that the parties agreed to invest approximately equal funds into PNS (id.); that the Sainis were to have an equal interest and shareholder status in PNS (id.); that “Gillon would manage the operations of the business under certain terms which was [sic] orally agreed to prior to the incorporation of PNS” (id. at 8); that they “deferred to Mr. Gillon’s “expertise and knowledge in running the gas station” (id.); that Mr. Gillon owned “competing gas stations” (id.); that Mr. Gillon was “the controlling shareholder of

PNS” (id.); that they “relied on Gillon to keep them apprised of the financial condition of PNS” (id. at 8-9); “that the parties disagreed as to the terms of the distribution of the net profits as to the business” (id. at 9); “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” (id. at 9); that “Sainis would share in the profits based on the ratio of each party’s investment instead of Gillon’s proposal that they share the net profits 50/50” (id. at 9-10); that “Saini was concerned because Gillon refused to provide her with financial documents” (id. at 10); that 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” (id.); that “[b]oth parties had a different understanding as to the financial arrangement” (id.); that “Saini became even more concerned when she did not receive any return on her investment” (id.); that, based on “Ms. Couch’s investigation, Saini discovered that Gillon was self dealing by transferring money to himself and diverting gasoline to his other gas stations” (id. at 11); that, based on Ms. Couch’s report, “Gillon had diverted corporate assets . . . [and] 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” (id. at 11-12); that “[t]he Sainis relied on the

financial information given to them by Gillon [which] drove the terms of the MOA” (id. at 12); that “they did not know the extent of the debt owed to R.E. Powell [or other unpaid debts] until the[y] actually took over the business” (id.); and that, “[a]fter 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 the monies he had taken from the business” (id.).

The Sainis’ argument reasserts these same issues and claims. See, e.g., Appellants’ br. at 18 (“Gillon asserted that Saini was not a shareholder of PNS”); id. at 20 (“Gillon . . . concealed his self dealing and self payments”); id. at 21 (“[a] disputed fact was whether or not Gillon had authority or permission to pay himself a salary of \$5,000 per month through PNS and his taking of corporate funds for himself and his other businesses”); id. at 22 (“Gillon’s conduct [drawing a salary] amounted to self-dealing”); id. at 24 “there is a dispute as to the amount of funds each party invested and agreement as to the amount each was to invest”); id. at 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”); id. at 26 (“Gillon’s wrongful taking of corporate assets” was a breach of fiduciary duty); id. at 27 (“[u]nauthorized and unapproved loans equate to self-dealing and may be a

breach of fiduciary duty to the company”); *id.* at 29 (Gillon took “excessive compensation, and wrongfully divert[ed] and convert[ed] corporate assets to his own benefit . . .”); *id.* at 32 (“Gillon had the burden to show good faith for any transactions involving self-dealing or transactions evidencing personal benefit including . . . payments directed from PNS to himself”); *id.* at 33 (Gillon retained “personal profits from PNS in direct violation of his duty of good faith and loyalty”); *id.* at 34 (“[t]here was also evidence of gross mismanagement which also was a breach of fiduciary duty owed . . . to the corporation”); *id.* at 36 (“Gillon transferred funds from the company to himself and third parties”).

Each of the above issues and claims was fully adjudicated at trial. See findings of fact and conclusions of law at CP 441-466; RP 22-27, 45, 60-65, 122, 128-29 (8/20/09); RP 20-22, 26-30, 36 (8/21/09); RP 19, 32-33 (3/16/10); RP 58-62, 73-106; 108-111, 116-17, 122, 128, 166-68, 170-72 (3/17/10); see also citations to the record above at pages 6-12. Collateral estoppel and res judicata thus bar the Sainis from relitigating the same issues and claims. Officers Guild, 157 Wn. App. at 327-28, 331-32. The Sainis’ argument that the trial court erred in dismissing them is therefore harmless.

3. The Sainis’ Claims Fail as a Matter of Law.

The Sainis’ breach of contract claim fails as a matter of law. The Sainis

invested their money in PNS, not Mr. Gillon; and PNS used the money to acquire the DeVere real property and business assets in its own name. CP 441-42; Exs 2, 19LL; RP 14-15 (3/16/10); RP 124-25 (3/9/10). Once they invested their money in PNS, it now belonged to the corporate entity, not the Sainis. “A corporation is, by legislative enactment, an entity.” State of Cal. v. State Tax Comm., 55 Wn.2d 155, 157, 346 P.2d 1006 (1959). “It is such, separate and distinct from the persons who own its stock. This statutory entity, so long as it exists, is the owner of all of the property which the corporation possesses. An individual shareholder has no property interest in its physical corporate assets.” Id.

