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No. 67823-0-I

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

Mr. John L. Donlin,

Appellant

v.

Mr. Jerry Murphy, *et al.*,

Respondents

OPENING BRIEF OF APPELLANT JOHN L. DONLIN

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67823-0-I
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10/10/03

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This story begins, like so many storied partnerships, with two individuals Mr. John Donlin (the Appellant and “Donlin”) and Mr. John Murphy (the Respondent and “Murphy”) each seeking an opportunity. Murphy had become unemployed in early 2005 when a Court appointed Special Master terminated his employment as the Trustee of the John Graham Trust. CP 102, 109-15. Donlin had long worked in the family business as an “in-law” and sought create something on his own. CP 102.

Donlin and Murphy met in approximately 2003 on the sidelines of the children’s soccer games. CP 102. Over the years they got to know each other while watching youth soccer and cheering on their kids. *Id.* In early 2005, their conversations turned to matters of business affairs and of going into business together—possibly buying a business from Donlin’s relatives. CP 102-3. Their intent was to be 50/50 partners. CP 102.

In early 2006, the two men purchased Greenshields Industrial Supply Inc. (“GIS”) located in Everett. CP 103. They agreed to a purchase price of \$875,000 with each man contributing \$237,000 with the balanced financed. *Id.* In 2006, the two men operated GIS. During 2006, Murphy caused GIS to improve the real estate and buildings. *Id.*

In 2007, it all changed. Murphy demanded that Donlin give up equity to Murphy without any compensation. CP 104. When Donlin

refused the offer, Murphy expelled Donlin from the business and its property. CP 105. Murphy next secretly formed a limited liability company that purchased the land from out under GIS. Donlin knew nothing about the land deal until it was over and GIS' rent and lease costs began to climb.

On April 4, 2009, Donlin, utilizing different lawyers, filed a lawsuit for a Judicial Dissolution and accounting of GIS. CP 297. As the litigation proceeded, Murphy formed yet another entity, Contractor Supply Corporation ("CSC"), on August 9, 2009. CP 254. CSC pushed GIS out of its business operations. CP 253-4, 282-89.

On September 11, 2009, the trial court appointed a receiver on Donlin's motion. CP 96, 246-49. On October 7, 2009, Donlin amended his Complaint to include Murphy and CSC in the lawsuit and to include additional derivative claims. CP 250. On November 4, 2009, the trial court approved the sale of GIS's assets and debt to CSC on the receiver's recommendation. CP 246-49. The trial court entered an Order confirming the GIS sale on December 14, 2009. CP 243-44.

On April 1, 2010, Washington's Secretary of State administratively dissolved GIS because GIS failed to file its renewal paperwork. CP 164. On May 7, 2010, Murphy filed a summary judgment motion seeking, *inter alia*, to dismiss Donlin's remaining derivative claims. CP 214-36. The

trial court denied the motion. CP 210-13. On June 10, 2010, Donlin dismissed his personal claims against Murphy and proceeded to trial on the derivative claims. CP 207-09.

Trial was set for September 19, 2011. CP 167. On September 16, 2011, CSC and Murphy moved to dismiss the remaining derivative claims. CP 177-79. The trial granted the Motion to Dismiss. CP 1-2. The trial court denied Donlin's Motion for Reconsideration and Donlin then filed this Appeal. CP 3-8.

As discussed more thoroughly below, this Appeal will likely turn on the parties' competing views of: (1) CR 23.1, (2) RCW 23B.14.340, (3) the meaning of Judge Farris' June 7, 2010 Order, and (4) Sound Infiniti, Inc. v. Snyder, 169 Wash.2d 199, 212-213, 186 P.3d 1107 (2010). The question under CR 23.1 is whether the plaintiff shareholder is required to be a shareholder of an active corporation, or whether the plaintiff shareholder may fairly and adequately represent the interests of the similarly situated shareholders of an administratively dissolved corporation? The question under RCW 23B.14.340 is whether the statute encompasses the remedies, rights, and claims related to derivative claims even when the subject corporation is administratively dissolved? Next, did Judge Farris' June 7, 2010 Order create residual GIS property to be disposed of under Washington's corporate dissolution statutes? Last, did

the Court in Sound Infiniti, Inc., dismiss the plaintiff's derivative claim solely because he lost his shareholder status or because he was the only shareholder to lose his status while the entity continued to exist as an active Washington Corporation and the defendants remained shareholders?

