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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' FINAL BRIEF

EPTING & RANNIK, LLC

December 13, 2022
Charleston, South Carolina

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INTRODUCTION

A party who elects a remedy and pursues it to a final adjudication cannot then pursue alternative remedies based upon the same factual allegations. Here, Plaintiff elected an accounting. On the morning of trial, Plaintiff argued the case should be consolidated with Plaintiff's other causes of action and tried as one in circuit court, because the facts underlying all his claims were the same. The Master denied the motion.

Following trial, the Master in Equity entered an order deciding the accounting claim and establishing the amount owed to Plaintiff. Plaintiff moved for reconsideration, contending the Master's order denied him an election of remedies. The Master granted the motion.

This was error. Plaintiff is bound by his judicial admissions at trial that the facts underlying the accounting cause of action are the same as those underlying his other causes of action. Because Plaintiff elected a remedy and pursued it to a final adjudication, the Master's order is a final order and binds Plaintiff. Because Plaintiff never appealed or cross-appealed the Master's final order, the case is over except as to the issues presented in this appeal.

STATEMENT OF THE ISSUES ON APPEAL

1. Whether the trial of the accounting action and the Master in Equity's November 22, 2021 order deciding that action constituted an election of remedies by Plaintiff, therefore rendering the order a final order, and therefore rendering as error the grant of reconsideration on the basis of Plaintiff's pursuit of other remedies.
2. Whether the absence of an appeal or cross-appeal by Plaintiff of the Master's November 22, 2021 ends Plaintiff's claims.
3. Whether Plaintiff's repeated violation of court orders in this action warrants a sanction.

STATEMENT OF THE FACTS

Defendant/Appellant Carolyn Billips ("Ms. Billips") is the President and majority

shareholder of Alex's Restaurants, Inc. ("Alex's"), a family restaurant based in Goose Creek, South Carolina. Ms. Billips' owns a 66.33% interest in Alex's. Ms. Billips also owns and operates another restaurant in Summerville, South Carolina called "Family Restaurant," formerly operated as "Flowertown Restaurant."

Plaintiff/Respondent Tony Billips ("T. Billips") is Ms. Billips' step-son and owns an 18.33% interest in Alex's. The remaining shareholder is Ms. Billips' son, Alex Jr., also with 18.33%, whose shares Ms. Billips has the authority to vote.

Alex's is an ongoing business, although one that is suffering through a global pandemic.¹ To ensure Alex's could weather the past and present financial difficulties, Ms. Billips paid herself a sub-market salary for running the business,² sold personal assets and contributed the proceeds to the business to keep it afloat, and made business loans between Family Restaurant and Alex's. Without Ms. Billips' actions, Alex's would not have survived.³

STATEMENT OF THE CASE

T. Billips sued Ms. Billips in 2016 on numerous theories,⁴ legal and equitable, contending that Ms. Billips had mismanaged the business to his detriment. **R. p. 0046 (Compl.); R. p. 0080 (Am. Compl.)**. On May 3, 2017, the case was referred to the Master in Equity for a trial on the accounting cause of action. **R. p. 0003**.

¹ Previously, there were multiple locations of Alex's, but all but one closed because of financial difficulties largely related to the end of video poker.

² And, at times, no salary at all.

³ As the Master in Equity found.

⁴ Plaintiff's amended complaint, filed January 1, 2018, asserts claims for Injunctive Relief, Fraud, Accounting, Piercing the Corporate Veil, Breach of Trust, Breach of Fiduciary Duty as Co-Trustee, Breach of Fiduciary Duty as Majority Shareholder, Judicial Determination of Shareholder's Interest, Oppression, Constructive Trust, Conversion, and Resulting Trust. **R. pp. 0080-94**.

