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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No. 2015-CP-10-5463
Appellate Case No. 2020-001203
Opinion No.: 6056, Heard October 10, 2023 –Filed April 3, 2024

The Boathouse at Breach Inlet, LLC, by and through its Member,
Laurence O. Stoney, Jr., …...…………………..……………………………… Appellant.

v.

Richard S. W. Stoney, Individually and as Member-Manager of
The Boathouse at Breach Inlet, LLC, and Crew Carolina, LLC,

and

Theodore Stoney, Jr., Individually and as Trustee for Richard Stoney, Jr. and Gregory G. Holmes, Third-Party Intervenors,

of whom

Richard S. W. Stoney is ………………………………………………… Respondent/ Petitioner

PETITION FOR REHEARING

Respondent Richard S.W. Stoney, Petitioner herein, ("Petitioner") hereby petitions for a rehearing pursuant to SCACR Rule 221(a).

Introduction and Overview:

This Petition is presented in three sections: Section I, Witness Credibility; Section II, Dissociation; and Section III, Extraneous Findings.

Respondent, who is the Petitioner herein, suggests that this Court overlooked and misapprehended the points argued herein. For the reasons argued, this Court should rehear, reconsider, and modify its Opinion in the following particulars.

At the outset, and respectfully, Petitioner suggests that the Opinion of this Court filed April 3, 2024 is extraordinary, inasmuch as this Court rejects the careful and considered findings of fact and credibility made by a highly respected and experienced trial judge, who heard and observed, at extraordinary length, the evidence in the case, and in particular the testimony of the principal protagonists, Laurence and Richard Stoney.

I. Witness Credibility.

Standard of Review: Credibility.

The general authority of an appellate court in South Carolina, in an appeal from a case in equity, to find facts in accordance with its own view of the preponderance of the evidence, is qualified by, if not limited by, the principle that deference must be given to the circuit court's determination of witness credibility: "*Nonetheless, we defer to the Circuit Court's determinations of witness credibility*". *Lollis v. Dutton* 421 S.C. 467, 479, 807 S.E.2d. 723 (Ct. App. 2017); citing *Laughon v. O'Braitis* 360 S.C. 520, 524-525, 602 S.E.2d 108-110 (Ct. App. 2004). "*However this broad scope of review does not require* *this Court to disregard the findings at trial or ignore the fact that the Circuit Court was in a better position to assess the credibility of the witnesses."* And: "*Even when this court's scope of review is broadened in equity cases, "[t]he credibility of testimony is a matter for the finder of fact to judge*." *Lollis*, supra, 421 S.C. at 483, citing *S.C. Dept. of Soc. Svcs. vs. Forrester*, 282 S.C. 512, 516, 320 S.E.2d 39,42 (Ct. App. 1984) (Emphasis added.)

Although this Court correctly cites to a general proposition for the standard of review as articulated in the case of *Straight v. Goss*, 383 S.C. 180, 191, 678 S.E.2d 443, 449 (Ct. App. 2009), that the Appellate Court is "*not required to disregard*, the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility", *Straight v. Goss* was a case in which the Court of Appeals simply affirmed the trial court's factual findings.

Here, however, this Court purports to reverse the Trial Court's extensive factual findings, and to make factual findings of its own, including findings that are dependent upon witness credibility which are directly the opposite of the conclusions reached by the Trial Judge. Therefore, notwithstanding the Trial Court's Order specifically citing his evaluation of witness credibility as a principal reason for his findings and conclusions (R. p. 29), this Court does not address, at all, its reasons for arriving at its own conclusions of witness credibility, not to mention its reasons for rejecting Judge Newman's findings of credibility.

The essential holding of the Trial Court here on appeal is that Appellant Laurence Stoney lacks requisite standing, because the Trial Judge did not accept as true Laurence's testimony that he sought to vindicate a corporate wrong. The Trial Judge concluded, instead, that Laurence was pursuing the case out of vindictiveness and spite: "*Upon* *consideration of all the evidence, particularly evaluating the credibility of the witnesses, contrary to my preliminary findings, the conduct of Laurence Stoney related to the Company establishes that he does not seek to vindicate a corporate wrong."* (R. p. 29). And, at R. p. 32: "*I conclude that Laurence is acting in pursuit of personal gain and not in the best interest of the Company as his conduct has caused direct harm to the Company. Although the Court preliminarily ruled that Laurence could adequately defend the best interest of the Company, the Court reverses its preliminary finding, which is unsupported by the complete record*." (Emphasis added.)

Moreover, concluded the Trial Judge, "…*it is clear to the Court that Laurence Stoney did not seek to vindicate a corporate wrong as originally presented, but rather was acting through personal vindictiveness."* (R. p. 23)

In his Order, trial Judge Newman makes extensive factual findings, including a discussion of the formation of Boathouse at Breach Inlet, LLC; the relative interests of its members, the business plan for creating a family of related restaurants; and the positions and the interests of the principal party protagonists, Laurence and Richard Stoney. Importantly, prior to filing his final Order in the case, Judge Newman had heard, received, observed, and processed the evidence in this case in two extensive hearings: the first, a preliminary hearing on standing on December 13th and 14th, 2018, at which Laurence offered lengthy testimony encompassing 90 pages of transcript (R. pp. 274-327 and R. pp. 330-368); and where Richard offered testimony encompassing 58 pages. (R. pp. 393-451).

The second hearing in which Judge Newman received and observed the testimony of Laurence and Richard was the trial on the merits heard March 9th and 10th, 2020, at which

Laurence's testimony encompassed 50 pages of transcript (R. pp. 692-742) and Richard's testimony encompassed 76 pages (R. pp. 743-794; R pp. 800-820; R. pp. 940-1015).

Therefore, Judge Newman had an extensive opportunity to observe and evaluate the credibility of Laurence and Richard Stoney, who testified for no less than two hours, each. The significance of reporting the volume of pages required to report their testimonies, above, is that the amount of transcript pages required to report their testimony suggests the time duration of their appearance on the witness stand, and therefore the amount of time available for Judge Newman to evaluate and to assess the substance of their testimony, their demeanor, and ultimately, their credibility. Assuming the questions and answers reported on one page of transcript encompass only one minute, arguably a conservative estimate, Laurence's total 140 pages of transcribed testimony in the two hearings exceeds two hours; as does Richard's total of 134.

A clear example of Judge Newman's credibility findings is invited by this Court's recitations, in the two paragraphs of its Opinion disposing of Laurence's vindictiveness, where this Court finds: "*Laurence acknowledged his concern with the money missing from the Company, but he explained that in bringing this action he sought to recover the money owed to the Company and use it to make the Restaurant a showpiece*…" (Opinion, Page 11.) In making this finding, which this Court apparently accepts as a true and credible statement of Laurence's motive and intent in prosecuting this case, this Court could only read Laurence's words from the printed transcript.

The Trial Judge, on the other hand, heard the same words, but spoken directly from Laurence's lips, and in the circumstances that allowed the Court to observe Laurence's demeanor, and to hear his renditions during extensive direct and cross examination in two hearings, over a total time span of more than two hours. The Trial Judge then expressly rejected the truth of Laurence's professed reasons for prosecuting this action, as follows: "*…it is clear to the Court that Laurence Stoney did not seek to vindicate a corporate wrong as originally presented, but rather was acting through personal vindictiveness*...". (R. p. 23) (Emphasis added)

This is a direct and resounding repudiation and rejection by the experienced Trial Judge, of the credibility of Laurence Stoney, as to the most critical point at issue in the trial of the case: whether Laurence brought the case for personal gain, and with vindictive animus; or whether, as Laurence claims, to vindicate a corporate wrong.

The conclusions drawn by this Court and by the Trial Judge are diametrically opposed. The singular difference between them is that the Trial Judge reached his conclusions based upon hours spent hearing, receiving, observing and evaluating the testimony of Laurence and Richard; whereas, this Court had only a printed transcript.

In rejecting Judge Newman's conclusions as to Laurence's credibility, this Court failed to articulate any reasons why it did so. Rule 220(b) of the South Carolina Appellate Court Rules provides, *inter alia*, "*In every decision rendered by an Appellate Court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case…*" See, also, *Dearybury vs. Dearybury*, 351 S.C. 278, 283, 569 S.E.2d 367 (S.Ct. 2002) "*Accordingly, when an appellate court chooses to find facts in accordance with its own view of the evidence, the court must state distinctly its findings of fact and the reason for its decision.*" Citing to Rule 220(b).

The central issue decided by the Trial Court is that Laurence's motivations for bringing this action were vindictive and personal: a vendetta waged against his cousin Richard, whom he was committed to punish, whatever the cost. In the preliminary hearing on Laurence's standing, held December13-14, 2018, he testified that, whereas his 5% interest of a four million dollar recovery would amount to $200,000.00, he had paid, in fees and costs to that point, *"I would guestimate around $200,000.00"* (R. p.296 line 13). Laurence agreed that he had testified in deposition that *"I don't care if it costs more than that, I'm going to keep paying until we get this thing straightened out*." (R. p. 296, lines 22-24).

