

No. 47716-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

ALEX SAFRANSKI, Appellant

v.

SULTAN WEATHERSPOON, Respondent.

ON APPEAL FROM CLARK COUNTY
SUPERIOR COURT
(Hon. David E. Gregerson)

**RESPONDENT'S RESPONSE BRIEF
AND CROSS-APPEAL BRIEF**

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Table of Contents

I.	INTRODUCTION	1
II.	RESPONDENT’S ASSIGNMENT OF ERROR.....	3
III.	ISSUE PERTAINING TO ASSIGNMENT OF ERROR.....	3
IV.	COUNTERSTATEMENT OF THE ISSUE PERTAINING TO APPEAL	4
V.	COUNTERSTATEMENT OF THE CASE.....	4
VI.	ARGUMENT	9
A.	Weatherspoon had Standing to Sue Safranski for Fraud.	9
1.	The Common Law Pertaining to Shareholder Standing.....	10
2.	Weatherspoon’s Fraud Claim Qualifies Under Both <i>Sabey</i> Exceptions.	15
a.	<i>The Special Duty Exception</i>	15
3.	Safranski’s Duty to Disclose Arising from Half-Truths.....	19
4.	Weatherspoon’s Damages were Personal from Injuries to “Other Shareholders.”	21
B.	The Court did not Abuse its Discretion in Denying Remittitur.....	22
VII.	WEATHERSPOON’S CROSS-APPEAL	24
A.	Standard of Review.	24
B.	The Court Erred in Awarding Prejudgment Interest on the Award of Dividends to Safranski.	24
VIII.	CONCLUSION	28

Table of Authorities

	<u>Page</u>
Cases	
<i>Adcox v. Children's Orthopedic Hosp. & Med. Ctr.</i> , 123 Wn.2d 15, 864 P.2d 921 (1993).....	10
<i>Associated Indemnity Corp. v. Del Guzzo</i> , 195 Wn. 486, 81 P.2d 516 (1938).....	20
<i>Aventa Learning, Inc. v. K12, Inc.</i> , 830 F.Supp.2d 1083 (W.D. Wash., 2011)	18
<i>Bulzomi v. Dep't of Labor & Indus.</i> , 72 Wn. App. 522, 864 P.2d 1996 (1994).....	10
<i>Dautel v. Heritage Home Center, Inc.</i> , 89 Wn. App. 148, 948 P.2d 397 (1997).....	26, 27
<i>Far West Federal Bank v. Office of Thrift Supervision Director</i> , 119 F.3d 1358 (9th Cir. 1997)	11
<i>Fiorito v. Goerig</i> , 27 Wn.2d 615, 179 P.2d 316 (1947).....	28
<i>Gilliland v. Mt. Vernon Hotel Co.</i> , 51 Wn.2d 712, 321 P.2d 558 (1958).....	20
<i>Hansen v. Rothaus</i> , 107 Wn.2d 468, 730 P.2d 662 (1986).....	27
<i>Hunter v. Knight, Vale & Gregory</i> , 18 Wn. App. 640, 571 P.2d 212 (1977).....	16, 17, 18, 19
<i>Miller v. Arctic Alaska Fisheries Corp.</i> , 133 Wn.2d 250, 944 P.2d 1005 (1997).....	20
<i>Sabey v. Howard Johnson & Co.</i> , 101 Wn. App. 575, 5 P.3d 730 (2000).....	8, 10, 11, 15, 17, 18, 19, 21, 22
<i>Scoccolo Constr. Inc. v. City of Renton</i> , 158 Wn.2d 506, 145 P.3d 371 (2006).....	24
<i>Story v. Shelter Bay Co.</i> , 52 Wn. App. 334, 760 P.2d 368 (1988).....	9
 Other Authorities	
19 <i>Am.Jur.2d Corporations</i> §1955	13
19 <i>Am.Jur.2d Corporations</i> §1956	14
27 C.J. Fraud, p. 1074, §17	20
<i>American Jurisprudence</i>	13
<i>Fletcher, Cyclopedia of the Law of Corporations</i>	11, 12, 13, 21, 22
Restatement, Second of Torts (1997)	17
 Rules	

CR 23.1.....	12
CR 50.....	9, 10
CR 56.....	10
CR 59.....	23

I. INTRODUCTION

A jury found that Appellant Alex Safranski fraudulently induced Respondent/Cross-Appellant Sultan Weatherspoon to sell his majority interest in Duma Video, Inc. (“Duma”), causing him to sustain economic damages.¹

The fraud occurred when Safranski concealed from Weatherspoon that he had entered into a bonus arrangement with the purchaser of Duma’s assets. The jury found he had a duty to disclose that arrangement to Weatherspoon, and that Weatherspoon would not have entered the purchase and sale agreement had Safranski made that disclosure.

The trial was bifurcated by the court. Phase I involved a six-day jury trial on plaintiff Safranski’s wage claim, and defendant Weatherspoon’s counterclaim for fraud. On March 31, 2015, the jury found against Safranski on his wage claim, and for Weatherspoon on his fraud counterclaim. Weatherspoon was awarded \$275,637.50 in damages.²

After the jury trial, a bench trial was conducted on Safranski’s claim that certain amounts Duma paid Weatherspoon to reimburse him for business expenses over a four-year period should be treated as dividends (Phase II). On May 28, 2015, the court entered findings of fact

¹ CP 384.

² CP 384.

and conclusions of law awarding Safranski \$57,785 as dividends, and then adding \$37,429 in prejudgment interest.³

The court entered a net judgment of \$169,893.50 in favor of Weatherspoon.⁴

Safranski appeals from the fraud verdict. He contends that he is sheltered from any liability because the victim of his fraud lacked standing to sue him.