The case was tried on August 24 and 25, 2021. *See* **R. pp. 0203, 0475**. On the morning of trial, Plaintiff requested the matter instead be sent to Circuit Court for a single trial on all of his causes of action, noting that the factual allegations underlying his contentions as to the accounting were the same as those underlying his other causes of action. **R. p. 0219, lines 7–23; *infra***. The Master denied the request, finding that the case was referred to him by consent for an accounting and that the Court would abide by the order of reference. **R. p. 0221, lines 13–15.**⁵

Plaintiff’s claim for an accounting alleges that “[t]he amount due to Plaintiff [from the sale of his stock] from Defendant is not readily ascertainable” **R. p. 0084 ¶ 38**. At trial, Plaintiff acknowledged that the buyout of his stock was the relief he sought via the accounting:

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.

R. p. 0511, lines 1–10.

The Court ruled that the present value of Plaintiff’s 18.33% interest in Alex’s was \$44,143.08 and ordered that Defendant pay that amount to Plaintiff, **R. pp. 0032–38**, noting on the record that Ms. Billips’ extraordinary efforts were the sole reason the business remained in operation. **R. p 0712, lines 7–9; R. p. 0715, lines 13–18**. In light of Plaintiff’s requested remedy, the Court further ruled that, upon tender of that amount to Plaintiff, his shares would be

⁵ While there is no appeal of this ruling, a trial court’s rulings related to maintaining control of the docket are reviewed for abuse of discretion. *S.C. Pub. Interest Found. v. Richland Cnty.*, 436 S.C. 271, 279, 871 S.E.2d 599, 603 (Ct. App. 2021).

returned to the corporation. **R. p. 0038.**

Plaintiff moved for reconsideration, claiming that a forced buyout of Plaintiff's interest would deny Plaintiff an election of remedies as to his other causes of action. **R. pp. 0183–85.** The Master agreed (**R. p. 0040**), and Defendants timely appealed. **R. p. 0813.**

After receiving the appeal, this Court requested the parties submit memoranda on the appealability of the Master's orders. The parties did so, on February 3, 2022 (T. Billips, **R. p. 0785**) and February 4, 2022 (Ms. Billips, **R. p. 0791**) respectively. Ms. Billips argued that the Orders were appealable, both because the Orders "involved the merits," and also because they determined the factual contentions underlying all of Plaintiff's causes of action, rendering the Master's ruling a final order pursuant to *Lawson v. Rogers*. 312 S.C. 492, 501, 435 S.E.2d 853, 858–59 (1993). On March 11, 2022, this Court ruled the case was immediately appealable and ordered that this appeal should proceed. **R. p. 0001.**

ARGUMENT

I. Standard of Review

Election of remedies is a legal doctrine, *Cowart v. Poore*, 337 S.C. 359, 364, 523 S.E.2d 182, 185 (Ct. App. 1999). Whether a party has elected a remedy is a question of law, and questions of law are reviewed de novo. *E.g., Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

A court's rulings related to maintaining control of its docket are reviewed for abuse of discretion. *S.C. Pub. Interest Found. v. Richland Cnty.*, 436 S.C. 271, 279, 871 S.E.2d 599, 603 (Ct. App. 2021).

II. Plaintiff's Case Is Over

Because the Master's November 22, 2021 Order deciding the accounting cause of action

is a final order, and because Plaintiff did not appeal or cross-appeal that order, the order determined all issues between the parties, except as presented in the Defendants' appeal.

A. Final Order

A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.

NationsBank of N.C., N.A. v. Parsons, 324 S.C. 506, 512, 477 S.E.2d 735, 738 (Ct. App. 1996).

The Master's Order is a final order because Plaintiff elected his remedy in pursuing the accounting to a final adjudication, and he is therefore prevented from pursuing alternative remedies based upon the same factual allegations (as discussed herein and in Defendant's prior briefing to this Court on the question appealability).

Plaintiff concedes that all of his causes of action arise from the same operative facts. *Infra*. Part III.C. Therefore, the Master's ruling on reconsideration that Plaintiff's alternative causes of action could proceed in circuit court was error and must be reversed.

