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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM WILLIAMSBURG COUNTY  
Court of Common Pleas

R. Ferrell Cothran, Jr., Circuit Court Judge

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Appellate Case No. 2023-001087  
Case Nos. 2018-CP-45-00258 and 2019-CP-45-00193

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Bank of Newington, Appellant,

v.

LHSC, Inc., Williamsburg County Development Corporation, Viking Fire Protection, Inc. of the Southeast, and HBC, Inc., Defendants, of which Williamsburg County Development Corporation and HBC, Inc. are the Respondents,

AND

HBC, Inc., Cross-Claimant, Respondent,

v.

LHSC, Inc., Cross-Claim Defendant,

AND

HBC, Inc., 3rd Party Plaintiff, Respondent,

v.

Louis Hornick, II, and Blake Fickling, 3rd Party Defendants,

AND

Williamsburg County Development Corporation, Cross-Claimant, Respondent,

v.

LHSC, Inc., Cross-Claim Defendant,

AND

Williamsburg County Development Corporation, 3rd Party Plaintiff, Respondent,

v.

Louis Hornick, II, and Blake Fickling, 3rd Party Defendants.

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**THE BANK OF NEWINGTON'S INITIAL RESPONSE BRIEF TO WCDC'S APPEAL**

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## STATEMENT OF ISSUES ON APPEAL

- I. Did WCDC's motion to amend claiming a scrivener's error toll the time for WCDC to appeal?
- II. Did the Bank of Newington preserve the issues of causation, damages and liability by raising them during trial and post trial proceedings and receiving a decision on the issues?
- III. Did the Bank of Newington's Eighteen page Motion to Amend, which the Trial Court granted in part, satisfy the "particularity" requirement?

## STATEMENT OF THE CASE

On February 24, 2017, the Bank of Newington loaned LHSC, Inc. (“LHSC”) \$3,535,535.00 to purchase property, upfit a building and start a textile manufacturing business in Williamsburg County, South Carolina. The loan was a USDA guaranteed, business and industry loan. LHSC granted the Bank of Newington a purchase money mortgage to secure the loan. The principal of LHSC was Louis Hornick, II (“Hornick”). LHSC purchased the property and an empty speculative building from the Williamsburg County Development Corporation (“WCDC”) for \$500,000. The consideration for the purchase was \$250,000 in cash and WCDC’s receipt of 250 shares of preferred stock in LHSC.

LHSC hired HBC, Inc. (“HBC”) to upfit the building for a total construction cost of \$1,600,000. HBC hired Viking Fire Protection Inc. of the Southeast (“Viking”) to install the sprinkler system for the building. Blake Fickling (“Fickling”) supervised and monitored the loan for the Bank of Newington.

HBC applied for its final draw on November 28, 2017, which was the amount it owed to Viking and its retainage. LHSC refused to pay the draw amount. On February 7, 2018, WCDC issued an \$80,000.00 loan to LHSC, and on February 14, 2018, LHSC granted WCDC a second mortgage to secure the loan. LHSC continued to refuse full payment to Viking and HBC. The project failed.

On March 14, 2018, Viking filed a mechanic’s lien in the amount of \$181,479, and on June 8, 2018, Viking filed a lawsuit against LHSC, HBC, the Bank of Newington, and WCDC. The case number of the first case was 2018-CP-45-00258 and it is referred to as the “Mechanic’s Lien Action.” Viking raised a foreclosure of mechanic’s lien against LHSC, breach of contract claim against HBC, claim for violation of S.C. Code § 27-1-15 against HBC, and quantum meruit claim

against LHSC. Viking named the Bank of Newington and WCDC by virtue of their recorded mortgages against the property. All parties answered. HBC and LHSC asserted counterclaims and cross claims.

On July 2, 2018, HBC filed a notice of mechanic's lien claiming \$271,679.00, which included the amount owed to Viking. On November 15, 2018, HBC filed a motion to stay the mechanic's lien action pursuant to an arbitration clause in the construction agreement between it and LHSC. The motion remained pending until June 3, 2019, when HBC withdrew it.

LHSC defaulted on the loan, and on April 4, 2019, the Bank of Newington, filed a foreclosure action against LHSC, WCDC, HBC and Viking.<sup>1</sup> The case number for the second case is 2019-CP-45-00193 and it is referred to as the "Foreclosure Action." WCDC answered asking the court to protect its interest in its mortgage, LHSC did not answer and went into default. HBC answered, counter-claimed, cross-claimed and filed third-party claim against Fickling and Hornick.