Safranski argues that only Duma had a right to sue him for his fraud. But Duma was precluded from suing Safranski. The very contract selling Duma's assets, which Safranski fraudulently induced, also unwittingly transferred the fraud claim to the purchaser of Duma's assets. Safranski's fraud thus placed Duma's claim beyond reach of the court, and the majority shareholder.

The standing rule Safranski argues for does not immunize one shareholder who defrauds another shareholder. A shareholder's fraud that causes the majority shareholder to lose control of the corporation, or devalues his or her shares, is actionable by the majority shareholder.

Safranski owed fiduciary duties to Weatherspoon as a shareholder, and he owed a separate duty to disclose under the law of fraud. Safranski does not challenge the existence of either of those duties. A breach of either, or both, of those duties was actionable by Weatherspoon.

³ CP 466.

⁴ CP 419.

Safranski also challenges the trial court's denial of remittitur. The trial court properly declined to invade the province of the jury, finding that the verdict was supported by the evidence.

On his cross-appeal, Weatherspoon does not challenge the trial court's treatment of expense reimbursements as dividends. He only contends that Safranski was not entitled to an additional award of \$37,429 in prejudgment interest. The court made no finding that the expenses reimbursed to Weatherspoon were not for legitimate business purposes. The business expenses were just not sufficiently documented.

II. RESPONDENT'S ASSIGNMENT OF ERROR

Defendant Weatherspoon assigns error to the trial court's finding of fact that the dividend award for insufficiently documented business expenses was a "liquidated" liability and Safranski was entitled to \$37,429 in prejudgment interest.⁵

III. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Did the court err in finding that Weatherspoon's liability to Safranski was ascertainable, when the court's only finding to convert expense reimbursements to dividends was that Weatherspoon should have better documented the business expenses?

⁵ CP 466 (Finding I.10).

IV. COUNTERSTATEMENT OF THE ISSUE PERTAINING TO APPEAL

Does a plaintiff shareholder have standing to sue a defendant/shareholder when the defendant breaches one or both of two independent legal duties owed to the plaintiff?

V. COUNTERSTATEMENT OF THE CASE

Duma was founded by Weatherspoon in 2001.⁶ Weatherspoon had developed and patented software that compressed video. Compression of video is necessary to transmit video from a camera to a remote receiver. Examples are the transmission of video from a news helicopter to a video truck, or the transmission of video from the camera traversing an NFL football field to a video truck parked outside the stadium. The technology is complex, but in very general terms, Duma's software involved an "encoder" (on the camera end), and a "decoder" (on the receiver end). Duma licensed its encoder and decoder products to sellers and users of video equipment.

After Weatherspoon started Duma, he employed Safranski in 2003 as a software programmer to continue the company's improvement of its compression technology. He gave Safranski 20% ownership in Duma as an incentive.⁷

On July 27, 2012, Safranski filed the instant lawsuit against Weatherspoon and Duma in Clark County Superior Court.⁸ Safranski

⁶ CP 18.

⁷ CP 18.

⁸ CP 1.

alleged a claim against Duma and Weatherspoon for unpaid wages.⁹ Safranski also alleged a derivative action on behalf of Duma against Weatherspoon.¹⁰ Safranski claimed that Weatherspoon breached his fiduciary duties to Duma by taking improper reimbursements from business expenses over a four-year period.¹¹

Shortly before Safranski filed his lawsuit, on June 22, 2012, Safranski entered into an employment agreement with Duma's largest customer – a company that Safranski knew Weatherspoon had been negotiating with for three months to sell the assets of Duma.¹² That company was Broadcast Microwave Services, Inc. (“BMS”). Safranski did not disclose this employment agreement to Weatherspoon.¹³

The employment agreement contained a provision whereby BMS agreed to pay Safranski a “bonus” of \$160,000 if he would complete the development of Duma's next-generation decoder, referred to as the H.264 decoder.¹⁴

Without knowledge of Safranski's bonus arrangement, on August 17, 2012, Weatherspoon executed an agreement to sell his majority interest in Duma to BMS.¹⁵ BMS agreed to pay \$1,250,000 for Duma's assets in a transaction referred to as the Asset Purchase Agreement (“APA”).

⁹ CP 4.

¹⁰ CP 2-3.

¹¹ CP 3.

¹² CP 65.

¹³ CP 66, Br. of App., p. 7.

¹⁴ CP 66.

¹⁵ CP 66.

BMS insisted on holding back \$350,000 of this purchase price under a provision called an “Earnout.” Under this Earnout provision, BMS would not pay the \$350,000 holdback unless, in its sole discretion, Weatherspoon successfully completed the development of the H.264 decoder.¹⁶

Safranski concedes in this appeal that the H.264 decoder he agreed to develop for the \$160,000 bonus under his employment agreement was the same H.264 decoder that Weatherspoon needed to develop in order to have BMS pay the \$350,000 Earnout payment.¹⁷

Had Safranski disclosed the truth to Weatherspoon, Weatherspoon would not have sold his interest under the APA.¹⁸

Weatherspoon believed BMS had agreed to obtain the H.264 decoder only from his efforts on behalf of Duma. Unbeknownst to Weatherspoon, however, Safranski was now a competitor in a race that Weatherspoon did not know he had entered. Safranski’s bonus arrangement increased the risk that BMS would decide not to pay the \$350,000 Earnout.¹⁹ If BMS could get an H.264 decoder for \$160,000 through Safranski, why would BMS pay \$350,000 for the same decoder from Weatherspoon?

