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**SC Court of Appeals**

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY

Master-in-Equity

The Honorable Mikell R. Scarborough

2016-CP-10-06265

Appellate Case No.: 2022-000078

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Tony A. Billips, individually and as a derivative shareholder of Alex's Restaurants' Inc.,  
..... RESPONDENT,

vs.

Caroline A. Billips, individually and as Trustee for 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., ..... APPELLANTS.

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**RESPONDENT'S FINAL BRIEF**

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Dated: January 3, 2023  
Charleston, SC

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### **STATEMENT OF ISSUES ON APPEAL**

1. THE MASTER IN EQUITY'S SUBJECT MATTER JURISDICTION IS LIMITED BY THE CONSENT ORDER OF REFERENCE TO THE ACCOUNTING CAUSE OF ACTION ONLY.
2. THE MASTER DID NOT ADDRESS THE CAUSES OF ACTION THAT WERE REMANDED TO THE CIRCUIT COURT.
3. APPELLANTS' REQUEST FOR SANCTIONS IS IMPROPER AND NOT PRESERVED FOR REVIEW.
4. THE MASTER'S ORDERS SHOULD BE AFFIRMED FOR ANY GROUNDS APPEARING IN THE RECORD PURSUANT TO RULE 220(C) SCACR.

### **STATEMENT OF THE FACTS**

Respondent does not adopt Appellants' Statement of the Facts. Respondent separately states the below facts as background information for this Honorable Appellate Court. To the extent that facts are necessary as to the matters raised in this appeal, those facts are addressed within the body of Respondent's brief.

Alex L. Billips the deceased founder of Alex's Restaurants, was the father of Respondent Tony A. Billips. Appellant, Carolyn Billips is the stepmother of Respondent. Carolyn was named personal representative of the estate of Alex L. Billips and a co-trustee of the testamentary trust in favor of Tony A. Billips and Appellant's sons who are the beneficiaries of the trust. She has exercised total control over Alex's Restaurants Inc. since the passing of founder Alex L. Billips. Tony Billips worked for his father washing dishes when he was a child. He was an employee of Alex's, and through hard work, rose to become the

manager of the Goose Creek location. When he left the company in 2011, he was cut off from all communication and contact with Carolyn Billups and the company.

It is undisputed that Respondent Tony A. Billips, has an 18.33% percent share in Alex's Restaurant Inc. He sought numerous times to have a distribution of his undisputed share of 18.33% in Alex's Restaurant's Inc., and sought documentation of Alex's cost sheets, inventory and sales reports, and other financial statements, which the controlling shareholder, Appellant Carolyn Billips, refused to provide.

At the time of trial, the sole undisputed ongoing location of Alex's Restaurants in operation was the Goose Creek location. Appellants sold Alex's restaurant locations on Dorchester Road (which included a laundry mat), Savannah Highway, Rivers Avenue and the Alex's Restaurant location in Moncks Corner.<sup>1</sup> Appellant Carolyn Billips admitted, that when the various locations were sold, she applied the money as she saw fit, including paying her personal obligations; because of what she described as a "dilemma" with the IRS, and South Carolina Department of Revenue. (R.p. 621, lines 14-23).

### **STATEMENT OF THE CASE**

Respondent does not adopt Appellants' Statement of the Case. Respondent incorporates and separately Designates for Inclusion in the Record on Appeal, the Case Summary of the Charleston County Clerk of Court for the subject case, Case No.: 2016-CP-10-06265. Respondent's Statement of the Case will be brief and includes the Order of Reference, which provides the basis of the subject matter jurisdiction of the Master and portions of the trial transcripts. To the extent that matters are in issue before this Honorable Appellate Court, the

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<sup>1</sup> The parties dispute whether Respondent is also entitled to 18.33 % of the Summerville location, known as the Flowertown Restaurant, which had a common menu, mission statement and was also solely controlled by Carolyn Billips.

relevant filings and portions of the transcripts are addressed within the body of Respondent's Brief, to include but not be limited to the issue of Appellant's Request for Sanctions.

