THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas, 13th Circuit

Letitia H. Verdin, Circuit Court Judge

COMMON PLEAS CASE NO.: 2019-CP-39-01224

Appellate Case No. 2022-001777

Christopher Young and Biotech Restorations, LLC,

Appellants/Respondents,

v.

Joanna Marie Paynter, a/k/a Joey Paynter, Samantha P. Nelson, and Paynter Consulting, LLC,

Respondents/Appellants.

APPELLANTS/RESPONDENTS' REPLY BRIEF

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The intent of the trial court's order dated Nov. 17, 2022, was to address construction of the contract. (August 11, 2022, Hearing Transcript, *e.g.,* at p. 5, lines 4-16 and p. 6, lines 9-14). The parties never presented proposed Findings of Fact, as contemplated and planned, and the trial court never made any prior to entering judgment on all claims.

I. TRIAL COURT "FINDINGS" RE: OWNERSHIP OF THE FACTOR

Despite not dedicating a section of the Nov. 17, 2022 Order to specific Findings of Fact, the trial court made one finding in its Order dated Nov. 17, 2022. The finding in question is as follows: "Joey Paynter and Samantha P. Nelson own the Factor Biotechnology as they own and solely possess the knowledge to create it." (*Id.* at 5). The trial court also declared that this sole ownership arose "upon … death" of Dr. Valerie Paynter on Sept. 4, 2017.

As set forth in the May 30, 2006 General Partnership Agreement ("GPA"), at Para. 8, "No partner may sell his or her interests in the Partnership business to a third party unless mutually agreed to by the other partner." (*Id.*). As with almost every provision in the GPA, this was a mutual obligation / benefit to the other partner, namely one partner must behave in the same manner as the other, and *vice versa*.

By Respondents/Appellants own testimony, they breached Para. 8 when they allegedly became the owner(s) of the Factor in February to April 2016. But the trial court did not rely on this sworn testimony of Joanna Paynter in her May 19, 2020 Declaration. Instead, it "concluded" the Daughters became the sole owners of the Factor "upon [the] death" of their mother. (*Id.* at 4). Nothing further is provided to determine which facts in the record the trial court considered or failed to consider in making this finding of ownership.

Respondents/Appellants first allege Appellants' Initial brief ignores the trial court's construction, and further that such a fact-finding (within the construction order) is somehow protected by decisions made in the Probate Court, which cannot now be "collaterally attacked." The trial court did not rely upon or reference the probate court[i] findings to declare that the Daughters were now the sole owners of the Factor. Respondents/Appellants want this Court to accept this Finding of Fact as to ownership because the trial court order also declared that "nothing within the [GPA] requiring or limiting [Dr. Valerie Paynter] to [share]" the Factor. (*Id.*). Respondents/Appellants adopt this "nothing" position from the trial court order, arguing as follows:

> Nothing in the remainder of the Agreement requires Paynter Consulting or Dr. Paynter to share, transfer, or otherwise disclose the Factor Biotechnology or the proprietary Factor formulation to anyone, including Plaintiffs [Appellants/Respondents]." Moreover, the trial court correctly observed that "there is nothing contained within this Agreement to restrict Paynter Consulting or Dr. Paynter from sharing knowledge concerning the Factor formulation with others, including her children [Respondents/Appellants]."

(Brief of Respondents/Appellants, at 9) (underline emphasis added).

As set forth in the mere two pages that comprise the GPA, everything in the GPA contemplates the partnership and the continuing partnership will share "profits" as follows:

- 50 / 50 split of net profits during the lifetime of both partners;
- 50 / 50 split of net profits from projects started before death of a partner;[ii]
- 90 / 10 split of "net profits annually" from Factor projects after a partner dies;[iii]
- 90 / 10 of any sale with 90 % "gross" to the remaining / continuing partner.

(*Id.*).