B. Plaintiff Did Not Appeal or Cross-Appeal

Plaintiff has not appealed or cross-appealed the Master's rulings—including (i) the August 24, 2021 ruling denying postponement of trial and consolidation into a single action in circuit court, (ii) the November 22, 2022 order valuing Plaintiff's interest, and (iii) the December 21, 2022 order affirming the Court's previous rulings.

A party aggrieved by a lower court order may notice an appeal of that order within 30 days of its entry, or may cross-appeal within 5 days of service of a notice of appeal by the other party. Rules 203(b)(4), (c), S.C.A.C.R. Plaintiff did neither.⁶

⁶ This Court requested the parties provide memoranda on whether the orders were immediately appealable and agreed with Defendant that they were. Whether that would provide Plaintiff with an additional 30 days to appeal or 5 days to cross-appeal is not a consideration as Plaintiff did

Accordingly, Plaintiff has lost his right to appeal the Master's orders. *Jennings v. Stevens*, 574 U.S. 271, 276, 135 S. Ct. 793, 798 (2015) (“an appellee who does not cross-appeal may not ‘attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary’” (quoting *United States v. Am. Rlwy. Express Co.*, 265 U.S. 425, 435, 44 S. Ct. 560 (1924))); Rule 203(d)(3), S.C.A.C.R.

III. Plaintiff Is Bound by the Master's November 22, 2021 Order

A. Plaintiff Elected His Remedy - *Lawson v. Rogers*

On reconsideration, Plaintiff argued that the Master's order granting Plaintiff's request for a buyout of his stock denied him an election of remedies. The Master erred in granting Plaintiff's Motion to Reconsider, because Plaintiff had already elected his remedy in proceeding with the accounting to a final adjudication.

The doctrine of election of remedies involves a choice between two or more different and coexisting modes of procedure and relief afforded by law for the same injury. *Tzouvelekas v. Tzouvelekas*, 206 S.C. 90, 33 S.E.2d 73 (1945). The doctrine seeks to prevent a double recovery for a single wrong. *Save Charleston Found. v. Murray*, 286 S.C. 170, 333 S.E.2d 60 (Ct. App. 1985). When one set of facts entitles the plaintiff to alternative remedies, he may plead and prove his entitlement to either or both; however, the plaintiff may not recover both. *Id.* The invocation of one remedy constitutes an election of remedies that will bar another remedy consistent therewith, where the suit upon the remedy first invoked reaches the state of final adjudication. *Id.*

neither.

1. A Party Who Elects an Accounting Cannot Pursue Other Remedies Based Upon the Same Facts

[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)).

In *Lawson v. Rogers*, the South Carolina Supreme Court held that a party who proceeds in an accounting action based upon the same facts as his other, non-accounting causes of action (i) is bound by the factual determinations made in the accounting action, and (ii) has made an election of remedies, precluding him from proceeding with alternative remedies for the same wrong. 312 S.C. 492, 501, 435 S.E.2d 853, 858–59 (1993). The Court stated:

Lawson and Houck raise a final issue, which is that the order below went beyond the scope of the accounting by making conclusions of fact and law which should be left for the tort claims. We disagree. The pleadings reflect all the claims arise out of the same set of facts and wrongdoing. 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.

Id. at 501, 435 S.E.2d at 858–59. Here, a consent order was filed referring the case to the Master for an accounting, and Plaintiff proceeded with the accounting action, acknowledging on the record that the request for an accounting and arguments about the value of the business arose out of the same allegations as Plaintiff’s other causes of action — namely, alleged malfeasance and self-dealing in the operation of the business. *See infra* Part II.A.2. Accordingly, Plaintiff was not denied an election of remedies; he *made* an election of remedies. To hold otherwise would be to allow Plaintiff a second bite at the apple and risk inconsistent results.

