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SC Court of Appeals

**THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS**

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas for the Ninth Circuit

The Honorable Mikell Scarborough, Master in Equity

Case No.: 2016-CP-10-06265
App. Case No. 2022-000078

TONY A. BILLIPS, individually and as a derivative shareholder of Alex's Restaurants, Inc.,.....*Plaintiff/Respondent,*

v.

CAROLYN A. BILLIPS, individually and as Trustee of the benefit of Anthony Billips, William Casey Ivey, and Alex Billips, and as controlling person of Alex's Restaurants, Inc. and ALEX'S RESTAURANTS, INC.,.....*Defendants/Appellants.*

APPELLANTS' INITIAL REPLY BRIEF

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October 17, 2022
Charleston, South Carolina

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Defendant/Appellants Carolyn Billips and Alex's Restaurants, Inc. (collectively, "Ms. Billips" or "Appellants") file this brief Reply.

I. Respondent Did Not Address Appellants' Judicial Admission Argument and Therefore Has Conceded It

In her Initial Brief, Ms. Billips argued that Respondent Tony Billips ("Respondent") is bound by his counsel's admission to the trial court that all of his causes of action arise out of the same alleged malfeasance. **Initial Brief** at 8–9. Respondent failed to respond this argument and has therefore conceded it. *See* 5 AM. JUR. 2d – *Appellate Review* § 512 (2016) ("[i]f an appellee fails to respond to an issue in its brief, the court may treat the failure to respond as a confession that the appellant's position is correct"); *First Union Nat. Bank of S.C. v. FCVS Comms.*, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) (citing the same), *rev'd in part on other grounds*, 328 S.C. 290, 494 S.E.2d 429 (1997).

Having conceded that he is bound by this judicial admission,¹ he is estopped from contending that his other causes of action have a separate factual basis that was not presented to the Master as part of the accounting. *See, e.g., Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004) ("Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding."); *Carolina Renewal, Inc. v. S.C. Dep't of Transp.*, 385 S.C. 550, 554, 684 S.E.2d 779, 782 (Ct. App. 2009) (the doctrine of collateral estoppel precludes parties "from relitigating an issue that was decided in a previous action, regardless of whether the claims in the first and subsequent lawsuits are the same"). And, having proceeded with his accounting

¹ *See Meyer v. Berkshire Life Ins. Co.*, 372 F.3d 261, 264–65 (4th Cir. 2004) ("Judicial admissions are not . . . limited to affirmative statements that a fact exists. They also include intentional and unambiguous waivers that release the opposing party from its burden to prove the facts necessary to establish the waived conclusion of law.").

cause of action to its conclusion, he has elected his remedy and is barred from pursuing additional remedies for that same alleged wrong. *Infra* Part III.

II. Respondent's Failure to Appeal

On the morning of trial, Respondent moved the trial court to postpone the accounting trial, arguing that all of his causes of action should be tried in a single case in circuit court because they all arise from the same malfeasance. **Trial Tr. (Aug. 24, 2021)** at 16:20–17:23; 18:14–17; **Trial Tr. (Aug. 25, 2021)** at 232:4–21. The Master denied Respondent's motion, and the accounting trial went forward to its conclusion. *Id.* at 19:13–15.

Having not appealed this ruling, Respondent cannot contend that he was denied due process by the Master's decision to proceed with and resolve the accounting cause of action, or by the legal consequences thereof.

III. Accounting

Respondent contends that “[t]he Master's role was solely to make a determination on the value of Respondent's interest in the business.” **R. Brief** at 11. This misapprehends the purpose of an accounting and runs contrary to the relief he requested both in his complaint and in his live testimony before the trial court.

An accounting is a cause of action by which a court determines a party's financial interest and enters a judgment thereupon. The South Carolina Supreme Court explained it thus:

[T]he equitable remedy of “accounting” sought by the parties in the instant case . . . refers to “an adjustment of the accounts of the parties and a rendering of a judgment for the balance ascertained to be due.”

Historic Charleston Holdings, LLC v. Mallon, 381 S.C. 417, 427, 673 S.E.2d 448, 453 (2009) (citing 1 AM. JUR. 2d – *Accounts and Accounting* § 52 (2005)) (emphasis added). This is precisely what *Respondent* requested the trial court do. The prayer for relief in Respondent's

amended complaint requested:

[A] judicial determination of Plaintiff's interest in Alex's Restaurants, Inc. and the distribution of that interest to Plaintiff.