Moreover, any prior agreement between the parties merged into PNS upon its formation; therefore, the rights and obligations became those of PNS, not the individual investors. “[W]hatever the legal relationship of the parties may have been prior to the formation of the corporation, it was changed by that transaction.” Hamilton v. Johnson, 137 Wn. 92, 100, 241 P. 672 (1925). Thus, it was PNS who paid Mr. Gillon’s salary; it was PNS who was to pay the Sainis any alleged return on their investment; and it was PNS who failed to divide the profits (as the Sainis themselves alleged in their original verified complaint at CP 7); therefore, the Sainis’ cause of action is against PNS, not Mr. Gillon. A corporation acts through its directors and of-

ficers (Mr. Gillon and Ms. Saini), not through its individual shareholders. Lycette v. Green River Gorge, Inc., 21 Wn.2d 859, 862, 153 P.2d 873 (1944); RCW 23B.08.010 and .300.

Finally, the Sainis admit that there was no enforceable agreement between the parties, because there was no “meeting of the minds”. The Sainis state: “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 Both parties had a different understanding as to the financial arrangement.” Appellants’ br. at 10. For a contract to exist, there must be a mutual intention or “meeting of the minds” on the essential terms of the agreement. Olson v. Bon, Inc., 144 Wn. App. 627, 639, 183 P.3d 359 (2008) (quoting Saluteen-Maschersky v. Countrywide Funding Corp., 105 Wn. App. 846, 851, 22 P.3d 804 (2001) (quoting McEachren v. Sherwood & Roberts, Inc., 36 Wn. App. 576, 579, 675 P.2d 1266 (1984))). The Sainis’ admission of a lack of mutual intention renders any alleged agreement unenforceable.

The Sainis’ claim for an alleged breach of fiduciary duty between shareholders likewise fails as a matter of law. “Washington courts have not outlined the scope of the duty owed by a shareholder to his fellow shareholders beyond the common sense prohibition against retaining personal profit *owing to the corporation.*” McCormick v. Dunn & Black, P.S., 140 Wn. App. 873,

894-95, 167 P.3d 610 (2007), review denied, 163 Wn.2d 1042 (2008) (italics added). Thus, the duty is to the corporation, not to fellow shareholders. “The stockholders have no direct power to manage the affairs of the corporation. They must function through a board of directors.” Lycette, 21 Wn.2d at 862.

Although Mr. Gillon managed the business, he was not the majority and controlling shareholder, as the Sainis argue. See Appellants’ br. at 31. The Sainis allege that they had either *a majority ownership interest* in PNS, or, at a minimum, *an equal ownership interest* with Mr. Gillon. CP 104-105 at ¶¶3.2-3.5, and CP 106 at ¶3.11. Ms. Saini was also a director and officer of PNS. CP 441. The Sainis thus concede that Mr. Gillon was not the controlling shareholder. Indeed, no shares of stock were ever issued. CP 441.

The Sainis’ remaining three causes of action, which were concurrently asserted by PNS, are for breach of a director’s and officer’s duty of good faith and loyalty to the corporation; wrongful diversion of corporate assets; and conversion of corporate assets. CP 114-18. Each claim belongs to PNS, not the Sainis individually. In essence, the Sainis have asserted a shareholder’s derivative claim, which cannot be maintained unless the corporate entity refuses or is unable to act. “In a derivative suit, a stockholder asserts rights or remedies belonging to the corporation for the corporation’s benefit Such suits arise in equity to enforce a corporate right which the corporation fails, is

unable, or refuses to assert by court action.” Haberman v. WPPSS, 109 Wn.2d 107, 147, 744 P.2d 1032, 750 P.2d 254 (1987); CR 23.1. PNS asserted its own claims against the Gillons, which were adjudicated in favor of the Gillons at trial. CP 462-64. The Sainis’ identical claims, therefore, fail as a matter of law.

Res judicata also bars the Sainis from relitigating the identical claims in a subsequent proceeding. Officers Guild, 157 Wn. App. at 327-28. The Sainis had their day in court through PNS. Had PNS prevailed on its claims against the Gillons, the Sainis would have been the direct beneficiaries of any monetary award, since they have had sole ownership and control of PNS since August 12, 2008. Ex 10.

D. The Entire Appeal is Frivolous Because it is so Devoid of Merit That There is No Chance of Reversal; Therefore, the Gillons Should be Awarded Their Attorney Fees and Costs.