Moreover, the evidence of Laurence's motivations was directly expressed: Ted Stoney testified that in a conversation with Laurence shortly before filing this case in 2015, Laurence said to him: *"I'm going to get Richard. I'm going to turn his world upside down*." Ted further recalled: "*I remember that one quite vividly because I was personally shaking after the confrontation."* (R. p. 1023, line 10 to R. p. 1024, line 15, and R. p. 1028, line 5 to R. p. 1029, line 5.

What this Court does not address at all, with all due respect, are its "points", or "reasons", for rejecting Judge Newman's thorough and careful consideration of the full evidence, and most importantly the Trial Judge's findings of credibility, as is clearly required by SCACR Rule 220 (b). Thus inviting the query: why would this Court accept as true Laurence's claimed motive for bringing this action to be because *"… he sought to recover the money owed to the Company and use it to make the restaurant a showpiece*", as concluded in this Court's Opinion with no explanation or reason for the Court's finding? Rather than, as concluded by the Trial Judge, who clearly based his reasoning on findings of credibility after receiving hours of testimony, that Laurence was acting through personal vindictiveness (R. p. 23); and that he was not seeking "to vindicate a corporate wrong" (R. p. 29). The differences cannot be reconciled. Because they turn upon the question of Laurence's credibility, the final conclusion must default to the Trial Judge's rendition, in the interests of the deference required by *Lollis and its predecessors.* See *Brown v. Brown,* 123 S.E.2d 772. 239, S.C. 444 (1962), noting, that regard to equitable cases tried by a judge alone. "[G]reat weight is accorded the findings of fact of the trial Judge for, as stated in Le v. Lee, he 'saw the witnesses, heard the testimony delivered from the stand, and had the benefit of that personal observance and contact with the parties which is of peculiar value in arriving at a correct result in a case of this character.'" (Citing, *Lee v. Lee*, 237 S.C. 532, 188 S.E.2d 171 (1961). This has long been the standard under South Carolina Law.

<u>Personal Motivations</u>.

Judge Newman's Order at R. p. 31 includes a section entitled "<u>Personal Motivation</u>" in which he finds:

Rather than filing an individual action, which Laurence could have done under code section 33-44-410, he chose to file a shareholder derivative action under which, if he were to succeed, the company could execute against the LLC membership of Richard, thus effectively removing the sixty percent member by a five percent member and entirely disabling the management of the LLC. Although this issue was addressed preliminarily, the Court reverses its preliminary findings, which are unsupported by the complete record at trial.

The genesis for Judge Newman finding that through this action Laurence could cause the company to execute against Richard's membership interest to satisfy a judgment that

Richard could not pay, is contained in Laurence's testimony at R. pp. 699 line 12 through R. p. 705 line 15. In the course of those pages, Laurence testified as follows:

1. Q: *So you agree that 95 percent of the members of this LLC oppose this lawsuit; is that correct?*

A: *Yes.*

(R. p. 700, lines 12-14)

2. Q: *Right. So let's say at the end of this case Judge Newman grants judgment against Richard Stoney for $5 million – the number we saw on the screen, 4.9 yesterday. And let's assume that Richard cannot pay it, what happens next?*

A: *That will be up to my lawyers to decide how we handle that.*

(R. p. 700, lines 15-21)

3. Q: *So what is your plan -- Laurence Stoney what is your plan about what happens next?*

A: *It would be to attach income assets, whatever we have to do to try collect it.*

Q. *So what assets do you have in mind to attach?*

(R. p. 701, lines 2-7)

4. Q: *So let me get back to my question. So what is your next step when receiving (sic) assets? What assets?*

A: *We'll have to delve into that and find out what they are.*

Q: Well, what assets do you know that Richard owns?

A: To my knowledge, Richard has no assets.

Q: The only thing Richard has is his membership interest in this restaurant; *right?*

A: *That is correct.*

(R. p. 701: 25 to R. p. 702: 1-9).

Here, Laurence, a five percent member reveals his true motivation for pursuing the underlying action: to squeeze out Richard Stoney, the majority member, from the company, thereby increasing his own pro-rata interest - - an effort opposed not just by Richard, but also every other current member of the Company. To find that Richard could respond to a four or five million-dollar judgment defies the reality of the evidence. Although filed derivatively, the action amounts to a hostile take-over attempt by a five-percent member of a closely held company.

Judge Newman's conclusion that Laurence's underlying motivation is to squeeze out Richard, is amply supported by the record: He testified in Family Court, in favor of Richard's ex-wife Lori, that he would support an award to her of Richard's interest in the Boathouse at Breach Inlet. (R .p. 728: 13 to R. p. 729: 24). He also testified in the same proceeding that he would support the replacement of Richard as manager and the hiring of Bill Hall, a Charleston Restaurateur, to manage Boathouse at Breach Inlet. (R. at Idib).

In short, the evidence of Laurence's ulterior motivations in pursuing this derivative lawsuit with a vindictive animus, and for personal gain, is clear from the record. The evidence supports Judge Newman's conclusions in this respect.

This Court should rehear, reconsider, or modify its conclusions to the contrary.

II. Dissociation.

It is undisputed that at the time of trial of this case, six of the eight LLC members were also members of the Stoney family. The close family relationship of the members is of particular significant with respect to the issue of dissociation.

The line of questioning cited above in Section 1 with regard to credibility, continues as follows (Note: parts have been underlined, for emphasis only):

1. Q: *So isn't it your plan to take Richard's membership interest in this case? Isn't that your agenda?*

A: *That would be the last thing I would like to do.*

Q: *Why is that? Why do you say that that would be the last thing you would like?*

A: <u>*Because I don't want to be in the restaurant business with Richard. Okay.*</u>

Q: *You don't want to be in the – because it's not reasonably practical, (sic, "practicable") is it, for you to be in the restaurant business with Richard; is it?*

(R. p. 702:17 to R. p. 703:3)

(Objection colloquy excluded)

2. Q: *It's not reasonably practicable for you and Richard to continue together in the restaurant business, is it, Laurence?*

A: *It would be difficult. Not impossible, mind you, but –*

Q: <u>*But not practical (sic, "practicable")?*</u>

A: <u>*Not practical. That would be a good term.*</u>

Q: <u>*Now, you're aware, aren't you, that we're asking Judge Newman to do something alternatively? We're asking Judge Newman to order that you be bought out. Are you aware of that?*</u>

A: <u>*I understand something to that effect. He mentioned it*</u> *–*

Q: *Well, you were in the courtroom when we argued it; weren't you?*

A: *Yes.*

Q: *For fair value. Not fair market value, but fair value, which is better than fair market value and an award of --*

A: *Why would you say that that is better than fair market value?*

Q: *Say again.*

A: *Why would you say that that is better than fair market value?*

Q: *I'm not going to debate that with you, Mr. Stoney. I'm asking the questions.*

A: *I'm trying to answer.*

Q: *So my question to you is: What's wrong with that as a solution to this?*

A: *I think it's a viable solution. It just hasn't happened.*

Q: *Now, I want you to understand -- in fairness, I want you to understand why I ask the question. We're asking the Judge to order that, rather than order judgment. It that's inclined, so I don't want --*

A: *I can't tell what you're asking the Judge to do.*

Q: *So if the Judge orders a buyout at fair value and reasonable fees, you say that you have no problem with that; right?*

A: *If that's what the judge orders. I think the best thing to do is to get the money back into -- the missing 5 million bucks back into the restaurant and get the restaurant going.*

Q: *Even though 95 percent of the members oppose that; right?*

A: *What's wrong with doing the right thing?*

(R. p. 703: 10 to R.p. 705: 7)

Furthermore, Richard and Ted Stoney also testified that it was "not reasonably practicable" to carry out the business of the LLC with Laurence as a member. See R. p. 1030: 5-18 (Ted) and R. p.1004:11 to R. p. 1005: 19 (Richard).

Although this Court acknowledges that "the parties expressed their opposition to doing business together" (Opinion at Page 16), the parties' positions were nevertheless unified that it was "not reasonably practicable" for them to continue in the restaurant business, together. Therefore, this Court overlooked the more significant evidence noted from the testimonial excerpts quoted above.

The Equitable Remedy of a Fair Value Buy Out of Laurence's Interest Was Invited By Laurence's Testimony.

Under the evidence developed in this case, particularly the testimonial exchange recited above, the dissociation of Laurence and his compensation at "fair value" was in every respect an invited remedy.