Am. Compl. at 14. During his live testimony at trial, Respondent testified:

Q. And you're asking this Court to determine the value of that interest and cash you out on your interest, correct?

A. Yeah, from the – what was given to me when it was given to me.

Q. And that would be based on the value today of –

A. Correct.

Q. – the operations?

A. Yes, sir.

Trial Tr. (Aug. 25, 2021) at 37:1–10. The Master's November 22, 2021 order granted this very relief, ordering that Respondent receive \$44,143.08 in exchange for his interest:

Accordingly, the Court finds the value of Mr. Billips' 18.3% interest to be \$44,143.08. . . . IT IS FURTHER ORDERED that, upon tender of the sum of \$44,143.08 to Mr. Billips, his shares shall be transferred back to the corporation for the benefit of Ms. Billips.

Order (Nov. 22, 2021). It was error to reverse the award on reconsideration and remand the case to circuit court so Respondent could have another bite at the apple.

IV. **Respondent's Election of Remedies**

In pursuing his accounting cause of action to its conclusion and asking the Court to distribute his interest to him,² Respondent elected his remedy and cannot now pursue additional causes of action based on the same alleged wrong. As this State's Supreme Court held in

Lawson v. Rogers:

² Respondent contends that the referral of the accounting cause of action to the Master was not an election of remedies. **R. Brief** at 12. This is not Appellant's contention. Appellant argues that it was the trying of the accounting cause of action to a conclusion that constituted an election of remedies, not the referral itself. Respondent offers nothing to counter this contention.

Lawson and Houck, having chosen to proceed in an accounting action, have made an election of remedies, and may not now proceed with alternative remedies for the same wrong.

Lawson v. Rogers, 312 S.C. 492, 501, 435 S.E.2d 853, 858 (1993). There being no causes of action in Respondent's complaint based on different facts than his accounting cause of action, Respondent has elected his remedy and is not permitted to pursue other causes of action based on those same facts.

A. Respondent's Contention Regarding *Lawson v. Rogers*

Respondent contends that *Lawson v. Rogers* is distinguishable from the instant case because, in that case, "all of the issues in a contention partnership dispute were determined by the trial court which had subject matter jurisdiction over all issues and all causes of action." **R. Brief** at 10 (emphasis in original). This is incorrect. In *Lawson*, the case was bifurcated and the legal causes of action were stayed pending the accounting:

The legal actions were stayed while the hearing on the accounting was held. After hearing the evidence presented by both sides related to the accounting action, Judge Lockemy issued a decree.

Lawson, 312 S.C. at 494-95, 435 S.E.2d at 855. Further, the arguments in the accounting cause of action centered on two types of alleged misappropriation (*id.* at 495, 435 S.E.2d at 855 ("Two separate types of misappropriation are alleged in this action.")); and, like here, the same alleged misappropriation that formed the basis of the accounting cause of action was the basis for the legal causes of action (*id.* at 501, 435 S.E.2d at 858 ("The pleadings reflect all the claims arise out of the same set of facts and wrongdoing.")). Accordingly, the Supreme Court held that:

[H]aving chosen to proceed in an accounting action, [the plaintiffs] have made an election of remedies, and may not now proceed with alternative remedies for the same wrong.

Id. The *Lawson* case is squarely on point and precludes Respondent from proceeding with additional causes of action based on the same alleged wrong.

V. **Respondent's Remaining Contentions**

A. **Preservation of Issues for Appeal**

Respondent contends that (i) the sanctions requested by Appellants in this appeal were never requested from or ruled on by the trial court (**R. Brief** at 14); and (ii) Appellants never argued to the trial court that Respondent was bound by his election of remedies (**R. Brief** at 10), meaning neither issue is preserved for appeal. This is demonstrably untrue.

1. Appellants DID Request Sanctions Before the Trial Court.

On October 4, 2018, Appellants moved the trial court to dismiss Respondent's complaint as a sanction for Respondent's noncompliance with court orders and non-cooperation in discovery. **Mot. to Dismiss (Oct. 4, 2018)**. The motion was denied by the trial court by order dated December 28, 2018. **Order (Dec. 28, 2018)**. This was not an immediately appealable order.

Following the entry of the trial court's November 22, 2021 Order and Respondent's December 2, 2021 Motion for Reconsideration, Appellants filed an opposition to Respondent's Motion along with a Motion requesting, *inter alia*, relief on account of Respondent's noncompliance with numerous court orders. **Memo and Mot. (Dec. 17, 2021)**. On December 21, 2022, the trial court entered a final order granting the Motion for Reconsideration in part and denying Appellants' requested sanction. **Order (Dec. 21, 2021)** ("Defendant's remaining relief is respectfully DENIED.").

Accordingly, the question was presented to trial court and was ruled on by the trial court in a final order. The matter is preserved, and this appeal represents Appellants' first opportunity to appeal the issue to this Court.