HBC's claims against the Bank of Newington were: (1) lien subordination, (2) intentional interference with a contract, (3) breach of covenant of good faith and fair dealing, (4) unjust enrichment, and (5) alter ego. HBC third party claims against Fickling were: (1) intentional interference with a contract, (2) alter ego, (3) breach of covenant of good faith and fair dealing, (4) civil conspiracy and (5) conversion. HBC requested a jury trial in its answer.

Discovery disputes arose between the Bank of Newington and HBC starting in January 2020. Both filed motions to compel, and the Honorable Kristi F. Curtis ("Judge Curtis") partially granted HBC's motion and granted the Bank of Newington's motion.

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<sup>1</sup> WCDC incorrectly states that LHSC filed an answer in the Foreclosure Action. It did not and was held in default. (Foreclosure Decree, ¶ 4. R. \_\_\_\_\_).

In September 2021, a potential buyer expressed interest in purchasing the building and property. The Bank of Newington and buyer entered into an agreement for the buyer to purchase the property for \$2,000,000 subject to the Bank of Newington acquiring title by foreclosure. The parties agreed to allow the property to go through foreclosure and deposit the proceeds in an escrow account that would effectively substitute the account for the property.

The Bank of Newington filed a motion for various relief, which included a request to strike HBC's demand for jury trial and consolidate the Mechanic's Lien Action and Foreclosure Action, and it filed a motion for summary judgment against HBC and Viking. Viking also filed a motion for summary judgment against HBC. HBC filed another motion to compel against the Bank of Newington and a motion to dismiss against the Bank of Newington.

On March 10, 2022, after a hearing on February 9, 2022, the Honorable R. Ferrell Cothran, Jr. ("Judge Cothran") issued a Foreclosure Decree. The Decree granted the Bank of Newington's claim for foreclosure and established the debt owed by LHSC.

On May 19, 2022, Judge Curtis heard the Bank of Newington's motion for various relief and motion for summary judgment. She also heard HBC's motion to compel and motion to dismiss. On June 28, 2022, Judge Curtis denied HBC's motion to compel by a Form 4 Order. HBC filed a motion to reconsider this order.

A public sale was held on June 6, 2022, and the Bank of Newington was the successful bidder.<sup>2</sup> After the Special Referee conveyed title to the Bank of Newington, it completed the sale to the buyer. The Decree required the sales proceeds placed in an escrow account but a dispute arose over the execution of an escrow agreement, and the Bank of Newington filed a motion to

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<sup>2</sup> No money was generated at the public sale. The Bank of Newington was the only bidder and then it sold the Property to the third-party. WCDC's initial brief incorrectly states that a Third-Party was the successful bidder.

enforce the decree against HBC. On June 28, 2022, Judge Cothran filed an Order requiring HBC and Viking to enter into an Escrow Agreement pursuant to the Decree.

After this Order was signed and filed, the net proceeds from the sale were deposited into the Escrow Account. The Escrow Account was substituted for the Property for all purposes and with no prejudice to any parties equitable or legal claims. One Million Nine Hundred Eighty-Nine Thousand Five Hundred Sixty and 67/100 Dollars (\$1,989,560.67) was deposited into the Escrow Account. G. Wells Dickson, Jr., who also served as the Special Referee to conduct the public sale, served as Escrow Agent.

On August 4, 2022, the Honorable R. Kirk Griffin (“Judge Griffin”) heard Viking’s motion for summary judgment, and on August 17, 2022, Judge Griffin filed an Order granting summary judgment to Viking in the amount of \$257,538 against HBC plus post judgment interest.

On August 18, 2022, Judge Curtis denied the Bank of Newington’s motion for summary judgment and HBC’s motion to dismiss. She granted the Bank of Newington’s motion to strike HBC’s jury demand and to consolidate the two cases.<sup>3</sup> On September 22, 2022, Judge Curtis partially granted HBC’s motion to reconsider and ordered the Bank of Newington to produce information regarding the identity of investors.

