The South Carolina Court of Appeals

Bank of Newington, Appellant-Respondent,

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-Appellants,

AND

HBC, Inc., Cross-Claimant, Respondent-Appellant,

v.

LHSC, Inc., Cross-Claim Defendant,

AND

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

v.

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

AND

Williamsburg County Development Corporation, CrossClaimant, Respondent-Appellant,

v.

LHSC, Inc., Cross-Claim Defendant,

AND

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

v.

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

Appellate Case No. 2023-001087

The Honorable R. Ferrell Cothran, Jr.
Williamsburg County
Trial Court Case No. 2018CP4500258

INITIAL REPLY BRIEF OF RESPONDENT-APPELLANT WILLIAMSBURG COUNTY DEVELOPMENT CORPORATION

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

CASES

RULES

ARGUMENT

I. BON MISSTATES THE EVIDENCE.

BON argues that WCDC presented no evidence to show a diminution in LHSC's share value after the 2017 closing on the real property. (BON 12/6/2023 Response Brief, p. 9). This is quite misleading, because BON's liability for the damages award to WCDC of $250,000 is not based on share value. BON is liable because it caused LHSC to be incapable of repurchasing those shares, at $250,000. (3/13/2023 Order, FOF 21, p. 10; COL 5, 7, & 12, pp. 19, 20, 21) (6/2/2023 Order, FOF 21, p. 10; COL 5 & 7, pp. 19-20). The evidence showed, and the trial court found that BON grossly mismanaged all Project funds, which caused the Project to fail, and caused LHSC itself to fail, thereby causing LHSC to become unable to repurchase the shares. (3/13/2023 FOF 1-48, COL 1-12, pp. 1-21) (6/2/2023 Orders, FOF 1-48, COL 1-11, pp. 1-23).

It is undisputed that LHSC was newly created and existed only for the purpose of Project - building and startup of a manufacturing plant in Kingstree[1]. Because LHSC was a start-up with no assets other than the Project itself[2], its principal, Hornick, asked WCDC[3] to agree to accept half the real estate purchase price in cash and the other half to be paid in five years[4], secured and

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[1] BON's Initial Brief acknowledges as much, in its 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." (11/6/2023 BON Initial Brief, p. 2).

[2] LHSC's sole asset initially was the Loan (Tr. 1/25/2023 p. 613, line 23 – p. 614, line 12) followed by the grants from WCDC and the State, as well as WCDC's later $80,000 loan earmarked for construction costs. (BON Ex. 7, VIKING V BON000245) (WCDC Exhibit 19) (Tr. 1/24/2023 p. 579, lines 5-20).

[3] (Tr. 1/25/2023, p. 623, lines 8-25).

[4] (Tr. 1/25/2023, p. 623, lines 16-19).

represented by 250 shares of LHSC stock at closing, which LHSC valued at $1,000 each[5]. And, in order to facilitate the Project, WCDC agreed[6]. No evidence suggested that LHSC's obligation to repurchase the stock could be fulfilled by repurchase at any price other than $250,000.

The value of the Project increased in February 2018, due to the construction improvements made to the real property by HBC and the infusion by WCDC of the $80,000 loan. BON admitted that these funds were earmarked to pay for this construction, but that BON disbursed it for Hornick's "salary" and BON's Loan interest payments instead. (Tr. 1/23/2023, p. 88, line 15-23; p. 120, line 17 – p. 121, line 15; p. 266, lines 3-20; Tr. 1/24/2023, p. 364, lines 9-21; p. 394, line 18 – p. 395, line 20).

Despite BON's insistence[7] that it could not control its borrower's refusal to pay HBC, and that BON was not required to pay contractors or vendors directly, BON required LHSC to assign all LHSC's rights in the HBC contract to BON at the February 24, 2017 closing on the Loan, as additional security for the Loan. (BON Ex.s 7 and 9) As a result, BON had complete control over LHSC's fulfillment of its duties under that Project construction contract – including paying its contractor. (BON Ex. 9). "The rights assigned by this Assignment include, but are not limited to, all of Borrower's right, power, privilege and option to modify or amend the Construction Contract, terminate the Construction Contract, and waive or release the performance or satisfaction of any duty or obligation under the Construction Contract." (*Id.*, LHSC-0351) (underscore added).

BON admitted at trial that, before it made the Loan, it reviewed the SCDOC analysis[8] of

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[5] (WCDC Ex.s 3A and 3B).

[6] (Tr. 1/25/2023, p. 623, lines 24-25).

[7] BON made these assertions in its appellant's brief. (11/6/2023 BON Initial Brief, pp. 19 and 24).

[8] (Tr. 1/23/2023, p. 126, lines 20-24; Tr. 1/24/2023, p. 309, line 12 – p. 310, line 10). (WCDC Ex.

the Project, showing LHSC's asset as the $3,000,000 Loan (the actual amount of which grew to $3,535,535.00 at closing[9]); projecting that LHSC would generate revenues to provide 105 jobs and sustain an annual payroll of $3,810,000 in its first year in business; and also projecting $88,000,000 in benefits to the County through these jobs and revenue over the course of 10 years. (WCDC Ex. 19). (Tr. 1/23/2023, p. 126, line 5 – p. 127, line 8; Tr. 1/24/2023, p. 309, line 23 – p. 310, line 10).