“RAP 18.9 authorizes an award of terms or compensatory damages against a party who `uses these rules for the purposes of delay, files a frivolous appeal, or fails to comply with these rules. . . .” Delany v. Canning, 84 Wn. App. 498, 509, 929 P.2d 475 (1997), review denied, 131 Wn.2d 1026 (1997) (quoting RAP 18.9(a)). An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there is no reasonable possibility of reversal. Id. at 510. Re-

solving all doubts in favor of the Sainis, their appeal is frivolous; it raises no debatable issues upon which reasonable minds could differ.

Pursuant to RAP 18.9(a), an award of attorney fees may be made against “a party or counsel” who violates the rule. The Court should order that opposing counsel pay the Gillons’ attorney fees. Counsel represented the Sainis and PNS at trial (CP 440) and on appeal. As such, she was fully aware of the issues raised and adjudicated at trial. She must also be held knowledgeable of the standards of appellate review and procedure.

The judgment in favor of the Gillons has no reasonable possibility of reversal because (1) no assignment of error or argument was made that the findings of fact were not supported by the evidence; (2) no assignment of error or argument challenged the trial court’s conclusions of law; (3) each of the trial court’s findings was supported by substantial evidence; (4) no objection or motion for recusal was made at trial when the trial judge disclosed the grounds purporting to show bias; (5) the mere fact that the trial judge had his tax returns prepared by another member of the firm employing a witness for the Gillons cannot reasonably be said to constitute bias as a matter of law; (6) the argument that the judge gave more credibility to the testimony of Ms. Pratt than to Ms. Couch is not proper for appellate review; (7) the Sainis failed to designate critical matters considered by the trial court in dismissing

their claims on summary judgment, thus precluding review by this Court; (8) the Sainis' claims were raised and adjudicated at trial, which the Sainis concede; and (9) each claim fails as a matter of law.

Although the order dismissing the Sainis' claims was based on the Gillons' summary judgment motion addressing the second amended complaint (CP 189-191), the Sainis cite to, and argue from, their abandoned original complaint (CP 1-16), and an unrelated summary judgment motion (CP 49-63), in asserting that the trial court erred in dismissing their claims. See Appellants' br. at 16, 20, 22-23, 26, and 33.

The Sainis also cite repeatedly to their original complaint, and to their self-serving declarations (CP 831-916), as support for their "factual background". See Appellants' br. at 6-12. The declarations were the subject of motions to strike brought by the Gillons, as reflected in the trial court's summary judgment order. CP 189-191. The Sainis, however, failed to make the motions to strike part of the record on appeal. The Sainis likewise failed to make part of the record the declarations filed in support of the Gillons' motion to dismiss the Sainis' claims; they then argued that the trial court erred *because the Gillons failed to file declarations in support of their motion.* Appellants' br. at 1, 15, 17, 21, 25-26.

The Sainis' brief misrepresents the record below; it contains many self-

self-serving and unsupported statements; it also states, as established fact, matters which were either adjudicated to the contrary at trial, or for which no findings of fact were made. See Appellants' br. at 6-7, 10, and 13, 16-27, 29-41. "If no finding is entered as to a material issue, it is deemed to have been found against the party having the burden of proof." Pacesetter Real Estate v. Falls, 53 Wn. App. 463, 475, 767 P.2d 961 (1989). The Sainis' unsupported, self-serving statements warrant no consideration. An appellate court will not consider self-serving statements in a brief that are unsupported in the record. Housing Auth. v. Newbigging, 105 Wn. App. 178, 184, 19 P.3d 1081 (2001). The Sainis' failure to present a fair statement of the facts also violates RAP 10.3(a)(5).

The Sainis' appeal has served only one purpose – to further unnecessarily delay this litigation, which the Sainis began in August of 2007. CP 1. Attorney fees are therefore appropriate under RAP 18.9(a). Because counsel for the Sainis drafted their brief, and thus controlled its content, and because counsel chose to pursue the appeal, it is she against whom the award of attorney fees should be made.

Alternatively, an award of attorney fees should be against the Sainis, not PNS. Until the Sainis pay the Gillons the MOA purchase price, the Gillons still have monies invested in PNS, and the Sainis now have sole control of

the business. It would, therefore, be inequitable to allow them to use PNS's funds to pay an award of attorney fees. Furthermore, seven out of eight of the Sainis' assignments of error, and 40 pages of their 50-page brief, are devoted to the trial court's summary judgment dismissal of their individual claims. The remainder of their brief addresses the trial judge's alleged bias, which would also benefit the Sainis if they were to prevail on appeal.