On November 21, 2022, WCDC filed a motion to amend its answer and assert counterclaims and third party claims against the Bank of Newington and Fickling. WCDC proposed to add the following claims: (1) breach of contract accompanied by fraud, (2) breach of contract, covenant of good faith and fair dealing, (3) veil piercing in equity, (4) unjust enrichment,

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<sup>3</sup> WCDC’s brief implies that consolidating the two actions for trial was by consent. Initial Brief of the Appellant, p. 1. That is not the case. HBC opposed the motion to strike its request for a jury trial, and Judge Curtis granted the Bank of Newington’s motion to strike and consolidate on the merits. (Order, dated August 18, 2022; R\_\_\_). WCDC chooses to ignore this fact as it demonstrates that the statute of limitations bars its claims.

(5) fraud and misrepresentation, (6) constructive trust, (7) conversion, and (8) tortious interference with contract. Viking also filed a motion to amend its answer in the Foreclosure Action and raise the same claims. The Court granted the motions on December 9, 2022.

Viking and the Bank of Newington settled Viking's claims. As part of the settlement, Viking assigned its Judgment and other claims to the Bank of Newington. On January 23, 24 and 25<sup>th</sup>, 2023, Judge Cothran conducted the non-jury trial of the remaining claims. At the end of the trial, Judge Cothran took the matter under advisement. On February 7, 2023, Judge Cothran circulated an email to counsel outlining his decision to award relief to HBC and WCDC. He instructed counsel for WCDC to draft a proposed order, which he signed and filed on March 13, 2023. The Order awarded WCDC \$621,404.66, which represented grant money it claimed it paid, shares of stock it claimed it owned, attorneys' fees and prejudgment interest. The Order awarded HBC \$620,150.14 which included prejudgment interest, the lien amount it claimed including the amount owed Viking, and attorneys' fees. HBC's award was offset by the amount of Viking's lien without interest or attorneys' fees, which was \$181,479.00. WCDC was given first priority and HBC given second priority over the funds in the Escrow Account. The Bank of Newington's priority was reduced to third, and it would get the balance of the Escrow Account.

On March 13, 2023, the Bank of Newington filed a motion to stay enforcement of the Order, which the Court granted until it heard the motion. On March 22, 2023, the Bank of Newington filed a Motion pursuant to Rules 52(b), 59(a) and (e), SCRCP, requesting the Court amend its Order or order a new trial. The Court heard the motion and motion to stay on May 12, 2023.

On June 2, 2023, the Court issued an Amended Order reducing the amount awarded to WCDC by its \$250,000 stock investment into LHSC and reducing HBC's award by the full

Judgment to Viking as of August 22, 2022, which was \$257,538.00. On June 12, 2023, WCDC filed a motion to amend pursuant to Rules 59 and 60, SCRCP. Judge Cothran held another hearing on June 29, 2023, to decide the Bank of Newington's motion to stay and WCDC's motion to amend. Also on June 29, 2023, the Bank of Newington filed a notice of appeal of the June 2, 2023, Order.

On July 25, 2023, Judge Cothran denied the motion to stay and denied the motion to amend. The Order directed the Escrow Agent to disburse the amounts set forth in the Order. However, HBC and WCDC refused to sign instructions that did not provide per diem interest, and the Bank of Newington filed a motion to enforce the Order. The Court indicated an intent to grant the Bank of Newington's motion, but as of this date, it has not signed and filed an order.

On July 26, 2023, HBC and WCDC filed notices of appeal of the July 25<sup>th</sup>, 2023 Order and notices of cross appeals against the Bank of Newington's appeal. On August 23, 2023, the Bank of Newington filed a notice of appeal of the Court's Order on the motion to stay.<sup>4</sup> The appeals were consolidated into the instant action. The parties signed Escrow Instructions on August 9, 2023, which disbursed disputed amounts to WCDC of \$376,991.19 and HBC of \$368,286.00. The rest of the money in the Escrow Account was disbursed to the Bank of Newington. The Escrow Account has been closed.

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<sup>4</sup> This was not an amended appeal as described in WCDC's brief. The Bank of Newington filed a second appeal on the stay issue, which was consolidated into this appeal.

## STATEMENT OF FACTS<sup>5,6</sup>

The Court conducted a non-jury trial of the two consolidated actions on January 23, 24 and 25<sup>th</sup>, 2023. Before trial, the Bank of Newington and Fickling submitted their pretrial briefs on January 18, 2023.<sup>7</sup> On January 23, 2023, the first day of Trial, the Bank of Newington and Fickling submitted their supplemental pretrial brief. (Trial Transcript, p. 5, ll. 3-17; R\_\_\_\_). The parties agreed and the Court allowed during the trial for the parties to file their pretrial briefs.