On November 21, 2016, Respondent brought this action in the Court of Common Pleas for the Ninth Judicial Circuit (R.pp. 46-63). Thereafter, Appellants filed their Answer on January 30, 2017. (R.pp 67-79). On January 18, 2018, Respondents filed an Amended Complaint asserting causes of action for Accounting of Trust; Accounting of Corporation; Breach of Fiduciary Duty as Co-Trustee; Breach of Fiduciary Duty as Controlling Shareholder; Conversion; Breach of Trust; Derivative Action by Shareholder; Piercing the Corporate Veil; Judicial Determination of Shareholder's Interest; Constructive Trust; Resulting Trust and Oppression (R.pp. 80-95). On May 3, 2017, the case was referred to the Master in Equity for a trial *solely* to resolve Respondents accounting cause of action. (Order of Reference, R.p. 4).

The May 3, 2017 Consent Order of Reference expressly provides:

IT IS ORDERED that the matter be, and the same hereby is, referred to the Honorable Mikell Scarborough as Master in Equity for Charleston County with regard to the accounting requested by the Plaintiff.

(Id.,).

The litigation has been protracted by disputes pertaining to the pleadings and discovery as reference to the case summary will clearly show (Case Summary, R.p. 808-812).

On December 13, 2018, the Court entered a Consent Order to Seal portions of the deposition transcript of John Freeman, Respondents ethics and corporate expert and lines 2-3 of the transcript of the September 5, 2018 Hearing. (Consent Order to Seal. R.p. 21-26)

On August 10, 2021, the Master entertained Appellant's Motion to Exclude Expert Witness Testimony of Respondent's experts. Respondent filed a Motion to Compel Discovery.

On the same date the Master issued a Form- 4 Order. The Motion to Exclude was

Denied as it relates to James Ewart as he has testified to his opinion and the basis for calculation of value. “The Motion to Exclude was GRANTED as to John Freeman, whose testimony is not necessary at the accounting hearing before this Court.” (emphasis added) (Form 4 Order 8-10-2021, R.p. 29)

At the call of the case on August 24, 2021, the Master stated,

This is a 2016 case number CP-10-6265. This case was referred to me back in 2017 for the purposes of an accounting to determine, the value of the entity known as Alex's Restaurants. And then there are other causes of action, which would then be sent back to the Circuit Court for trial. (R.p. 206. lines 10-17).

Respondent then moved for all causes of action to be returned to the Court of Common Pleas, because after three years of discovery the Appellant failed to provide documentation necessary for the Master to value the Respondent's interest in Alex's. (R.p. 210, line 22, - p. 212, line 10).

Appellants' counsel stated that:

First this matter was referred to you, as you said, in 2017 by consent for an accounting of plaintiff's interest in Alex's Restaurant, Inc., which is what Plaintiff requested in his pleading. (R. p. 213, lines 17-21).

And:

Now the court has before it the task of placing a valuation on Mr. Tony Billips 18 and third percent share of that entity (R. p. 214, lines 10-18)

The Master adamantly denied Respondent's motion stating:

Well don't I have to – isn't the whole idea of doing the accounting here is for me to come up with some estimate of the value of what the business is so you can go next door, pursue all of your causes of action. (R.p. 218, lines 12-24).

The Master made clear that the jurisdiction of his Court, the sole purpose of the hearings of August 24-25 2021, was to make a determination on the value of the business to

help guide the Circuit Court when adjudicating the other causes of actions. Specifically, the Master in Equity stated that other facts of malfeasance related to other causes of action had nothing to do with the accounting action.

No, it doesn't. Malfeasance would have nothing to do with this percentage interest and the value of the business. It may go to damages, but it has absolutely zero to do with his percentage of the value of the business. (R.p. 220, lines 4-9).

The trial was held on the accounting cause of action only on August 24-25, 2021. The Court valued the ongoing Goose Creek operations only, with an adjustment for monies utilized by Respondent for the benefit of the Flowertown Restaurant in Summerville.

The Master explained the limitations of his consideration in this case ... "I don't have—I don't believe I have enough information as to render a value for the other (5) units that have been sold." (R.p. 715, lines 19-21).

The Master, in no uncertain terms, clarified that his determination of the value of Respondent's 18.33 % interest in operating location of Alex's Inc., would not end the case. "Ultimately, I've got to give y'all a number, and the sad part about this, at least unless, y'all can resolve it is, this doesn't end the litigation." (R.p. 717, lines 5-8).