2. Plaintiff’s Accounting Action Is Based Upon the Same Facts as His Other Claims

As conceded by Plaintiff’s counsel during trial, Plaintiff’s Accounting cause of action

arises out of the same facts and alleged wrongdoing as Plaintiff's other causes of action:

MR. ELLIS: [W]e do not think judicial economy is best served by *presenting to both this Court and the fact – finder of facts in Common Pleas . . .*

THE COURT: Well, we are way past judicial economy. We are five years into this case, and we haven't gotten anywhere.

MR. ELLIS: . . . of *how her malfeasance has – how she's treated Alex's as her own bank account to fund her other businesses and has co-mingled funds so much.* We do not think judicial economy is best served by *presenting her malfeasance twice.*

R. p. 0218, line 25 – p. 0219, line 12 (emphasis added). Later, counsel confirmed Plaintiff's position:

And again, at the beginning of this case, we said that malfeasance of the defendant is a large factor in determining the valuation of this case.

R. p. 0593, lines 11–14.

Counsel's statements are consistent with how Plaintiff's claims were pled:

- His Accounting cause of action alleged that an accounting was necessary “to prevent unjust enrichment by Defendant” (**R. p. 0084 ¶ 33**), “to determine what assets have been liquidated by the Defendant for her personal benefit” (**R. p. 0084 ¶ 34**), and because “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” (**R. p. 0084 ¶ 38**);
- His claim for Breach of Fiduciary Duty states that “Defendant breached her fiduciary obligation owed to Plaintiff by siphoning off corporate assets of Alex's Restaurants, Inc., and engaging in self dealing by personally profiting off of those above-mentioned transactions.” (**R. p. 0085 ¶ 47**)
- His claim for a Derivative Shareholder Action states that Ms. Billips, “as controlling shareholder, was siphoning off corporate assets for personal gain.” (**R. p. 0087 ¶ 64**) and “engaged in self dealing by liquidating a substantial majority of corporate assets for personal financial gain.” (**R. p. 0088 ¶ 68**).

That the causes of action arise out of the same facts cannot be disputed for a further reason. On the morning of trial, Plaintiff sought to postpone the accounting on the grounds that

the factual underpinnings of all claims were the same as the underpinnings for his remaining claims. **R. p. 211, line 25 – p. 221, line 18.**

Accordingly, Plaintiff is bound by this judicial admission and cannot now argue that his other causes of action are founded upon other facts, having conceded that they are not and moving for a single trial on all causes of action. *See, e.g., United States v. Blood*, 806 F.2d 1218, 1221 (4th Cir. 1986) (“Generally, statements by an attorney concerning a matter within his employment may be admissible against the retaining client.”); *Black’s Law Dictionary* 54 (10th ed. 2014) (defining a judicial admission as “[a] formal waiver of proof that relieves an opposing party from having to prove the admitted fact and bars the party who made the admission from disputing it;⁷ *see also Parnell v. Farmers Tel. Coop.*, 289 S.C. 112, 114, 344 S.E.2d 883, 884 (Ct. App. 1986) (noting a party need not “offer evidence to prove facts admitted by the opposing party”).

Moreover, because Plaintiff did not appeal that order, he is bound by it. *Supra* Part II.B.

3. Plaintiff Is Bound by the Master’s Findings

Even if the Master’s Order were not final, the factual findings made in an accounting are binding with regard to a plaintiff’s other causes of action where the accounting arises out of the same set of facts and alleged wrongdoing as the other causes of action. *See Lawson v. Rogers*, 312 S.C. 492, 501, 435 S.E.2d 853, 858 (1994) (“Lawson and Houck raise a final issue, which is that the order below went beyond the scope of the accounting by making conclusions of fact and law that should have been left for the tort claims. We disagree.”); IA C.J.S. *Accounting* § 55(a) at 61 (1985) (a court’s order in an accounting is conclusive on the question of a defendant’s liability to

⁷ This doctrine was recognized by this Court in a 2014 unreported case, a citation to which is provided for reference: *McCray v. Valle*, No. 2014-UP-313, 2014 WL 3845087, at *1 (S.C. Ct. App. Aug. 6, 2014)

the plaintiff as to all matters dealt with in the decree, and is equally conclusive on the plaintiff as determining that he has no other claim against the defendant growing out of the subject matter involved).