These are specific and unambiguous provisions above, of which the 5th sentence of Para. 4 was added to the May 30, 2006 GPA, as a revision to the Jan. 10, 2006 GPA. The May 30, 2006 GPA also reflected the partners' amendments to allow each partner to operate through their

respective LLC's. Despite these provisions, Respondents/Appellants argue "nothing" in the GPA is helpful to Appellants/Respondents.

The partners contemplated and agreed that the remaining / continuing partner, *whoever that may have been*, had the "right" to "continue the business of the Partnership," with the corresponding obligation to account for and pay 10 % of net profits annually to the heirs / estate of the deceased partner. In addition, the May 30, 2006 revisions to the GPA provided for this same remaining / continuing partner, *whoever that may have been*, to continue to develop value in the Factor and sell it, as long as the "heirs / estate" are paid "10% gross from the sale of the Factor Technology." (*Id.* at 1, Para. 4).

Respondents/Appellants wish for the record in this case to show that Dr. Valerie Paynter provided a license to Paynter Consulting, LLC, revocable in her sole discretion. Unfortunately for Respondents/Appellants, that is not the record before this Court. Instead, Dr. Valerie Paynter knowingly and willingly agreed to every provision in the May 30, 2006, GPA, and she benefitted from the same from 2006 to sometime in 2014 or 2015 when the decision was apparently made (without notice to Appellants/Respondents) that Paynter Consulting, LLC was no longer going to abide by the GPA. Dr. Valerie Paynter was certainly capable of retaining counsel to have drafted such a revocable license provision. She and Respondents/Appellants retained counsel in 2014-2015 in their attempt to dissolve the GPA, solely in the name of Paynter Consulting, LLC, which they knew Appellants/Respondents were not going to agree to dissolve by consent.

Respondents/Appellants knew all too well about the 4 different split scenarios set forth above. They benefitted from the first 50 / 50 split provision for many years, with Paynter Consulting, LLC being paid almost 41,000,000.00 from 2006 to 2014-2015. They wanted no part of the latter three split provisions. As a result, Appellants/Respondents have been deprived of the

use of the Factor since at least as far back as 2014-2015, as well as the right to sell it at a 90/10 split. The actions of Respondents/Appellants have made such use or sale by Appellants/Respondents impossible.

Because all the evidence points to a specifically contemplated situation of continued use, as well as the right to sell the Factor to the continuing / remaining partner, the trial court order must be overturned in its finding that Respondents/Appellants own it solely / in the entirety. What they have is the right to 10 % of net profits annually of post-death Factor projects (with no input or effort required), and 10 % gross of any sale (again, with no input or effort required). That is what the partners agreed to in 2006, applying mutually, and that is what must be ordered.

II. SPLIT OF PROFITS "IN THE EVENT OF A DEATH OF A PARTNER"

Respondents/Appellants argue in Section II of their brief that while the "surviving partner has the right to continue the business of treating contaminated soils, that right does not require use of the Factor biotechnology." (*Id.* at 12). The GPA at Para. 3 states, "The **business of the partnership** is set forth below and relates to the treatment of contaminated soil, marine sediments and other media as applicable to the Factor biotechnology." (*Id.*) (underline emphasis added). When the partners chose to describe the right of the continuing / remaining partner, the GPA at Para. 4, stated, "In the event of a death of a partner, the remaining partner has the right to continue the **business of the Partnership** by themselves or in conjunction with any other persons they may select." (*Id.*) (underline emphasis added).

Appellants/Respondents wish this Court to assign no meaning to this 3rd sentence in Para. 4 of the GPA. Instead, their argument, apparently, is that the only right this 3rd sentence confers is the right to work in the environmental remediation business, as if permission were needed.

Respondents/Appellants do not even attempt to explain how the trial court flip-flopped on the 90 / 10 split provision as it relates to the continuing / remaining partner's right to sell the Factor.

The construction of the contract / GPA is reviewed *de novo*, and for the reasons set forth above and in Appellants/Respondents' Initial Brief, the trial court order must be vacated and / or reversed with instructions for a proper construction that allows the parties to benefit from the provisions the partners agreed to in 2006.