The Master's Order of November 22, 2021, is detailed and included findings on Factual Background, Operations of Alex's, Methodology for Valuing Alex's, Adjustment Relating to Flowertown, Valuing Mr. Billips' Interest, concluding:

Mr. Billips owns 18.33% of Alex Restaurants, Inc., valued at \$ 301,030.30 which amounts to \$ 55,178.85.

The Court finds a 20% discount on this amount is a conservative reduction to account for Mr. Billips' status as a minority shareholder in a business not readily marketable.

Accordingly, the Court finds the value of Mr. Billips 18.33% interest to be \$44, 143.08 ( $\$ 55, 178.85 - \$ 11,035.77 = \$44,143.08$ ).

(Order, R. pps 37-38).

Thereafter each side filed a Motion for Reconsideration. In deciding the Motions to Reconsider the Court Ordered in pertinent parts,

The Court GRANTS the (Respondents) 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. (emphasis added).

Further, the Court Grants the (Appellant's) Motion to Seal the record as to Four exhibits requested as the Court finds this request reasonable and limited in scope and the allegations contained therein not relevant to the accounting cause of action. Defendant's remaining relief is DENIED.

(Form 4 Order, 12-21-2021, R.pp 40-42)

On July 1, 2022, a Consent Order Granting Leave for Respondent to deposit \$ 44,143.08 into Court pursuant to Rule 67, SCRPC was issued. (R.pp. 43-45).

#### **STANDARD OF REVIEW**

Questions involving subject matter jurisdiction are questions of law for the court. *Martin v. Paradise Cove Marina, Inc.*, 348 S.C. 379, 384, 559 S.E.2d 348, 351 (Ct. App. 2001)(Internal citations omitted). An appellate court is "free to decide a question of law with no particular deference" to the trial court. *Catawba Indian Tribe v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007).

The Court "reviews questions of law de novo." *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 564, 658 S.E.2d 80, 90 (2008). The de novo standard does not relieve the appellant of the burden of identifying error in the Maser's findings. See *Kosciusko v. Parham*, 428 S.C. 481, 491, 836 S.E.2d 362, 367 (Ct. App. 2019).

## ARGUMENT AND CITATION TO AUTHORITY

It is unclear exactly what Appellants are asserting in their first issue statement. What is clear, is that Appellants' entire appeal overlooks the limited subject matter jurisdiction granted to the Master in the Order of Reference. (Order of Reference, R.p. 4).

In addition, Appellants' third issue statement on appeal raises a question that is based on a false argument, because the Master did not make the findings on which Appellants' assertions of error are based. All claims, other than the cause of action for an accounting were remanded to the Circuit Court for a decision on the merits as to Respondents other causes of action. (Final Order, Form 4 Order 12/21/2021, R.p. 40).

Appellants fail to identify any reversible error in the Master's decision to grant Respondents' Motion to Reconsider, choosing instead to focus all their arguments on the limited accounting issue that was in fact decided. See, Brief of Appellant.

Furthermore, the bulk of Appellants' arguments are not before this Court, because the scope of this appeal is limited to what the Master actually decided below, and the sole issue is whether the Master properly granted Respondent's Motion for Reconsideration.

As explained herein, the Master properly granted Respondent's Motion to Reconsider because the Master does not have subject matter jurisdiction over Respondent's remaining claims.

### **I. THE MASTER IN EQUITY'S SUBJECT MATTER JURISDICTION IS LIMITED BY THE CONSENT ORDER OF REFERENCE TO THE ACCOUNTING CAUSE OF ACTION ONLY.**

Considering the relief requested by Appellant, the issue is straightforward: Under South Carolina law, does the Master in Equity have subject matter jurisdiction to decide claims that are not before it? The answer is unequivocally no. The only court in South Carolina that has

jurisdiction over Respondent's remaining claims is the Court of Common Pleas, whom the Master properly remanded the case to for a decision on the merits on the remaining causes of action. (Master's Final Order)(Master's Decision on Motion to Reconsider)(R.p. 40).

**A. Subject matter jurisdiction.**

Subject matter jurisdiction is “the power of a court to hear and determine cases of the general class to which the proceedings in question belong.” *McCullar v. Estate of Campbell*, 381 S.C. 205, 206, 672 S.E.2d 784, 784 (2009) (Internal quotations omitted). “A court’s subject matter jurisdiction is determined by whether it has the authority to hear the type of case in question.” *Allison v. W. L. Gore & Assocs.*, 394 S.C. 185, 188, 714 S.E.2d 547, 549 (2011); *Anderson v. Anderson*, 299 S.C. 110, 115, 382 S.E.2d 897, 900 (1989).