2. Appellants DID Argue to the Trial Court That Plaintiff Was Not Entitled to Pursue Additional Remedies Based on the Same Factual Allegations.

In their December 17, 2021 opposition to Respondent’s Motion for Reconsideration,

Appellants argued:

Mr. Billips’ complaint incorporates all of his factual allegations into the Accounting cause of action, *id.* at § 32, and he sought to prove them at trial before this Court, contending they were necessary to establishing the valuation of Mr. Billips’ interest. Unsatisfied with this Court’s assessment of his proof, [Respondent] seeks a “redo;” and only now that [Respondent] has failed to establish his claimed valuation does he recant what he testified to under oath and seek the opportunity to pursue [a] different remedy.

Memo and Mot. (Dec. 17, 2021) at 2. The issue was presented to the trial court and was ruled on by the trial court in a final order, preserving it for appeal.

B. What Was Before the Master

Respondent contends that the Master’s subject-matter jurisdiction was limited by the consent order of reference. **R. Brief** at 8–9. This much is true. However, Respondent’s accounting cause of action was based on precisely the same allegations of wrongdoing as his other causes of action.³ *See Initial Brief* at 8–9.

The gravamen of all of Respondent’s claims was the allegation that Ms. Billips had comingled corporate and personal assets and/or siphoned money out of the corporation for personal use.⁴ *See Am. Compl.* at ¶¶ 33, 34, 38, 47, 64, 68; **Initial Brief** at 8. Indeed, the

³ As discussed above, Respondent is bound by his counsel’s admission that all his causes of action relate to the same alleged malfeasance. *Supra* Part I. Nevertheless, it bears repeating that there is no factual contention in Respondent’s pleading that was not placed before the Master as part of the accounting.

⁴ At trial, Respondent further sought to prove that Ms. Billips used her majority interest to deny Respondent a meaningful ability to influence the direction of the corporation, including the sale of certain locations of Alex’s Restaurants as a result of financial hardships suffered by the company. *E.g.*, **Trial Tr. (Aug. 24, 2021)** at 235:8–242:18. This was likewise unsuccessful, the Master finding Ms. Billips’ efforts, including making the difficult decision to close certain

accounting cause of action itself alleges:

The amount due to Plaintiff from Defendant is not readily ascertainable because the amount of corporate assets siphoned out of the corporation to the Defendant in her personal capacity is unknown.

Am. Compl. ¶ 38. This allegation was placed squarely before the Master, who ruled as follows:

The Court finds that the use of proceeds from the sale of assets of Alex's [the business at issue] in order to satisfy tax obligations for Flowertown [a separate business owned by Ms. Billips] requires an adjustment in the valuation of Alex's. Contemporary accounting records show that \$170,277.57 of proceeds from those sales went to satisfying tax obligations for Flowertown.

[. . .]

However, contemporary accounting records also establish that Ms. Billips contributed \$168,213.90 in personal assets for the benefit of Alex's during this same time period, as follows:

[. . .]

As the proceeds to Flowertown exceeded Ms. Billips' personal contributions by \$2,063.67, the Court finds that Ms. Billips owes \$2,063.67 to Alex's Inc., increasing the valuation of Alex's Inc. by that amount, for a total of \$301,030.30.

Order (Nov. 22, 2021) at 5–6. Accordingly, the Master heard evidence regarding Respondent's allegations of co-mingling and siphoning funds from the corporation and ruled that the full extent of damage to the business was \$2,063.67. There can be no contention the matter was not properly before the Master or properly resolved by the Master.

Nonetheless, Respondent contends that “[t]he Master only considered a narrow set of facts to make one narrow determination on the value of Respondent's interest in the remaining location of Alex's Inc.” **R. Brief** at 11. Notably, Respondent is unable to articulate a single fact or issue that was not presented to the Master. Nor could he, having conceded that the same

locations, were the only thing that kept the business afloat. **Trial Tr. (Aug. 25, 2021)** at 241:19–242:17.

factual underlying his other causes of action were an essential component of his accounting cause of action:

[W]e believe that the malfeasance does go directly to the value of the business.

Trial Tr. (Aug. 24, 2021) at 18:15–16; *see also* **Initial Brief** at 8. This argument was reiterated by Respondent’s counsel after the close of the evidence (**Trial Tr. (Aug. 25, 2021)** at 232:9–233:4) and responded to by Appellant’s counsel thereafter. **Trial Tr. (Aug. 25, 2021)** at 234:10–21.

Respondent had a full and fair opportunity to prove that Ms. Billips was comingling and/or siphoning funds from Alex’s Restaurants, Inc. He cannot be permitted to (i) argue to the trial court that certain evidence was an essential component of the accounting, (ii) present that evidence to the trial court, and then (iii) argue to this Court that he is not bound by the trial court’s rulings in relation to that evidence.