Here it is beyond dispute that the accounting cause of action and T. Billips' other causes of action arise out of the same facts and alleged wrongdoing. *Supra* Part I.B.1. Accordingly, T. Billips is bound by the Master's findings, including:

The Court finds that Plaintiff has *failed to prove any conduct on the part of Defendants or any other reason that would justify this Court valuing Mr. Billips' interest of Alex's Restaurant, Inc. based on its value in 2014 rather than as of today.*

R. p. 0034 (emphasis added);

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?

R. p. 0712, lines 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 would still be open, is what it sounds like to me. And so there should be some credit there.

R. p. 0715, lines 13–18.

4. *Granting Plaintiff a Do-Over Would Prejudice Defendant, and the Master Erred in Granting Reconsideration*

a. The Master's Rulings

At trial, Defendant confirmed he sought a buyout of his shares:

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.

R. p. 0511, lines 1–10. Accordingly, the Master’s November 22, 2021 Order held:

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.

R. p. 0038. Disappointed with the valuation of his interest, Plaintiff moved for reconsideration, contending:

It is Plaintiff’s belief that whether or not Plaintiff’s shares should be ordered to be purchased by Alex’s Restaurant’s, Inc. is properly adjudicated via his oppression cause of action.

[. . .]

By forcing the purchase of Plaintiff’s shares in this accounting action, it is Plaintiff’s belief that he is prejudicially being denied his election of remedies. By ordering the purchase of Plaintiff’s shares via this accounting action, Plaintiff fears he may be denied his ability to seek his prayed for relief under his oppression cause of action and his standing to seek his proper recompense in collateral actions.

R. p. 0183-84. Defendant opposed the motion, arguing:

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, he seeks a “redo;” and only now that Plaintiff has failed to establish his claimed valuation does he recant what he testified to under oath and seek the opportunity to pursue different remedy.

R. p. 0196. The trial court agreed with Plaintiff and held in its December 21, 2021 order:

Upon consideration of the Plaintiff’s Motion to Reconsider the Master’s Order, filed December 2, 2021, the Court GRANTS the Motion to the extent it orders payment of money in exchange for shares. Instead, the Court orders this action be REMANDED to the Circuit Court on the remaining causes of action after this Court’s Order on the Accounting.

R. p. 0040.

b. The Master Erred in his December 21, 2021 Order by Holding That Plaintiff Would Not Be Removed as a Shareholder by Payment of \$44,143.08

This matter was referred to the Master for an accounting on May 3, 2017 and was tried on August 24 and 25, 2021. During this time, defendant prepared her case with the understanding that it would be tried as an accounting. Though the allegations of wrongdoing are the same between the various causes of action, the accounting is an equitable cause of action to be tried nonjury before the Master, whereas Plaintiff's legal causes of action would be tried before a jury. Defendant's approach in front of the Master was very different to what it would have been in front of a jury, and Defendant relied upon Plaintiff's admission that the alleged malfeasance in the accounting claim and its remaining claims was the same malfeasance.

In such circumstances, this Court has noted that it is appropriate to require such an election of remedies prior to trial:

In this case, Ethridge and Fann have pleaded both legal and equitable causes of action. The legal cause of action-breach of contract accompanied by a fraudulent act-seeks both actual and punitive damages. The equitable causes of action seek an accounting between partners and the award of a one third interest in real property and other assets of the partnership. Because of the difference in these remedies, the proof of damages involves significantly different evidence. Much of the accounting evidence would not be relevant to measuring damages for breach of contract; the evidence on punitive damages would be irrelevant to the equitable claims. The equitable causes of action assume Harper is a member of the partnership. The legal cause of action rests on the theory that he has been wrongfully excluded from the partnership and is no longer a partner. Finally, the legal claim is triable by a jury. The equitable claims are typically referred to the master in equity for trial without a jury.