BON also admitted at trial that it placed LHSC in default on the Loan in June 2018, when the Project account balance was insufficient to make the next Loan payment. (Tr. 1/23/2023, p. 91, line 22 – p. 92, line 9). BON then sued LHSC's principal, Hornick, and obtained an uncollectible default judgment against him on his personal guarantee of the Loan ($3,932,124.68) *before* BON proceeded in the present consolidated cases. (9/25/2019 Default Judgment in 2019-CP-45-00325, p. 3). Hornick disappeared[10] after the Project funds had all dried up, without BON ever verifying that the manufacturing equipment and inventory had been paid for. At that point there were no LHSC assets from which WCDC could collect, because BON held the first mortgage on the real property and even the (undelivered) equipment was covered by that mortgage and financing statement. (BON Ex. 7, VIKING V BON000251).

BON obtained its foreclosure decree on March 10, 2022 in the present action, including an award for $4,495,651.88 against LHSC on the Loan. (3/10/2022 Foreclosure Decree in 2019-CP-45-00193, pp. 1-8).

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19). And see WCDC's testimony about the DOC analysis. (Tr. 1/25/2023, p. 624, line 24 – p. 625, line 4; p. 661, line 1 – p. 662, line 12)

[9] (BON Ex. 7, VIKING V BON 000245)

[10] BON's brief correctly points out that Hornick and LHSC were both in default in the present action. At trial Gilleon Frieson testified that WCDC contacted the State Department of Commerce to request an audit of the Loan in November 2022, and after that, Hornick had "got ghost and would not respond." (Tr. 1/25/2023, p. 775, lines 6 – 22).

And it was never disputed that LHSC has been uncollectible by everyone other than BON since LHSC's default on the Loan in 2018. As shown above, LHSC's sole asset was the Project, but after BON placed LHSC in default on the Loan, LHSC had no assets of any kind susceptible to collection by WCDC, HBC or Viking. (Tr. 1/24/2023 p. 579, lines 5-23).

At trial, the court noted its inference, from all the evidence presented, that LHSC had no assets and BON counsel made no attempt to deny or correct this fact. (*Id.*). Had the inference been incorrect, BON counsel would have been ethically obliged to bring that to the court's attention, due to counsel's obligation of candor to the tribunal. Rule 407 SCACR, RPC 3.3. *And see, e.g., In re Jennings*, 321 S.C. 440, 449, 468 S.E.2d 869, 874–75 (1996) (disbarring attorney for, among other things, dishonest conduct and lack of candor toward a tribunal).

LHSC did not even own the equipment for which BON disbursed at least $603,787[11], because that equipment was security for BON's Loan (BON Ex. 7, VIKING V BON000251) and, because it was never delivered; nor did LHSC own any of the likewise undelivered inventory, for which BON disbursed a total of $500,299.51.[12] (Tr. 1/23/2023, p. 167, lines 3-8; p. 216, line 22 –

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[11] "On March 1, 2017, BON paid Mr. Hornick $603,787.00 at his request, **on [Hornick's] assurance that he would then pay Diversified** that amount. (VIKING v. BON 000486, 487, 507). On cross-examination, **BON** ... **admitted** that, soon after this disbursement, **BON became aware that Mr. Hornick paid Diversified only $500,000.00 and Mr. Hornick retained $103,787.00, without justification** for doing so. There was **no evidence** that Diversified was ever paid the balance owed to it ... ($103,787.00), nor **that BON ever sought the return from Mr. Hornick of the $103,787.00** he had wrongfully retained. **And there was no evidence that any equipment was ever delivered to the property by Diversified."** (3/13/2023 and 6/2/2023 Orders, FOF 19, p. 9) (emphasis added).

[12]"April 4, 2017, Fabric, $54,433.75; May 9, 2017, Asmara Home Products $80,315.18; May 22, 2017, Asmara Inventory $68,000.00; June 29, 2017, Firefend Inventory $18,225.00; July 13, 2017, Working Capital $26,000.00; August 3, 2017, New Product Inventory $31,050.00; December 7, 2017, 10% Equipment Cost $80,505.00; March 5, 2018, Firefend Material $34,950.00; March 29, 2018, Fill Sales Order 31,000.00; April 6, 2018, 50% of Swatch Book Invoice $32,202.00; April 19, 2018, Swatch Books Completed and JoAnne Fabrics $43,618.58) (WCDC Ex.s 33-35)" (3/13/2023 and 6/2/2023 Orders, FOF 35, p. 14).

p. 217, line 1; Tr. 1/24/2023, p. 385, lines 15-17). Thus, once BON orchestrated LHSC's default on the Loan, LHSC's value was less than $0 due to the outstanding purchase money Loan from BON, the unpaid $80,000 loan from WCDC and HBC's Mechanic's Lien for the unpaid invoice of $262,496.50, as well as the $250,000 stock re-purchase owed to WCDC.