Weatherspoon delivered his H.264 decoder in the summer of 2013.²⁰ Safranski delivered his H.264 decoder to BMS around the same

¹⁶ CP 65.

¹⁷ Br. of App. at p. 1.

¹⁸ CP 109.

¹⁹ CP 109.

²⁰ CP 67.

time.²¹ BMS paid Safranski his \$160,000 bonus, but refused to pay Duma the \$350,000 Earnout under the APA, claiming the decoder was deficient.²²

Weatherspoon eventually discovered Safranski's employment agreement in the discovery process of Safranski's lawsuit.²³ Weatherspoon and Duma both asserted counterclaims for fraud discussed below.²⁴

Safranski responded by moving for summary judgment against both fraud counterclaims, arguing that neither Duma nor Weatherspoon had standing to sue him.²⁵

Regarding Duma's counterclaim of fraud, Safranski relied on a provision of the APA defining the "Purchased Assets" that were conveyed from Duma to BMS.²⁶ Section 2.01 of the APA included within the "Purchased Assets":

(g) All rights of any Action of any nature available to or being pursued by Seller to the extent related to the Business, the Purchased Assets or the Assumed Liabilities, whether arising by way of counterclaim or otherwise.

Safranski argued that Duma lacked standing because its fraud claim against him was a "Purchased Asset," and therefore, BMS owned the claim.²⁷

²¹ CP 67.

²² CP 67.

²³ CP 67.

²⁴ CP 16 (24).

²⁵ CP 82.

²⁶ CP 084-85.

²⁷ CP 085 and CP 120.

The trial court agreed.²⁸

As for Weatherspoon's direct counterclaim against Safranski for fraud, Safranski contended that Weatherspoon lacked standing because there was no duty owed by Safranski to Weatherspoon that qualified under *Sabey v. Howard Johnson & Co.*, 101 Wn. App. 575, 5 P.3d 730 (2000).²⁹

The trial court rejected this argument, holding that material issues of fact existed concerning whether Safranski had made half-truths to Weatherspoon sufficient to trigger a duty to disclose his bonus agreement with BMS.

A jury trial was conducted March 23 to March 31, 2015. The jury found Safranski liable to Weatherspoon for fraud and awarded \$275,637.50 in damages.³⁰ Subsequently, a bench trial was held on May 14-15, 2015, relating to expense reimbursements. The court awarded Safranski \$105,744 for his share of expense reimbursements and prejudgment interest.³¹ The net judgment in the amount of \$169,893.50 was entered on May 28, 2015.³² Safranski filed a Notice of Appeal on

²⁸ RP, 4/18/2014 hearing at p. 38. In a reciprocal vein, the trial court also dismissed Safranski's derivative claim filed on behalf of Duma against Weatherspoon. The court ruled that Duma's claim against Weatherspoon relating to the expense reimbursements was also a "Purchased Asset" under the APA. Safranski then recovered on a direct claim against Weatherspoon for the expense reimbursements. And yet Safranski contends on appeal that Weatherspoon lacked standing to sue him for his fraud.

²⁹ CP 085.

³⁰ CP 384.

³¹ CP 466.

³² CP 419.

June 17, 2015,³³ and Weatherspoon timely filed his Cross-Notice of Appeal on July 1, 2015.

VI. ARGUMENT

A. Weatherspoon had Standing to Sue Safranski for Fraud.

As an initial matter, the record for review was not properly presented to this Court, thus it should decline to review Safranski's assignments of error.³⁴

The trial court made two rulings regarding Safranski's defense of lack of standing: First, the trial court denied a motion for summary judgment.

Safranski then orally raised the issue of standing at the conclusion of the evidence in a Rule 50 motion for judgment as a matter of the law.

NAITO: And, Your Honor, plaintiff has a CR 50 motion for the court also.

THE COURT: Go ahead.

MR. NAITO: And this is on the -- whether or not Mr. Weatherspoon has standing to bring a fraud claim against plaintiff. And that argument is set forth on page 18 and 19 of my trial memorandum. It is substantially the same argument that was made at summary judgment.

THE COURT: Thank you. Mr. Seidl, any response?

MR. SEIDL: Your Honor, unless you need additional argument on that, I think the argument we made at

³³ CP 417

³⁴ The party seeking review has the burden of providing the appellate court with an adequate record to review the issues raised on appeal. *See Story v. Shelter Bay Co.*, 52 Wn. App. 334, 345, 760 P.2d 368 (1988).

summary judgment, in which you denied that very same motion, I would adopt and incorporate that argument.

THE COURT: It does seem to be a pure legal issue and I do appreciate counsel cutting to the chase on this. Court previously ruled on that and does find -- well, actually denies any motion based upon lack of standing and affirms.³⁵

On appeal, Safranski does not designate the factual record of evidence admitted during trial, upon which the trial court relied to deny the CR 50 motion. "An insufficient record on appeal precludes review of the alleged errors."³⁶

Without that evidence, this Court cannot properly review the basis for the denial of the CR 50 motion, and because there was a trial, Safranski cannot appeal denial of the CR 56 motion.³⁷ For that reason alone, this Court should affirm the judgment.

1. The Common Law Pertaining to Shareholder Standing.

Safranski attempts to use principles regarding standing to create a self-styled immunity for himself. According to Safranski's misguided view, no party had standing to redress the fraud he perpetrated: Not Duma, because the fraudulently-induced APA transferred Duma's fraud claim to BMS; and not Weatherspoon because Safranski owed him no duty that qualified under *Sabey*.

³⁵ SRP, 3/30/2015, p. 60, ll 4 25.

