

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 16, 2014

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP267

Cir. Ct. No. 2012CV50

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

ESSENTIAL HOMECARE, INC. AND PANG LOR,

PLAINTIFFS-APPELLANTS,

v.

**MAI SEE VANG YANG, UNITED PERSONAL HOMECARE, INC. AND
KUE KARINA YANG,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Marathon County:
GREGORY B. HUBER, Judge. *Affirmed.*

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Essential Homecare, Inc., and Pang Lor appeal a grant of partial summary judgment. The circuit court concluded Lor failed to demonstrate compliance with the statutory requirement to make a written demand

upon a corporation prior to commencement of a derivative proceeding under WIS. STAT. § 180.0742(1).¹ We affirm.

¶2 At issue in the present case is the ownership of Essential Homecare. Lor contends that as a 50% shareholder of Essential Homecare, she was entitled to commence and maintain both direct and derivative causes of action after Mai See Vang Yang appropriated to herself the corporation's funds and removed most of the office furniture, equipment and corporate records. Vang Yang insists she is the sole shareholder and was entitled to do as she saw fit.

¶3 There is no dispute among the parties that a genuine issue of material fact exists as to corporate ownership. Assuming for purposes of summary judgment that Lor was in fact a shareholder, the issues on appeal involve: (1) whether Lor satisfied the requirements of WIS. STAT. § 180.0742, for a "written demand" upon the corporation to take suitable action prior to commencing a derivative action;² and (2) whether the circuit court properly identified and dismissed the derivative causes of action.

¶4 The circuit court concluded several causes of action in Lor's complaint supported direct action claims. However, the court also held Lor failed to satisfy the notice prerequisites of WIS. STAT. § 180.0742(1), for derivative causes of action, because text messages sent to Vang Yang demanding return of the corporate funds "do not satisfy the requirement of a written notice." The court

¹ All references to the Wisconsin Statutes are to the 2011-12 version.

² WISCONSIN STAT. § 180.0742 Demand, states: "No shareholder or beneficial owner may commence a derivative proceeding until all of the following occur: (1) A written demand is made upon the corporation to take suitable action."

then identified and dismissed without prejudice the derivative causes of actions in Lor's complaint. Lor now appeals.

¶5 Lor insists a text message may properly constitute a "written demand" upon the corporation to take suitable action. She analogizes text messages to e-mails, and contends courts have recognized text messages in other statutory contexts as "all but replac[ing] hardcopy correspondence and memoranda." Under the circumstances of the present case, where only two shareholders each own 50% of the corporate stock, she contends text messages sent to Vang Yang served the same purpose as a formal written letter sent to the corporation. Further, Lor argues the shareholders regularly used text messages as a means of communicating about Essential Homecare's business, and the exigency of the circumstances did not allow time for a letter to be sent to the corporation. Because the corporate assets had been stripped, immediate action was necessary to preserve the corporation, which was best accomplished by sending text messages to Vang Yang, the corporation's president and the shareholder responsible for the improper conduct.

¶6 We need not decide whether text messages comply with the statutory prerequisite under WIS. STAT. § 180.0742(1) that "[n]o shareholder or beneficial owner may commence a derivative proceeding until ... [a] written demand is made upon the corporation to take suitable action." Assuming without deciding that a text message may constitute a "written demand," we conclude partial summary judgment was nevertheless appropriate for the following reasons.

¶7 In spite of Lor's argument that the text messages were sufficient to put the corporation on notice to take suitable action pursuant to WIS. STAT. § 180.0742, the text messages were not produced in evidence in the summary

judgment proceedings. This court therefore has no record of the actual language used to determine whether the language was sufficient to put the corporation on notice to take suitable action.

¶8 Lor’s argument that demand upon Vang Yang was sufficient under the circumstances also ignores the statute’s explicit requirement that the demand be made “upon the corporation.” *See* WIS. STAT. § 180.0742(1). In fact, given the nature of text messages, the record on appeal contains no evidence indicating a corporation could receive a text message as an individual entity. In addition, the text messages were not sent by Lor. Rather, the text messages were sent by her husband, Vang Thao.³ He admitted, “I attempted to contact Mai See [Vang Yang] by text message. Mai See did not respond. I sent a text message to Mai See asking her to return Essential Homecare’s funds. Mai See refused the request.” Accordingly, we conclude Lor has failed to show that the prerequisites for derivative claims were met.

¶9 We also conclude the circuit court properly identified which causes of action were derivative. Derivative claims “belong to the corporation, not to the complaining [shareholder].” *See Park Bank v. Westburg*, 2013 WI 57, ¶41, 348 Wis. 2d 409, 832 N.W.2d 539. Generally, a derivative claim is one that “a corporation could bring because the corporation’s assets are affected.” *Id.* (quoted source omitted). In a derivative action, a shareholder assumes the mantle of a corporation itself to right wrongs committed by those temporarily in control of the corporation. The purpose of a shareholder derivative action is to prevent injustices

³ Vang Thao was also chief financial officer of Essential Homecare.

to the corporation by allowing shareholders to enforce corporate interests when the directors refuse to take corrective action. *See id.*

¶10 In analyzing whether a cause of action supports a derivative claim, courts must determine whether the cause of action states claims for injuries primarily to the corporation. *See id.*, ¶¶41-44. However, “[i]t is well established that where the injury and damages are independent,” a disaffected shareholder may assert both derivative and direct action claims. *See id.*, ¶44. “An individual ‘may sue to redress direct injuries to him or herself regardless of whether the same violation injured the corporation.’” *Id.* (citation omitted).

¶11 In the present case, the circuit court correctly recognized that it could not rule on the factual dispute concerning whether Lor was a shareholder. Thus, assuming Lor was a shareholder, the court stated its task was “to identify which claims are wholly derivative and must therefore be dismissed.” The court concluded the first, second and fourth causes of action⁴ contained proper direct

⁴ We decline to discuss the merits of the direct causes of action. As occurred in the trial court, Vang Yang fails in her briefs to this court to develop arguments pertaining to direct causes of action. The circuit court stated:

The defendants did not attack any single claim specifically, except for a brief, passing mention of the theft claim in a single paragraph of their initial brief. Primarily, the defendants argued that all claims should be dismissed because Lor lacked standing to bring any claims, either derivative or direct. Given that strategy, the individual claims were not specifically briefed. Because the court now dismisses only the derivative claims, the only remaining task is to identify which claims are wholly derivative and must therefore be dismissed. The court will not otherwise address the merits of the individual claims, since those were not briefed.

On appeal, Vang Yang’s entire argument regarding the merits of the direct causes of action is essentially a half-page undeveloped contention that all causes of action should be dismissed because Lor lacked standing to bring any claims, either derivative or direct. Vang

(continued)

action aspects, and therefore survived. The remaining causes of action were determined to be derivative and were dismissed.

¶12 As the circuit court properly recognized, the dismissed causes of action were asserted on behalf of Essential Homecare. Among other things, the dismissed causes of action included causes of action maintained on behalf of the corporation for theft and conspiracy to commit theft; breach of fiduciary duty to the corporation; judicial removal of Vang Yang as a corporate officer; a request for an accounting; intentional interference with Essential Homecare’s contracts with its clients; declaration of a constructive trust; and injunctive relief. These causes of action asserted injuries primarily to the corporation, and the court therefore properly identified and dismissed them as derivative claims. *See Westburg*, 348 Wis. 2d 409, ¶43.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

Yang simply states in conclusory fashion, “In the end, the claims brought by Lor individually redress the alleged wrongs done to ... Essential.” We will not abandon our neutrality to develop arguments and will not consider conclusory arguments. *See M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