The only reasonable inference from this and all the other evidence discussed in WCDC's briefs to this Court is that BON's actions proximately caused LHSC to become incapable of performing its contractual duty to pay WCDC the $250,000 balance owed on the real estate, pursuant to the stock agreement. And that is clearly the inference the trial court drew in both orders at issue:

> 5. **BON's actions** constituted gross negligence and gross mismanagement of Project funds, including WCDC's grant of $200,000.00, and loan of $80,000.00; and those actions **caused LHSC to become incapable of paying the remaining $250,000.00 owed to WCDC, for the real estate purchase, represented by LHSC's now worthless stock pledge**.
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> 7. **BON's gross mismanagement of Project funds proximately caused** the Project to fail; it caused LHSC to default on the Loan; it caused **LHSC to become defunct and incapable of repaying** WCDC's $200,000.00 grant, **WCDC's $250,000.00 balance on the real property,** and WCDC's $80,000.00 post-construction loan and interest accrued thereon, plus attorney fees and costs.

(3/13/2023 and 6/2/2023 Orders, COL 5, 7, pp. 19-20) (emphasis added).

"The Court will not disturb the trial court's findings unless they are found to be without evidence that reasonably supports those findings." *Portrait Homes - S.C., LLC v. Pennsylvania Nat'l Mut. Cas. Ins. Co.*, No. 2020-000735, 2023 WL 8610277, at *14 (S.C. Ct. App. Dec. 13, 2023) (citation omitted). "Further, questions concerning credibility and the weight to be accorded evidence are exclusively for the trial court." *Id.* (citation omitted). "We may not consider the case based on our view of the preponderance of the evidence, but must construe the evidence presented to the [trial court] so as to support [its] decision wherever reasonably possible." *Id.* (citation omitted).

II. BON MISCHARACTERIZES WCDC'S POST-TRIAL MEMORANDUM OF LAW OPPOSING BON'S RULE 59 MOTION.

BON argues that WCDC did address the substance of BON's March 22, 2023 Rule 59 motion. (12/6/2023 BON Response Brief, p. 9). This conclusory argument is objectively false. WCDC's Memorandum of Law specifically cited BON's motion 44 times in detailed argument opposing that motion; it cited to 36 legal authorities supporting its contentions; and it offered argument and analysis refuting application of BON's few cited legal authorities. (5/10/2023 WCDC/HBC joint return, *passim*). Thus, BON's argument should be disregarded.

III. WCDC'S APPEAL IS TIMELY.

BON argues that WCDC's June 12, 2023 Rule 59(e) and 60(a) motion to alter or amend the June 2, 2023 Order did not toll the time for WCDC's appeal. (12/6/2023 BON Response Brief, p. 11) (citing *dicta* in *Otten v. Otten*, 287 S.C. 166, 167, 337 S.E.2d 207, 208 (1985)). Otten held that "Under Rule 59(f), when [a Rule 59(e)] motion is made, the time for appeal from the judgment begins to run from the time of the order granting or denying the motion." *Otten v. Otten*, 287 S.C. at 167, 337 S.E.2d at 208.

Our appellate courts consistently honor the plain language of Rule 203 SCACR: "When a timely motion ... to alter or amend the judgment (Rules 52 and 59, SCRCP), ... has been made, the time for appeal for all parties shall be stayed and shall run from receipt of written notice of entry of the order granting or denying such motion." Rule 203(b)(1) SCACR. *See, e.g.*, *Hudson v. Hudson*, 290 S.C. 215, 216, 349 S.E.2d 341, 342 (1986) ("Notice of Appeal need not be filed so long as post-trial motions are pending.") (citing *Otten v. Otten,* 287 S.C. at 167, 337 S.E.2d at 208). "The time for appeal generally runs from the date of disposition of the post-trial motions." *Murray Properties P'ship of Dallas v. L.P. Cox Co.*, 293 S.C. 170, 171, 359 S.E.2d 279, 280 (1987) (citing *Otten v. Otten,* 287 S.C. at 167, 337 S.E.2d at 208). *And see, Canal Ins. Co. v. Caldwell*,

338 S.C. 1, 5, 524 S.E.2d 416, 418 (Ct. App. 1999) (citing *Otten v. Otten,* 287 S.C. at 167, 337 S.E.2d at 208 (stating that when a motion to alter or amend is made under Rule 59, "the time for appeal from the judgment begins to run from the time of the order granting or denying the motion").

WCDC's Rule 59(e) motion was very brief, consisting of only two pages, but it clearly raised the *substantive* basis for amending the June 2, 2023 order by restoring the award to WCDC of $250,000 for the balance owed on the real property and reducing the award to BON by $250,000, because the award to WCDC is supported in the other Findings and Conclusions in both the March 13, 2023 and June 2 2023 orders:

> The $250,000 purchase price was included in the Findings of Fact ("FOF") 21 and 46 and COL 1, 4, 5, and 7. In COL 12, all elements of WCDC damages were included except the $250,000 purchase price. This resulted in the order of judgment to WCDC missing $250,000 purchase price damage (see pg. 24, items 4).
>
> If the Court intended to [in]clude this element of damage, $250,000 for the purchase price, the amount due WCDC by order of judgment should be $621,404.76, reducing the amount due the Bank of Newington by $250,000

(6/12/2023 WCDC motion, p. 2).