Subject matter jurisdiction can be challenged at any time, even for the first time on appeal. *Ex parte Cannon*, 385 S.C. 643, 654, 685 S.E.2d 814, 820 (Ct. App. 2009). Lack of subject matter jurisdiction may not be waived and should be taken notice of by this Court. *Johnson v. S.C. Dep't of Prob.*, 372 S.C. 279, 284, 641 S.E.2d 895, 897 (2007).

Understanding this well-settled law confirms that the Master lacks jurisdiction to decide Respondent's remaining claims against Appellants, and therefore, properly granted Respondent's Motion to Reconsider.

**B. The Master in Equity's jurisdiction is limited by the Order of Reference.**

Pursuant to Rule 53, SCRCP, a “master has no power or authority except that which is given to him by the order of reference.” *Bunkum v. Manor Properties*, 321 S.C. 95, 98, 467 S.E.2d 758, 760 (Ct.App.1996), cert. denied (October 17, 1996). Absent a reference of any or all issues in an action, the master lacks jurisdiction to enter judgment since nothing can originate before a master...” *Bailey v. Bailey*, 330 S.C. 326, 498 S.E.2d 891 (S.C. App. 1998).

The May 3, 2017, Consent Order referring this case to the Master is clear: *only* the accounting requested by the Respondent was referred to the Master in Equity. The Master conducted the hearings in accordance with the Order of Reference and determined that the value of Respondent's interest in the only location of Alex's Inc. remaining in operation (Goose Creek location), is the sum of \$ 44,143.08. (Order 11-22-21, p. 7)(R.p. 38).

The entirety of this case and all causes of action were not before the Master. The Master only had jurisdiction to make a determination on the accounting, and only heard testimony and considered facts pertaining to the accounting cause of action. (Final Order)(R.p. 32-38). The Master clearly delineated his role and the scope of the causes of action to be determined. (See, R.p. 729, lines 5-7; R.p. 730, lines 2-7; R.p. 781, lines 6-14, and R.p.782, lines 11-2).

Counsel for Appellants admitted that the Master in Equity was granted limited jurisdiction over the accounting cause of action. Appellants' counsel stated that:

First this matter was referred to you, as you said, in 2017 by consent for an accounting of plaintiff's interest in Alex's Restaurant, Inc., which is what Plaintiff requested in his pleading. (R. p. 213, lines 7-21).

And:

Now the court has before it the task of placing a valuation on Mr. Tony Billups 18 and third percent share of that entity (R.p. 214, lines 10-18)

The Master correctly refused to hear facts relevant to Respondent's other causes of action. The Master adamantly denied Respondent's motion stating:

Well don't I have to – isn't the whole idea of doing the accounting here is for me to come up with some estimate of the value of what the business is so you can go next door, pursue all of your causes of action. (R. p. 218, lines 12-24).

In their grounds for appeal, Appellants ignore the limited subject matter jurisdiction of the Consent Order of Reference; the clear language of the Order referring the accounting causes of action to the Master in Equity is dispositive of this issue. The Master in Equity had no authority to expand that jurisdiction and correctly states the limit of his jurisdiction throughout the transcript and in his orders. (Order 11/21/2021, R.p.32)(Order 12/21/2021)(R.p. 40).

Appellants now argue, for the first time on appeal, that the trial of the accounting cause of action constituted an election of remedies by Respondent, therefore rendering the order a final order, and therefore rendering as error the grant of reconsideration on the basis of (Respondents) pursuit of other remedies. (Appellants Brief, p. 6).

Additionally, Appellants argue that the absence of an appeal or cross-appeal by Respondent) of the Master's November 22, 2021, Order ends Respondent's Claims. (Ibid, p.5). Appellants also seek the sanction of withholding the amounts awarded for (Respondent's) stock in the Goose Creek location. Respondent submits that the Appeal is meritless and interposed to delay the trial of the surviving Causes of Action in the Amended Complaint.