II. ASSIGNMENTS OF ERROR

1. The lower court erred in concluding that GIS' administrative dissolution precluded Donlin from meeting the requirement under CR 23.1 that he fairly and adequately represent the interests of the similarly situated shareholders to maintain his derivative standing. CP 84.
2. The lower court erred in concluding that RCW 23B.14.340's mandate—that an administrative dissolution shall not take away or impair any remedy available against such a corporation or its shareholders for any claim existing prior to the corporation's dissolution—failed to apply to derivative claims. CP 86.
3. The lower Court erred in failing to conclude that Donlin maintained his status as shareholder after GIS' administrative dissolution under RCW 23B.14.050 (1) that provides that administratively dissolved corporations continue in existence to wind up their affairs by, *inter alia*, collecting its assets. CP 88-9.
4. The lower court erred in concluding that Judge Farris' June 7,

2011, Order failed to create residual personal property vested in GIS capable of being collected upon by GIS post dissolution. CP 91-3.

5. The lower court erred in concluding that Judge Farris' June 7, 2010, Order did not consider and reject Murphy's argument that GIS' administrative dissolution mandated the dismissal of Donlin's derivative claims because the dissolution divested Donlin of his ownership status of GIS that in turn divested Donlin of his derivative standing to bring such claims. CP 177-79.

III. STATEMENT OF ISSUES

1. **Derivative Standing under CR 23.1:** Did GIS' administrative dissolution during the pendency of Donlin's derivative claims render Donlin incapable of fairly and adequately representing the interests of GIS's other shareholders when—by virtue of RCW 23B.14.210 (3), RCW 23B.14.050 (1), and Judge Farris' June 7, 2010 Order—their rights as GIS shareholders remained identical to Donlin's rights with respect to the derivative claims throughout the dissolution process. **Assignment of Error**

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2. **RCW 23B.14.340:** Whether RCW 23B.14.340's mandate that the administrative dissolution of a corporation shall not take away or impair any remedy available against such corporation or its shareholders for any

right or claim existing prior to the corporation's dissolution applies to derivative claims such that GIS' administrative dissolution would not take away or impair Donlin's derivative claims against Murphy. **Assignment of Error 2**

3. **RCW 23B.14.210(3)**: Whether RCW 23B.14.210(3)'s mandate that a corporation continues its existence as necessary to wind up its business and affairs after being administratively dissolved resulted in GIS' continued corporate existence after its administrative dissolution so that it could wind up its business affairs by completing Donlin's lawsuit on the derivative claim. **Assignment of Error 3**

4. **Derivative claims as a post dissolution asset**: Whether Judge Farris' hand penned interlineation on the June 7, 2010 Order that "the sale of the business [GIS] was Court authorized on the condition the Plaintiff's and shareholders claims in this lawsuit would remain for trial and survive the sale, [sic][and] not be transferred" created residual property rights in GIS that required winding up after the administrative dissolution. **Assignment of Error 4**

5. **Trial Court considered and rejected Murphy's argument that Donlin loss of shareholder status divested him of derivative standing**: Whether the trial court's denial of Murphy's May 7, 2010 Motion for Summary Judgment constituted a consideration and rejection of Murphy's

argument—that Donlin lost his derivative standing when GIS administratively dissolved during the pendency of this litigation because the dissolution stripped him of his shareholder status—when the trial court issued the June 7, 2010, Order denying summary judgment (1) after Murphy expressly informed the court that GIS was administratively dissolved a month prior to the motion and when Murphy presented the court with only two cases (both of which were from out of state courts) for the proposition that a plaintiff shareholder loses standing to maintain a derivative claim if and when they lose their status as corporate shareholder. **Assignment of Error 5**

IV. STATEMENT OF THE CASE

A. The Parties and the Initial Background Facts.

Donlin and Murphy met in about 2003. CP 102 Donlin had long worked in a number of family-run businesses, while Murphy had been a trustee with the John Graham Trust. CP 102, 109-15. By 2005, Donlin wanted to venture out on his own and Murphy had been removed by from his position as Trustee by a court appointed special master. CP 102, 109-15. The two men sought to go into business together as 50/50 partners. CP 102.

