

FILED**OCT 15 2019**CIRCUIT COURT
WAUKESHA COUNTY, W**STATE OF WISCONSIN CIRCUIT COURT WAUKESHA COUNTY****PAUL and MARY BRUNNER,****Plaintiffs/Third-Party Defendants,****Case No. 18CV1687****v.****SHERRI BRUNNER, individually and as personal
Representative of the Estate of Brian P. Brunner,****Defendant/Third-Party Plaintiff,****and****FLOORCARE USA, INC.,****Interested Party.**

**DECISION AND ORDER ON MOTIONS FOR RECONSIDERATION AND FOR
RELIEF FROM COURT'S 9/10/19 ORDER, AND ORDER TO SHOW CAUSE
REGARDING THE APPOINTMENT OF A RECEIVER (SETH DIZARD) FOR
FLOORCARE USA, INC.**

¶1. The parties seek relief from this Court's September 10, 2019 Decision and Order ("Decision and Order). The Plaintiffs filed a Motion to Reconsider, and Modify or Vacate that Decision and Order. They take issue with paragraphs 77 and 99 of the Decision and Order wherein the Court found that, pending final resolution of the various claims associated with Floorcare USA, Inc.'s ("Company's") share ownership, the ownership of the Company is 85 percent Brian and 15 percent Paul, as reflected in the Joint Unanimous Consent Resolution dated February 25, 2016 ("Consent Resolution").

¶2. Both the Plaintiffs and Sherri Brunner also filed separate motions requesting relief from that part of the Decision and Order ordering that distributions paid to Paul and to Sherri, \$410,563 and \$61,500, respectively, be returned to the Company within 30 days of the date of the Decision and Order unless such amounts or some portion of them are authorized by a properly constituted board of directors.

¶3. A hearing on the motions was held on October 14, 2019. After argument, the Court rendered its decision on the motions on the record, and stated that the Court would prepare a written decision and order.

¶4. With respect to the Plaintiffs' motion to reconsider, Plaintiffs contend that the Court had no authority to determine the ownership of the Company pendente lite because no party requested this relief, and that the decision effectively granted Sherri a temporary injunction in violation of the procedural and substantive requirements under Wisconsin law.

¶5. The Court disagrees and denies Plaintiffs' motion to reconsider. Both parties, in their pleadings and in the pending motions for summary judgment, requested the Court to determine the Company's shareholder ownership. The parties submitted undisputed facts in support of their cross-motions for summary judgment. Those undisputed facts include the Consent Resolution. By its terms, the Consent Resolution resolves on behalf of the shareholders and directors that: (1) the directors of the Company are Brian and Paul; (2) Brian is President and Secretary, and Paul is Vice President and Treasurer; (3) the registered agent of the Company is changed from Paul to Brian; and (4) the shareholders as of January 1, 2016, are Brian (85 percent) and Paul (15 percent). With respect to share ownership, the Consent Resolution provides

The Shareholders as of January 1, 2016, and thereafter until as may be changed in writing, holding all of the issued and outstanding shares of

stock in the corporation are as set forth below herein and are confirmed, ratified and approved, and shall control any shareholding contrary or inconsistent with the following shareholding: [Brian 85%, Paul 15%].

¶6. It is undisputed that the Consent Resolution was signed by both Brian and Paul. It is undisputed that it is the only corporate record identifying the Company's share ownership. It is undisputed that shares transferred through the Consent Resolution and that the Company identified the share ownership in its corporate tax returns for 2015 and 2016 consistent with the ownership reflected in the Consent Resolution. It is undisputed that there is no writing changing the ownership from that reflected in the Consent Resolution.

¶7. The Plaintiffs have argued that the agreement embodied in the Consent Resolution is unenforceable and even if enforceable, Brian materially breached the agreement warranting rescission. For the reasons contained in the Decision and Order, the Court concluded that it could not grant summary judgment to Plaintiffs, but that those arguments would proceed to trial. Accordingly, unless and until the Court grants the Plaintiffs' requested relief setting aside or voiding the terms of the Consent Resolution, the Consent Resolution reflects the Company's share ownership.