Barely a month before trial on December 12, 2022, and more than four years after litigation began, WCDC amended its answer to assert counterclaims against the Bank of Newington. (Amended Answer of WCDC, dated December 12, 2022; R\_\_\_\_). The Bank of Newington denied the counterclaims including that it damaged WCDC. (Reply of Bank of Newington and Blake Fickling, dated December 12, 2022; R\_\_\_\_). The Bank of Newington did not consent to damages and causation.

WCDC agreed to sell the Property for \$500,000.00 payable by \$250,000 cash at closing and 250 preferred shares of LHSC also received at closing. (Exhibit 7, Settlement Statement; R\_\_\_\_ and Exhibit, Purchase Agreement; R\_\_\_\_.) At trial, WCDC mischaracterized the Purchase Agreement with LHSC to state that LHSC owed a balance of \$250,000.00 for the purchase. This

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<sup>5</sup> During the trial, the Plaintiff presented a binder with several exhibits in it. The Court advised the parties that if it took the notebook, it would consider every exhibit in it. (Trial Transcript, p. 744, l. 16-p. 748, l. 23; R\_\_\_\_). The Court took the notebook and no party requested that any exhibits in it be struck. Consequently, the Bank of Newington includes the entire notebook with the record on appeal.

<sup>6</sup> The Bank of Newington asserts and incorporates by reference the Statement of Facts from its initial brief. In the interest of brevity, it will not restate them in this response brief. WCDC's appeal essentially revolves around the sole and often repeated argument that the Bank of Newington did not preserve error as to causation, and the Bank of Newington will address these points in the Statement of Facts.

<sup>7</sup> The Bank of Newington and Blake Fickling, pursuant to Rule 16, SCRCP, submitted their pretrial briefs to the Court, WCDC and HBC before trial. (E-Mail to Judge Cothran, Dated January 18, 2023; R\_\_\_\_).

was false. There was no balance owed on the purchase price, but the misstatement caused unnecessary confusion that made its way into the Court's Order.<sup>8</sup> (Order, Finding ¶ 21 and 46; R\_\_\_).

During trial, WCDC's executive director, Gilleon Frierson, admitted during cross that WCDC received LHSC shares at closing, never sent a demand to LHSC for repayment of any amount loaned or given to LHSC, and never even valued the shares when they purchased them. (Trial Transcript, Volume III, Testimony of Gilleon Frierson, p. 719, ll. 5-24, p. 740, l. 21-p. 741, l. 14, p. 754, l. 22-757, l. 1; R\_\_\_). WCDC took stock, not cash or debt, and it took the stock knowing and ignoring the risk associated with the stock. (Trial Transcript, Vol. III, Testimony of Frierson, p. 756, l. 15-p. 757, l. 1; R\_\_\_). WCDC presented no evidence to support a claim that its share value in LHSC was diminished from the value it acquired at closing.

On March 22, 2023, the Bank of Newington filed an eighteen page brief pointing out issues that the Trial Court either did not rule on or decided incorrectly. (Bank of Newington Motion to Amend, dated March 22, 2023; R\_\_\_). The Trial Court scheduled a hearing on the motion for May 12, 2023. Three days before the hearing, WCDC filed a 54 page brief essentially claiming it did not understand the motion filed by the Bank of Newington. WCDC's brief did not attempt to address the substantive issues raised in the Bank of Newington's motion.

The Bank of Newington's motion was heard on May 12, 2023. (May 12, 2023, Hearing Transcript; R\_\_\_). During the hearing, the Bank of Newington argued that WCDC received shares from LHSC and suffered no lost value. (Id. at p. 9, l. 17-p. 10, l. 1; R\_\_\_).

On June 2, 2023, the Trial Court partially granted the Bank of Newington's motion, and it

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<sup>8</sup> Counsel for WCDC drafted the Order pursuant to the Court's instructions in its February 7, 2023, Email outlining its decision on the trial. (February 7, 2023, Email; R\_\_\_).

reduced the damages awarded to WCDC by \$250,000.00, which represented the portion of the purchase price assigned to the shares. On June 12, 2023, WCDC filed a motion styled as under Rules 59 and 60, but it only alleged that the Trial Court committed a scrivener's error in forgetting to include the stock value damages. (June 12, 2023, Motion to Amend filed by WCDC; R\_\_\_). The Court heard WCDC's motion on June 29, 2023. (June 29, 2023, Hearing Transcript; R\_\_\_).