By late 2005, the men had found a business to buy: Greenshields Industrial Supply Inc. (“GIS”) located in Everett’s industrial district and

specializing in hoses, hose fittings, cable, tools and like items. CP 103. The sellers were selling the business and the underlying real estate. CP103. The men agreed to purchase the business, but they lacked the funds to purchase the underlying real estate. CP 103. Therefore, they decided to lease the underlying real estate with the lease including an option to buy the real estate and buildings. CP 103. The purchase option was exercisable by both men jointly. CP 103. The purchase price was \$875,000 with each man contributing \$237,000 with the balanced financed. In 2006, the two men operated GIS. CP 103. During 2006, Murphy caused GIS to improve the real estate and buildings in 2006. CP 299, 252

In 2007, it all changed. In February, Murphy requested that Donlin agree to adjust GIS's equity to 65/35% in Murphy's favor. CP 104 Donlin refused. CP105 In May 2007, Murphy wrote Donlin expelling him from GIS's operations and the real property. CP 105 On June 18, 2007, Murphy formed a limited liability company called Whido Isle LLC without notice to and the knowledge of Donlin. CP 105, 106, 128-30, 139-40, 142-44. Whido Isle promptly exercised a purchase option on the real property underlying GIS. CP 105, 106. Despite his 50% ownership interest in GIS, Donlin still knew nothing. CP 105, 106.

B. Superior Court Proceedings.

On April 4, 2009, Donlin, utilizing different lawyers, filed a lawsuit for a Judicial Dissolution and accounting of GIS. CP 297. As the litigation proceeded, Murphy formed another entity, Contractor Supply Corporation (“CSC”), on August 9, 2009. CP 254. CSC adopted GIS’s business operations, employees, and vendor/credit relationships. CP 254, 253, 282-89. Donlin and GIS’s prior debt were not initially part of CSC. CP 284.

On September 11, 2009, the trial court appointed a receiver on Donlin’s motion. CP 96, 246-49. On October 7, 2009, Donlin amended his Complaint to include Murphy and CSC in the lawsuit and to include additional claims. CP 250. On November 4, 2009, the trial court approved the sale of GIS’s assets and debt to CSC on the receiver’s recommendation. CP 246-49. The trial court ruled that the sale of GIS’s assets to CSC failed to include the claims raised by Donlin’s Amended Complaint and that such claims were preserved and could go forward to trial. CP 243-44. The trial court entered an Order confirming the GIS sale on December 14, 2009. CP 243-44.

The litigation continued throughout 2010 with the lawsuit focused on the actions of Murphy and CSC. CP 214, 237. On April 1, 2010, Washington’s Secretary of State administratively dissolved GIS because

GIS failed to file its renewal paperwork. CP 164. On May 7, 2010, Murphy filed a summary judgment motion seeking, *inter alia*, to dismiss Donlin's remaining derivative claims. CP 214-36. The motion raised a number of arguments to support why the court should dismiss Donlin's claims. CP 214-36. With respect to the derivative claims, Murphy argued that Donlin lost his standing to maintain the derivative claims because he ceased to be a GIS shareholder when GIS administratively dissolved. CP 233-36. Murphy's argument on this point relied solely on two cases that each turned on the rule that derivative claims are usually dismissed if the plaintiff shareholder is divested of ownership status during the pendency of the litigation. CP 233-34. The trial court rejected this reasoning when it denied the motion. CP 210-13.

On June 10, 2010, Donlin dismissed his personal claims against Murphy and proceeded to trial on the derivative claims. CP 207-09.