As a direct expression of Laurence's motive and intent, his testimony that "*I don't want to be in the restaurant business with Richard*." (R. p. 702:24) is significant. To accomplish that result, either Laurence must leave the restaurant business; or Richard must leave it. Arguably through this lawsuit, therefore, Laurence seeks either to be bought out of his interest in Breach Inlet; or he seeks to force Richard out. The latter recourse, to force Richard out, would be achievable by Laurence's successful prosecution of an uncollectible, four or five-million-dollar judgment against Richard, upon which he could derivatively execute, to seize and liquidate Richard's membership interest; an ulterior motive that the Trial Judge found to be credible. (R. pp. 31-32)

Alternatively, Laurence conceded in his testimony that, although it was not his first choice, a buy out of his interest at "fair value" was a "viable solution", but that "just hasn't happened". (R. p. 704:14-15).

Thus, the Trial Judge was presented with two equitable alternatives in this case: One, to order an outcome that would cause the forfeiture of Richard's membership interest in circumstances that the Court concluded were pursued by Laurence vindictively and for self-interest. The other, to acknowledge Laurence's expressed intent "not to be in the restaurant business with Richard", and his concession that a "fair value" buyout of his membership interest was a "viable solution" that "just hasn't happened". Laurence's trial concessions essentially invited the outcome reached by Judge Newman.

From these circumstances, Judge Newman derived an elegant, equitable solution: as proposed by Laurence in his testimony, he need no longer be in the restaurant business with Richard. As acknowledged by Laurence in his testimony, he will be compensated at "fair value" for his membership interest; a resolution that he, himself, conceded to be viable.

This Court should rehear and reconsider its overruling of Judge Newman's equitable remedy.

III. Extraneous Findings

Although Judge Newman's Order, which this court purports to reverse, does no more than conclude that Laurence lacks standing to bring this derivative action because of his vindictive animus and personal agenda, this Court's opinion makes findings of fact and law unnecessary to the issue of Laurence's standing qualifications. The sweeping breadth of this Court's opinion invokes a consideration articulated in the South Carolina case of

Blanford v. Mauterer 252 S.C. 146, 159, 165 S.E.2d 633 (S.Ct. 1969). In *Blanford,* the late Justice Thomas Bussey wrote in a concurring opinion: "*I agree with the result reached in the opinion of Mr. Justice Littlejohn, but am strongly of the view that the court should refrain from passing upon the adequacy of the consideration for the respective leases involved… It is a well-established general rule that an appellate court, with certain exceptions not here present, should, in the exercise of proper judicial restraint, decide only such questions as are necessary for a determination of the appeal. 21 CJS Courts, Section 182, Page 292; 5 Am Jur (2d) 201, Appeal and Error, 760; West's South Carolina Digest, Appeal and Error 843.*"

Justice Bussey's reference to the "general rule" invoking judicial restraint is amply supported in the jurisprudence of the United States, in addition to the general citations in Corpus Juris Secundum and to American Jurisprudence, 2d. More recent case law seems to invoke a phrase to describe the general rule, which is stated, repeatedly: *"The cardinal principle of judicial restraint – if it is not necessary to decide more, it is not necessary to decide more – counsels us to go no further"*. For example, the principle is invoked in the case of *PDK Laboratories, Inc., v. United States Drug Enforcement Administration* 362 F.3d 786 (D.C. Ct. App., 2004). In his concurring opinion in the *PDK Lab* case then-circuit Judge Roberts, now Chief Justice of the United States, writes, *inter alia*: *"This is a sufficient ground for deciding this case, and the cardinal principle of judicial restraint — if it is not necessary to decide more, it is necessary not to decide more — counsels us to go no further."*, 362 F.3d 799.

A national research of the phrase "The cardinal principle of judicial restraint" produces numerous references to the phrase. For example: *Cain v. William J. Huff, II*

Revocable Trust Declaration, dated June 28, 2011, 216 N.E.3d 456 (Indiana, 2023); *State ex rel. King v. Cuyahoga County Board of Elections,* 208 N.E.3d. 787 (Ohio 2022); *Cohen v. Board of Trustees of the University of the District of Columbia*, 819 F.3d 476 (Ct. App. D.C. 2016); *Blumenthal v. Trump,* 949 F.3d 14 (Ct. App. D.C. 2020); *Digiport, Inc., v. Foram Dev. BFC, LLC*, 314 So. 3d 550 (Ct. App. Fed 2020); *Parry v. Shaffer*, 656 S.W.3d 660 (Ct. App. TX 2022); *Sunbelt Plastic Extrusions v. Paguia*, 360 Ga. App. 894 (Ct. App. GA 2021).

In his concurring opinion in the *Blanford* case, Justice Bussey discusses the potential prejudice created by the Appellate Court "going further" than necessary for a determination of the appeal: " *To what extent persons not parties to the present appeal would be bound by our opinion is a matter which is not now before us … still, an unnecessary appellate approval of the disposition made below on the issue of adequacy of consideration could well work a practical, if not a legal, prejudice to these parties*." 252 S.C. at 159.

The findings and conclusions of this Court are unnecessary to the question of standing, and that present prejudice at a retrial include the following:

1. <u>The Opinion of this Court at Page 3:</u> "In order to support these less successful companies and to pay for personal expenses, Richard borrowed money from the Company, which he booked as "Due to the Company" / "Due from Crew Carolina"

a. To the extent that this statement from this Court's opinion suggests that Richard Stoney personally borrowed money from the Company to support the less successful companies, the statement is both incorrect and prejudicial in the event of a retrial of the case. It is clear from the evidence that the entity managing the restaurants was Crew

Carolina, LLC which, as this Court points out in a different context, is a legal entity separate and apart from its members. It is, therefore, inaccurate to say that Richard borrowed money from the Company to support these less successful companies; and further it would be prejudicial at a retrial.

b. Furthermore, the opinion makes it appear as if Richard used over $4,000,000.00 for personal use when, in reality, even Don Hollerbach, Laurence's accounting expert, agreed that only $42,835.19 was attributable to Richard's personal expenses (Hollerbach Testimony at R. p. 628:3-9, confirmed by Jamie Stabler at R. p. 673:14-20). The record reflects that these expenses were cumulative, having been incurred over the course of more than a decade, and that Richard had made considerable unilateral payments back to the Company over the years. (R. p. 672:9-14.)

2. The Opinion of this Court at Page 4: "Richard instructed Jarvis to refrain from discussing the due to/from book entries with other members of the Company and did not permit him to share the Company's tax returns with certain members, including Laurence".

a. At trial, Jarvis testified that Laurence's attorneys, Haynsworth Sinkler Boyd, prepared the affidavit; that he had "problems" with the wording of the affidavit; that he had been in poor health at the time he signed the affidavit; and that Laurence's lawyers had threatened to hold him in a deposition for ten hours if he did not sign the affidavit at their office. (R. pp. 902:1-17; 903:1 to 907:10; 911:10 to 912:2; 912:13-15; 913:19 to 916:15; 916:24 to 918:7). When asked why he signed the Affidavit if he thought there were mistakes in it, Jarvis testified, "Well, I certainly wanted to get out of the offices of Haynsworth Sinkler Boyd. I did not want to do a 10-hour deposition" (R.

p. 917:6-12) and "looking back on it, there were certain things that I wished I could have asked for a change in that affidavit." (R. p. 917:6-14). Jarvis testified that he just wanted to get out of there.

3. The Opinion of this Court at Page 5: "Laurence asked Richard to see the Company's books at least ten times, but the only time Richard offered to let him see the books, Richard required him to sign a nondisclosure agreement, which Laurence declined to do".

a. The Court of Appeals' Opinion erroneously states that Laurence had asked Richard to see the Company's books at least ten times despite a lack of supporting evidence and conflicting testimony. While Laurence self-servingly testified that he had requested records at least ten times (R. p. 741:4-18), there was no evidence submitted to the court that he actually did so. Moreover, there was conflicting evidence, wherein Richard Stoney testified that the books were made available to Laurence for review on multiple occasions (R. p. 761:2-18).

b. Finally, the request that Laurence sign a non-disclosure agreement was clearly necessary, as Laurence himself conceded under oath, that his history of badmouthing the Boathouse to its purveyors could have been disloyal to the Company. "Okay. Maybe it would be disloyal. I'll grant you that." (See R. p. 715:23 to 716:14). As Richard testified, the NDA was also authorized under the Operating Agreement, of which Laurence is a signatory (R. p. 761:15-18) See also Operating Agreement, § 3.6 at p. 1155, stating:

§ 3.6 Information.

In addition to the other rights specifically set forth in this Operating Agreement, each Member is entitled to all information to which that Member is entitled to have access pursuant to Section 33-44- 408 of the Act under the circumstances and subject to the conditions therein stated. The Members agree, however, that the Manager from time to time may determine, due to contractual obligations, business concerns, or other considerations, that certain information regarding the business affairs, properties, and financial condition of the Company should be kept confidential and not provided to some or all other Members, and that it is not just or reasonable for those Members or assignees or representatives thereof to examine or copy that information.