During the hearing, Judge Cothran expressly stated that the Bank of Newington objected and argued the issue that it was not responsible for damages related to WCDC's stock ownership in LHSC. (June 29, 2023, Hearing Transcript, p. 6, l. 10-p. 10, l. 11; R\_\_\_). Judge Cothran stated "I was put on notice, and I rethought the whole process about the stock option, and I just don't think, I think that's not necessarily the bank's fault." (Id. at p. 9, ll. 16-18; R\_\_\_). The issue of share value representing damages to WCDC was raised to Judge Cothran, argued during the Trial and ultimately decided albeit, initially, incorrectly. (Trial Transcript, Volume III, p. 718, ll. 10-16; R\_\_\_). Judge Cothran confirmed during the hearing that the issue was raised to him.

## **ARGUMENT AND CITATION OF AUTHORITY**

### **STANDARD OF REVIEW**

A foreclosure action is an action in equity. Historic Charleston Holdings, LLC v. Mallon, 365 S.C. 524, 533, 617 S.E.2d 388, 392 (Ct. App. 2005). In an equity case, the appellate court may view the evidence, find facts, and reverse a finding of fact based on its own view of the preponderance of the evidence. Id.; *see also* Forester v. Forester, 226 S.C. 311, 85 S.E.2d 187, 188 (1954).

## ANALYSIS

- I. WCDC's motion claiming a scrivener's error did not toll the time to appeal and its appeal is untimely.

A notice of appeal must be served on all respondents within thirty days after receipt of written notice of the order or judgment. Rule 203(b)(1), SCACR. Only timely motions made for judgment n.o.v. (Rule 50, SCRCPP), motion to alter or amend the judgment (Rules 52 and 59, SCRCPP) or a motion for a new trial (Rule 59, SCRCPP) toll the time to file an appeal. *Id.* "Rule 60(a), allows the correction of clerical mistakes in judgments. A motion made under Rule 60 does not toll the running of the time for appeal." Otten v. Otten, 287 S.C. 166, 167, 337 S.E.2d 207, 208 (1985). A court should treat a motion based on the substance of the relief sought regardless of the form in which the request for relief was framed. Standard Fed. Sav. & Loan Ass'n v. Mungo, 306 S.C. 22, 26, 410 S.E.2d 18, 20 (Ct. App. 1991).

WCDC seeks to appeal the Order it received on June 2, 2023. Consequently, unless it filed a motion that tolls the time to appeal, its appeal was due 30 days later or 5 days after the Bank of Newington's appeal, whichever is later. Rule 203(c), SCACR. On June 12, 2023, WCDC, filed a motion it framed as under Rule 59(e) and Rule 60(a), SCRCPP.

However, the ground WCDC asserted to support its motion demonstrate the substance of the motion is a claim of a clerical mistake. (WCDC, Motion to Alter/Amend Judgment, p. 2; R\_\_\_). A claim for relief based on a clerical mistake is in substance a motion under Rule 60(a), SCRCPP. Rule 60(a), SCRCPP and Otten, 287 S.C. at 167, 337 S.E.2d at 208. WCDC's motion is one under Rule 60(a), SCRCPP, and the motion did not toll the time to file an appeal of the June 2, 2023, Order. WCDC did not appeal the June 2, 2023, Order until July 26, 2026, which was 54 days after receipt of the order. Consequently, WCDC's appeal is untimely and must be dismissed.

- II. The Bank of Newington preserved the issues of damages, liability and causation by raising them during trial and post-trial motion proceedings and receiving a decision on the issues from the Trial Court.
  - A. The Trial Court expressly stated that the Bank of Newington raised the issue of speculative damages during trial and post trial motion proceedings.

WCDC spends most of its brief claiming that the Bank of Newington did not raise the issues of causation and damages during trial and in its post trial motion. This, despite the Trial Court expressly ruling on the issues of causation and damages, and WCDC is appealing the “undecided decision.”