Trial was set for September 19, 2011. CP 167. CSC and Murphy moved to dismiss the remaining derivative claims based on the argument that GIS's administrative dissolution divested Donlin of his derivative standing necessary to maintain derivative claims. CP 193-206. The court heard this motion on September 16, 2011 and granted the Motion to Dismiss. CP 177-79. The trial court denied Donlin's Motion for Reconsideration and Donlin then filed this Appeal. CP 1-8.

V. ARGUMENT

Donlin appeals the trial court's September 16, 2011, Order granting Murphy's Motion to Dismiss. Murphy brought his CR 12(b)(6) Motion to Dismiss for the purpose of dismissing Donlin's derivative claims. Murphy set his motion to be heard on the Friday before the first day of trial, which was Monday September 19, 2011.

The crux of Murphy's motion was that GIS' April 1, 2010 administrative dissolution deprived Donlin of his ownership status of GIS shares. CP 164. Murphy then reasoned that Donlin's loss of shareholder status in turn divested him of his derivative standing such that he could no longer rightly pursue such claims on GIS' behalf. CP 193-206. The trial court agreed and issued the Order of Dismissal. CP 177-79.

This appeal centers on how a corporation's administrative dissolution, during the pendency of a shareholder's litigation of derivative claims, impacts the plaintiff shareholder's standing to maintain the derivative claim. Before the trial court, Murphy took the position that GIS' administrative dissolution extinguished the entity's existence and immediately terminated Donlin's ownership of GIS shares. CP 203. However, this position is directly contradicted by at least three Washington statutes: RCW 23B.14.210(3); RCW 23B.14.050(1), and RCW 23B.14.220(3) that collectively state that an administratively

dissolved company continues its existence. These statutes represent the view of Washington's legislature on the question of corporate existence post administrative dissolution. A slightly different question, however, is before this Court with respect to these three statutes; whether and how the statutes in question to apply to derivative claims post administrative dissolution.

The second major question for the Court is whether a shareholder plaintiff may continue to satisfy the requirements of CR 23.1 when the subject corporation is administratively dissolved during the pendency of his or her derivative claim. Before the trial Court, Murphy took the position that a plaintiff shareholder's loss of shareholder status (which according to Murphy occurred axiomatically upon an administrative dissolution) prevented the plaintiff from fairly and adequately representing other similarly situated shareholders. As such, a plaintiff shareholder in this context could not meet the requirements of CR 23.1 and therefore such a plaintiff lost his or her standing to maintain a derivative claim.

At various points in the litigation, Murphy presented the trial court with legal authority that affirmed his position with respect to such a loss of derivative standing. But none of the cited cases involved the question of a corporation being administratively dissolved during the pendency of a derivative claim. In the cases cited by Murphy, the respective courts

dismissed the plaintiff shareholder's claims based on a finding that the plaintiff lost derivative standing when: (1) the shareholder plaintiff lost his shareholder status but the entity continued in existence as an active Washington corporation and the defendants continued their shareholder status in the active corporation; (2) the shareholder plaintiff lost his shareholder status because a third-party purchased all the corporate shares, including the shares of the plaintiff shareholder; and (3) the shareholder plaintiff lost his shareholder status because he was the sole shareholder, who lost his shareholder status when he caused his entity to file for bankruptcy thereby vesting all shareholder rights in the bankruptcy estate of now bankrupt entity. Murphy did not present the trial court with any authority addressing the interplay between the administrative dissolution of an entity and the ability of shareholder plaintiff to maintain his or her derivative standing.

Murphy's approach appeared to create a favorable forfeiture based on an analysis that seems inconsistent with the Washington's administrative dissolution statutes creating and mandating the administrative dissolution process. To Donlin, the parties' competing approach to the interplay between the state dissolution statutes and the civil rule-created requirements for derivative standing are illustrated by an analogy to the idea of a small boat filled with people.