¶8. What precipitated the motion to reconsider likely was the Plaintiffs' fear that pending a final decision on the various challenges to the Consent Resolution, Sherri, as the current 85% owner, intends to call a shareholder meeting, elect a board of directors, and take control of the Company—and in so doing, fire Paul as the first order of business. Apparently, their concerns are well-founded. In her opposition to Plaintiffs' motion to reconsider, Sherri states that is precisely what she intends to do in the light of the Court's finding of the current share ownership. That was not the Court's intention in stating the share ownership pending a final resolution of the parties' claims, and it has no intention of permitting this course of action.

¶9. The Court notes the following: The Company's articles of incorporation require two directors. Since Brian's death, the Company has had only one director. Despite the Court's urging, Paul and Sherri have not been able to cooperate in the management of the Company or the appointment of a new director to fill the vacancy. Paul's control of the Company after Brian's death has resulted in several breaches of fiduciary duty involving unilateral actions taken for his own interests, and not the interests of the Company or its shareholders, generally. Sherri has stated that, during the pendency of the case, she would exercise her shareholder authority to elect her own directors and fire Paul. After trial, it is clearly a possibility that the Court would void or rescind the transfer of shares in the Consent Resolution for the reasons proffered by the Plaintiffs, thereby putting into question Sherri's authority and the actions taken by her and her board of choice in the intervening months—potentially leading to loss of corporate value and fostering further litigation over, among other things, breaches of fiduciary duties.

¶10. At the hearing, the Court analogized the Company to a ship. Clearly, the ship is in troubled waters. When Paul assumed the helm, he steered into more troubled waters. Sherri promises to assume the helm and steer the ship in a different direction. She has no experience with this ship and the direction she chooses may not be smooth sailing but even more dangerous waters. Months from now, the Court could conclude, based upon the trial, that Sherri should not have had the right to assume the helm at all, and there is no way to determine where the ship would have been had it sailed a different or preferred course in this interim period.

¶11. It is in this light that the Court is obliged to find one to assume the helm of the ship and who will guide it and protect its value until a final resolution determining who should have control of the helm.

¶12. Wis. Stat. § 180.1431, provides, “[a] court in a proceeding brought to dissolve a corporation may issue injunctions, appoint a receiver pendente lite with all the powers and duties that the court directs, take other action required to preserve the corporate assets wherever located and carry on the business of the corporation until a full hearing can be held.” Sherri has brought a claim to dissolve the Company. The Court finds that, as a result, § 180.1431 grants the Court authority to appoint a receiver to preserve the Company’s assets until a final hearing resolving the issues in the case. As mentioned at the hearing on the motions, the Court intends to exercise that authority, and issues this Order to show cause why the Court should not appoint a receiver, Seth Dizard, to operate the Company pending a final determination on share ownership and the selection of a new board. In citing this statute, the Court is not finding that the requirements for dissolution under §180.1430 have been satisfied or that dissolution of the Company is appropriate.

¶13. The parties will file their responses to the Court’s order to show cause by close of business on October 24, 2019, outlining any objections to the Court’s proposed course of action and identified receiver, and the Court will hold a hearing on October 31, 2019, at 3:00 p.m. to address the matter.

¶14. For the reasons discussed above and until further order of the Court, Paul is enjoined from exercising any authority he would have to name a director to fill the vacancy resulting from Brian’s death, and Sherri is enjoined from exercising any authority to call a shareholder meeting to elect a new board of directors.

¶15. The Court grants both parties’ motions for relief from the Decision and Order. Until further order of this Court, both parties are relieved of the obligation to repay the

unauthorized distributions. The receiver, if appointed, will have an opportunity to weigh in on the repayment of distributions, including the timing and scope of any further repayment.

Dated this 15th day of October, 2019.

BY THE COURT:
/s/ Michael J. Aprahamian
Circuit Court Judge