Appellants' theory relies primarily on the case *Lawson v. Rogers*, 312 S.C. 492, 435 S.E.2d 853 (1993), in which all the facts and all of the issues in a contentious partnership dispute were determined by the trial court which had subject matter jurisdiction over all issues and all causes of action. In *Lawson*, learned trial Judge James Lockemy, who later rose to be the Chief Judge of this Honorable Court of Appeals, heard all the evidence, determined the competing claims and causes of action, rendered a decision on the entire controversy in his determination of the accounting cause of action. (Emphasis added)

In *Lawson*, the Court of Appeals determined that because the trial court weighed all of the facts and evidence and made findings and determinations of fact and law involving all causes of action, that the Order was final as to all claims. Unlike *Lawson*, the Master in Equity in this case *sub judice*, did not consider facts and evidence beyond what was necessary to determine the accounting cause of action.

The jurisdiction of the Master in Equity for this case was narrow. The Master's role was solely to make a determination on the value of Respondent's interest in the business. He did not have subject matter jurisdiction to weigh and determine facts plead in the Respondent's amended complaint as to the other causes of action. The 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.

For these reasons, the Master's decision granting Respondent's Motion to Reconsider and remanding Respondent's remaining causes of action for a decision on the merits, should be affirmed.

## **II. THE MASTER DID NOT ADDRESS THE CAUSES OF ACTION THAT WERE REMANDED TO THE CIRCUIT COURT.**

Appellants argue that the Master's Order regarding the accounting cause of action are final as to all causes of action. At the trial of August 24-25, 2021, however, the Master recognized and exercised jurisdiction only over the determination of the value of Respondent's share in Alex's, Inc. as it pertained to the Goose Creek location. The Order of Reference provides that the Master is to preside over *only* the accounting requested by the Plaintiff. (Order of Reference, R. p. 4).

“Due process guarantees to persons who never had a chance to present their evidence and arguments on a claim a full and fair opportunity to litigate the relevant issue . . . .” *Doe v.*

*Bishop of Charleston*, 407 S.C. 128, 138, 754 S.E.2d 494, 499 (2014)(quoting *Richburg v. Baughman*, 290 S.C. 431, 435, 351 S.E.2d 164, 166 (1986)).

Appellants' arguments that the Respondent would get "two bites at the apple" when the remaining causes of action are remanded to the circuit court for review is spurious and would violate Respondents due process rights. In effect only a small part of the apple was referred to the Master, the remainder of the apple will be determined in the Court of Common Pleas.

The Master in Equity only had limited jurisdiction to hear facts related to the accounting and the Master stated that he was without sufficient information to make a determination of the value of the locations that had been sold and could only make determinations on the valuation of the sole operating location of Alex's, and nothing else. No other facts were considered and no other causes of action were adjudicated. Unlike *Lawson* the parties had no opportunity to present all the facts of the case for the Master's consideration in reaching a decision.

In *Lawson*, the trial court actually heard testimony and considered all facts of the case that were determinative of the other causes of action. Here, the Master explicitly refused to hear facts unrelated to the accounting for Alex's. (R.pps 206-221). Denying the Respondent, the ability to pursue the remaining causes of action in the Court of Common Pleas would defy the Order of Reference from the Court of Common Pleas limiting the jurisdiction of the Master, as well as the Master's Order and contradict basic tenants of judicial fairness.

Respondent is entitled to a full and fair opportunity to litigate the remaining causes of action. For the above reasons, the Master's decision in the Final Order and granting Respondent's Motion to Reconsider should be affirmed.

### III. THE CONSENT ORDER OF REFERENCE WAS NOT AN ELECTION OF REMEDIES BY THE RESPONDENT

Appellants argue that Respondent is barred from presenting its remaining causes of action in the Court of Common Pleas because the referral of the accounting action to the Master amounted to an election of remedies, and the determination of the value of Respondent's interest in the accounting action is final as to all other causes of action.

“An election presupposes the existence of two or more remedies from which a choice may be made, and the conclusiveness of such election is predicated on the inconsistency of such remedies.” *Jones v. S.C. Power Co.*, 198 S.C. 380, 388, 18 S.E.2d 336, 340 (1941)(Concurrence); *Taylor v. Medenica*, 324 S.C. 200, 218, 479 S.E.2d 35, 45 (1996)(Election of remedies is not applicable where there are two separate causes of action, each based on different facts and circumstances.); *Tzouvelekas v. Tzouvelekas*, 206 S.C. 90, 33 S.E.2d 73 (1945).