In these circumstances, it is reasonable to require Harper to make an election of remedies prior to trial. The facts alleged in the complaint show that one primary wrong is involved entitling the plaintiffs to a single recovery. This much is conceded by Harper himself. The burden of defending different claims involving substantially different proof, the requirement of different modes of trial, and the

potential for jury confusion regarding evidence of damages if the legal and equitable claims are tried together, all suggest that fairness and orderly adjudication will be better served by requiring an election.

Harper v. Ethridge, 290 S.C. 112, 121–23, 348 S.E.2d 374, 379–81 (Ct. App. 1986).

Plaintiff *did* elect his remedy by proceeding with an accounting to determine what amount was due to him for purchase of his interest. *Save Charleston Found. v. Murray*, 286 S.C. 170, 333 S.E.2d 60 (Ct. App. 1985). Allowing him to force a do-over by electing and pursuing a different remedy post-trial prejudices Defendant and is reversible error. And, as Plaintiff elected to be bought out of his shares at the price determined by the Master, the Master erred in granting reconsideration.

IV. Sanctions

Defendant moved the trial court to sanction Plaintiff by barring him from any recovery on account of his counsel's conduct; namely, repeatedly ignoring court orders and attempting to use the legal process to blackmail Defendant. **R. pp. 0197–98.**

A. Repeated Violations of Discovery Orders

Since Plaintiff filed his complaint on November 30, 2016, Defendant sought to discover the specific misconduct Plaintiff alleged Defendant to have engaged in. Plaintiff's responses to Defendant's discovery requests provided no further insight.⁸ **R. pp. 0799–800.** Still seeking to understand the allegations against her and prepare her defense, Defendant sought to obtain the opinions of Plaintiff's experts. Plaintiff next contended that he needed additional information from Defendants in order to prepare his experts. **R. p. 0779, lines 7–16.** The Court stated:

⁸ In those responses, Plaintiff named three expert witnesses. When contacted by Defendant's counsel, one stated he had not even been contacted by Plaintiff's counsel about serving as an expert.

Mr. Ellis, if you can state specifically what it is that you need, put that in writing to them – by email would be sufficient I would think. “Hey, we need this, we need that. I can get that stuff to my expert” and then make him available for a deposition, and then you all can start moving this ball down the road.

R. p. 0783, lines 10–16. This did not occur. The Court further ordered that, by:

June 15, 2018 – Plaintiff shall file any amended complaint by this date.

August 15, 2018 – Plaintiff shall make his experts available for deposition by this date.

R. p. 0014. Neither occurred. Plaintiff ignored the Court’s specific direction in each and every instance noted above.

In fact, five months later, the window for discovery set forth in the scheduling order closed, Plaintiff never having identified what information they required from Defendant, or having provided discovery responses stating what their experts’ opinions were, or filing an amended complaint, or making his expert available for deposition (and ultimately, naming yet another expert).

On April 23, 2019, the parties were before the Court again regarding Ms. Billips’ deposition. The Plaintiff still having provided no information about the nature of Ms. Billips’ alleged misconduct, Defendants were concerned that the deposition would be a fishing expedition. **R. p. 0739, lines 6–23.** The Court agreed and ordered Plaintiff to provide a list of topics for Ms. Billips’ deposition within 30 days, stating:

Let’s get that [information] to the Plaintiff within 15 days. You can give them 15 days to review it, and then – that’s what, 30 days out?

[. . .]

Would you be in a position then to send the – you can do your deposition of Ms. Billips at that time, once you’ve got that information. Send them the areas of inquiry you want to get.