An issue raised to and ruled upon by the trial judge is preserved for appellate review. Wilder Corp. v. Wilke, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998). A party need not use the exact name of a legal doctrine to preserve error. S.C. DOT v. First Carolina Corp., 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007). Rather, an objection that is sufficiently specific to inform the trial court of the point being urged is all that is required. Wilder Corp., 330 S.C. at 76, 497 S.E.2d at 734.

The Bank of Newington did not consent to WCDC’s damages, and it presented evidence at trial that WCDC received \$250,000 in cash and \$250,000 in stock at closing. The Bank of Newington also presented evidence and argument at trial that any such damages were speculative and improper. WCDC did nothing to value the stock at closing, and it accepted the risk of taking stock instead of cash. The Bank of Newington raised the issue in its motion to amend.

Judge Cothran expressly stated that the Bank of Newington objected and argued the issue that it was not responsible for damages related to WCDC’s stock ownership in LHSC. (June 29, 2023, Hearing Transcript, p. 6, l. 10-p. 10, l. 11; R\_\_\_). Judge Cothran stated “I was put on notice,

and I rethought the whole process about the stock option, and I just don't think, I think that's not necessarily the bank's fault." (Id. at p. 9, ll. 16-18; R\_\_\_).<sup>9</sup>

More evidence that the issue of stock damages was raised at trial and during post-trial proceedings is that Judge Cothran decided the issue and amended the Order. For the Trial Court to have issued damages for lost share value and then amended the decision, the issue must have been presented and ruled upon by the Trial Court. To say otherwise, defies logic. The Bank of Newington did not consent to damages, and it was the only party who presented evidence to demonstrate there was no lost value, particularly any lost value caused by the Bank of Newington.<sup>10</sup>

B. WCDC abandoned any challenge to the Trial Court's decision on substantive grounds.

WCDC is requesting the Court of Appeals reverse the finding and holding of the Trial Court that WCDC's alleged stock loss damages were speculative. However, neither in WCDC's motion to amend filed on June 12, 2023 nor in its brief before the Court of Appeals does WCDC provide any argument that the Trial Court's decision was substantively incorrect. The entirety of WCDC's brief is devoted to issue preservation and particularity arguments.

An appellant that does not provide an argument or supporting authority for an issue has abandoned it. First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, (1994). WCDC

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<sup>9</sup> Judge Cothran did not, *sua sponte*, raise the issue of stock value damages. WCDC cites Heins v. Heins to support its argument. However, Heins involved relief awarded to a party who did not file a motion to amend and otherwise did not request relief. Heins v. Heins 344 S.C. 146, 151, 543 S.E.2d 224, 226 (Ct. App. 2001). As demonstrated above, the Court did not *sua sponte* award relief. The Trial Court acted in response to the Bank of Newington's timely filed motion to amend and argument during trial.

<sup>10</sup> WCDC makes the argument that a spreadsheet was produced for the first time in a 30(b) deposition after it filed a motion to amend. However, that assertion is incorrect. To its defense, WCDC would not know because it did not participate in discovery until December 2022.

has abandoned any claim that the Trial Court's decision on loss stock value damages was speculative. Regardless, the decision was correct.

WCDC agreed to take stock instead of cash or debt at its own risk. (Exhibit, Purchase Agreement, 2(b); R\_\_\_\_). This was stock, not debt, and WCDC took it regardless of not valuing the stock and knowing the risk associated with the stock. (Trial Transcript, Vol. III, Testimony of Frierson, p. 719, ll. 5-24, p. 756, l. 15-p. 757, l. 1; R\_\_\_\_). There was no requirement in the agreement that LHSC pay it back in installments. Essentially, WCDC attempted to make a derivative claim as a shareholder over the alleged diminution of its stock value. However, the general rule is that an individual shareholder cannot pursue individual causes actions against third-parties for wrongs against the corporation. Babb v. Rothrock, 303 S.C. 462, 465, 401 S.E.2d 418, 419 (1991).<sup>11</sup>

In addition, the damages are speculative. Speculative damages are “damages that depend upon future developments which are contingent, conjectural, or improbable.” 56 Leinbach Investors, LLC v. Magnolia Paradigm, Inc., 411 S.C. 466, 478, 769 S.E.2d 242, 249 (Ct. App. 2014). Where a future injury is only “possible” or whether the amount is speculative, the plaintiff cannot recover. Id.