The Members acknowledge that from time to time, they may receive information from or regarding the Company in the nature of trade secrets or that otherwise is confidential, the release of which may be damaging to the Company or Persons with which it does business. Each Member shall hold in strict confidence any information it receives regarding the Company that is identified as being confidential (and if that information is provided in writing, that is so marked) and may not disclose it to any Person other than another Member or the Manager, except for disclosures (i) compelled by law (but the Member must notify the Manager promptly of any request for that information, before disclosing it, if practicable), (ii) to advisers or representatives of the Member or Persons to which that Member's Membership may be Disposed as permitted by this Operating Agreement, but only if the recipients have agreed to be bound by the provisions of this section or (iii) of information that Member also has received from a source independent of the

Company that the Member reasonably believes obtained that information without breach of any obligation of confidentiality. The Members acknowledge that breach of the provisions of this section may cause irreparable injury to the Company for which monetary damages are inadequate, difficult to compute or both. Accordingly, the Member agree that the provisions of this section may be enforced by specific performance.

4. <u>The Opinion of this Court at Page 10:</u> “It is evident Richard and the other Company members who opposed this action were motivated by their individual interests. Richard, the majority member and the one accused of malfeasance and looting the Company, naturally opposed this action. Ted admitted he opposed the action because he was currently in litigation with Richard to recover over $3 million that Richard owed him. Although he proclaimed he did not support this action, Ted acknowledged the Company supported Richard's other entities and the return of the $4 million Richard "borrowed" from the Company would benefit it. Holmes and Cox benefited from Richard's malfeasance by receiving distributions when other members of the Company did not. While Richard's daughter testified she did not support the litigation, her mother holds her share in trust and supports the action”.

a. Hollerbach testified that only one disproportionate check was issued to Cox. Notably, there was no evidence presented that either Holmes or Cox knew they were receiving disproportionate distributions or any evidence that their opposition to the derivative action was ill-motivated. There was zero evidence of intent as it relates to either Holmes or Cox, just circumstantial evidence, which the Court did not find credible or compelling. R. p. 630:8-16.

b. This finding by the Court is purely a credibility issue, and is entirely without support in the record. Although they are not parties to this Appeal, it is improper and unfair to assign to the other members' motivations of self-interest for the positions they took in the trial below. Although this Court argues why it could be by their individual interests, whether they did so would be a question of their credibility, if this case were to be retried.

5. <u>The Opinion of this Court at Page 10:</u> "Holmes and Cox benefited from <u>Richard's malfeasance</u> by receiving distributions when other members of the Company did not." (Emphasis added).

a. To characterize Richard's conduct with respect to Holmes and Cox benefiting, or in any other context, is not necessary to a determination whether the Trial Judge erred in ruling that Laurence lacked standing to bring the lawsuit. It would be an understatement to say that this finding would be extremely prejudicial upon a retrial of the case. Although, Richard would have available the argument that the finding was no more than dictum, the conclusion is prejudicial and should be stricken, or qualified. Not even the Appellant himself argued that this Court should reach such a conclusion.

6. <u>The Opinion of this Court at Page 11:</u> "No one disputes Richard owes the Company over $4 million dollars".

a. This reaches far beyond the scope of what was appealed by effectively piercing the corporate veil and ignores the affirmative defenses raised by Richard, including the business judgment rule and laches. It ignores that the $4-million-dollar figure is attributable to Crew Carolina, not Richard personally. Again, even Don Hollerbach, Laurence's accounting expert, agreed that only $42,835.19 was attributable to Richard's personally. (Hollerbach Testimony at R. p. 628:3-9, confirmed by Jamie Stabler at R. p. 673:14-20).

b. The opinion also disregards that Laurence was aware of the centralized management system employed by Crew Carolina as early as 1999 and ignores that he too benefited from it as a member of the Boathouse at East Bay when that restaurant failed to recover after the untimely murder of its manager at the premises. (See Chip Robinson Testimony, R. p. 870:24 to 871:25; 872:10 to 873:8; Laurence Testimony, R. p. 283:18-284:5).

As Judge Newman's order specifically notes, "Laurence was aware as early as 1999, that the cash generated by the Boat House at Breach Inlet was being used to support other restaurants and made no complaint as long as he benefitted." (Order, p. 9).

The opinion ignores the sound findings of Judge Newman, who was in a better position to judge the credibility of witnesses. See Section II, above, which addresses these findings in greater detail.

7. <u>The Opinion of this Court at Page 14:</u> "First in taking our own view of the preponderance of the evidence, we find Laurence was truthful in testifying the vendors came to him about the credit issues."

a. Petitioner's response to this conclusion is generally discussed in Section I of this Petition, relating to the Court's conclusions about credibility.

b. To reiterate, however, it is remarkable that in this case the Trial Judge concluded that Laurence was not a credible witness, as was manifest in the many findings of the Trial Court Order on Appeal; and yet, nevertheless, this Court reaches the opposite conclusion, without the benefit of observing the witness testimony and demeanor.

Conclusion.

The narrow issue decided by Judge Newman was that Laurence Stoney's motive in prosecuting this action was personal and vindictive; and that it was not to vindicate a company interest. The Trial Judge's conclusion was based substantially upon his findings that Laurence Stoney's testimony was not believable.

Respectfully, this Court was obligated to defer to Judge Newman's credibility determinations. However, not only did this Court not do so, but its Opinion offers no reasons why it did not so defer.

It is noteworthy that Judge Newman's stature in the South Carolina judiciary is extraordinary and impeccable. It is undisputed that his opportunity to hear and observe the testimony from Laurence and Richard Stoney was extensive.

Petitioner prays that this Court rehear and reconsider its conclusions, in deference to the conclusions of the learned Trial Judge, and that it will affirm his carefully reasoned Order.

Respectfully,

BARR, UNGER & McINTOSH, LLC

s:/Capers G. Barr, III
Capers G. Barr, III
SC Bar No: 00542
11 Broad Street (29401)
P.O. Box 1037
Charleston, SC 29402
Telephone: 843-693-4379
Facsimile: 843-723-9039
cgb@barrungermcintosh.com
Attorney for Respondent

THE LAW OFFICE OF JESSE SANCHEZ, LLC
s:/Jesse Sanchez
Jesse Sanchez (SC Bar No: 101906)
751 Johnnie Dodds Boulevard, Suite 200
Mount Pleasant, SC 29464
(843) 814-8181 (Phone)
(843) 284-3953 (Fax)
jesse@jessesanchezlaw.com
Attorney for Respondent

Charleston, South Carolina

April 18, 2024

Other Counsel of Record:

Attorneys for Appellant:

Scott Y. Barnes, Esq.
Stafford J. McQuillin, III, Esq.
Tyler K. Gilliam, Esq.
HAYNSWORTH SINKLER BOYD, P.A.
134 Meeting Street
Charleston, SC 29401

Attorney for Third-Party Intervenor:

George K. Kefalos, Esq.
GEORGE J. KEFALOS, P.A.
46-A State Street
Charleston, SC 29401

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The Boathouse at Breach Inlet, LLC, by and through its member, Laurence O. Stoney, Jr., Appellant,

v.

Richard S.W. Stoney, individually and as Member-manager of The Boathouse at Breach Inlet, LLC and Crew Carolina, LLC, Defendants,

and Theodore Stoney, Jr., individually as Trustee for Richard Stoney, Jr. and Gregory G. Holmes, Third-Party Intervenors, of whom Richard S. W. Stoney, individually and as Member-manager of The Boathouse at Breach Inlet, LLC is the Respondent.

No. 6056

Appellate Case No. 2020-001203

Court of Appeals of South Carolina

April 3, 2024

Heard October 10, 2023

Appeal From Charleston County Clifton Newman, Circuit Court Judge

Sarah P. Spruill and Tyler Keith Gilliam, both of Haynsworth Sinkler Boyd, PA, of Greenville; and Stafford John McQuillin, III and Scott Y. Barnes, both of

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Haynsworth Sinkler Boyd, PA, of Charleston; all for Appellant.

Capers G. Barr, III, of Barr Unger & McIntosh, LLC, of Charleston; and Jesse Sanchez, of The Law Office of Jesse Sanchez, of Mount Pleasant; both for Respondent.

OPINION

VERDIN, J.:

The Boathouse at Breach Inlet, LLC (the Company), by and through its member Laurence D. Stoney, Jr. (Laurence),[1] appeals the circuit court's ruling that Laurence lacked standing to bring this derivative action against Richard S.W. Stoney (Richard), individually and as member-manager of the Company, and Crew Carolina, LLC. Laurence also argues the circuit court erred in granting a motion to dissociate Laurence as a member of the Company. We reverse and remand.