WCDC's Rule 59(e) motion, coming so fast on the heels of BON's fully briefed and argued Rule 59(e) motion, required no further explanation in order for the trial court and all counsel to understand it. Indeed, BON does not claim that it did not understand WCDC's motion, its substantive grounds, or the relief sought in that motion, nor does BON claim that its rights would be prejudiced by treating WCDC's motion as what it says it is - a Rule 59(e) motion to alter or amend. (12/6/2023 BON Response Brief, *passim*).

Thus, the substance of WCDC's Rule 59(e) motion to alter or amend is not merely a Rule 60(a) motion to correct clerical errors. And BON's own authority stands for this principle:

The court at every stage of the proceeding must disregard any error or defect in the

> proceeding which does not affect the substantial rights of the parties. Rule 7(b), S.C.R.Civ.P., provides an application to the court for an order shall be by written motion. Rule 8(f), S.C.R.Civ.P., requires all pleadings to be so construed as to do substantial justice to all parties.

Standard Fed. Sav. & Loan Ass'n v. Mungo, 306 S.C. 22, 25–26, 410 S.E.2d 18, 20 (Ct. App. 1991) (affirming the decision of the master that a motion for a rule to show cause was in substance a petition to amend the judgment). "It is the substance of the requested relief that matters regardless of the form in which the request for relief was framed." *Id.*, at 26, 410 S.E.2d at 20. Accord, *Richland County v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002).

Thus, WCDC's Rule 59(e) motion tolled the time for appeal until after the ruling on that motion was received, and WCDC's appeal is timely.

IV. BON FAILED TO REFUTE WCDC'S ARGUMENTS.

BON continues to argue that its Rule 59 motion was sufficient because the trial court seemed to understand it. (12/6/2023 BON Response Brief, pp. 12; 15-16). But WCDC's arguments and references to the Record support WCDC's contention that the trial court *misunderstood* BON's motion, because BON did not raise speculativeness in that motion. And BON fails to refute WCDC's further arguments that WCDC suffered prejudice because BON never raised speculativeness in the trial court; BON's Rule 59(e) motion did not challenge was too imprecise to have preserved any issue for BON's appeal; and that the trial court lacked authority to amend the order on *sua sponte* grounds of speculativeness, more than 10 days after the order, and without notice and opportunity for WCDC to be heard on those grounds.

Instead, BON claims: "*More evidence* that the issue of stock damages was raised at trial and during the post-trial proceedings *is that Judge Cothran decided the issue* and amended the Order." (*Id.* p. 13). No authority supports this contention that the Judge's decision constitutes evidence.

BON tries to support its claim that speculativeness was raised at the hearing on its motion by citing to BON's counsel's own speculation to the trial court, which still never raises the issue of speculativeness of the **amount** of the $250,000 debt owed by LHSC as the basis for the damage award, nor does it raise speculativeness as to whether BON **caused** LHSC to become incapable of paying it that debt:

> [Mr. Wilcox] Another important point is that Williamsburg County Development Corporation still owns that stock. It got the stock it allegedly bargained for, says it bargained for, when it purchased – when it sold the land to LHSC. It got 250 shares of preferred stock. Mr. Frierson [sic] testified he didn't – they didn't put any value on it when they got the shares, but they still have them. And, frankly, they're probably worth the same as what they were worth back then.

(Tr. 5/12/2023, p. 9, line 17 – p. 10, line 1). This argument by BON does not constitute an argument that the $250,000 damages award was speculative, and it cannot be allowed to contradict BON's admissions at trial that WCDC's expectation in 2017, that LHSC could repay that amount in five years, according to the stock buy back agreement, was reasonable. (Tr. 1/23/2023, p. 155, line 22 -p. 156, line 16). (And see, 3/13/2023 and 6/2/2023 Orders, FOF 46, p. 17).

BON inexplicably argues that WCDC was not prejudiced "*based on the format*" of BON's motion. (12/6/2023 BON Response Brief, p. 16). WCDC did not claim prejudice based on the "format" or any other technical deficiency in BON's motion. WCDC's prejudice results from the fact that BON's motion did not challenge as erroneous any of the Findings and Conclusions relevant to the award of $250,000 in damages for the amount due on the real property, represented by the LHSC stock. (3/22/2023 BON motion, *passim*).

"The unchallenged ruling, right or wrong, is the law of the case and requires affirmance." *First Union Nat. Bank of S.C. v. Soden*, 333 S.C. 554, 566, 511 S.E.2d 372, 378 (Ct. App. 1998). Failure to challenge a ruling "is an abandonment of the issue." *Lindsay v. Lindsay,* 328 S.C. 329, 338, 491 S.E.2d 583, 588 (Ct. App. 1997). See, also, *Buckner v. Preferred Mut. Ins.*

Co., 255 S.C. 159, 160–61, 177 S.E.2d 544 (1970) ("[A]ppellant excepted to the court's first conclusion, but has not excepted to its second ... Therefore, the finding...is the law of this case and requires affirmance.").