C. The Master’s Findings

Respondent contends “the Master did not make the findings on which Appellants’ assertions of error are based.” **R. Brief** at 7. Appellants assume Respondent is arguing that the Master made no findings about the alleged malfeasance; *i.e.*, comingling personal assets with corporate assets and siphoning of corporate assets. However, and as quoted in Appellants’ initial brief, the Master found:

I think the evidence before the Court is that [Alex’s] could not be a going concern but for the efforts of Ms. Billips. Okay?

Trial Tr. (Aug. 25, 2021) at 238:7-9; and

This is an ongoing business, and it’s largely dependent upon the efforts of Ms. Billips over there. I don’t think if it was [not] for her, the business s would still be open, is what it sounds like to me. And so there should be some credit there.

Trial Tr. (Aug. 25, 2021) at 241:13-18; *see also supra*, Part V.B (citing Nov. 22, 2021 Order at 5–6). Respondent’s contention is unsupportable.

D. Confidentiality

Respondent characterizes Appellants’ contention regarding an order that required certain materials be kept confidential as “absurd,” arguing no such order exists. **R. Brief** at 15.

Appellants note to this Court that the December 13, 2018 order entered by the Master requires:

The Parties shall not refer to the sealed portion of the filing, the sealed portion of the transcript of the September 10 hearing before this Court, or any subsequently sealed materials in the future, unless that reference is itself made confidential and/or, if filed, filed under seal.

Consent Order (Dec. 13, 2018) at 3. The sealed portion of the referenced filing and hearing both related to the very same matter Respondent alleged in his unsealed, publicly filed Motion to Reconsider. Respondent plainly violated the Master’s December 13 Order.

VI. Sanction for Repeated Ignoring of Court Orders

Respondent states “[t]he litigation has been protracted by disputes pertaining to the pleadings and discovery as reference to the case summary will clearly show.” **R. Brief** at 3. This is misdirection. What Respondent fails to note is that it was *Respondent’s* repeated non-cooperation in discovery and non-compliance with Court Orders that delayed resolution of the dispute. *See Brief* at 13–15 (detailing the instances of noncompliance by Respondent); **Motion to Dismiss (Oct. 4, 2018)** (same). It was precisely this conduct by Respondent that formed the basis of Appellants’ request that the trial court sanction Plaintiff in the form of forfeiture of his interest in Alex’s Restaurants. **Opp. to Mot. for Reconsideration (Dec. 17, 2021)** at 3–4 & n.3.

A quality shared by the best trial judges is a desire to establish and maintain cordial relationship with the bar, often giving attorneys every benefit of the doubt regarding their

conduct before the court. The Master is such a judge, and as lawyers, we are fortunate to receive this treatment. This goal may come into tension, however, with the goal of ensuring that the court's authority is respected and its orders obeyed.

To further this latter goal, the rules of civil procedure provide trial courts with express means of encouraging attorneys and parties to comply with court orders. For example, Rule 37(b)(2)(C), SCRCP provides:

If a party . . . fails to obey an order to provide or permit discovery . . . , the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

[. . .]

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

See also Davis v. Parkview Apts., 409 S.C. 266, 283, 762 S.E.2d 535, 544 (2014) (affirming a trial court's dismissal of actions as a sanction for noncompliance with court orders). However, a judge's humanity may cause him to err on the side of the former goal rather than the latter.

Here, at least four separate orders of the trial court were ignored by Respondent. **Initial Brief** at 13–15. This flagrant abuse of the trial court's directives is precisely what Rule 37(b)(2)(C) exists to redress. The trial court's denial of Appellants' request for sanctions on account of this conduct was guided by good intentions and is understandable; but it was a misapplication of the law and an abuse of discretion, and one that is harmful to the court's authority. Appellants request this Court speak up for the Master, and for the bench, and signal that these abuses will not be tolerated.

CONCLUSION

For the reasons stated in this and her prior brief, Ms. Billips asks that this Court reverse the Master's December 21, 2021 ruling on Respondent's Motion to Reconsider and Appellants' Motion for Relief and hold (i) that Respondent is bound by his election of his accounting remedy; (ii) that the Master's November 22, 2021 Order is a final order resolving all of Respondent's causes of action; (iii) that the Master erred in suspending his award of \$44,143.08 to Respondent and permitting Respondent to pursue additional causes of action based upon the same alleged wrong; and (iv) that the appropriate sanction for Respondent's ignoring of court orders is forfeiture of the amount owing to him for his minority interest in Alex's Restaurants, Inc.

Respectfully submitted:

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