IV. CONCLUSION

The judgment should be affirmed. The trial court's unchallenged findings of fact are verities on appeal. There is no evidence to support the claim that the trial court judge was biased, and the Sainis' bias argument turns on the credibility of the witnesses, which is not a proper matter for appellate review. The Sainis' failure to designate critical matters considered by the trial court in dismissing their claims on summary judgment precludes review by this Court. Even if the trial court erred in dismissing the Sainis' claims, the error was harmless, because each claim and related issue was adjudicated in favor of the Gillons at trial. Moreover, since PNS was the real party-in-interest, and brought claims against the Gillons in its own right, the Sainis' concurrent claims against the Gillons fail as a matter of law.

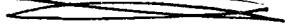
Attorney fees are appropriate under RAP 18.9(a) because the appeal raises no debatable issues upon which reasonable minds could differ; it is so to-

tally devoid of merit that there is no reasonable possibility of reversal. Counsel for the Sainis should be ordered to pay the attorney fees, because she chose to pursue the appeal and decided both the form and substance of the Sainis' brief. Alternatively, the attorney fees should be awarded against the Sainis and not PNS.

DATED this 2nd day of May, 2011.

Respectfully submitted,

CONE GILREATH LAW OFFICES

By: 

Douglas W. Nicholson, WSBA #24854
Attorney for Respondents

Appendix A

FILED

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KITTITAS COUNTY
SUPERIOR COURT CLERK

1 **IN THE SUPERIOR COURT OF WASHINGTON IN AND FOR KITTITAS COUNTY**

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

5 Plaintiffs,

6 PNS PROPERTIES, INC., a Washington
7 corporation,

8 Third Party Plaintiff,

9 v.

10 PARMINDER SINGH GILLON and
11 BHUPINDER GILLON, as individuals
12 together with the marital community
13 composed thereof,

14 Defendants.

15 *****

16 THIS MATTER, having duly and regularly before the undersigned judge in the above-
17 entitled Court on defendant Gillons' motion for summary judgment dismissal of plaintiff Sainis'
18 first through fifth causes of action, and the Court having reviewed the files and materials herein,
including the following:

- 1. The pleadings on file herein;

Order Granting Gillons' Motion for
Partial Summary Judgment
Page 1 of 3

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Telephone (509) 925-3191
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- 1 2. Defendant Gillons' motion for summary judgment dismissal of plaintiff Sainis'
- 2 first through fifth causes of action as alleged in the Second Amended Complaint;
- 3 3. The declaration of Douglas W. Nicholson in support of defendant Gillons'
- 4 motion, including attached exhibits;
- 5 4. Plaintiff Sainis' response in opposition to defendant Gillons' motion for summary
- 6 judgment;
- 7 5. The declarations of plaintiffs Saini in support of their opposition, including
- 8 attached exhibits;
- 9 6. The declaration of Noah Davis in support of plaintiff Sainis' response, including
- 10 attached exhibits;
- 11 7. Defendant Gillons' reply to plaintiff Sainis' response;
- 12 8. The declaration of Parminder Gillon in support of defendant Gillons' reply to
- 13 plaintiff Sainis' response, including attached exhibits;
- 14 9. The supplemental declaration of Douglas W. Nicholson in support of the Gillons'
- 15 reply to plaintiff Sainis' response;
- 16 10. Defendant Gillons' motion to strike the Sainis' declaration and exhibits submitted
- 17 in response to the Gillons' motion for summary judgment;
- 18 11. The declaration of Tiffany Couch filed in response to defendant Gillons' reply;
- 19 12. The Praecipe filed by plaintiff Sainis' counsel;
- 20 13. Defendant Gillons' motion to strike the Sainis' late-filed exhibits and the
- 21 declaration of Tiffany Couch;
- 22
- 23
- 24

1 14. The supplemental declaration of Noah Davis in support of Sainis' opposition to
2 the Gillons' motion for summary judgment and objection to the Gillons' second motion to strike;

3 15. The Gillons' motion to strike the supplemental declaration of Noah Davis and
4 attached Exhibits;
5 and having heard oral argument by counsel for the respective parties, and having duly considered
6 the matter before it,

7 IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that defendant Gillons'
8 motion is hereby granted, and that plaintiff Sainis' first through fifth causes of action, inclusive,
9 are hereby dismissed, with prejudice.