The Court should disregard BON's conclusory and unsupported arguments and deem them to be abandoned on appeal. *See, Hoyler v. State,* 428 S.C. 279, 833 S.E.2d 845 (2019) (finding issue to be unpreserved as to post-trial motions because supporting materials were conclusory and cited no authority) (citing *S.C. Dep't of Soc. Servs. v. Mother ex rel. Minor Child,* 375 S.C. 276, 283, 651 S.E.2d 622, 626 (Ct. App. 2007) (noting an issue was abandoned because the appellant made a conclusory argument without citation of any authority to support her claim). *See also, R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.,* 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000) ("An issue is deemed abandoned if the argument in the brief is only conclusory."); *State v. Coif,* 332 S.C. 313,322,504 S.E.2d 360, 364 (Ct. App. 1998) (finding a conclusory, two-paragraph argument that cited no authority other than an evidentiary rule was abandoned), *affd as modified on other grounds,* 337 S.C. 622, 525 S.E.2d 246 (2000)). *See also, Glasscock, Inc. v. U.S. Fid. & Guar. Co.,* 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001) ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

V. BON FAILED TO REFUTE WCDC'S ARGUMENT THAT THE ORIGINAL DAMAGES AWARD WAS SUPPORTED BY THE EVIDENCE AS WELL AS THE FINDINGS AND CONCLUSIONS.

BON argues that WCDC did not argue to the trial court or to this Court that the June 2, 2023 order "was substantively incorrect." (12/6/2023 BON Response Brief, p. 13). BON's argument ignores WCDC's Statement of Facts and its points of Argument demonstrating that the unchanged Findings in the June 2, 2023 order are solidly supported by the evidence and that the

unchanged Findings and Conclusions in that order are *contradicted* by the court's removal of the award of $250,000 for the balance owed on the real property. (WCDC Initial Brief, pp. 4-36). And BON ignores WCDC's Rule 59(e) motion citing to the unchanged FOF and COL, which most clearly contradict the removal of the award of $250,000:

> **The $250,000 purchase price was included in the Findings of Fact ("FOF") 21 and 46 and COL 1, 4, 5, and 7**. In COL 12, all elements of WCDC damages were included except the $250,000 purchase price. This resulted in the order of judgment to WCDC missing $250,000 purchase price damage (see pg. 24, items 4).
>
> If the Court intended to [in]clude this element of damage, $250,000 for the purchase price, the amount due WCDC by order of judgment should be $621,404.76, reducing the amount due the Bank of Newington by $250,000

(6/12/2023 WCDC motion, p. 2) (emphasis added).

VI. BON CANNOT RAISE THE ISSUE OF DERIVATIVE ACTIONS FOR THE FIRST TIME ON APPEAL AND ITS ARGUMENT IS UNSUPPORTED.

BON claims, for the first time, that WCDC "attempted to make a derivative claim as a shareholder over the alleged diminution of its stock value." (12/6/2023 BON Response Brief, p. 14). But it never made any such claim in the trial court. In fact, the word "derivative" does not appear in any of the 5 transcripts in the record on appeal. (Tr. 1/23/2023; Tr. 1/24/2023; Tr. 1/25/2023; Tr. 5/12/2023; Tr. 6/29/2023). Nor does it appear in BON's Rule 59 Motion. (3/22/2023 BON Motion, *passim*). Nor is it raised to this Court in BON's initial appellant brief. (11/6/2023 BON Initial Brief, *passim*).

"It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review." *Cox v. S.C. Educ. Lottery Comm'n*, 441 S.C. 209, 218, 893 S.E.2d 342, 346 (citation omitted). Thus, BON's derivative action argument is not preserved for appeal. Judgment.

Moreover, BON offers no argument or citation to the Record on Appeal to support its

premise. Instead, BON cites *Babb v. Rothrock*, 303 S.C. 462, 401 S.E.2d 418 (1991) for the premise that "an individual shareholder cannot pursue individual causes [of] action [] against third parties for wrongs against the corporation." (12/6/2023 BON Response Brief, p. 14) (underscore added). But that mischaracterizes the nature of the action in *Babb,* as well as its holding.

Babb was a shareholder's action seeking contribution from fellow shareholders, based on alleged shareholder misappropriation of corporate property, and the *Babb* Court held that "individual shareholders may not sue corporate directors or officers directly for losses suffered by the corporation." *Babb v. Rothrock*, 303 S.C. 462, 464, 401 S.E.2d 418, 419, (1991) (emphasis added). *Babb* is, thus, inapposite to WCDC's claims against BON, because BON is not a director or officer of LHSC and WCDC sued for losses sustained by WCDC – not LHSC. (12/12/2022 WCDC Am. Answer, Counterclaim, Crossclaim and 3rd-Party Claim, *passim*).

VII. BON CANNOT RAISE SPECULATIVENESS FOR THE FIRST TIME ON APPEAL.

For the first time BON argues that the damages at issue are speculative. (12/6/2023 BON Response Brief, p. 14). As shown at length in WCDC's Initial Brief, BON never raised this argument at trial or in its post-trial motion or argument. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the [circuit court] to be preserved for appellate review." *Cox v. S.C. Educ. Lottery Comm'n*, 441 S.C. at 218, 893 S.E.2d at 346 (citation omitted). Thus, this argument is unpreserved.