Thus, only where there is “a choice between two or more different and coexisting modes of procedure or forms of relief afforded by law for the same injury” is an election of remedies warranted. *Austin v. Stokes-Craven Holding Corp.*, 387 S.C. 22, 56, 691 S.E.2d 135, 153 (2010)(“The basic purpose of election of remedies is to prevent double recovery for a single wrong.”).

The Respondent is not seeking double redress for a single wrong. (Complaint)(Amended Complaint)(R.pps 46-61,pps. 80-95). Here it is clear that the Master determined the value Respondent's interest in the ongoing portion of Alex's, with the remaining causes of action to be determined in the Court of Common Pleas. (Final Order Form 4, (R.p.40).

Use of the doctrine of election of remedies is limited to cases where a double recovery by the Respondent is threatened. *Save Charleston Foundation v. Murray*, 286 S.C. 170, 333 S.E.2d 60 (Ct.App.1985). Here the Respondent cannot recover for the same action twice when only a limited set of facts were presented to the Master to determine the value of Respondent's interest in the portion of Alex's that continues to operate.

Significantly, Appellants fail to appreciate that the accounting cause of action—which was determined by the Master—sounds in equity, whereas, Respondent's claims for breach of fiduciary duty, conversion, breach of trust, derivative action by shareholder, oppression and other causes of action contained within the Amended Complaint sound in law. The Supreme Court has made clear that parties "have a right to pursue one or more remedies." *Nettles v. Lightsey*, 190 S.C. 116, 117, 2 S.E.2d 481, 481 (1939). Respondent did not elect between two choices of remedy, nor did Respondent waive the right to proceed in the Court of Common Pleas, on the other causes of action by consenting to the referral of one cause of action to be determined by the Master.

This is distinguished from *Cowart v. Poore*, 523 S.E.2d 182, 337 S.C. 359 (S.C. App. 1999) insofar as *Cowart* was given the option to choose between two remedies available to him. In this case the Master's jurisdiction was limited and does not constitute a final order as to all the causes of action.

For these reasons, the Master's decision in the Final Order and Order granting Respondent's Motion to Reconsider should be affirmed.

#### **IV. APPELLANTS' REQUEST FOR SANCTIONS IS IMPROPER AND NOT PRESERVED FOR REVIEW.**

"An appellate court will not consider issues on appeal which have not been preserved for appellate review." *Ulmer v. Ulmer (In re Ulmer)*, 369 S.C. 486, 490, 632 S.E.2d 858, 861

(2006). An issue is not preserved for appellate review where “no ruling was ever made on this issue.” *Dawkins v. Mozie*, 399 S.C. 290, 295, 731 S.E.2d 342, 345 (Ct. App. 2012). Preservation rules are intended to ensure that appellate courts review considered decisions of our trial courts and that issues are not being raised for the first time on appeal. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998).

In the case at bar, Appellant proceeded with the hearings of August 24-25, 2021, without making any request for sanctions. Appellants, for the first time, within their Reply to Respondent’s Motion for Reconsideration, raised the issue of sanctions. Appellants, therefore waived any attempt to request sanctions for alleged violations of issues dealt with by the Court in discovery rulings in 2018 and 2019.

Appellants absurdly request that counsel be sanctioned for “Violations of a Confidentiality Order”. (App. Brief at 15). However, there is no “Confidentiality Order”. There is a Consent Order to Seal portions of the deposition transcript of John Freeman, and a portion of the transcript from a September 10, 2018 hearing. (Consent Order of December 13, 2018).

At trial, Tony Billips testified that things changed with his contact and communication with Ms. Billips, with Alex’s Inc., with his brothers after he left Alex’s in 2011. That he felt like he was cut off because, “I feel like it was – we (Carolyn and I) were intimate, and I walked out, that might have been stepping on some toes and hurting some feelings.” (Tr. p. 434, lines 11 – 23). Respondent’s counsel then made an offer of proof, stating that it (the intimate relationship) is necessary to show motive, goes to everyone’s credibility and is relevant, material and significant evidence to the 2011 timeframe. (R.p. 435, lines 2- 11)

Attorney Rannek responded and argued, “I believe this is going to whether Mr. Billips is entitled on the question of liability. This doesn’t factor into the question of the valuation of his share of Alex’s Restaurants, Inc.” (Id., lines 18-22). The Court allowed the question, but limited the inquiry to the 2011 timeframe. (R.p.435, line 23-p. 436 line 1).