³⁶ *Bulzomi v. Dep't of Labor & Indus.*, 72 Wn. App. 522, 525, 864 P.2d 1996 (1994).

³⁷ When a trial court denies summary judgment due to factual disputes, and a trial is subsequently held on the factual issues, the losing party must appeal from the sufficiency of the evidence presented at trial, not from the denial of summary judgment. *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 35, n.9, 864 P.2d 921 (1993).

A straightforward application of the case law confirms Weatherspoon's standing to sue for breach of two independent duties Safranski owed to Weatherspoon.

Safranski initially defines the issue as one "where the courts must distinguish between a direct claim by a corporation and derivative claims by their shareholders."³⁸ He wrongly asserts that Weatherspoon did not "bring to trial a derivative suit on behalf of Duma" explaining that the court dismissed Duma's claim because the corporation sold its claim to BMS.³⁹ Thus, Safranski argues that Weatherspoon must qualify his direct claim under one of the two exceptions in *Sabey*.

Safranski cites extensively to William M. Fletcher's treatise, *Fletcher, Cyclopedia of the Law of Corporations*, which he correctly describes as "one of the leading treatises" in this area, and one that "Washington courts have expressly adopted" on this subject.⁴⁰

While both exceptions under *Sabey* apply, the issue here is not a choice between a derivative or a direct claim. Safranski ignores the well-established rule that "[a]n individual cause of action can be asserted when the wrong is both to the shareholder and to the corporation."⁴¹

As explained extensively in *Fletcher*, the requirement of a shareholder to bring a derivative claim does not arise in a case such as this one. The direct versus derivative issue arises when a shareholder

³⁸ Br. of App. at 13.

³⁹ *Id.* at 18.

⁴⁰ *Id.* at 13.

⁴¹ *Fletcher* at §5908, p. 497-98. See, e.g., *Far West Federal Bank v. Office of Thrift Supervision Director*, 119 F.3d 1358 (9th Cir. 1997).

should properly assert derivatively the corporation's claim against a party whose only legal duty was to the corporation.⁴² The threat of multiplicity of lawsuits by other shareholders, or a recovery that prejudices the interests of the non-suing shareholders are of primary concern in such cases.⁴³

Here, Duma filed its own direct claim against Safranski – not derivatively through Weatherspoon, as Safranski misstates, but as a direct claim. Indeed, Weatherspoon could not have met the requirement under CR 23.1 that he had tried and failed to have the corporation act on its claim before filing a derivative suit.

Duma's direct claim was dismissed on Safranski's motion because the trial court held that Duma's claim had been sold to BMS under the APA.

The real issue is whether Weatherspoon also had a direct claim of his own. If he did, it does not matter whether Safranski also breached a duty owed to the corporation.

A shareholder may sue to redress direct injuries to him regardless of whether the same violation injured the corporation. If the shareholders properly establish an individual cause of action, they can maintain an action against a third party despite the fact that the corporation itself is also suing that party.⁴⁴

Fletcher also describes a shareholder's right to sue as follows:

⁴² CR 23.1.

⁴³ Neither of these concerns would be present here anyway. Weatherspoon was the only shareholder, apart from the fraud-doer/shareholder.

⁴⁴ *Fletcher* at §5911.

A shareholder may sue as an individual where the act complained of creates not only a cause of action in favor of the corporation but also creates a cause of action in favor of the shareholder as an individual, such as where the act is in violation of duties arising from contract or otherwise, and owed to the shareholder directly, and under certain circumstances, even if the shareholders are unable to get relief on behalf of the corporation, their individual wrongs are not without remedy.⁴⁵

Fletcher enumerates the type of cases recognizing a shareholder's right to file a direct claim. They include:

4. Actions directly relating to the stock held by the shareholder, including... **fraud in inducing a subsequent sale of stock**....

8. Acts depriving a shareholder or member of rights such as, including acts **depriving one of the advantage of majority control**. (Emphasis added.)⁴⁶

Cases collected in *American Jurisprudence* summarize the same rule:

A stockholder may maintain an individual, as distinguished from a derivative, action against directors, officers, or others for wrongs constituting a **direct fraud** on him or her such as being induced to purchase stock in a corporation and pay a higher price than the stock was fairly and reasonably worth, or **being induced to sell stock for a sum less than its true value** by reason of false and fraudulent representations by others, or **losing control of the corporation** as the result of fraud. (Emphasis added.)⁴⁷

Finally, courts allow direct actions by shareholders when, as here, the corporation cannot obtain a recovery sufficient to protect the injured shareholder:

⁴⁵ *Id.* at 556-59.

⁴⁶ *Id.* at §5915.

⁴⁷ 19 *Am.Jur.2d Corporations* §1955 (2004).

In addition, an individual action [by a shareholder] will be allowed if there is a fiduciary relationship between the parties, which requires the wrongdoer to protect the interests of the stockholder, and if that duty has been violated and full relief to the stockholder cannot be had through a recovery by the corporation.⁴⁸

The trial court instructed the jury that Safranski owed fiduciary duties directly to Weatherspoon as a shareholder.⁴⁹ A second source of legal duty arose under the law of fraud. The court instructed the jury that Safranski had a duty to disclose the BMS bonus arrangement to Weatherspoon if the jury found that Safranski made half-truths to Weatherspoon.⁵⁰

Because Weatherspoon proved a breach of one or both of those duties, the Court should hold that his standing to assert that breach as a direct claim was never in doubt. Had Weatherspoon relied exclusively upon a duty Safranski owed only to the corporation (i.e., the duties Safranski owed as a former director or former employee of Duma), the analysis of Weatherspoon's standing would have been different. That was not the case below, however.