BON relies on *56 Leinbach Inv'rs, LLC v. Magnolia Paradigm, Inc.*, 411 S.C. 466, 478, 769 S.E.2d 242, 249, (Ct. App. 2014) for its definition of speculative damages:

> Speculative damages are damages that depend upon **future developments which are contingent, conjectural, or improbable**. As a general rule, courts will find that all damages must be susceptible of ascertainment with a reasonable degree of certainty, and that uncertain, contingent, or speculative damages cannot be recovered in any action[.]

Id. (emphasis added).

But BON fails to show that the 250 shares of LHSC stock, which LHSC valued at $1,000 each, and which it agreed to buy back from WCDC five years after closing[13] "depends upon future developments which are contingent, conjectural, or improbable." *Id.* BON offers no argument or reference to the Record to support any contention that the **amount** of $250,000 in damages, reached by multiplying the 250 shares by the value of each share, could be considered dependent upon future improbable developments, nor as to whether BON **caused** LHSC to be incapable of paying its obligation to pay that amount to WCDC under the buy back agreement.

Thus, BON's speculativeness argument should be disregarded as abandoned. *See, Hoyler v. State,* 428 S.C. at 279, 833 S.E.2d at 845 (finding issue to be unpreserved as to post-trial motions because supporting materials were conclusory and cited no authority) (citing *S.C. Dep't of Soc. Servs. V. Mother ex rel. Minor Child,* 375 S.C. at 283, 651 S.E.2d at 626) (noting an issue was abandoned because the appellant made a conclusory argument without citation of any authority to support her claim). *See also, R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.,* 343 S.C. at 437, 540 S.E.2d at 120 ("An issue is deemed abandoned if the argument in the brief is only conclusory."); *State v. Colf,* 332 S.C. at 322,504 S.E.2d at 364 (finding a conclusory, two-paragraph argument that cited no authority other than an evidentiary rule was abandoned), *affd as modified on other grounds,* 337 S.C. 622, 525 S.E.2d 246 (2000)). *See also, Glasscock, Inc. v. U.S. Fid. & Guar. Co.,* 348 S.C. at 81, 557 S.E.2d at ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review.").

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[13] (WCDC Ex.s 1-2; 3A; 3B; 19; 33 *passim;* HBC Ex. 3, p. 10). (Tr. 1/25/2023, p. 623, lines 8-25).

VIII. WCDC AND HBC PROVED CAUSATION AT TRIAL AND CAUSATION IS FULLY SUPPORTED IN BOTH ORDERS.

BON argues that the only wrongs alleged against it were its (grossly negligent) disbursements of Project funds, and that WCDC did not prove that BON caused LHSC to be incapable of paying WCDC the $250,000 owed for the real property, per the stock agreement. (12/6/2023 BON Response Brief, p. 15). It argues that BON could not have foreseen the resulting diminution in the value of LHSC and its stock, due to BON's disbursements. (*Id.*). But once again, BON misstates the pleadings and the evidence.

In addition to BON's gross negligence and mismanagement of the Project funds, WCDC alleged and proved that BON tortiously interfered with WCDC's contracts by causing LHSC to become incapable of performing its duties to repay WCDC's $80,000 loan and to pay $250,000 under the stock agreement; and it did so not only through its grossly negligent disbursements, but also by condoning or participating in Hornick's illegal demands to renegotiate contract prices for the general contractor (HBC) and the subcontractor (Viking) after they had performed the work. (12/12/2022 WCDC Am. Answer, Counterclaim, Crossclaim and 3rd-Party Claim, ¶ 29 (so-called "negotiations" between Fickling and Hornick, regarding payment to HBC); ¶¶ 59-60 (describing interference with HBC's contract); and ¶¶ 91-94 (tortious interference claim incorporating by reference all prior allegations); pp. 6, 10, 14-15; Tr. 1/23/2023, p. 140, line 25 – p. 142, line 13; p. 247, line 5 – p. 248, line 10) (HBC Ex. 3, pages 2-6; 8-11; VIKING v BON000507; 526; 533; 536; 543; 556; 566; 570; and 573; HBC Ex.s 12-13; HBC Ex. 14 VIKING v. BON000053; 56; and 59; HBC Ex.s 15; 16; 22; 33; 34; 42; WCDC Ex. 25).

And the trial court clearly found the evidence of these acts to be credible because it based many of its Findings and Conclusions on this evidence:

10. I find that BON breached the USDA requirement of independent cost estimates in

conformity with contract documents, on and after December 22, 2017, when BON failed to pay HBC $262,496.50 as recommended by Partner, for work HBC completed November 28, 2017, and instead, **BON allowed Mr. Hornick to interfere -with the contractual obligation to pay HBC**. On that date, Partner submitted its recommendation, which stated in part:

On December 4, 2017 Partner visited the job site to review Application Number 8. HBC, Inc. has requested $262,496.50 for the work performed through November 28, 2017. Based on review of Application Number 8 and our observations at the site, Partner recommends funding $262,496.50. The project is now complete.