In Murphy's view, the critical idea is that a shareholder plaintiff (a person in the small boat) loses the ability to maintain their derivative standing the moment they are thrown from the boat (i.e. lose their shareholder status) because they no longer have sufficiently shared interests with anyone who remains in the boat to be able to act on behalf of people in that small boat. In fact, Donlin would generally agree with the Murphy position provided that anyone remained in the boat. But in the case of a corporation's administrative dissolution, everyone and anyone in the boat is thrown out of the boat at precisely the same moment. Thus, with respect to derivative claims, the boat passengers maintain a unity of interests as they transition from the boat to the water (i.e. as the shareholders move from shareholders of an active corporation to shareholders in an administratively dissolved corporation). Donlin specifically posits that this continued unity of interests is the touchstone of compliance with the requirement under CR 23.1 that the plaintiff shareholder must fairly and adequately represent the interests of other similarly situated shareholders.

Contrary to Murphy's position before this Court, Donlin's position harmonizes the requirements of CR 23.1 with the dissolution process created by the three statutes referenced above (RCW 23B.14.210(3); RCW 23B.14.050(1), and RCW 23B.14.220(3)). These statutes operate

collectively to enable a dissolved entity to continue to exist so that the corporation may wind up its business affairs in an orderly fashion without the administrative dissolution working a forfeiture of any claim. This continued existence, even if for the limited purpose of winding up a corporation's business interests, necessarily means the continued existence of shareholders with a proprietary interest in the dissolved corporation's wind up rights and residual property interests. This continued existence would also enable a shareholder to represent the other shareholder who would all hold the same rights with respect to the corporation's post dissolution wind up rights and residual property interests. This reasoning harmonizes the effects of the civil rule creating derivative standing with the effects of the statutes creating administrative dissolution.

The final wild-card fact before this Court is the legal effect of Judge Farris' hand-written interlineation on the June 7, 2010 Order denying Murphy's Motion for Summary Judgment. In addition to denying all the issues in Murphy's Motion for Summary Judgment, Judge Farris wrote, "The sale of the business was court authorized on the condition the Plaintiff's and shareholders claims in this lawsuit would remain for trial and survive the sale,[and] not be transferred."

To Donlin, Judge Farris' words appear to create two independent conditions for trial court's approval of the sale of GIS to CSC. First, the

shareholder claim in the lawsuit had to remain for trial. Second, the shareholder claims in the lawsuit survived the sale vested in GIS and they were not transferred to CSC. Significant to Donlin is the fact GIS' administrative dissolution occurred about two months prior to Judge Farris' Order. In fact, Murphy expressly told the trial court that GIS "was administratively dissolved as of April 1, 2010" in his May 2010 Motion for Summary Judgment, CP 214-36. On the Motion's following page Murphy cited two out of state cases for the proposition that "[i]f a shareholder in a corporation is divested of ownership of that corporation while a derivative suit is pending, the suit will usually be dismissed." CP 233-34. In light of these events, Donlin reads the trial court's June 7, 2010 Order as the court considering and rejecting the operative facts and arguments Murphy raised and relied upon in his September 16, 2011 Motion to Dismiss.

A. De Novo Standard of Review

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

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

A motion to dismiss for failure to state a claim is a motion on the pleadings, and extraneous evidence is not considered. Yurtis v. Phipps, 143 Wash. App. 680, 181 P.3d 849, 854 (Div. III 2008). In fact, a dismissal for failure to state a claim is appropriate only if it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief. Bravo v. Dolsen Companies, 125 Wash. 2d 745, 888 P.2d 147, 150 (1995). Finally, a Court should grant a dismissal for failure to state a claim “sparingly and with care,” and only in the unusual case when the face of the complaint shows and insuperable bar to relief. San Juan County v. No New Gas Tax, 160 Wash. 2d. 141, 157 P.3d 831, 842 (2007).

Under this standard for motions to dismiss for failure to state a claim, Donlin notes that a motion to dismiss was the improper vehicle for Murphy’s September 16, 2011, Motion because Murphy presented and relied upon evidence outside the scope of the lawsuit’s initial pleadings. The proper vehicle for Murphy’s motion would have been a motion under

CR 56. Given the nature of Murphy's motion and his reliance on evidence outside the pleadings, Donlin was entitled to the additional notice provided under the Civil Rules by CR 56. An Order granting Murphy's motion to dismiss was improper for this reason alone.