III. EXCLUSIVE USE / CONTROL OF FACTOR TO RESPONDENTS

The record shows Respondents/Appellants have had exclusive use and control of the Factor since at least as far back as 2015-2016, apparently without making any profitable use of it during this time. Instead, they were sitting on this multi-million dollar asset, waiting for no further legal action, so they could then license it, sell it, or otherwise monetize it without the involvement of or benefit to Appellants/Respondents. The trial court order noted that continuing the "business of the Partnership" was "impossible" without use of it by Appellants/Respondents.

If a proper construction of the GPA provides for exclusive use and control of the Factor by Respondents/Appellants, how can the remaining / continuing partner have any rights to sell the Factor and split the profits 90 / 10 % gross? They cannot do it. The 90 / 10 split on the sale provision is rendered meaningless.

If the Respondents/Appellants are to continue to have exclusive use and control of the Factor, including the new and novel (flip-flopped) concept of them paying 10 % gross on any sale to Appellants/Respondents, then all of the unambiguous split provisions set forth above are rendered meaningless. Worse than that, the undeniable intent of these provisions has been turned

upside down, such that Appellants/Respondents, again, have received no benefit(s) from the GPA since 2015.

Later in its Nov. 17, 2022 order, the trial court states, "If the partners intended for the remaining partner to have the "exclusive" right to continue business with the Factor Biotechnology following the death of the other, language indicating that would be included in the contract." (*Id.* at 7). Respectfully, this is error to attempt to conclude what the partners could have, should have or would have done. The trial court's role was to construe the GPA, as written, and not to add its own provisions. *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994).

Construction of this aspect of the contract / GPA is also reviewed *de novo*, and for the reasons set forth above and in Appellants/Respondents' Initial Brief, the trial court order must be vacated and / or reversed with instructions for a proper construction that allows all parties to benefit from the provisions the partners agreed to in 2006.

IV. BREACHES BY PAYNTER CONSULTING, LLC AND DAUGHTERS

As noted in Section I above, the trial court, *arguably*, made only one factual finding, and in doing so, did not identify it as a Finding of Fact. This is evident from the record, specifically the trial court's orders subject to this appeal by Appellants/Respondents dated Nov. 17, 2022, and the judgment entered on Dec. 13, 2022. The judgment entered on Dec. 13, 2022, "grants a verdict" to the Defendants without setting forth any analysis of the facts presented at the trial.

Respondents/Appellants acknowledge there are no Findings of Fact with respect to the breaches of the GPA. In their Response Brief at p. 16, they note the "court's conclusion that the Agreement was not breached." (*Id.*). Next, Respondents/Appellants argue Appellant "fail[ed] to

identify any evidence to support the conclusion that if the Agreement were breached, then Respondents/Appellants intentionally procured its breach." (*Id.*). Respondents/Appellants chose not to call any witnesses at trial, therefore, the only evidence in the record came from Appellant / Chris Young and third-party Kevin Dillard's testimony.

As referenced above, the trial court order failed to consider or address Para. 8 of the GPA, which provided, "No partner may sell his or her interests in the Partnership business to a third party unless mutually agreed to by the other partner." (*Id.*). As set forth above, Appellants/Respondents have received no benefits from the GPA since 2014-2015, which is either the result of a partnership dissolution, which did not occur, a complete disappearance of the environmental remediation market, which also did not occur, or breaches by one of the partners.