Application of these standing rules to deny Weatherspoon's recovery would be legally untenable. Safranski could commit fraud with impunity, while the victim of his fraud is left without remedy or redress. He cites no legal authority that would countenance such a manifest injustice.

⁴⁸ 19 *Am. Jur. 2d Corporations* §1956 (2004).

⁴⁹ CP 376.

⁵⁰ CP 372.

2. Weatherspoon's Fraud Claim Qualifies Under Both *Sabey* Exceptions.

Safranski relies upon *Sabey*⁵¹ for his standing argument. Though *Sabey* involved facts that were very different, the case only supports Weatherspoon's standing.

Plaintiff Sabey purchased a company,⁵² He sued a consultant that had provided an expert opinion to the company, before Sabey purchased the company.⁵³ During Sabey's due diligence, the consultant provided its expert opinion to Sabey, who alleged that he relied upon it in deciding to buy the company.⁵⁴ When Sabey sued the consultant individually, the defendant consultant contended that only its client, the corporation, not Sabey, had standing.⁵⁵ The Court of Appeals disagreed.⁵⁶

After stating the general rule that "a shareholder cannot sue for wrongs done to a corporation..." the *Sabey* court explained two exceptions to this rule.⁵⁷ Safranski erroneously contends that neither of those exceptions apply to Weatherspoon's fraud claim.

a. *The Special Duty Exception.*

The court first defined the "special duty" exception as follows:

As an exception to the general rule, a stockholder may maintain an action in his own right **against a third party** (although the corporation may likewise have a cause of action for the same wrong) when the injury to the individual resulted from violation of some special duty

⁵¹ *Sabey v. Howard Johnson & Co.*, 101 Wn. App. 575, 5 P.3d 730 (2000).

⁵² *Id.* at 579.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 581.

⁵⁶ *Id.* at 584.

⁵⁷ *Id.* at 595.

owed to the stockholder but only when that special duty had its origin in circumstances independent of the stockholder's status as a stockholder.⁵⁸

Safranski contends that the fiduciary duties he owed to Weatherspoon do not satisfy this exception because they were not "independent of the stockholder's status as a stockholder."⁵⁹ His fiduciary duties arose precisely because Safranski was a shareholder.

Safranski's error is in contending that a fiduciary duty owed between shareholders is disqualified by the phrase "independent of the stockholder's status as a stockholder." *Sabey* is explicit that this qualifier applies when the shareholder sues "**a third party.**"

Safranski cites to zero cases in which a shareholder's direct claim against another shareholder was disqualified because the duty arose out of the defendant shareholder's status as a shareholder. Nor is there any legal authority supporting such a misguided and illogical interpretation.

If the fiduciary duty between shareholders could not serve as a "special duty" permitting a direct claim, there would be no cases authorizing such direct actions between shareholders. And yet, as set forth above, breach of fiduciary duty and fraud claims are oftentimes allowed as direct actions between shareholders. Safranski himself believes that because after his derivative claim on behalf of Duma against Weatherspoon for the expense reimbursements was dismissed, he

⁵⁸ *Id.* at 585, quoting *Hunter v. Knight, Vale & Gregory*, 18 Wn. App. 640, 646, 571 P.2d 212 (1977) (emphasis added).

⁵⁹ Br. of App. at 21.

relied instead upon Weatherspoon's fiduciary duty owed to Safranski to recover on a direct claim.

Moreover, if such fiduciary duties were not actionable by the shareholder harmed by a breach, what meaning would they have?

In *Sabey*, the plaintiff shareholder sued a third party – a consultant to the corporation.⁶⁰ The plaintiff could not rely upon the third-party consultant's duty of care to its client, the corporation, to meet this special duty exception.⁶¹

Nevertheless, the shareholder was entitled to rely upon a direct duty owed to him by the third party under the tort of negligent misrepresentation.⁶² When the consultant furnished its opinion to Sabey in the due diligence process, the *Sabey* court held:

Under the RESTATEMENT [(SECOND) OF TORTS, §552 (1997)], this representation, and those that preceded it, could be found to create (and breach) a duty to Sabey personally.⁶³

The *Sabey* court cited *Hunter*,⁶⁴ which also illustrates a third-party claim. In *Hunter*, unlike *Sabey*, the shareholder could not point to an independent duty.⁶⁵

The plaintiff shareholder sued an accounting firm that had performed work for the corporation.⁶⁶ The *Hunter* court held that the

⁶⁰ *Sabey*, 101 Wn. App. at 579-581.

⁶¹ *Id.* at 588-592.

⁶² *Id.*

⁶³ *Id.* at 586.

⁶⁴ *Hunter*, 18 Wn. App. at 646.

⁶⁵ *Id.*

⁶⁶ *Id.* at 641-643.

plaintiff shareholder had not established a special duty owing to him directly, and he could not vicariously rely on the CPA firm's duty it owed to the corporation.⁶⁷

Aside from *Sabey*, the only other case relied upon by Safranski again illustrates this point. In *Aventa*,⁶⁸ defendant K12 purchased plaintiff Aventa Corporation.⁶⁹ Aventa, and two of its shareholders, sued K12 on a variety of claims relating to financial projections made by K12 before the acquisition.⁷⁰

Defendant K12 contended that Aventa's two shareholder claims should be dismissed because only Aventa had standing to sue K12.⁷¹ The U.S. District Court agreed.⁷²

Citing *Sabey* and *Hunter*, the District Court held that the two plaintiff shareholders had not established that K12 owed them a special duty having "its origin in circumstances independent of the stockholder's status as a stockholder."⁷³ In fact, the shareholders made no attempt to establish any such special duty.