Tony Billups then testified that he was intimate with Carolyn Billups up until 2011. That they vacationed together, met privately in the mountain house and anywhere they could, and there were sexual relations involved. (R.p. 436, lines 3-21).

In her case in chief, Carolyn Billips admitted under cross examination that her relationship with her step-son Tony Billips “did go the wrong way.” (R.p. 623, line 23- p. 625, line 16).

The Court overruled Rannek’s objection and allowed some leeway. Whereupon counsel for Respondent offered that Carolyn’s response would go to the issue of credibility. Carolyn Billips then admitted that she, went along with something that she should not have. She explained it was “[a]n intimate relationship that I did not want to, did not plan to. And so my sons wouldn’t – my children, grandchildren wouldn’t find out. I continued because I was told one time, it doesn’t make any difference between one time or how many times.” (R. p. 625, lines 7-16).

To review an alleged determination of a lower court to not sanction a party, or their Counsel, the request must be initially made and determined by the trial court; and that without findings or a decision, nothing is preserved for this Court’s review. Respondent submits that only the Master can impose sanctions for bad behavior, acts or omissions in his Court via a finding of direct contempt.

In this case, Appellants do not directly contest the Master's determination of the value of Respondent's interest, instead arguing that Respondent's entire case is over. Then, in perhaps the ultimate game of "gotcha", Appellants' counsel requests that this appellate court sanction and bar Respondent from any recovery for allegedly violating discovery rulings of the Master from 2018 and 2019, an issue neither ruled upon nor adjudicated below.

The game of "gotcha", where form is elevated over substance is disfavored. *See*, Jean Hoefer Toal et al., Appellate Practice in South Carolina 183 (3rd ed. 2016); *Atl. Coast Builders v. Lewis*, 398 S.C. 323, 333, 730 S.E.2d 282, 287 (2012) (Toal, C.J., dissenting); and *Singh v. Singh*, 434 S.C. 223, 226 n.7, 863 S.E.2d 330, 334 n.7 (2021).

For these reasons, the Master's Final Order and decision granting Respondent's Motion to Reconsider should be affirmed.

#### **V. RULE 220C, SCACR**

The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.

#### **CONCLUSION**

The Appellant has filed a spurious appeal in the hopes of finally ending the causes of action that were remanded to the Court of Common Pleas.

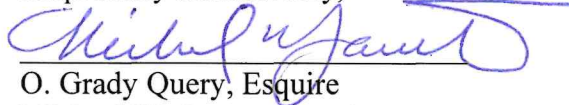
The Master in Equity's subject matter jurisdiction is limited by the Order or Reference. The Master was granted limited jurisdiction to make a determination on the accounting cause of action only. Throughout the trial the Master was adamant about proceeding on the accounting cause of action only. The Master declined to hear facts and determine issues related to the malfeasance causes of action, including breaches of fiduciary duties, conversion, breach of trust, derivative action by shareholder, piercing the corporate veil, constructive trust,

resulting trust; oppression. The Master only allowed evidence as to the accounting action, to include allowing limited evidence which went directly to the credibility of the parties.

Appellant chose not to appeal the Master's determination of the value of Respondent's interest in Alex's. Appellant then declares the Master erred in not sanctioning the Respondent on Motion for Reconsideration, and finally urges that, "The appropriate sanction is to withhold the amounts awarded for his stock."

Respectfully the Orders of the Master in Equity should be Affirmed, and the remaining causes of action remanded to the Court of Common Pleas.

Respectfully Submitted By,



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Dated: January 3, 2023  
Charleston, South Carolina

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SC Court of Appeals

STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY

Master-in-Equity

The Honorable Mikell R. Scarborough  
2016-CP-10-06265

Appellate Case No.: 2022-000078

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Tony A. Billips, individually and as a derivative shareholder of Alex’s  
Restaurants’ Inc., ..... RESPONDENT,

vs.

Caroline A. Billips, individually and as Trustee for 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., ..... APPELLANTS.

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CERTIFICATE OF COUNSEL

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The undersigned hereby certifies that the Respondent’s Final Brief complies with  
Rule 211(b)



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