10 DONE IN OPEN COURT this 24th day of April, 2009.

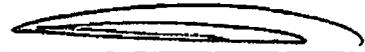
11 
12 The Honorable Scott R. Sparks

13 Presented by:

Approved as to Form,
Notice of Presentation Waived:

14 CONE GILREATH LAW OFFICES

IN PACTA PLLC

15 By: 

16 Douglas W. Nicholson, WSBA #24854
17 Attorney for Defendants Gillons

18 By: _____

Noah Davis, WSBA #30393
Attorney for Plaintiffs Saini

Appendix B

MEMORANDUM OF AGREEMENT

The undersigned parties, BHISHAM SAINI and NEENA SAINI (hereinafter "Saini") and PARMINDER GILLON and BHUPINDER GILLON (hereinafter "Gillon"), each acting individually and on behalf of their respective marital communities, hereby agree as follows:

1. Effective as of 5:00 p.m. on Tuesday, August 12, 2008, management and control of PNS Properties, Inc. shall transfer from Gillon to Saini;

2. All liabilities ^{actually or profits, income gained} incurred by or on behalf of PNS Properties, Inc. after said date and time shall be the sole responsibility of Saini, who shall in turn indemnify and hold harmless Gillon from same; ^{PNS Inc & its sole shareholder}

3. ~~On or before 5:00 p.m. on Tuesday, August 19, 2008, Saini shall either agree to buy out Gillon's interest in PNS Properties, Inc. or sell PNS Properties, Inc., including all assets thereof, and shall confirm their decision in writing by said date and time,~~

4. ~~In the event Saini ^{shall} elects to purchase Gillon's interest in PNS Properties, Inc.,~~ The purchase price shall be the total sum of all funds invested by Gillon in PNS Properties, Inc., whether by capital contribution or loan, and Gillon shall provide to Saini the documentation necessary to confirm said amount; ~~the purchase price to be paid shall be by agreement of the~~

^{Parties, by independent audit or by court order - and any amounts remaining in dispute shall remain a part of the litigation.} 5. Said funds shall be placed into an interest-bearing blocked account, pursuant to court order, and shall remain in said account until such time as the dispute between the parties giving rise to Kittitas County Superior Court Case No. 07-2-00469-9 shall be resolved through settlement, arbitration and/or mediation, or by trial on the merits; ^{Alternatively, the Sainis may purchase/place a bond into the court registry in the court FRO by Paragraph 4.}

6. In the event any funds are determined to be owed by Gillon to PNS Properties, Inc. and/or Saini arising from the allegations contained in said complaint, said funds shall be paid to PNS and/or Sainis from the purchase price funds being held in the blocked accounts before the balance, if any, is distributed to Gillon; ^{however this paragraph does not act as a cap on any settlement amount or award that either party may be entitled through the litigation - see P 7.}

7. In signing this agreement, neither Saini nor Gillon waives any rights or remedies available to them arising from the complaint and counterclaims alleged in the above-referenced litigation; ^{nor does} ~~this Agreement does not affect liability for ~~or ownership~~~~

^{my unknown of pre-existing debts or income earned or assets held prior to 5pm 8/12/08 & which shall be determined and operational at a later date as part of the ongoing litigation.}

8. Parminder Gillon agrees to cooperate and assist with the transition of management & ownership of the company & gas station including turning over all keys & combinations & passwords (with the exception of the office located on premise to which Parminder shall ~~keep the keys & have access to until 8/19/08 @ 6pm. at which time he shall~~ have access to until 8/19/08 @ 6pm. at which time he shall

Read, understood and agreed.

Parminder Gillon
Parminder Gillon, individually and on behalf of the marital community comprised of Parminder and Bhupinder Gillon

Read, understood and agreed.

Bhupinder Gillon
Bhupinder Gillon, individually and on behalf of the marital community comprised of Bhupinder and Parminder Gillon

Read, understood and agreed.

Bhisham Saini
Bhisham Saini, individually and on behalf of the marital community comprised of Bhisham and Neena Saini

Read, understood and agreed.

Neena Saini
Neena Saini, individually and on behalf of the marital community comprised of Neena and Bhisham Saini

8 8 8. Cont - Parminder also agrees to provide a list of employee work hours / shifts & to provide a list of vendors / third parties by 6pm Friday August 15

8 8 8 9. PNS Inc will provide an accounting for all finances (assets, income, liabilities) from inception through to ~~7/31/08~~ ^{7/31/08} to be provided by 6pm Friday August 15 & for all records 8/1 - 8/12 to be provided by 9/30/08.

8 8 10. The Parties shall execute a stock purchase Agreement consistent with this Memorandum of Agreement as soon as practical.

8 8 11. By special meeting of the shareholders held today, Parminder & Board & Neena assumed all offices of the company.
... elected President & Chairman.

CERTIFICATE OF SERVICE

I certify that on the 2nd day of May, 2011, I caused a true and correct copy of this Brief of Respondents to be served on the following in the manner indicated below:

Counsel for Defendant/Appellants:

Cathy Busha
Bush Law Office
409 N. Water Street, Ste. 101
Ellensburg WA 98926

(X) Hand-Delivery

By: 
Kimberly Baifes