With regard to the first exception, Defendants assert that there is no evidence that they owed any special duty to the individual plaintiffs – independent of their status as stockholders in *Aventa*, and Plaintiffs have asserted none.⁷⁴

⁶⁷ *Hunter*, 18 Wn. App. at 646-647.

⁶⁸ *Aventa Learning, Inc. v. K12, Inc.*, 830 F.Supp.2d 1083 (W.D. Wash., 2011).

⁶⁹ *Id.* at 1089.

⁷⁰ *Id.* at 1091.

⁷¹ *Id.* at 1102-1103.

⁷² *Id.* at 1103.

⁷³ *Id.*

⁷⁴ *Id.*

Like *Sabey* and *Hunter*, the shareholders of Aventa could not rely vicariously upon the duty owed by the defendant to the corporation.⁷⁵

Weatherspoon did not rely upon a duty Safranski owed to Duma. Nor did he sue a third party. Safranski did not object to any of the jury instructions relating to his duties, and he does not challenge his duties on appeal. The Court should hold that the fiduciary duties owed by Safranski qualify as a special duty actionable by Weatherspoon.

3. Safranski's Duty to Disclose Arising from Half-Truths.

Safranski fails to even address a second ground by which Weatherspoon established that Safranski owed him a legal duty.

In the summary judgment proceeding, Weatherspoon relied on a duty of disclosure to meet the special duty exception in *Sabey*.⁷⁶ At that stage of the case, the trial court had not yet ruled on whether a minority shareholder owed fiduciary duties to a majority shareholder. During trial, the court eventually held that such fiduciary duties did exist.

To overcome Safranski's earlier summary judgment motion, however, Weatherspoon did not rely upon Safranski's fiduciary duties.

Thus, Safranski is wrong that Weatherspoon must establish a fiduciary relationship in order to sue him for fraud. In this case, the evidence supports the fact that Safranski made misrepresentations to Weatherspoon by half-truth.⁷⁷

⁷⁵ *Id.*

⁷⁶ CP 104-107.

⁷⁷ CP 106, Defendants' Response to Plaintiff's Motion for Summary Judgment at pp. 11-12.

Weatherspoon relied upon case law defining when a person assumes a duty to disclose a fact. “A duty to speak [arises]... where only a partial disclosure is made...”⁷⁸ “The duty to speak may arise from partial disclosure, the speaker being under a duty to say nothing or to tell the whole truth.”⁷⁹

At trial, the court instructed the jury that a duty to disclose arises when a person makes half-truths.⁸⁰ By that time, the court had also concluded that Safranski owed fiduciary duties to Weatherspoon as a minority shareholder, and so instructed the jury.⁸¹

The jury returned a general verdict that Safranski had committed fraud.⁸² There was no special finding as to whether the duty breached was the duty to disclose owing to half-truths and/or Safranski’s fiduciary duties as a shareholder.

When a jury renders a general verdict, any error claimed for one theory is harmless when no error is claimed or found for the alternative theory.⁸³

Assuming, *arguendo*, that Safranski’s fiduciary duty is disqualified because it arose out of his status as a shareholder,

⁷⁸ *Gilliland v. Mt. Vernon Hotel Co.*, 51 Wn.2d 712, 717, 321 P.2d 558 (1958).

⁷⁹ *Associated Indemnity Corp. v. Del Guzzo*, 195 Wn. 486, 509, 81 P.2d 516 (1938), citing, 27 C.J. Fraud, p. 1074, §17.

⁸⁰ CP 372.

⁸¹ CP 376.

⁸² CP 384.

⁸³ See *Miller v. Arctic Alaska Fisheries Corp.*, 133 Wn.2d 250, 265-66, 269, 944 P.2d 1005 (1997), holding that error in dismissing one claim was harmless where jury’s verdict could be upheld on another claim with the same damages.

Safranski's duty to disclose under the law of fraud clearly qualifies under *Sabey*. Indeed, the court's analysis in *Sabey* is instructive.

As explained above, the *Sabey* court found that the consultant may have assumed a direct duty to Sabey under the tort of negligent misrepresentation. In precisely the same way, so did Safranski assume a duty of disclosure under the law of intentional misrepresentation. The analysis should apply with greater force when the conduct of the defendant is intentional rather than merely negligent.

While Safranski may not have had a duty had he remained completely silent, under the law of fraud Safranski assumed a duty of full disclosure when he made half-truths to Weatherspoon. This duty to disclose is entirely distinct from his fiduciary duties as a shareholder, and arises because of his conduct (making half-truths), not his shareholder status. Thus, the Court should hold that Safranski's duty to disclose qualifies under *Sabey*.

4. Weatherspoon's Damages were Personal from Injuries to "Other Shareholders."

Sabey provides a second exception allowing a shareholder's direct claim when the shareholder suffers damages that are distinct from damages suffered by "other shareholders."⁸⁴

As an example of individual harm, *Fletcher* explains:

An intentional dilution of a minority shareholder's proportionate ownership by majority shareholders, officers and directors may support a claim that the

⁸⁴ *Sabey*, 101 Wn.App. at 585.

resulting harm to the minority shareholder constituted a distinct individual injury.⁸⁵

Similarly, in this case, it was the minority shareholder who, by his fraud, diluted the interest of the majority shareholder. Safranski lured Weatherspoon into an asset sale that put payment for his shares at greater risk than Weatherspoon assumed when he signed the APA. This effectively devalued Weatherspoon's shares, but not Safranski's shares, who stood to profit from his fraud by reaping a \$160,000 personal bonus from BMS.