B. Administrative Dissolution does not Erase Derivative Standing

The first question is whether Donlin satisfies the standing requirements of CR 23.1 after GIS's administrative dissolution. CR 23.1 requires a unity of interest between plaintiff shareholder and the interests he or she represents. Washington's legislature appears to adopt this position also with respect to administrative dissolutions because it failed to create a special, separate process for accounting for derivative claims as part of the administrative dissolution process. To the contrary, as discussed below, Washington's legislature ensured that the administrative dissolution statutes expressly stated that an administratively dissolved corporation continues to exist for the limited purpose of winding up its business affairs. In light of this continued corporate existence, the question with respect to CR 23.1 and an administrative dissolution is whether the pre-dissolution unity of interests shared by the shareholders remains after an administrative dissolution sufficiently enough to satisfy the requirements of CR 23.1.

1. Donlin fairly and adequately represented the interests of the similarly situated shareholders of the administratively dissolved GIS.

CR 23.1 provides in relevant part:

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

Before the trial court, Murphy focused on the text that “the derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders” to argue that Donlin could not meet the requirement the moment GIS was administratively dissolved because he was no longer a “shareholder.” CP 199. More to the point, Murphy argued to the trial court that Donlin “cannot fairly and adequately represent the interests of a group which no longer exists and which [Donlin] is no longer a part.” CP 200. Thus, Murphy focused on the nature of Donlin’s rights and not on whether Donlin shared a unity of interests with the other similarly situated shareholders. Murphy’s focus enabled Murphy to contrast his view of Donlin’s shareholder rights (divested of these rights by the administrative dissolution) with the rights of shareholders of an active corporation.

The problem with this reasoning is that GIS was not an otherwise active Washington corporation after its administrative dissolution. GIS

had no group of shareholders of an active Washington corporation. GIS only had shareholders of an administratively dissolved corporation.

Murphy cited Sound Infiniti, Inc. v. Snyder, 169 Wn.2d 199, 212-213, (2010) to support his position that a shareholder loses its standing to maintain a derivative action when it loses its shareholder status. CP 202. The facts underlying Sound Infiniti are, however, significantly and fatally different than the facts of this case. In Sound Infiniti, three shareholders formed the underlying corporation. Id. A dispute arose between two of the shareholders and the third shareholder. Id. The two shareholders engineered a reverse stock split that ultimately terminated the third shareholder's ownership of corporate stock. Id. The two shareholders continued on as shareholders of the active ongoing Washington Corporation. Id. The expelled third-shareholder filed suit asserting derivative claims against the other two shareholders. Id.

In applying CR 23.1 to the facts of the Sound Infiniti matter, the Supreme Court affirmed Washington's long-standing rule that a "shareholder must remain a shareholder in order to maintain corporate derivative claims. Sound Infiniti at _____. Significant to Donlin is the fact that the Supreme Court supported its analysis by stating "[i]t is therefore utterly unreasonable to think that [the third shareholder] could fairly and

adequately represent the interests of the shareholders similarly situated, as he is simply not a shareholder.” Id.

To Donlin, the Supreme Court’s ultimate reliance on the above last statement signifies that the rule enunciated in this statement is the acid test of CR 23.1: does the plaintiff fairly and adequately represent the interest of the similarly situated shareholders. Applying this rule in the context of an administrative dissolution, which treats all shareholders identically, requires the Court to ask if the plaintiff shareholder of the dissolved corporation has a sufficient unity of interests with the other shareholders of the administratively dissolved corporation such that the plaintiff may fairly and adequately represent their interests. The answer is yes.