FACTUAL/ PROCEDURAL BACKGROUND

In 1995, Richard, who is a licensed attorney, decided to open a restaurant on the Isle of Palms, which he named The Boathouse on Breach Inlet (the Restaurant). He entered into a twenty-year lease with the option to purchase the property and then proceeded with construction and preparations. When an investor backed out at the eleventh hour and Richard was running out of money, Richard's brother, Theodore Stoney (Ted), and their first cousin, Laurence, offered to invest in the Restaurant. On November 21, 1997, Richard, Laurence, and Ted executed the operating agreement to form the Company. [2] Richard owned eighty percent; Laurence owned five percent; and Ted owned ten percent for himself and an additional five percent in trust for Richard, Jr., Richard's son.[3] At the time of trial, the Company's members were Richard; Ted; Ted on behalf of Richard, Jr.; Laurence; Richard's now ex-wife, Lori Stoney; Lori on behalf of their daughter Croft Stoney; Gregory Holmes, who bought shares in 2009; and Michael Cox, who bought shares in 2014. Richard maintained sixty percent of the voting rights.

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The Restaurant was an immediate success and received national publicity. With the success of the Restaurant, the Company's members opened a second restaurant in downtown Charleston, The Boathouse on East Bay (BEB Restaurant). They formed The Boathouse on East Bay, LLC (BEB) on January 8, 1999, and the BEB

Restaurant opened the next month. The BEB members were the same as the Company, with the addition of two new members: Michael Maloney and Beverly Stoney Johnson, Richard and Ted's sister.

Shortly before opening the BEB Restaurant, Richard formed Crew Carolina, LLC (Crew Carolina) to manage the Company and BEB, their corresponding restaurants, and the future restaurants Richard envisioned. Richard, who was Crew Carolina's sole member, held a meeting with the Company's and BEB's members to discuss Crew Carolina's business plan. Richard testified that forming Crew Carolina created savings and increased the buying power in negotiations with vendors by centralizing the restaurants' purchasing, accounting, and operations. Crew Carolina used a sweep account for banking, in which the restaurants' sales were deposited nightly into their individual accounts and then swept into Crew Carolina's central account overnight.

Richard rapidly expanded his restaurant and catering empire under the umbrella of Crew Carolina. However, after BEB, he did not offer Laurence a membership interest in any of the subsequent ventures. Unfortunately, unlike the Company and the Restaurant, none of the subsequent companies enjoyed lasting profitability and success. In order to support these less successful companies and to pay for personal expenses, Richard borrowed money from the Company, which he booked as "due to [the Company]/ due from" Crew Carolina. During his divorce hearing, Richard stated repeatedly that he "'robb[ed] Peter to pay Paul' to keep creditors at bay and allow certain businesses to continue operating." *Stoney v. Stoney*, 425 S.C. 47, 58, 819 S.E.2d 201, 207 (Ct. App. 2018).

Jamie Stabler, Crew Carolina and the Company's current comptroller, bookkeeper, and "crisis manager," acknowledged Richard used funds from the Company to fund his personal expenses and unsuccessful restaurants and entities. She testified Crew Carolina owed the Company over $4 million. She detailed how Richard's day-to-day operation of borrowing money from the Company put the Company into a cash flow crisis, even though the Company consistently produced income. The Internal Revenue Service charged the Company $43,840 in fines and penalties for failing to pay its taxes in a timely manner. Stabler also testified that the Company at times could not make payroll, harming employees who may have been living paycheck to paycheck. She stated Richard used the Company's funds for

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non-business travel to the Bahamas, Belgium, Chicago, France, Key West, and New York; payments to his former girlfriend; expenses for his polo ponies; and expenses relating to his share of the family property, Kensington Plantation. She admitted Crew Carolina did not have an income stream or a bank account and she did not believe the Company could collect the outstanding amount it was owed by Crew Carolina. In addition, Stabler testified that Richard had her inquire about writing off the debt to the Company. Eventually, the Company forgave $361,537 in indebtedness on its 2010 tax return.

Richard was advised to stop his practice of taking money from the Company to fund other expenses. On November 26, 2007, Chip Robinson, who was Crew Carolina's comptroller at the time, informed Richard that counsel advised him that any commingling of funds between business entities without identical ownership was not permitted without the members' written permission. In an April 15, 2010 memo, Robinson told Richard they were "consumed with cash flow issues" from two of Richard's other restaurants and suggested removing the Company "in this role as blood donor for the hemorrhages at [the other restaurants to] solve the cash flow issues." Despite these warnings, Richard continued this practice until at least May 2019 and made matters worse.

J. Dennis Jarvis, who was an accountant for the Company, Crew Carolina, and Richard, personally, stated in an affidavit that he was told on numerous occasions that Richard would not repay the millions of dollars he owed to the Company. Because Crew Carolina did not have a cash flow stream or a prospect of generating one, Jarvis and Robinson agreed that Richard should treat the money owed from Crew Carolina to the Company as personal draws to Richard, which must be repaid. In addition, Jarvis stated that Richard proposed closing Crew Carolina and writing off over $4 million that Crew Carolina owed the Company. Finally, Richard instructed Jarvis to refrain from discussing the due to/from book entries with other members of the Company and did not permit him to share the Company's tax returns with certain members, including Laurence. At trial, Jarvis described Richard's use of the Company's funds for personal expenses as "deadly."

Laurence's expert witness, Don M. Hollerbach, a forensic accountant, testified Richard "commingled funds using funds for personal use and effectively turning a commercial enterprise that is a restaurant enterprise into a banking enterprise." Hollerbach summarized his opinions: (1) Richard owed the Company over $4 million; (2) if this amount was a loan, Richard owed $*428,107.23* in interest; (3)

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there were disproportionate distributions;[4] and (4) the diversion of funds from the Company for personal matters and funding unrelated entities harmed the Company and put it in a cash flow crisis.

Laurence began to suspect Richard was borrowing the Company's funds as early as 1999 because distributions decreased every year even though the Restaurant was doing well. When he asked Richard why he was not receiving distributions, Richard told Laurence to trust him and assured Laurence in an August 9, 2005 letter, "I'm not in the business with my family and dear friends in an attempt to skim profits or benefits not available to them . . . ." Laurence asked Richard to see the Company's books at least ten times, but the only time Richard offered to let him see the books, Richard required him to sign a nondisclosure agreement, which Laurence declined to do. Laurence acknowledged that his relationship with Richard started to deteriorate when the financial issues began.

Laurence also presented evidence of Richard's questionable actions as the Restaurant's property's landlord. Richard had the Company guarantee his personal loan to purchase the property. On November 7, 2012, Richard had the Company confess judgment in favor of the lender in the amount of $*1,812,017.69*, which he claimed he did to prevent foreclosure of the property.

In May 2011, Richard, as manager and landlord for the Company, entered into a lease that allowed the Company to renew its lease with him in five-year terms through 2035. However, in February 2015, the limited liability company Richard formed to own the land, 101 Palm Boulevard, LLC,[5] entered into a new lease that was only for five years. At trial, Richard testified he was willing to extend the lease to 2035, saying he expected everyone to trust him. The February 2015 lease also changed the responsibility for repairing a bulkhead from the landlord to the Company. Richard explained he did not think it was fair or in his best interest as the landlord to have the responsibility for the bulkhead, which served the Restaurant and not the marina on the property.[6]

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On October 9, 2015, Laurence brought this derivative action on behalf of the Company against Richard and Crew Carolina (collectively, Defendants), asserting various causes of action including breach of fiduciary duty, conversion, unlawful distributions, an accounting, and unjust enrichment. He sought actual and consequential damages; punitive damages; attorney's fees and costs; prejudgment interest; a full accounting, and orders piercing the corporate veil, declaring Defendants were not entitled to indemnification from the Company, and requiring repayment of the money Richard took from the Company.

Defendants answered, asserting a general denial and various defenses, including the statute of limitations, laches, the business judgment rule, doctrines of waiver and estoppel, unclean hands, and asserting that Laurence could not fairly and adequately represent the Company's interests. Ted and Holmes (collectively, Intervenors) moved to intervene, asserting they opposed the derivative action. Laurence subsequently filed an amended complaint asserting Intervenors were not similarly situated members of the Company because they were motivated by their individual interests and benefited from the improprieties in Richard's management. The parties filed a stipulation that Laurence was not similarly situated to any other member of the Company.