Moreover, Weatherspoon lost control of Duma owing to Safranski's fraud. The jury's damage award was intended to place Weatherspoon in a position he would have been but for Safranski's fraud.

The jury was instructed that in order to find for Weatherspoon, they must find, by clear and convincing evidence, that Weatherspoon himself sustained damages.⁸⁶

The Court should rule that Weatherspoon's harm was "separate and distinct from that suffered by other shareholders,"⁸⁷ and therefore qualifies under the second *Sabey* exception.

B. The Court did not Abuse its Discretion in Denying Remittitur.

Safranski also assigns error to the trial court's denial of Safranski's post-jury trial motion for remittitur. Safranski requested the

⁸⁵ 12B W. Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations*, §5914 (perm. ed. 2013 & supp. 2015).

⁸⁶ CP 379, 380.

⁸⁷ *Sabey*, 101 Wn.App. at 584.

trial court to reduce the jury's award of damages to Weatherspoon from \$275,637.50 to \$167,212.45.⁸⁸

Safranski complains that the jury should have agreed with his closing argument, and awarded less than Weatherspoon argued for. Having lost that jury argument, Safranski now argues that the trial court should have substituted its judgment for the jury's finding.

Safranski cites CR 59(1)(7), which permits a new trial where "there is no evidence or reasonable inference from the evidence to justify the verdict." However, Safranski does not actually argue there was no evidence to support the jury's award of \$275,637.50.

Safranski also cites RCW 4.76.030, which provides authority for a remittitur:

If the trial shall, upon a motion for new trial, find the damages awarded by a jury to be so excessive or inadequate as unmistakable to indicate that the amount thereof must have been the result of passion or prejudice,...

Safranski does not argue that the jury was motivated by passion or prejudice in awarding \$275,637.50. Instead, Safranski argues that a lower amount of \$167,212.45 should have been viewed by the jury as a "straightforward calculation that sets an upper limit on the amount of damages that Weatherspoon could have possibly suffered."⁸⁹

These arguments do not satisfy the high burden for a trial court to invade the province of the jury.

⁸⁸ Br. of App., p. 27.

⁸⁹ Br. of App. at 30.

Weatherspoon offered the jury several alternative ways in which Weatherspoon's damages could be based upon the evidence.⁹⁰ After giving due consideration to those alternative calculations, and when considering all of the evidence adduced in a six-day trial, the jury awarded \$275,637.50.⁹¹

That figure was well within the range of substantial evidence, Safranski's disagreement with the figure notwithstanding. The trial court properly declined to exercise its discretion to overturn the jury's considered judgment.

VII. WEATHERSPOON'S CROSS-APPEAL

A. Standard of Review.

An appellate court reviews a trial court's award of prejudgment interest for an abuse of discretion.⁹²

B. The Court Erred in Awarding Prejudgment Interest on the Award of Dividends to Safranski.

Following the jury trial, the court conducted a hearing on Safranski's claim against Weatherspoon relating to amounts that Weatherspoon had been reimbursed by Duma for business expenses from 2006 to 2012.⁹³

Safranski alleged that only a small percentage of the total of \$334,747.40 in challenged reimbursements were "clearly improper" or

⁹⁰ CP 454.

⁹¹ CP 454.

⁹² *Scozzolo Constr. Inc. v. City of Renton*, 158 Wn.2d 506, 519, 145 P.3d 371 (2006).

⁹³ There were other and different payments from Duma to Weatherspoon that Safranski challenged. These items are not at issue here.

“probably improper.” Safranski summarized his year-by-year claim this way:

Exh No	Year	Undocumented Reimbursements	Clearly Improper Personal Expenses	Probably Improper Personal Expenses	Total
1	2006	\$33,962.56	\$ 0.00	\$ 0.00	\$33,962.56
2	2007	\$49,008.80	\$ 552.90	\$ 0.00	\$49,561.70
3	2008	\$62,280.78	\$ 0.00	\$ 0.00	\$62,280.78
4	2009	\$20,388.89	\$ 0.00	\$ 2,164.40	\$22,553.29
5	2010	\$80,388.81	\$ 814.92	\$ 654.36	\$81,858.09
6	2011	\$47,141.76	\$9,149.59	\$14,222.15	\$70,513.50
7	2012	\$12,915.76	\$1,101.72	\$ 0.00	\$14,017.48
		\$306,087.36	\$11,619.13	\$17,040.91	\$334,747.40

Based upon a stipulation, the court found that \$279,290 in expense reimbursements over a six-year period lacked sufficient backup documentation.⁹⁴ The court made the following express findings:

1.4 At the hearing, the parties entered a stipulation that the Court could use the figure of \$279,290 as the amount of undocumented expenses. **The Court makes no finding as to whether the undocumented expense reimbursements were for business expenses or for personal expenses.** The Court finds that defendant Weatherspoon failed in his duty to keep records of those expenses and, therefore, the expense amount will be treated as corporate profit.⁹⁵ (Emphasis added.)

Safranski then requested prejudgment interest on these amounts.⁹⁶ The court held that “All of Plaintiff’s were liquidated and thus prejudgment interest is awarded in amounts set forth on the summary attached hereto as Exhibit ‘A.’”

⁹⁴ CP 467.

⁹⁵ CP 467.

⁹⁶ CP 469.