Below sets forth facts in the record mandating a finding of breach(es) of the GPA by Paynter Consulting, LLC and Dr. Valerie Paynter during her lifetime, and afterwards by her Daughters:

- Refusing to conduct any business with Appellants/ Respondents as required by the GPA. Chris Young testified this refusal by the Defendants started at least as early as the Summer of 2015,[1] before Paynter Consulting, LLC, filed its 2015-Lawsuit in Pickens County Court of Common Pleas on August 17, 2015;

- Allegedly (and secretly) conveying / gifting (for no consideration) ownership of the valuable Factor from Paynter Consulting, LLC to the Daughters in February to April of 2016, immediately after the 2015-Lawsuit was sent to arbitration by Judge Cain;

- Attempting to sell the Factor to EnvirogenX during the lifetime of Dr. Valerie Paynter, as testified to extensively by third-party witness, Kevin Dillard, who was to receive a finder's fee in an amount of $500,00.00;

[1] The record in this case includes a letter from Counsel to Respondents/Appellants in January 2015, and further records of privileged communications with this same counsel by Appellants/Respondents dating back to Dec. 2014.

- Refusing to provide any updates to Appellants/Respondents of the Defendants' clandestine efforts to sell the Factor to EnvirogenX or others. Kevin Dillard testified he was falsely told the dispute with Appellants/Respondents was concluded and that the Defendants had the right to attempt to sell the Factor, and further that Chris Young / Biotech Restorations was not updated in any manner regarding these efforts;

- Failing to disclose the existence of Paynter Consulting, LLC or its partnership with Appellants / respondents to the Probate Court in the Personal Representative's Inventory and Appraisement, filed Oct. 16, 2017; and

- Providing false information to legal counsel in October 2019 with instructions to represent such false facts to Plaintiffs/Appellants/Respondents and their undersigned counsel, as follows: "no attempts were made to sell anything have occurred since Valerie's death (or really since she got really ill toward the end)," in an email dated Oct. 30, 2019. Similarly having their counsel representing they had no information regarding the Factor or possession of "Factor" notebooks, which are now held pursuant to the trial court's order dated August 17, 2020.

The evidence in each form set forth above, and in its totality, mandates nothing but a finding of a bad-faith breach of the GPA by all of the named Defendants, which necessarily includes interference by the Respondents/Appellants during the lifetime of their mother. Further, the record before this Court shows the trial court did not consider the evidence in the record and certainly did not make any specific Findings of Fact in support of its "conclusion" that the GPA was not breached.

The partnership worked, it was profitable and useful to the community by remediating contaminated sites from 2004 to 2015. Then, all of the sudden it became a failure. All the evidence presented points to a breach and breaches by Paynter Consulting, LLC, as well as intentional interference by Respondents/Appellants.

CONCLUSION

The record in this case shows transfer of a valuable asset with no paper trail and no probate. If such is to be allowed, then the probate courts will have been encouraged to look the other way when their officers / Personal Representatives conduct the affairs of the probate court such that they can become owners of estate assets outside of probate. To prevent further and continued irreparable harm to Appellants/Respondents, the improperly reached factfinding of the trial court must be remedied with instructions for a proper construction reflecting ownership and control of the Factor consistent with the unambiguous provisions of the GPA.

On the second and third arguments, review by this Court is *de novo*, and Appellant/Respondent respectfully requests remand with instructions to enforce the and properly interpret the unambiguous provisions of the GPA.

On Appellants' fourth argument, consistent with the unsupported finding in argument I above, Appellant requests, at a minimum, remand with instructions to reconsider and provide specific factual findings in support of the trial court's decisions, which the record mandates findings of breach and intentional interference with contract.

[signature and endnotes on next page]

Respectfully Submitted,

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[i] "Probate" is not in the Nov. 17, 2022 Order.

[ii] GPA at p. 1, Para. 4, 3rd sentence, stating, "Any outstanding revenues or revenues anticipated from projects under contract at the time of a death or incapacity will be paid to the partner's designated beneficiary." Obviously, the deceased partner would no longer be required to contribute any efforts to the payment splits required by this second scenario.

[iii] *Id.* at Para. 4, 5th sentence, stating, "The continuing partner will pay 10 % of net profits annually to the heirs / estate of the deceased partner on any contract involving the use of the Factor, and 10 % gross from the sale of the Factor Technology." Again, neither the deceased partner or his or her "heirs / estate" are required to contribute any efforts to these 90/10 post-death Factor projects.