The owner has authorized $126,000.00 to pay Viking, the subcontractor. **Per the owner, Viking has agreed to a $20,000.00 deduction due to the delays.** (WCDC Ex. 25, HBC Ex. 14; VIKING v. BON000053; 56; and 59)

11. ... BON -witnesses testified that the borrower, **LHSC, via its owner Mr. Hornick, refused to agree to pay any funds from the Working Capital & Contingencies funds on hand in the amount of $200,000.00.** (HBC Ex. 3, pages 2-6; 8-11; VIKING v BON000507; 526; 533; 536; 543; 556; 566; 570; and 573).

12. Evidence showed that Mr. **Hornick, improperly and -without justification, attempted to renegotiate Viking's subcontract price -** ... twice; and that Mr. Hornick did so -with HBC twice, both times after HBC had fully performed. And I find that **BON participated in or condoned these attempts, by refusing to pay as Partner recommended on December 22, 2017**. (HBC Ex.s 14, 15, 16, 22, 33, 34 and 42).

13. No evidence was presented to show that BON had any authority to delay payment to HBC; nor to pay HBC's subcontractor, Viking, directly as "the owner" Mr. Hornick had authorized; nor to **interfere -with or renegotiate the contract price set by Viking for its services; nor to allow LHSC, via Mr. Hornick, to so interfere.** And I find that these actions, and BON's failure to pay HBC $262,496.50 on and continuously after December 22, 2017, **breached BON's duties described herein; interfered with the completion of the Project within available funds; and prevented the drapery manufacturing plant from ever becoming operational**.

...

20. BON's disbursement of $603,787.00 to Mr. Hornick, instead of to Diversified, at the outset of the Project, and its failure to seek to recover the amount Mr. Hornick wrongfully retained ($103,787.00) were not consistent with prudent loan servicing practices and they constitute gross mismanagement of Project funds. **This gross mismanagement prevented completion of the Project within available funds and prevented the drapery manufacturing plant from ever becoming operational, in violation of the numerous duties imposed on BON by the** USDA Guarantee conditions, discussed herein.

...

31. **BON breached its above-mentioned duties by approving loan distributions for**

exorbitant travel expenses submitted by Mr. Hornick, without receipts or other verification that any travel took place or that the expenses were otherwise legitimate (WCDC Exhibits 33, 34 and 35) ... These **unverified travel expenses total $89,297.20**. (WCDC Exhibit 33 and 34). **These disbursements prevented completion of the Project within available funds and prevented the drapery manufacturing plant from ever becoming operational.**

...

33. **BON breached the above-mentioned duty by approving disbursements for monthly advances of Mr. Hornick's salary for 7 consecutive months, from March 2017 through September 2017, for a total of $116,666.69 in direct owner compensation.** (HBC Exhibits 3, 8, 9 and 10) (VIKING v BON000488-489; 506-509; 523-526; 544-546; 556; 564-567; 580-582). There was no evidence of legitimate services provided by Mr. Hornick. But there was evidence that **Mr. Hornick improperly interfered with Viking's subcontract and HBC's general contract. Jeff Hudson and Blake Fickling testified to Mr. Hornick's attempts to force HBC and Viking to accept discounts or reductions from their contract prices, in order to receive payment for work already completed. They testified to Mr. Hornick's attempts to obtain a second round of reductions thereafter. And they testified that BON, via its agent, Mr. Fickling, participated in or condoned Mr. Hornick's wrongful interference with HBC and Viking contracts, and took no action to stop this interference.** (HBC Exhibits 12, 13, 14, 15, 16, 21, 22, 33, 34, and 42)**. I find that BON's disbursements of $116,666.69 in direct owner compensation prevented completion of the Project within available funds and prevented the drapery manufacturing plant from ever becoming operational.**

...

36. The above **unverified inventory and equipment disbursements total $500,299.51,** paid to Mr. Hornick, all of which were made **after BON knew that Mr. Hornick had skimmed $103,787.00 from the original disbursement** to Mr. Hornick **in funds earmarked for Diversified, March 1, 2017.** I find that **the above disbursements constitute gross negligence and gross mismanagement of Project funds,** and that they **breached BON's contractual duties under the USDA Guarantee to act as a reasonably prudent lender** in servicing the Loan; **to ensure Project completion within available funds; to ensure that Loan proceeds were used for eligible Project costs**; to **follow a detailed timetable and corresponding budget** of costs; **and, to obtain the USDA's written consent before amending or waiving any of these conditions**.

...

5. **BON's actions constituted gross negligence and gross mismanagement of Project funds**, including WCDC's grant of $200,000.00, and loan of $80,000.00; and **those actions caused LHSC to become incapable of paying the remaining $250,000.00 owed to WCDC, for the real estate purchase, represented by LHSC's now worthless stock pledge.**

6. WCDC and HBC are entitled to recover their damages resulting from **BON's breaches**

> **of the above duties, grossly negligent loan servicing, and gross mismanagement of Project funds.** Mr. Hornick misappropriated Project funds, but **BON was responsible for disbursement of those funds, and it was BON who could have prevented Mr. Hornick's acts from causing harm**. ...
>
> 7. **BON's gross mismanagement of Project funds proximately caused the Project to fail**; it **caused LHSC to default on the Loan; it caused LHSC to become defunct and incapable of repaying** WCDC's $200,000.00 grant, **WCDC's $250,000.00 balance on the real property,** and WCDC's $80,000.00 post-construction loan and interest accrued thereon, plus attorney fees and costs.
>
> 8. **BON's gross mismanagement of Project funds proximately caused LHSC to breach its contract with HBC by allowing Mr. Hornick to interfere with its contract and prevent the last payment** due to HBC pursuant to its contract price, on and after December 22, 2017, plus attorney fees and costs.