Exhibit “A” then set forth the year-by-year award of dividends and prejudgment interest:⁹⁷

Pre-Sale Distributions Received by Sultan Weatherspoon

Year	Claimed Amount	Stipulated Amount	Safranski's Share	Interest	Set-Off
2006	\$33,962	\$28,336	\$5,863	\$5,912	\$11,775
2007	\$49,561	\$41,351	\$8,555	\$7,600	\$16,155
2008	\$62,280	\$51,963	\$10,751	\$8,260	\$19,011
2009	\$22,553	\$18,817	\$3,893	\$2,524	\$6,417
2010	\$81,858	\$68,297	\$14,131	\$7,466	\$21,597
2011	\$70,513	\$58,832	\$12,172	\$4,970	\$17,142
2012 (pre-sale)	\$14,017	\$11,695	\$2,420	\$698	\$3,118
Subtotal	\$334,744	\$279,290	\$57,785	\$37,429	\$95,214

The Court awarded Safranski \$57,785 in dividends and \$37,429 in prejudgment interest. The award of interest amounted to 64% of Safranski’s principal award for dividends.

The parties agree on the standard for prejudgment interest.

Nevertheless, a defendant is not required to pay prejudgment interest in cases where it is not possible to ascertain the amount owed to the plaintiff until the court has exercised its discretion in determining that amount. The amount owed must be ascertainable without the aid of the discretionary court ruling concerning the amount due before the obligor is liable for prejudgment interest.⁹⁸

Absent a finding that Weatherspoon intentionally took expense reimbursements he knew to be for personal expenses, it was not possible for him to ascertain the amount he owed to the plaintiff, until the court exercised its discretion in determining that amount.

⁹⁷ CP 469

⁹⁸ *Dautel v. Heritage Home Center, Inc.*, 89 Wn. App. 148, 154, 948 P.2d 397 (1997).

“A defendant should not, however, be required to pay prejudgment interest in cases where he is unable to ascertain the amount he owes to the plaintiff.”⁹⁹

The result would be different if, when the expense reimbursements were made, Weatherspoon knew that the reimbursements were for personal expenses. In that case, Weatherspoon would have been able to ascertain, at the time, that he owed Safranski for money wrongfully taken from the corporation.

However, without a finding of such intentional wrongdoing, nothing about Weatherspoon’s conduct could have made Safranski’s award “ascertainable without the aid of a discretionary court ruling concerning the amount due...”¹⁰⁰

The most that would have been ascertainable from the court’s findings, would have been the need for Weatherspoon to keep better documentation of business expenses. But Safranski would have had no financial interest as a shareholder in a proper, but undocumented, business expense. His interest as a shareholder would have been only to require better documentation. A business expense is no less a business expense simply because the shareholder does not submit sufficient documentation.

For this reason it cannot be said that Weatherspoon had any reason to know he was using “Safranski’s money” when he was reimbursed for business expenses. All he could have known is that the

⁹⁹ *Hansen v. Rothaus*, 107 Wn.2d 468, 473, 730 P.2d 662 (1986) and CP 436.

¹⁰⁰ *Dattel*, 89 Wn.App. 148, 154.

reimbursement of legitimate business expenses should have been documented.

Indeed, the amount due under the court's award was only determined after a stipulation was entered into by the parties. That stipulation was premised on the hopelessly time consuming prospect of going through hundreds of old expenses, item by item.

This situation is similar to the facts in *Fiorito v. Goerieg*.¹⁰¹ In *Fiorito*, members of a joint venture sued for an accounting, just as Safranski sued Weatherspoon for an accounting. The court disallowed prejudgment interest because the parties were in disagreement over the item-by-item accounting and “[n]othing remained to be done in view of the hopeless disagreement of the parties except to submit the matter to the court to determine whether any sum was due appellants or whether they had been over-paid.”¹⁰²

Where the finding is only that of undocumented business expense reimbursements, the Court should hold that the trial court abused its discretion in rewarding \$37,429 in prejudgment interest.

VIII. CONCLUSION

Under the guise of standing, Safranski attempts to get away with fraud and leave his victim without a remedy.

¹⁰¹ *Fiorito v. Goerieg*, 27 Wn.2d 615, 179 P.2d 316 (1947).

¹⁰² *Id.* at 620-21.

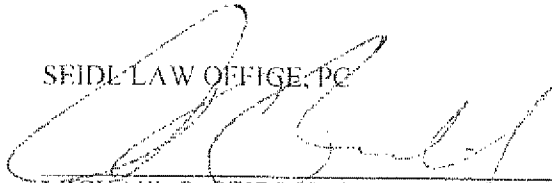
VIII. CONCLUSION

Under the guise of standing, Safranski attempts to get away with fraud and leave his victim without a remedy.

The Court should affirm the judgment against Safranski for fraud in the amount of \$275,637.50, and reverse the court's award of prejudgment interest in the amount of \$37,429.

DATED this 23rd day of February, 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

1. My name is Heather A. Dumont. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party of this action.

2. On the 23rd day of February, 2016, I served a copy of the foregoing **RESPONDENT'S RESPONSE BRIEF AND CROSS-APPEAL BRIEF** delivered via First Class United States Mail, postage prepaid, to the following persons:

Steven E. Turner
Steven Turner Law PLLC
1409 Franklin St Ste 216
Vancouver, WA 98660-2826
Attorneys for Appellant Alex Safranski

**I CERTIFY UNDER PENALTY OF PERJURY UNDER
THE LAWS OF THE STATE OF WASHINGTON THAT THE
FOREGOING IS TRUE AND CORRECT.**

DATED: February 23, 2016

At: Vancouver, Washington


HEATHER A. DUMONT

LANDERHOLM PS

February 23, 2016 - 4:16 PM

Transmittal Letter

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