R. p. 0750, lines 8–16. Defendant provided the requested materials as ordered; Plaintiff ignored the Court’s directive. Struck by the disrespect shown to the Master and the courts by the repeated ignoring of court orders, Defendant preserved the above wrongful conduct for review by this Court. **R. pp. 0197–98.**

B. Violations of Confidentiality Order

At a September 10, 2018 hearing, Defendants alerted the trial court to Plaintiff’s efforts to use scandalous allegations regarding past relations between Plaintiff and Defendant as a lever. This resulted in the trial court sealing a portion of a deposition transcript, removing certain allegations from the public record, and prohibiting reference to them except in a sealed filing or proceeding. **R. p. 0023 ¶ 4.** At trial, the Court allowed limited examination of the parties as the evidence adduced may be pertinent to the witnesses’ credibility.

In his Motion to Reconsider, Plaintiff ignored the Court’s ruling restricting the use of the scandalous allegations and, without evidence or truth, asserted in an unsealed filing that he was a minor child at the time of the alleged relations; *i.e.*, ignoring the Court’s confidentiality rulings, Plaintiff added allegations of criminality in a public filing. Upon Defendant’s motion, the Court sealed all of Plaintiff’s violations from public view.

C. Request for Sanctions

The profession of the law which he [a judge] is part is charged with the articulation and final incidence of the successive efforts towards justice; it must feel the circulation of the communal blood or it will wither and drop off, a useless member. – Learned Hand⁹

The integrity of the judicial system, and the public perception thereof, are fundamental in the authority and legitimacy of this most essential branch of government. This requires that

⁹ Hand, L., *The Speech of Justice*, 29 Harvard L. Rev. 6, 617–21 (Apr. 1916).

justice be valued and upheld by all of its participants. When the honors and ideals are dented by conduct unbecoming officers of the court, there must be redress.

In this spirit, Defendant requested that Plaintiff be sanctioned, both for his counsel's repeated violations of the trial court's orders and for his counsel's attempts to use the legal process for extortion. *Supra*. The Court denied this request, and Defendants ask this Court revisit it.

Defendant asks this Court to do what the trial court failed to do. No judge is without failings. Judge Scarborough's greatest strength is that he is a lawyer-oriented judge. Every lawyer is treated with respect, every lawyer is given a second chance, and every lawyer understands that this Judge recognizes the demands of the profession and the sacrifice of personal and family life. This Judge accommodates and indulges lawyer weakness in order to achieve a result that is just and benefits the system, a result that is sensitive to weaknesses in the process and shortcomings of lawyers themselves. This Judge indulges certain conduct because he is result-driven, not ego-driven; it is these strengths that allow him to sublimate his own personal feelings.

The Judge's decision in this context is understandable but wrong. The Plaintiff's actions are not in keeping with professional conduct, and sanction is warranted. The judge's default setting in this case was error. The appropriate sanction is to withhold the amounts awarded for his stock.

The Defendant not only complains *of* the Master, but also *for* him.

CONCLUSION

The Master erred as a matter of law in granting Plaintiff's motion for reconsideration on the basis that the original ruling denied him an election of remedies. Ms. Billips asks that this

Court reverse that ruling and hold (i) that Plaintiff 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 Plaintiff's causes of action; (iii) that the Master erred in suspending his ruling that, upon payment of \$44,143.08, Plaintiff would be divested of his stock; and (iv) that the Master erred in failing to hold that an appropriate sanction for Plaintiff's conduct was forfeiture to Defendant of the amount ordered to be paid to him for the transfer of his stock.

Respectfully submitted:

This 13th day of December, 2022
Charleston, South Carolina

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Dec 14 2022

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.*

CERTIFICATE OF COUNSEL PURSUANT TO RULE 211(B)

The undersigned certifies that the Appellants’ Final Brief and Final Reply Brief comply with Rule 211(b).

Respectfully submitted:

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