(3/13/2023 and 6/2/2023 Orders, FOF 10-13; 20; 33; 36 and COL 5-8, pp. 6-9; 13-14; 19-20) (emphasis added).

Thus, the evidence showed that it was *inevitable* that LHSC would be incapable of paying the $250,000 owed on the purchase of the real property, because BON orchestrated the demise of the Project at every turn, depleting Project funds and causing the Project – and LHSC to fail.

BON also argues that the damages were speculative because the value of LHSC stock depended on its future profitability. (12/6/BON Response Brief, p. 15). But this argument is totally unsupported. The evidence showed that LHSC was obliged to buy back the stock, valued at $1,000 per share, in five years. (WCDC Ex.s 1-2; 3A; 3B; 19; 33 *passim;* HBC Ex. 3, p. 10). (Tr. 1/25/2023, p. 623, lines 8-25). BON cites no evidence that the stock price could change. Nor does it cite evidence that the buy back required LHSC to be *profitable*. BON does not even tell us what it means by "profitable." Indeed, profit is money left over *after* obligations like this are paid. *See, e.g.*, Black's Law Dictionary, Deluxe Eighth Edition (2004), defining "profit" as "the excess of revenues over expenditures in a business transaction."

Thus, BON's speculativeness argument should be disregarded. *See, Hoyler v. State,* 428

S.C. at 279, 833 S.E.2d at 845 (finding issue to be unpreserved as to post-trial motions because supporting materials were conclusory and cited no authority) (citing *S.C. Dep't of Soc. Servs. V. Mother ex rel. Minor Child,* 375 S.C. at 283, 651 S.E.2d at 626) (noting an issue was abandoned because the appellant made a conclusory argument without citation of any authority to support her claim). *See also, R & G Constr., Inc. v. Lowcountry Reg'/ Transp. Auth.,* 343 S.C. at 437, 540 S.E.2d at 120 ("An issue is deemed abandoned if the argument in the brief is only conclusory."); *State v. Coif,* 332 S.C. at 322,504 S.E.2d at 364 (finding a conclusory, two-paragraph argument that cited no authority other than an evidentiary rule was abandoned), *affd as modified on other grounds,* 337 S.C. 622, 525 S.E.2d 246 (2000)). *See also, Glasscock, Inc. v. U.S. Fid. & Guar. Co.,* 348 S.C. at 81, 557 S.E.2d at ("South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review").

CONCLUSION

On the basis of all of the above, and on the basis of WCDC's and HBC's previously submitted Briefs, WCDC requests that the Court affirm the trial court's March 13, 2023 Order, reverse the June 2, 2023 Order as to Conclusion of Law 12, order the court to reinstate the award of $250,000 to WCDC for the balance owed on the real estate purchase, and reverse the July 25, 2023 Order as to WCDC's Rule 59 motion.

Respectfully submitted,

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January 16, 2024

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SC Court of Appeals

The South Carolina Court of Appeals

Bank of Newington, Appellant-Respondent,
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-Appellants,
AND
HBC, Inc., Cross-Claimant, Respondent-Appellant,
v.
LHSC, Inc., Cross-Claim Defendant,
AND
HBC, Inc., 3rd Party Plaintiff, Respondent-Appellant,
v.
Louis Hornick, II, and Blake Fickling, 3rd Party Defendants,
AND
Williamsburg County Development Corporation, CrossClaimant,
Respondent-Appellant,
v.
LHSC, Inc., Cross-Claim Defendant,
AND
Williamsburg County Development Corporation, 3rd Party Plaintiff,
Respondent-Appellant,
v.
Louis Hornick, II, and Blake Fickling, 3rd Party Defendants.

Appellate Case No. 2023-001087

PROOF OF SERVICE

Undersigned certifies that the above Initial Brief was filed electronically and served electronically and by regular U.S. mail on January 16, 2024 to all parties as follows:

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January 16, 2024

VIA EMAIL AND US MAIL:
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The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
PO Box 11629
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RE: Bank of Newington v. LHSC, Inc., et al.
Case Nos.: 2019-CP-45-00193 and 2018-CP-45-00258
Appellate Case No. 2023-001087

Dear Ms. Kitchings,

Please find attached hereto the Initial Reply Brief of Respondent/Appellant, Williamsburg County Development Corporation along with proof of service. Please note that a copy is being mailed as well.

By copy of this letter to Walker Willcox, attorney for Appellant Bank of Newington, and Wesley D. Few, attorney for the Respondent HBC, Inc. I am serving them with copies of the same.

If you have any questions or need additional information, please do not hesitate to contact me.

Thanking you for your consideration, I am

Very truly yours,

Jenkinson, Kellahan, Thompson & Reynolds, PA

W. E. Jenkinson, III
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WEJ/lls
Enclosure(s): as stated
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Walker H. Willcox, Esquire – via email and US Mail