2. Under Washington Law, a Corporation’s Administrative Dissolution Fails to Take Away or Impair any Remedy against the Dissolved Corporation or its Shareholders

Washington law mandates that the dissolution of a corporation by administrative dissolution by the Secretary of State shall not take away or impair any remedy available against such corporation or its shareholders for any right or claim existing prior to the corporation’s dissolution. RCW 23B.14.340. RCW 23B.14.340 is significant here because the legislature specifically applied this statute to “any remedy” without carving out an exception for derivative claims. In fact, to date Murphy has cited no case or other legal authority that addresses the impact of an administrative dissolution

on derivative claims. RCW 23B.14.340 provides:

The dissolution of a corporation either (1) by the filing with the secretary of state of its articles of dissolution, (2) by administrative dissolution by the secretary of state, (3) by a decree of court, or (4) by expiration of its period of duration shall not take away or impair any remedy available against such corporation, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution or arising thereafter, unless action or other proceeding thereon is not commenced within two years after the effective date of any dissolution that was effective prior to June 7, 2006, or within three years after the effective date of any dissolution that is effective on or after June 7, 2006. Any such action or proceeding against the corporation may be defended by the corporation in its corporate name. (Emphasis added.)

To Donlin, the emphasized language is plain and clear that this statute applies any and all remedies and claims. If Washington's legislature had wanted a different result in the context of derivative claims, then they could have exempted such remedies and claims and not used words like "any remedy" and "any claim."

3. Under Washington Law, Corporations Continue to Exist After Administrative Dissolution albeit for Limited Purposes

Before the trial court, Murphy maintained that GIS "ceased to exist and was no longer a Washington Corporation." CP 198. This idea was the key-stone to Murphy's Motion to Dismiss. To Murphy, GIS had been dissolved and therefore Donlin could not fairly and adequately represent the interests of a group of shareholders that ceased to exist when GIS ceased to exist. CP 200. The trial court agreed with Murphy.

Fortunately for Donlin, Washington's legislature mandates that corporations continue to exist after their administrative dissolution. The

legislature created this legal fact with two different but related statutes

RCW 23B.14.210 (3) and RCW 23B.14.050 (1) respectively:

(3) A corporation administratively dissolved continues its corporate existence but may not carry on any business except that necessary to wind up and liquidate its business and affairs in a manner consistent with RCW 23B.14.050.

(1) A dissolved corporation continues its corporate existence but may not carry on any business except that appropriate to wind up . . . its business and affairs, including: (a) Collecting its assets;

This statutorily mandated continued corporate existence is material here because it means that Donlin and the other GIS shareholders continued to be shareholders after April 1, 2010. Admittedly, after April 1, 2010, GIS was limited to conducting the business of winding up its affairs, which including bringing the GIS claims preserved by Judge Farris' June 7, 2010 Order to trial. Donlin's efforts to bring these judicially preserved claims to trial were Donlin's effort to collect GIS assets improperly taken from GIS.

Before the trial court, Murphy seemed to suggest that the court authorized sale of GIS assets to CSC constituted a full corporate wind up of GIS's asset. Of course, this read of the situation would be inconsistent with the plain language of Judge Farris' handwritten words on her June 7, 2010 Order that expressly conditioned the Court's approval of the sale of

GIS assets to CSC on the survival of the derivative claims against Mr. Murphy and CSC. Donlin's read of Judge Farris' words is that they created a Chose in Action that remained vested in post dissolution GIS. Under this read, Donlin's efforts to bring the litigation to closure constituted the type of wind up activity specifically authorized for administratively dissolved corporations under RCW 23B.14.210(3).

4. The Trial Court Considered and Rejected Murphy's Argument that Donlin lost his Derivative Standing as Evidenced by the Court's Order Denying Murphy's Motion.

The portion of the trial court's June 7, 2010 Order generally denying Murphy's May 7, 2010 Motion for Summary Judgment leaves open to discussion the scope of the trial court's general denial Order. CP 210-13. Undoubtedly, the scope of the trial court's denial is defined by the scope of the issues raised in the moving party's motion for summary judgment.