After a preliminary hearing on the issue of Laurence's standing to bring this derivative action, the circuit court issued an order allowing Laurence to proceed. Defendants and Intervenors filed a motion to dissociate Laurence, which the circuit court preliminarily denied. After a non-jury trial, the circuit court issued an order holding Laurence was not a fair and adequate representative under Rule 23(b)(1) of the South Carolina Rules of Civil Procedure (SCRCP) to bring this action. It explained his motivations were vindictive and personal, rather than seeking to vindicate a corporate wrong, and the equitable remedy he sought was too tainted by his own inappropriate conduct, especially since ninety percent of the Company's membership opposed the action. In addition, the circuit court granted the motion to dissociate Laurence. Laurence filed a motion to alter or amend, which the circuit court denied. This appeal followed.

STANDARD OF REVIEW

"A shareholder's derivative action . . . is one in equity." *Straight v. Goss*, 383 S.C. 180, 191, 678 S.E.2d 443, 449 (Ct. App. 2009). "[A]n action for dissociation is also equitable in nature." *Park Regency, LLC v. R & D Dev. of the Carolinas, LLC*, 402 S.C. 401, 411, 741 S.E.2d 528, 533 (Ct. App. 2012). "Therefore, this court may find facts in accordance with our own view of the preponderance of the

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evidence." *Straight*, 383 S.C. at 192, 678 S.E.2d at 449. "However, we are not required to disregard the findings of the trial judge who saw and heard the witnesses and was in a better position to judge their credibility." *Id.*

LAW/ANALYSIS

I. Laurence's Standing

Laurence argues the circuit court erred in holding he lacked standing to bring this action because a derivative action was the proper means of seeking redress for alleged wrongs to the Company. He asserts he was a legitimate "class of one" who would fairly and adequately enforce the rights of the Company. We agree.

Section 33-44-1101 of the South Carolina Code (2006) authorizes a member of a limited liability company to bring a derivative action. *See* § 33-44-1101 (authorizing a member to "maintain an action in the right of the company if the members or managers having authority to do so have refused to commence the action or an effort to cause those members or managers to commence the action is not likely to succeed"). Rule 23(b)(1), SCRCP sets out the requirements for "one or more . . . members" of a limited liability company to bring a derivative action to enforce a right of the company. Thus, under the plain language of the statute and applicable rule, a single member of a limited liability company can bring a derivative action. *See Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003) ("In interpreting the meaning of the South Carolina Rules of Civil Procedure, the Court applies the same rules of construction used to interpret statutes."); *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning."); *Maxwell*, 356 S.C. at 620, 591 S.E.2d at 27 ("If a rule's language is plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced.").

In addition, Rule 23(b)(1) limits who may bring such an action, providing "The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association." Rule 23(b)(1), SCRCP. Because our state has not yet addressed whether a single member of a limited liability company may bring a derivative action, we look to other jurisdictions for guidance.

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The Sixth Circuit Court of Appeals set forth the following factors for evaluating whether a derivative plaintiff meets the representation requirements outlined in Rule 23.1 of the Federal Rules of Civil Procedure:[7]

> [E]conomic antagonisms between representative and class; the remedy sought by plaintiff in the derivative action; indications that the named plaintiff was not the driving force behind the litigation; plaintiff's unfamiliarity with the litigation; other litigation pending between the plaintiff and defendants; the relative magnitude of plaintiff's personal interests as compared to his interest in the derivative action itself; plaintiff's vindictiveness toward the defendants; and, finally, the degree of support plaintiff was receiving from the shareholders he purported to represent.

Davis v. Comed, Inc., 619 F.2d 588, 593-94 (6th Cir. 1980).

However, "these factors 'are not exclusive and must be considered in the totality of the circumstances found in each case.'" *Cattano v. Bragg*, 727 S.E.2d 625, 629 (Va. 2012) (quoting *Jennings v. Kay Jennings Family Ltd. P'ship*, 659 S.E.2d 283, 288 (Va. 2008)). The Virginia Supreme Court recognized in applying the *Davis* factors, a single shareholder derivative claim is possible when "the totality of the circumstances support[s] a finding that the plaintiff's personal interests do not preclude the shareholder from fairly and adequately representing the corporation." *Id.*

The Utah Supreme Court similarly held that due to "the greater vulnerability to malfeasance that is present in closely held corporations" a single shareholder could maintain a derivative action as a "class of one" when the shareholder "(1) seeks by its pleading[s] to enforce a right of the corporation and (2) does not appear to be similarly situated to any other shareholder." *Angel Invs. LLC v. Garrity*, 216 P.3d 944, 951 (Utah 2009). As the Texas Supreme Court noted, "The rule[[8] does not

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place any minimum numerical limits on the number of shareholders who must be 'similarly situated.' It follows that if the plaintiff is the only shareholder 'similarly situated,' he is in compliance with both the letter and the purpose of the rule." *Eye Site, Inc. v. Blackburn*, 796 S.W.2d 160, 162-63 (Tex. 1990).

Numerous other courts have recognized a "class of one" may maintain a derivative action. *See, e.g.*, *Larson v. Dumke*, 900 F.2d 1363, 1368 (9th Cir. 1990) (holding "a single shareholder may bring a derivative suit"); *Jordon v. Bowman Apple Prods. Co.*, 728 F.Supp. 409, 412 (W.D. Va. 1990) ("In appropriate circumstances a single shareholder may be situated in a unique position and thus constitute a legitimate 'class of one.'"); *Halsted Video, Inc. v. Guttillo*, 115 F.R.D. 177, 180 (N.D. Ill. 1987) (holding the plaintiff was a "legitimate class of one" and the defendants did not meet their burden of showing that plaintiff was an inadequate representative); *Brandon v. Brandon Constr. Co.*, 776 S.W.2d 349, 353-54 (Ark. 1989) ("The real test is not the number of shareholders represented in a derivative action, but the alleged injuries and the remedies sought."); *Clemons v. Wallace*, 592 P.2d 14, 16 (Colo.App. 1978) (holding Rule 23.1 of the Colorado Rules of Civil Procedure did not preclude a derivative suit by a corporation with only one minority stockholder); *HER, Inc. v. Parenteau*, 770 N.E.2d 105, 114 (Ohio Ct. App. 2002) (holding that the appellant, who was "the only similarly situated shareholder, can fairly and adequately represent the interests of the corporation.").

We agree with the above cases and hold that under the appropriate circumstances, a single member of a limited liability company may "fairly and adequately represent the interests of" a class of one and have standing to maintain a derivative action. To hold otherwise would be to deprive a sole dissenting shareholder from seeking relief from another shareholder's wrongdoing. *Eye Site, Inc.*, 796 S.W.2d at 163 ("[W]e question the wisdom of construing [the rule] in any manner which prevents a shareholder in a close corporation from enforcing his rights.").

Considering the totality of the circumstances, we hold Laurence qualifies as a legitimate class of one. Reviewing the relevant *Davis* factors, we first address whether lack of support from the other members of the Company bars Laurence from maintaining this action. *See Davis*, 619 F.2d at 594 (listing "the degree of support plaintiff was receiving from the shareholders he purported to represent" as

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a factor). The parties stipulated Laurence was not similarly situated to the other members, and Laurence admitted that no other members officially supported this action.[9] However, we must consider the other members' motivations for opposing this action in determining whether Laurence is an adequate representative. *See Larson*, 900 F.2d at 1368 (stating the lack of support from the non-defendant shareholders did not make the sole shareholder an inadequate representative because "the non-defendant shareholders may have been motivated by individual interests, rather than the good of the corporation . . . ."); *Angel Invs. LLC*, 216 P.3d at 951 (holding that "shareholders' motivation for opposing the derivative action is relevant to determining the question of whether any shareholder is similarly situated to the derivative plaintiff"). Ignoring the opposing shareholders' motivations could "permit corporate looting and malfeasance in circumstances where all but one shareholder benefit personally from the illegality or are at risk of personal detriment were the malfeasance brought to light." *Angel Invs. LLC*, 216 P.3d at 951.

It is evident Richard and the other Company members who opposed this action were motivated by their individual interests. Richard, the majority member and the one accused of malfeasance and looting the Company, naturally opposed this action. Ted admitted he opposed the action because he was currently in litigation with Richard to recover over $3 million that Richard owed him. Although he proclaimed he did not support this action, Ted acknowledged the Company supported Richard's other entities[10] and the return of the $4 million Richard "borrowed" from the Company would benefit it. Holmes and Cox benefited from Richard's malfeasance by receiving distributions when other members of the Company did not. While Richard's daughter testified she did not support the litigation, her mother holds her share in trust and supports the action. Therefore, we hold the other members' lack of support does not preclude Laurence from maintaining this action as a class of one.