Furthermore, as a corollary to speculative damages, a plaintiff must show the defendant's actions proximately caused its damages. Winthrop Univ. Trs. v. Pickens Roofing & Sheet Metals, Inc., 418 S.C. 142, 161-62, 791 S.E.2d 152, 162-63 (Ct. App. 2016). Proximate cause requires the plaintiff to prove causation in fact and legal cause. Id. Causation in fact is proven by establishing the injury would not have occurred but for the defendant's negligence or breach. Id. Legal cause

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<sup>11</sup> WCDC did not assert at trial and the Order does not find or hold that the Purchase Agreement was ambiguous and required interpretation. Consequently, the terms of the agreement control.

is proven by establishing foreseeability, which is determined by looking to the natural and probable consequences of the defendant's conduct. Id.

The Bank of Newington's alleged wrongful conduct was disbursing funds to LHSC. The Bank of Newington could not have reasonably known that the natural and probable consequences of disbursing loan funds to its borrower would result in the diminution of WCDC's stock in LHSC. The value of LHSC's stock depended on its future profitability, and this future performance is contingent and conjectural, no one could predict with any reliable certainty the future performance of LHSC. The amount of WCDC's lost investment was also left to speculation. In sum, the Trial Court correctly struck WCDC's stock value damages.

III. The Bank of Newington's Eighteen Page Motion to Amend, which the Trial Court granted in part, satisfied the "particularity" requirement.

A motion shall state with "particularity the grounds therefor, and shall set forth the relief or order sought." Rule 7(b)(1), SCRC. "The particularity rule must be read flexibly in the recognition of the peculiar circumstances of the case." Camp v. Camp, 386 S.C. 571, 575, 689 S.E.2d 634, 636 (2010). The particularity requirement must not be applied in an overly technical fashion when the purpose of the rule is not jeopardized. Id.

The purpose of the rule is to provide notice to the court and the opposing party of the basis of the motion to reduce prejudice and allow the court to comprehend the basis of the motion and deal with it fairly. Id. When a challenge is made for the lack of particularity, a court should ask "whether any party is prejudiced by a lack of particularity or whether the court can comprehend the basis for the motion and deal with it fairly." Id.

The Bank of Newington did not file a one line motion to reconsider similar to the one that was approved in Camp v. Camp. Id. at 573 and 635. Rather, the Bank of Newington filed an 18

page brief two months before the Court heard the motion on May 12, 2023. The issue of stock damages had been argued at trial, and Section IV of the Bank of Newington's motion stated "WCDC did not pay \$200,000 in grant money and it received \$250,000 worth of shares, as WCDC valued them, from LHSC for the purchase of the real property." (The Bank of Newington's Motion to Amend, dated March 22, 2023, Section IV; R\_\_\_). The Bank of Newington raised and argued the issue during the May 12, 2023, hearing. (May 12, 2023, Hearing, p. 9, ll. 17-p. 10, l. 1; R\_\_\_). Judge Cothran comprehended the stock value issue and he dealt with it fairly. Judge Cothran stated as much during the June 29, 2023, hearing.

Although WCDC received the Bank of Newington's motion on March 22, 2023, it did not complain about particularity until it filed a 54 page brief on May 9, 2023, three days before the hearing. WCDC knew, and at a minimum should have known, that the stock value damages it was awarded were at issue. WCDC suffered no prejudice from the motion and decision based on the format of the Bank of Newington's motion.

The only confusion on the issue is on the part of WCDC by attempting to inject a misstatement that the stock represented debt LHSC owed to WCDC and that WCDC did not receive \$250,000 of the purchase price at closing. (Order, Finding 21 and Conclusion 46; R\_\_\_). The Bank of Newington pointed out this incorrect statement in its motion. The Court realized its mistake, and struck the award based on the obvious speculative issue.

Also, Rule 7 does not require a movant to respond line by line, finding by finding or conclusion by conclusion when challenging an order. Rule 7, SCRPC. The Bank of Newington's motion requests, *inter alia*, that the Court amend the order to find and hold that the Bank of Newington was entitled to all the Escrow Proceeds, reduce the amount awarded to WCDC and

HBC or order a new trial. The motion cited the rules, grounds and legal authority supporting the requested relief. The Bank of Newington complied with Rule 7.

### **CONCLUSION**

The Bank of Newington requests that the South Carolina Court of Appeals dismiss WCDC's appeal as untimely or deny the appeal and affirm the Trial Court's decision striking the \$250,000 award to WCDC.

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