Donlin admits that Murphy did not directly raise the issue of whether GIS's administrative dissolution mandated a dismissal of his derivative claim based on his lack of derivative standing caused by GIS' administrative dissolution. However, Murphy did expressly inform the trial court that GIS was administratively dissolved on April 1, 2010. CP 232. And, Murphy cited two out of state decisions: Johnson v. United States, 317 F.3d 1331 (Fed.Cir. 2003) and Schilling v Belcher, 582 F.2d

995 (5th Cir. 1978). CP 233. Murphy cited these decisions for the proposition that “[i]f a shareholder in a corporation is divested of ownership of that corporation while a derivative suit is pending, the suit will usually be dismissed.” *Id.* In the Johnson matter the plaintiff lost their shareholder status to their bankruptcy estate. Johnson, 317 F.3d 1331 (Fed.Cir. 2003). In the Schilling matter, the plaintiff lost their shareholder status to the buyer of all of the corporation’s shares, including the plaintiff Schilling’s shares. Schilling, 582 F.2d 995 (5th Cir. 1978). To Donlin the above quoted statement appears to be the heart of Murphy’s argument on his motion to dismiss and the cited cases reach the same result as was reached by the Supreme Court in the Sound Infiniti matter when it addressed the question of whether the plaintiff shareholder loses its derivative standing after the shareholder loses its shareholder status. If so, did not Judge Farris dispose of the issue raised in Murphy’s September 16, 2011 motion to dismiss when she issued her June 7, 2010 Order denying Murphy’s motion for summary judgment.

5. GIS is a creditor of any person or entity responsible for the loss of GIS’ property.

Before the trial Court, Murphy took the position that GIS was, under Donlin’s claims, both the creditor and debtor. In truth, under Donlin’s derivative claims GIS is the creditor and any person or entity that

improperly dissipated GIS' assets is the debtor on such a claim. Any assets recovered by GIS would then be divided by GIS' shareholders to the extent of their interests in GIS. The result will be the same after GIS' administrative dissolution because the assets would return to GIS that would then pay out the recovered funds to the shareholders of the now dissolved corporation after the payment of any remaining priority claims like taxes. Finally, as discussed above, under Washington's statutes defining the administrative dissolution process, GIS continued to exist after the April 1, 2010 dissolution. As such, any argument requiring the non-existence of GIS as a result of its administrative dissolution is without merit.

6. Donlin attempted to reinstate GIS prior to September 16, 2011.

Donlin attempted to reinstate GIS by filing the required documents with the secretary of state's office prior to September 16, 2011. CP 68-78. Before the trial court, Donlin argued that reinstating GIS rendered GIS's non-existence a nullity because GIS's reinstatement related back to the date of its prior administrative dissolution creating the legal fact that the administrative dissolution had never occurred. Specifically, RCW 23B.14.220 (3) provides:

(3) When the reinstatement is effective, it relates back to and takes effect as of the effective date of the administrative dissolution and the corporation resumes carrying on its business as if the administrative dissolution had never occurred.

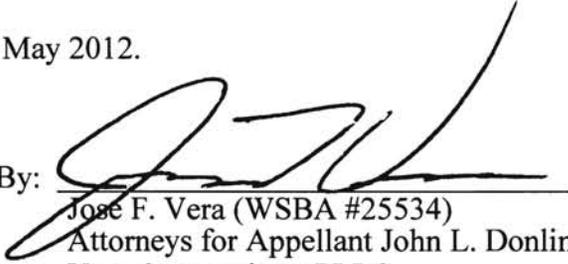
Donlin drew the trial court's attention to his reinstatement efforts and to this specific statutory provision during the September 16, 2011 hearing but to no effect on the hearing's outcome. CP 177-79. GIS's reinstatement should have resolved the issue in Donlin's favor under Washington law because Washington's legislature declined to create any exceptions to when RCW 23B.14.220 (3) would apply to render the fact of corporate non-existence a nullity. Under this statutory provision, GIS did not cease to exist.

Be this as it may, the truth of Donlin position that GIS continued to exist under RCW 23B.14.210(3) and RCW 23B.14.050 (1). As such, the result here will turn on an affirmation of these two statutes and the legislative process created thereby to wind down administratively dissolved corporations.

VI. CONCLUSION

For all these reasons, Donlin respectfully requests that the Court reverse the lower court's Order dismissing Donlin's derivative claims and remand this matter for trial.

Dated this 30th day of May 2012.

By: 

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