We next address whether Laurence's vindictiveness towards Richard motivated him to bring this action. *See Davis*, 619 F.2d at 594 (listing "plaintiff's vindictiveness toward the defendants" as a factor). We must keep in mind that "[c]harged emotions and economic antagonism are virtually endemic to disputes in closely held corporations." *Cattano*, 727 S.E.2d at 629. We therefore "must look beyond the mere presence of economic and emotional conflict, placing more

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emphasis on whether the totality of the circumstances suggest that the plaintiff will vigorously pursue the suit and that the remedy sought is in the interest of the corporation." *Id.*

Ted characterized the relationship between Richard and Laurence as being "as bad as you can get" and recalled Laurence threatened to "get Richard" and "turn his world upside down." Although Richard described Laurence as being humble, gracious, and enjoyable to be around at the time they formed the Company, he claimed that by the time they formed BEB, their relationship had deteriorated. The change in their relationship coincided with Richard using the Company's funds to support his other entities and personal expenses, which upset Laurence. In an email dated June 23, 2010, Richard criticized Laurence for being abrasive and threatening litigation, but in the same email, he acknowledged Laurence had not been receiving distributions because profits from the Company were used to support other entities. Ted recalled Laurence "claimed that monies were being diverted from the [Company] to pay for other entities," and he complained about not getting proper distributions from the Company. Laurence acknowledged his concern was the money missing from the Company, but he explained that in bringing this action, he sought to recover the money owed to the Company and use it to make the Restaurant a showpiece.[11] No one disputes Richard owes the Company over $4 million. With this action, Laurence seeks to return this money to the Company. While animosity certainly exists between the parties, we hold this hostility is not fatal to Laurence maintaining the derivative action.

We further hold the remaining *Davis* factors support Laurence's standing to bring this action. *See Davis*, 619 F.2d at 593-94 (listing the factors as "economic antagonisms between representative and class; the remedy sought by plaintiff in the derivative action; indications that the named plaintiff was not the driving force behind the litigation; plaintiff's unfamiliarity with the litigation; other litigation pending between the plaintiff and defendants; [and] the relative magnitude of plaintiff's personal interests as compared to his interest in the derivative action itself"). Laurence was the driving force of this litigation and was familiar with the proceedings. As far as the record shows, there is no other litigation pending between Laurence and Richard. Laurence has only a five-percent interest in the Company, but he sought to make Richard reimburse the Company over $4 million. As stated above, no one contests that Richard used the Company's funds to support his other entities and personal expenses. Laurence presented evidence that

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Richard's use of these funds hurt the Company, at times causing it to be unable to make payroll, incur late fees, and owe money to the IRS. Without a doubt, the return of over $4 million would benefit the Company. In addition, to support his breach of fiduciary duty claim, Laurence presented evidence that Richard used the Company as the guarantor for personal loans and modified the Company's lease to make it more beneficial to Richard as landlord. Laurence prosecuted this action vigorously and declared his intent for the proceeds of the action to be returned to the Company to improve the Restaurant. Therefore, we hold Laurence fairly and adequately represented the interests of the class of one in prosecuting this derivative action for the benefit of the Company. *See Cattano*, 727 S.E.2d at 629 ("[W]e must look beyond the mere presence of economic and emotional conflict, placing more emphasis on whether the totality of the circumstances suggest that the plaintiff will vigorously pursue the suit and that the remedy sought is in the interest of the corporation.").

Furthermore, we doubt Laurence would have had standing to bring an action against Richard individually. Pursuant to Section 33-44-410 of the South Carolina Code (2006), a member of a limited liability company may only maintain an action against the company or another member or manager to enforce that member's rights under the operating agreement and under South Carolina law. That member's loss must be "separate and distinct" from that of the company. *See Ward v. Griffin*, 295 S.C. 219, 221, 367 S.E.2d 703, 704 (Ct. App. 1988) ("A stockholder may individually sue corporate directors, officers, or other persons when he has sustained a loss separate and distinct from that of other stockholders generally." (quoting 19 Am. Jur.2d *Corporations* § 2245 (1986))); *id.* ("However, an individual stockholder has no right to bring an action in his own name and in his own behalf for a wrong committed solely against the corporation." (quoting 19 Am. Jur.2d *Corporations* § 2245)); *Wilson v. Gandis*, 430 S.C. 282, 311-12, 844 S.E.2d 631, 647 (2020) (holding the majority members of a limited liability company lacked standing to bring a breach of fiduciary duty claim in their individual capacities against the minority member because the majority members' loss would not be separate and distinct from the company's loss); *Patterson v. Witter*, 425 S.C. 213, 231, 821 S.E.2d 677, 687 (2018) ("An action seeking to remedy a loss to the corporation is generally a derivative one." (quoting *Brown v. Stewart*, 348 S.C. 33, 49, 557 S.E.2d 676, 684 (Ct. App. 2001))); *id.* ("An action regarding the fiduciary obligation of a director is ordinarily enforceable through a derivative action."); *id.* ("'A shareholder may maintain an individual action only if his loss is separate and distinct from that of the corporation.'" (quoting *Brown*, 348 S.C. at 49, 557 S.E.2d at 684)).

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Laurence's claims in this action involved losses to the Company, rather than to his own membership interest, and also involve Richard's alleged breach of his fiduciary duty to the Company; therefore, the claims must be brought in a derivative action. To deny Laurence standing in the derivative action would deny him and the Company a remedy, which we find is not the intent of Rule 23(b)(1). *See Eye Site, Inc.*, 796 S.W.2d at 163 ("[W]e question the wisdom of construing [the derivate standing rule] in any manner which prevents a shareholder in a close corporation from enforcing his rights."). Accordingly, we hold the circuit court erred in finding Laurence lacked standing to bring this derivative action on behalf of the Company.

II. Dissociation

Laurence argues the circuit court erred in granting the motion to dissociate him from the Company because Defendants and Intervenors did not meet their burden of showing it was not reasonably practicable to carry on the business with him. We agree.

"The term 'dissociation' refers to the change in the relationships among the dissociated member [of a limited liability company], the company and the other members caused by a member's ceasing to be associated in the carrying on of the company's business." *Park Regency, LLC*, 402 S.C. at 411, 741 S.E.2d at 533 (alteration in original) (quoting S.C. Code Ann. § 33-44-601 cmt. (2006)). A member may be dissociated from a limited liability company by judicial determination when the member "engaged in conduct relating to the company's business which makes it not reasonably practicable to carry on the business with the member." § 33-44-601(6)(iii).

Though not binding on this court, we find the Supreme Court of New Jersey's factors instructive when determining when judicial dissociation is warranted:

> (1) [T]he nature of the [limited liability company] member's conduct relating to the [limited liability company's] business; (2) whether, with the [limited liability company] member remaining a member, the entity may be managed so as to promote the purposes for which it was formed; (3) whether the dispute among the [limited liability company] members precludes them from working with one another to pursue the [limited liability company's] goals; (4) whether there is a

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> deadlock among the members; (5) whether, despite that deadlock, members can make decisions on the management of the company, pursuant to the operating agreement or in accordance with applicable statutory provisions; (6) whether, due to the [limited liability company's] financial position, there is still a business to operate; and (7) whether continuing the [limited liability company], with the [limited liability company] member remaining a member, is financially feasible.

IE Test, LLC v. Carroll, 140 A.3d 1268, 1279 (N.J. 2016). The court cautioned that "[Limited liability company] members seeking to expel a fellow member . . . are required to clear a high bar" and a court may not order disassociation "merely because there is a conflict." *Id.* It explained "disagreements and disputes among [limited liability company] members that bear no nexus to the [limited liability company's] business" did not justify a member's expulsion, and "it must be unfeasible, despite reasonable efforts, to keep the [limited liability company] operating while the disputed member remains affiliated with it." *Id.* at 1278.

In finding Laurence should be dissociated, the circuit court cited (1) Laurence's denigrating the Company to its food vendors; (2) his efforts to change the ownership and management of the Company during Richard's divorce litigation; and (3) his efforts to purchase the BEB land without disclosing his efforts to Richard. We find none of these incidents evidence conduct relating to the Company's business that would warrant judicial dissociation.

Richard and Ted claimed Laurence talked negatively about Richard to the representatives of Richard's major food suppliers at the Carolina Yacht Club, telling them that Richard was not paying his bills, that the restaurants were on a cash basis, and that Richard would not do business with Laurence. In contrast, Laurence stated the "word on the street" with the vendors was that Richard and the Company had bad credit. He maintained he did not tell the vendors that the Company had credit issues; rather, they told him. Both Richard and Laurence acknowledged having a confrontation about Laurence's statements, but while Richard testified that Laurence did not deny making the statements, Laurence asserted he told Richard the vendors were the ones talking about his bad credit.

First, in taking our own view of the preponderance of the evidence, we find Laurence was truthful in testifying the vendors came to him about the credit issues. Richard was, in fact, having credit issues at this time. Furthermore, Richard did

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not present any of the vendors at trial to contradict Laurence's assertions. Finally, we find Laurence's negativity was directed at Richard and not at the Company. *See* S.C. Code Ann. § 33-44-201 (2006) (stating a limited liability company is a legal entity distinct from its members).

Next, we hold Laurence's testimony at Richard's divorce hearing did not support judicial dissociation. At the 2011 divorce hearing, Laurence testified that he was not averse to the family court awarding Lori the Company and he agreed with her hiring a manager, such as Bill Hall of Hall's Chophouse, to manage the Restaurant. We find Laurence's planning for the possibility of Lori receiving Richard's membership interest in the Company did not warrant dissociation and any negativity was directed at Richard, individually, and not at the Company. *See* § 33-44-201 (stating a limited liability company is a legal entity distinct from its members).

Finally, we find Laurence's attempt to purchase the property that BEB leased for BEB Restaurant did not warrant dissociation. When

BEB Restaurant opened, BEB leased the property from the Drew family. The relationship with the Drew family quickly soured, and Richard and Ted entered into negotiations to purchase the property. Laurence also made an offer to purchase the property. He admitted he did not tell Richard and Ted he also wanted to purchase the property and explained he thought the property would be a good investment for him individually. Although Richard and Ted ultimately prevailed in purchasing the property, they paid $100,000 to $200,000 more than they originally planned.

We hold Laurence's attempt to purchase the property did not have a sufficient nexus to the Company's business to warrant dissociation. *See IE Test*, 140 A.3d at 1278 (holding "disagreements and disputes among LLC members that [bore] no nexus to the LLC's business [would not] justify a member's expulsion"). First, BEB was a separate limited liability company from the Company. Second, Richard and Ted bought the property for themselves and not on behalf of BEB or the Company. Accordingly, Laurence did not usurp a corporate opportunity, and he had an equal right to seek purchase of the property as they did. *See* S.C. Code Ann. § 33-44-409(e) (2006) ("A member of a member-managed company does not violate a duty or obligation under this chapter or under the operating agreement merely because the member's conduct furthers the member's own interest."); § 33-44-201 (stating a limited liability company is a legal entity distinct from its members).

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In addition, while the parties expressed their opposition to being in business together, we find their animosity was not sufficient for judicial dissociation. Much of their disagreement was over Richard's use of the Company's funds and may be resolved with this action. In addition, with only a five-percent interest, Laurence was not in a position to interfere with the management of the Company or create deadlock. Furthermore, the Restaurant was doing well financially, and Richard testified he expected it to increase sales by $250,000 to $500,000 that year. Therefore, the Company was in a financial position to continue operating, and Laurence remaining a member would not make the continuation of the Company financially unfeasible.

We, therefore, hold the circuit court erred in finding Laurence "engaged in conduct relating to the company's business which makes it not reasonably practicable to carry on the business with the member." *See* § 33-44-601(6)(iii). Accordingly, we reverse the circuit court's grant of the motion for dissociation.

CONCLUSION

We **REVERSE** the circuit court's finding that Laurence was not an appropriate member representative for this derivative action and its dismissal of this action. We further **REVERSE** the circuit court's granting of the motion to dissociate Laurence. We **REMAND** this matter for a determination of the merits of the derivative action.

Accordingly, the order of the circuit court is

REVERSED AND REMANDED.

WILLIAMS, CJ, and HEWITT, J, concur

Notes:

[1] Because this appeal involves several Stoney family members, we refer to them by their first names.

[2] Laurence invested $28,750; Ted invested $50,000 and received a greater percentage of the Company because he had also provided services during the construction of the Restaurant.

[3] The operating agreement listed slightly different ownership interests, but Richard testified the above-listed percentages were correct.

[4] Hollerbach testified Richard improperly made disproportionate distributions to Holmes and Cox

when other members of the Company did not receive distributions. Holmes received a total of $227,503 in distributions between 2012 and 2019; Cox received $7,354 in 2019.

[5] Richard was the sole member of this company.

[6] One quote for the total replacement of the bulkhead was $900,000.

[7] South Carolina Rule 23(b)(1) uses the language of the prior version of Federal Rule 23.1, which was in effect at the time *Davis* was decided. Rule 23, SCRCP, note. The 2007 amendment to Federal Rule 23.1 was "intended to be stylistic only." Fed.R.Civ.P. 23.1, Advisory Committee Notes.

[8] *See* Texas Rule of Civil Procedure 42(a). This rule was modeled after the Federal Rule of Civil Procedure 23.1. The comments to the current Texas Rule of Civil Procedure 42 explain that the portion of the rule regarding derivative suits was deleted because it was redundant to Article 5.14 of the Business Corporation Act, which sets forth detailed procedures for derivative suits.

[9] The circuit court noted Richard's ex-wife Lori supported Laurence's action.

[10] However, he claimed "it was all above-board" because "[e]verything was documented."

[11]Ted contended Laurence brought the action for personal gain and to get his portion of Kensington, the family plantation.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Clifton B. Newman, Circuit Court Judge

Case No. 2015-CP-10-5463
Appellate Case No. 2020-001203
Opinion No.: 6056, Heard October 10, 2023 –Filed April 3, 2024

The Boathouse at Breach Inlet, LLC, by and through its Member,
Laurence O. Stoney, Jr., …...………………..……………………………… Appellant.

v.

Richard S. W. Stoney, Individually and as Member-Manager of
The Boathouse at Breach Inlet, LLC, and Crew Carolina, LLC,

and

Theodore Stoney, Jr., Individually and as Trustee for Richard Stoney, Jr. and Gregory G. Holmes, Third-Party Intervenors,

of whom

Richard S. W. Stoney is ………………………………………………… Respondent.

PROOF OF SERVICE

I, the undersigned, certify that I have served Respondent Richard S.W. Stoney's *Petition for Rehearing* on Appellants The Boathouse at Breach Inlet, LLC, by and through its Member Laurence O. Stoney, Jr., by emailing a copy on April 18, 2024, addressed to their attorneys of record at the following AIS email addresses: Scott Y. Barnes, Esq. (sbarnes@hsblawfirm.com), Stafford J. McQuillin, III, Esq. (mmcquillin@hsblawfirm.com), Tyler K. Gilliam, Esq. (tgilliam@hsblawfirm.com), and George K. Kefalos, Esq. (george@kefaloslaw.com).

Respectfully submitted,

BARR, UNGER & McINTOSH, LLC

s/Capers G. Barr, III
Capers G. Barr, III (SC Bar No: 00542)
11 Broad Street (29401)
P.O. Box 1037
Charleston, SC 29402
Telephone: 843-693-4379
Facsimile: 843-723-9039
cgb@barrungermcintosh.com

THE LAW OFFICE OF JESSE SANCHEZ, LLC
s:/Jesse Sanchez
Jesse Sanchez (SC Bar No: 101906)
751 Johnnie Dodds Boulevard, Suite 200
Mount Pleasant, SC 29464
(843) 814-8181 (Phone)
(843) 284-3953 (Fax)
jesse@jessesanchezlaw.com
Attorney for Respondent

April 18, 2024
Charleston, South Carolina

BARR, UNGER & MCINTOSH LLC
ATTORNEYS AT LAW

Capers G., Barr, III
Direct Dial: 843-377-1226
Email: cgb@barrungermcintosh.com

April 18, 2024

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Apr 18 2024
SC Court of Appeals

VIA US PRIORITY MAIL AND EMAIL (ctappfilings@sccourts.org)
Hon. Jenny Abbott Kitchings
Chief Deputy Clerk
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: The Boathouse at Breach Inlet, LLC, et al. v. Richard S. W. Stoney, et al.
Appellate Case No: 2020-001203
Our File No: 2015-1098

Dear Ms. Kitchings:

Enclosed herewith, please find the following for the filing with the Court:

1. Respondent Richard S.W. Stoney's *Petition for Rehearing*;

2. A copy of *Opinion No. 6056*, filed on April 3, 2024 from which this Petition for Rehearing is made;

3. The corresponding *Proof of Service* evidencing service on all counsel of record via electronic mail.

4. My firm's check in the amount of $50.00 made payable to the Court of Appeals which represents the filing fee and which has been placed in today's outgoing mail via US Priority Mail.

Please advise me if you require anything further.

With kind regards,

Sincerely yours,

Capers Barr

Capers G. Barr, III

CGBIII/jth
Enclosure

cc (Via Email Only):

The Honorable Desiree Allen, Court Administration (dallen@sccourts.org)
Sarah P. Spruill, Esq. (sspruill@hsblawfirm.com)
Scott Y. Barnes, Esq. (sbarnes@hsblawfirm.com)
Stafford J. McQuillin, Esq. (mmcquillin@hsblawfirm.com)
Tyler P. Gilliam, Esq. (tgilliam@hsblawfirm.com)
George J. Kefalos, Esq. (george@kefaloslaw.com)
Jesse Sanchez, Esq. (jesse@jessesanchezlaw.com)
Richard S.W. Stoney, Esq. (via e-mail only)